

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 20, 2009

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

2009 AUG 20 PM 12:30  
CHIEF CLERKS OFFICE  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Re: **WASTE MANAGEMENT OF TEXAS, INC.**  
**SOAH DOCKET NO. 582-08-2186**  
**TCEQ DOCKET NO. 2006-0612-MSW**

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Closing Arguments in the above-entitled matter.

Sincerely,

  
Amy Swanhorn, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: [www.tceq.state.tx.us](http://www.tceq.state.tx.us)

printed on recycled paper using soy-based ink

**MAILING LIST**  
**WASTE MANAGEMENT OF TEXAS, INC.**  
**SOAH DOCKET NO. 582-08-2186**  
**TCEQ DOCKET NO. 2006-0612-MSW**

The Honorable Roy Scudday  
Administrative Law Judge  
State Office of Administrative Hearings  
P.O. Box 13025  
Austin, Texas 78711-3025  
Tel: 512/475-4993 Fax: 512/475-4994

John Riley  
Vinson and Elkins  
2801 Via Fortuna, Suite 100  
Austin, Texas 78746-7568  
Tel: 512/542-8729 Fax: 512/236-3257  
[bmoore@velaw.com](mailto:bmoore@velaw.com)

Erich M. Birch  
Angela K. Moorman  
Birch, Becker & Moorman, LLP  
Plaza 7000, Second Floor  
7000 North Mopac Expressway  
Austin, Texas 78731  
Tel: 512/514-6747 Fax: 512/514-6267  
[ebirch@birchbecker.com](mailto:ebirch@birchbecker.com)  
[amoorman@birchbecker.com](mailto:amoorman@birchbecker.com)

Annalynn Cox, Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767  
Tel: 512/854-9513 Fax: 512/854-4808  
[annalynn.cox@co.travis.tx.us](mailto:annalynn.cox@co.travis.tx.us)

Evan M. Williams  
524 North Lamar, Suite 203  
Austin, Texas 78703  
[ew@austin.rr.com](mailto:ew@austin.rr.com)

Meitra Farhadi, Assistant City Attorney  
City of Austin  
City of Austin Law Department  
P.O. Box 1088  
Austin, Texas 78767-1546  
Tel: 512-974-2310 Fax: 512/974-6490

Jim Blackburn  
Blackburn Carter  
4709 Austin Street  
Houston, Texas 77004  
Tel: 713/524-1012 Fax: 713/524-5165

Paul M. Terrill III  
Hazen & Terrill, P.C.  
810 W. 10<sup>th</sup> St.  
Austin, TX 78701  
Tel: 512/474-9100 Fax: 512/474-9888  
[pterrill@hazen-terrill.com](mailto:pterrill@hazen-terrill.com)

Amie Richardson, Staff Attorney  
Texas Commission on Environmental Quality  
Environmental Law Division, MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-0600 Fax: (512) 239-0606  
[arichard@tceq.state.tx.us](mailto:arichard@tceq.state.tx.us)

LaDonna Castañuela  
Texas Commission on Environmental Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-3300 Fax: (512) 239-3311

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

IN THE MATTER OF THE  
APPLICATION OF WASTE  
MANAGEMENT OF TEXAS, INC.  
FOR A MUNICIPAL SOLID WASTE  
PERMIT AMENDMENT PERMIT NO.  
MSW-249D

§  
§  
§  
§  
§

BEFORE THE  
STATE OFFICE OF  
ADMINISTRATIVE HEARINGS

CHIEF CLERKS OFFICE

2009 AUG 20 PM 12:30

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS AND ADMINISTRATIVE LAW JUDGE  
SCUDDAY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files these Exceptions to the Administrative Law Judge's Proposal for Decision in the above-referenced matter.

I. INTRODUCTION

Waste Management of Texas, Inc., 9900 Giles Rd., Austin, TX 78754 (WM or Applicant) applied for a permit amendment to authorize an expansion of their existing permit, to increase the volume and site life of the Austin Community Recycling and Disposal Facility, (Facility) a Type I municipal solid waste landfill facility located on Giles Road, approximately 250 feet north where Giles Road and Highway 290 meet in Austin, Travis County, Texas. The proposed expansion would add 71.11 acres to the permitted boundary of the Facility, for a total permitted area of 359.71 acres. Although certain areas could increase in elevation as part of the proposed expansion, the current maximum elevation of 740 feet would not change.

The Facility is currently permitted to receive municipal solid waste, or solid waste resulting from, or incidental to, municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals,

abandoned automobiles, and all other solid waste other than industrial solid waste. The Facility can also receive brush, construction-demolition waste, special waste, nonhazardous Class 2 and Class 3 industrial solid waste, and non-hazardous industrial solid waste that is Class 1 only because of asbestos content.

## II. PROCEDURAL HISTORY

The Texas Commission on Environmental Quality (TCEQ) received the application on August 6, 2005 and the Executive Director (ED) declared it administratively complete on September 15, 2005. The application was declared technically complete on January 4, 2008. On April 14, 2008, the ED held a public meeting in Austin, Texas, and on April 16, 2008, a preliminary hearing was held at the State Office of Administrative Hearings (SOAH) where parties to the contested case hearing were named and jurisdiction was taken. Named parties include the Applicant, TJFA, Travis County, The City of Austin, the ED, and OPIC. The hearing on the merits was held March 30, 2009 through April 13, 2009 and the Administrative Law Judge (ALJ) issued a Proposal for Decision (PFD)<sup>1</sup> on July 21, 2009.

## III. ANALYSIS

### A. **The permit should be denied because the proposed expansion is incompatible with surrounding land uses.**

First, OPIC refers the Commission and General Counsel to its Closing Arguments,<sup>2</sup> the City of Austin's Closing Argument,<sup>3</sup> and Travis County's Closing Argument.<sup>4</sup> OPIC maintains the opinion that this permit should be denied because the proposed expansion of the facility, and the commensurate extension of the life of the Facility, is incompatible with surrounding land

---

<sup>1</sup> See *In Re: In the Matter of the Application of Waste Management of Texas Inc., for a MSW Permit Ammendment, Permit No., MSW 249D (PFD)*, SOAH Docket No. 582-08-2186, TCEQ Docket No. 2006-0912-MSW, July 21, 2009.

<sup>2</sup> See Attachment A, containing *OPIC's Closing Arguments*, pages 2-6.

<sup>3</sup> See Attachment B, containing the City of Austin's discussion of land use compatibility.

<sup>4</sup> See AttachmentC, containing Travis County's discussion of land use compatibility.

uses.<sup>5</sup> OPIC cannot find that the expansion at this location is appropriate, given the overwhelming evidence of increasing development, and continued anticipated growth trends in the area, and the adverse impact on the surrounding area.

In addition, the Applicant only presented evidence showing that it sufficiently prepared a land use report, in accordance with 30 TAC §330.61. Although this meets the Applicant's burden to show that it submitted a complete application, it does nothing to show land use compatibility. And the Applicant's assumption that if a landfill merely operates as permitted, it is a compatible land use does not address the inherent conflict in expanding a landfill located in an increasingly urban area.

**B. Should the Commission approve the application, OPIC urges the Commission to also adopt the ALJs recommendation to incorporate additional groundwater monitoring wells and alter the Point of Compliance to include these wells.**

Should the Commission decide to approve the application, OPIC urges the Commission to, at a minimum, adopt the ALJ's recommendations to incorporate additional groundwater monitoring wells<sup>6</sup> and reconfigure the Point of Compliance (POC) to include the additional wells.

Incorporating additional groundwater monitoring wells and reconfiguring the Point of Compliance to include these four additional wells will address some of OPIC's concern regarding possible contamination from the Industrial Waste Unit (IWU) and the Phase I area.

**C. Should the Commission approve the application, Applicant should be required to sample and analyze for additional constituents.**

The Commission should require the Applicant to sample and analyze for additional groundwater contaminants. First, due to the myriad of unknowns associated with the IWU and the Phase I area, it makes sense to err on the side of caution.<sup>7</sup> Also, the ED did not oppose

---

<sup>5</sup> See 30 TAC § 330.61(h)(2), (3), and (4).

<sup>6</sup> *PF*D at 26-30; see also *PF*D at 19 (describing groundwater monitoring agreement between the City of Austin and the Applicant).

<sup>7</sup> The Precautionary Principle as drafted and finalized at a conference at the Wingspread Conference Center, Racine, Wisconsin, 23-25 January 1998: Where an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established

including a requirement to sample for constituents beyond what is required 40 CFR Part 258 Appendix I.<sup>8</sup>

Further, even though 30 TAC § 330.419(c) contains a list of factors that the ED shall consider when determining whether alternative or additional constituents should be included in a permit, this is not the standard for including additional constituents. This rule instructs the ED, when evaluating the application, to examine four broad factors. It is not a prima facie standard that must be met before additional constituents can be included in a MSW permit.

Additional constituents should be addressed in a permit such as this when the record shows that such constituents 1) “are reasonably expected to be in or derived from the waste contained in the unit;” or 2) “are likely to provide a useful indication of releases from the municipal solid waste management unit to the groundwater.”<sup>9</sup> In this vein, the ALJ notes that the addition of dioxane sampling and monitoring could be “beneficial to the groundwater monitoring system” and “the addition may be advisable.” Yet the ALJ thus far has not proposed to ultimately make a recommendation to include dioxane sampling and analysis in his PFD. OPIC urges the ALJ to revise his opinion to include, at a minimum, testing and analysis of dioxane, as this constituent has already been detected at the facility.<sup>10</sup>

Therefore, OPIC urges the ALJ to amend his findings of fact and conclusions of law to, at the very least, add dioxane to the permit as an additional constituent sampling requirement. At a minimum, this should include testing for dioxane at the wells covered by the voluntary agreement with the City of Austin<sup>11</sup> and wells monitoring possible flows from the IWU and Phase I area.

---

scientifically. <http://www.gdrc.org/u-gov/precaution-3.html> United Nations Environment Programme (UNEP) Principle 15 of the Rio Declaration on Environment and Development states: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>

<sup>8</sup> PFD at 30.

<sup>9</sup> 30 TAC § 330.419(c).

<sup>10</sup> PFD at 30.

<sup>11</sup> MW-29A, MW-32, PZ-26 and PZ-3. See PFD at 30.

**D. Although OPIC agrees with the ALJ's conclusion on operational hours, the ALJ has inappropriately placed the burden of proof on Protestants.**

30 TAC § 80.17(a) states that “the burden of proof is on the moving party by a preponderance of the evidence, except as provided [elsewhere for certain kinds of cases].” In TCEQ proceedings, this has long been interpreted as placing the burden of proof on the Applicant, as the party seeking TCEQ authorization for beginning, continuing, or changing its operations. Absent other express authority relating to contested case proceedings, the Applicant is the moving party on all issues as the Applicant initiated the action and is the only party allowed to present rebuttal testimony.

The Texas Appellate Court has stated, “[w]hile it may be difficult to prove a “negative,” it is Applicant's burden to establish that the proposed Permit terms will enable the Landfill to be in compliance with the MSW [municipal solid waste] rules.”<sup>12</sup> Therefore the Applicant has the burden to show that every part of the draft permit complies with TCEQ rules, not just those portions that differ from the current permit. Furthermore, as the Applicant was the party asking for a deviation from the rule-established norm, it has the burden to show that there was a need for the deviation.<sup>13</sup> The Applicant provided no such evidence.<sup>14</sup>

The Commission's rules at 30 TAC § 330.135 provide that normal waste acceptance hours are 7:00 a.m. to 7:00 p.m., Monday through Friday, unless otherwise approved. The rule further specifies that heavy equipment operation should not typically occur between 9:00 p.m. and 5:00 a.m. The Applicant also has the burden to show that the section of the draft permit allowing the Applicant to operate in excess of the rule-established norm would not create nuisance conditions for the surrounding neighbors.<sup>15</sup> As the ALJ concluded, though, “there is no evidence in the record to support Applicant's need for operational hours other than the default hours set forth in the rule.”<sup>16</sup> This should be enough.<sup>17</sup> But, numerous citizens have complained

---

<sup>12</sup> *BFI Waste Systems of North America, Inc. v. Martinez Environmental Group*, 93 S.W.3d 570, 578, (Tex.App. 2002).

<sup>13</sup> *Id.* at 577.

<sup>14</sup> *PF* at 64.

<sup>15</sup> 30 TAC § 330.15(a)(2).

<sup>16</sup> *PF* at 64.

about the nuisance conditions created by the Facility.<sup>18</sup> And the ALJ stated that limiting the operating hours will mitigate noise, odor, and dust conditions.<sup>19</sup>

In the alternative, even if the Commission finds that the burden was on the Protestants, the preponderance of the evidence justifies the ALJ's conclusion that the draft permit should include operating hours different from those in the previous permit.<sup>20</sup> Protestants offered ample evidence to demonstrate that the Applicant could not justify the extended operational hours, by presenting evidence showing the site created considerable noise, even standing 125 feet from the disposal activity, the minimum distance allowed between waste disposal areas and the property boundary.<sup>21</sup> There is also evidence in the record showing that limiting the landfill operations to daylight hours would minimize the impact on existing and future residential and civic uses.<sup>22</sup>

Therefore, because the Applicant has the burden of proof as the moving party under 30 TAC § 80.17(a), OPIC asks the ALJ to alter Finding of Fact #210 to read as follows;

210. ~~Protestants have~~ Applicant has the burden of proof to show that the current operating hours for the Facility should ~~be changed to conform with~~ exceed the default hours set forth in § 330.135, 7:00 a.m. to 7:00 p.m., Monday through Friday.<sup>23 24</sup>

---

<sup>17</sup> If Applicant had presented evidence showing that it needed the extended hours, though, Protestants still would have sufficiently presented evidence to refute this claim. See *BFI Waste Systems of North America, Inc. v. Martinez Environmental Group*, 93 S.W.3d 570, 577, (Tex.App. 2002); see also *FPL Farming, Ltd. v. Texas Natural Resource Conservation Com'n*, 2003 WL 247183, 4 (Tex.App. 2003).

<sup>18</sup> Please see the Exceptions filed by the Northeast Neighbors Coalition, pages 9-13 for an in-depth discussion of citizens' complaints.

<sup>19</sup> PFD at 64.

<sup>20</sup> PFD at 63-64.

<sup>21</sup> PFD at 63.

<sup>22</sup> *Id.*

<sup>23</sup> As an alternative, this finding of fact could be completely deleted.

<sup>24</sup> The associated Conclusion of Law #7 already seems to place the burden on the Applicant and state that it has not met this burden, so OPIC recommends no changes to this.

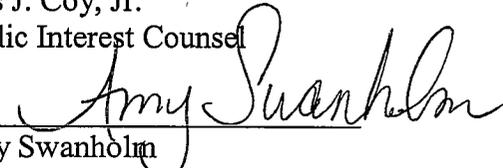
#### IV. CONCLUSION

OPIC recommends the Commission deny the application because the proposed expansion is incompatible with the surrounding land use. Alternately, OPIC urges the Commission to adopt the PFD and attached Findings of Fact and Conclusions of law with the following changes:

- 1.) Revise Finding of Fact # 210 as specified above, to reflect that the Applicant has the burden of proof on all issues.
- 2.) Revise Findings of Fact and Conclusions of Law to include sampling and analysis of additional constituents. At a minimum, this should include testing for dioxane at the wells covered by the voluntary agreement with the City of Austin<sup>25</sup> and wells monitoring flows from the IWU and Phase I area.

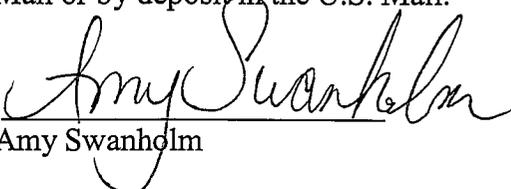
Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
Amy Swanholm  
Assistant Public Interest Counsel  
State Bar No. 24056400  
P.O. Box 13087 MC 103  
Austin, Texas 78711  
(512) 239-6363 PHONE  
(512) 239-6377 FAX

#### CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2009 the original and seven true and correct copies of the Office of the Public Interest Counsel's Exceptions to the Proposal for Decision were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

  
Amy Swanholm

<sup>25</sup> MW-29A, MW-32, PZ-26 and PZ-3. See PFD at 30.

# Attachment A

## OPIC's Closing Arguments

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

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

THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
CLOSING ARGUMENTS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE SCUDDAY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Closing Argument in the above-referenced matter.

I. INTRODUCTION

Waste Management of Texas, Inc. 9900 Giles Rd., Austin, TX 78754 (WM or Applicant) applied for a permit amendment to authorize an expansion of their existing permit, to increase the volume and site life of the Austin Community Recycling and Disposal Facility, (Facility) a Type I municipal solid waste landfill facility located on Giles Road, approximately 250 feet north where Giles Road and Highway 290 meet in Austin, Travis County, Texas. The proposed expansion would add 71.11 acres to the permitted boundary of the Facility, for a total permitted area of 359.71 acres. Although certain areas could increase in elevation as part of the proposed expansion, the current maximum elevation of 740 feet would not change.

The Facility is currently permitted to receive municipal solid waste, or solid waste resulting from, or incidental to, municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste. The Facility

can also receive brush, construction-demolition waste, special waste, nonhazardous Class 2 and Class 3 industrial solid waste, and non-hazardous industrial solid waste that is Class 1 only because of asbestos content.

## II. PROCEDURAL HISTORY

The Texas Commission on Environmental Quality (TCEQ) received the application on August 6, 2005 and the Executive Director (ED) declared it administratively complete on September 15, 2005. The application was declared technically complete on January 4, 2008. On April 14, 2008, the ED held a public meeting in Austin, Texas, and on April 16, 2008, a preliminary hearing was held at the State Office of Administrative Hearings (SOAH) where parties to the contested case hearing were officially named and jurisdiction was taken. Named parties include the Applicant, TJFA, Travis County, The City of Austin, the ED, and OPIC. The hearing on the merits was held March 30, 2009 through April 13, 2009. This matter has been directly referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing, therefore no issues have been specified by the Commission.

## III. ANALYSIS

### A. Expansion of the Facility is not compatible with surrounding land uses.<sup>1</sup>

The Texas Health and Safety Code and the TCEQ rules require the Commission to consider land-use issues when evaluating a permit application.<sup>2</sup> "A primary concern is that the use of any land for a municipal solid waste facility not adversely impact human health or the environment."<sup>3</sup>

WM and the Executive Director agree that the proposed expansion would be compatible with surrounding land uses because the Facility is already in operation and can be operated in a

---

<sup>1</sup> See *Order No. 12 Ruling on Evidence, Setting Schedule for Arguments, Adopting Common Outline, and Requiring Proposed Findings and Conclusions (Order No. 12)*, page 3, section B, subsection 1.

<sup>2</sup> Texas Health and Safety Code § 361.069 and 361.089; 30 TAC § 330.061(g), (h).

<sup>3</sup> 30 TAC § 330.061(h).

manner that is in compliance with TCEQ rules. TJFA, The City of Austin, and Travis County presented testimony that the Facility is incompatible with surrounding land uses because there was an expectation that all landfills in the area would close by 2015, the area is becoming increasingly urbanized, the presence of the landfill has deterred development in certain areas, surrounding landowners find the Facility to be a nuisance, and the Capital Area Council of Governments (CAPCOG) determined that it was incompatible.

OPIC cannot find that the expansion at this location is appropriate, given the overwhelming evidence that the Facility is incompatible with the increasing development and continued anticipated growth trends in the area, and will therefore adversely impact the surrounding area.<sup>4</sup> OPIC is likewise not persuaded by Applicant's experts who opine that if a landfill merely operates as permitted, it is a compatible land use.

It appears that the facts required for the analysis are not in dispute. No one questions the sufficiency of John Worrall's report prepared for WM in accordance with 30 TAC §330.61. However, it is clear that parties disagree on the correct interpretation and use of the data. The Executive Director did not actually analyze the information. Mr. Udenenwu confirmed that the ED conducted no independent analysis on whether the Facility expansion is compatible with surrounding land use.<sup>5</sup> The scope of the ED's review was only to ascertain whether the information required by 30 TAC §330.61 has been submitted in the application.

The Applicant's witnesses appear to base their compatibility determination on the idea that since homes, parks and schools are being constructed in the area where WM's site is already located, then by default the site is compatible. Mr. Worrall explains that landfill uses predate nearly all other land uses in the area.<sup>6</sup> He elaborates that the closest residence, businesses, daycare facility, and school were all constructed after WM began operation of the landfill.<sup>7</sup> When discussing growth trends of Austin, he notes that significant residential growth occurred since 2000 and is projected to continue through 2017.<sup>8</sup> Mr. Worrall also found that the area

---

<sup>4</sup> See 30 TAC § 330.61(h)(2), (3), and (4).

<sup>5</sup> Tr. vol. 11 at pp. 2404, lns. 15-20.

<sup>6</sup> See Ex App-300, prefiled testimony of John Worrall, page 14, line 27 through page 15, line 8.

<sup>7</sup> See Ex App-300, prefiled testimony of John Worrall, page 15, lines 1-5.

<sup>8</sup> See Ex App-300, prefiled testimony of John Worrall, page 16, lines 4-11.

around the landfill included the fastest growing sector of the city of Austin for the years 1990-2000.<sup>9</sup>

Apparently, Mr. Worrall assumes that as long as the landfill is operating in accordance with its permit conditions, then it will always be a compatible land use.<sup>10</sup> He only assumed that the Facility was operating within the rules, though,<sup>11</sup> and did not look into the compliance history of the Facility,<sup>12</sup> despite admitting that if a landfill was creating nuisance conditions for nearby individuals, it could be incompatible with surrounding land use.<sup>13</sup> This is particularly problematic, given that he also did not speak to any surrounding landowners when completing his land use analysis.<sup>14</sup>

OPIC cannot agree that because the landfill was there first, then compatibility with surrounding land uses should be assumed. Land use compatibility analyses are used to determine whether it is appropriate to site a new landfill in a certain location, or to expand the capacity of an existing landfill, considering current and probable future conditions. If WM's position were correct, there would be no need to ever conduct a land use analysis for an amendment application.

Further, WM has not used the information gathered as part of the land use compatibility analysis to mitigate any nuisance problems that may be currently caused by the existing landfill. As Charles Dominguez stated, an extensive land use study was performed, and that information was summarized in the appropriate portion of the application.<sup>15</sup> But, Mr. Dominguez also testified that he did not apply the results of the report when creating the site operating plan for the Facility, stating that he can not think of any regulation requiring the site operating plan to be compatible with surrounding land use.<sup>16</sup> Notably, the site operating plan "must include

---

<sup>9</sup> See Ex App-300, prefiled testimony of John Worrall, page 16, lines 2-3.

<sup>10</sup> See Ex JW-1, prefiled testimony of John Worrall, page 25, lines 12-17.

<sup>11</sup> Tr. vol 4, at pp. 567.

<sup>12</sup> Tr. vol 4. at pp. 578.

<sup>13</sup> Tr. vol. 4 at pp. 575-578 (specifically pp. 577, ln. 19 and pp. 578, lns. 8 and 13).

<sup>14</sup> Tr. vol 4 at pp. 563, lns. 19-23.

<sup>15</sup> Tr. v. 3 at pp. 453.

<sup>16</sup> Tr. v. 3 at pp. 452.

provisions for site management and the site operating personnel to meet the general and site-specific requirements of Subchapter D.<sup>17</sup> Subchapter D contains provisions for ensuring that the Facility will be operated in a manner that minimizes impact on the surrounding area, including provisions for operating hours,<sup>18</sup> control of windblown wastes,<sup>19</sup> management of waste transported to the Facility,<sup>20</sup> and visual screening of waste,<sup>21</sup> among other protective provisions.

The site operating plan would have been the appropriate vehicle for addressing many of the concerns surrounding landowners have with the existing facility, and the expansion of the facility. Precautions could have been taken, given the increasing urbanization of the area. Yet according to Mr. Dominguez' own testimony, the Applicant appears to have gathered the information required by 30 TAC § 330.61(g) and (h), but ignored the implications it raised. And the ED only reviewed the land use analysis and site operating plan to determine whether it included the required data and referenced the proper rules, not to determine whether the conclusions regarding land use compatibility were sound.

In addition, Jon White for Travis County stated that although the proposed site operating plan offers improvements over the existing site operating plan,<sup>22</sup> the language of the application and the draft permit provide WM with flexibility that may allow it to skirt the rules designed to protect against nuisance conditions.<sup>23</sup> WM could have incorporated stringent language to address the increased growth of the area and complaints of surrounding landowners into its application,<sup>24</sup> but instead appears to have only minimally included language claiming to meet nuisance related requirements.

---

<sup>17</sup> 30 TAC § 330.127.

<sup>18</sup> 30 TAC § 330.135.

<sup>19</sup> 30 TAC § 330.139.

<sup>20</sup> 30 TAC § 330.145.

<sup>21</sup> 30 TAC § 330.175.

<sup>22</sup> Tr. v. 9 at pp. 1938, lns. 1-3.

<sup>23</sup> Tr. v. 9 at pp. 1938, lns. 7-13.

<sup>24</sup> See Tr. vol 9 at pp. 1938, lns. 7-20; see also tr. at pp. 1940, lns. 20-24.

Finally, OPIC can not ignore the fact that there were concerns with land use compatibility at this facility as early as 1972.<sup>25</sup> Neither can OPIC discount opposing parties' extensive testimony regarding the facility's incompatibility with the Regional Solid Waste Management Plan.

OPIC finds that WM did not demonstrate that expansion of the landfill will be compatible with surrounding land uses. WM merely established that growth is rapidly occurring and then assumed that if the landfill is operating properly, then land use is compatible since the landfill was there before much of the growth. It has done little to address the nuisance issues associated with expanding a landfill located in an increasingly urban area. Furthermore, should the proposed expansion be approved, operations will continue in the area well past the current estimated closing date. This would only exacerbate the incompatibility, as the area surrounding the Facility is estimated to continue growing.<sup>26</sup> The landfill is located in an increasingly urban area near individuals who have found their lives already disrupted by the landfill, yet WM proposes to expand, while ignoring any impacts this may have on the surrounding community. Therefore, OPIC finds that expansion of the landfill will be incompatible with surrounding land use, and must recommend the ALJ make a commensurate finding.

**B. WM has not met its burden to show the application sufficiently demonstrates how the MSW facility will comply with applicable TPDES storm water permitting requirements.**<sup>27</sup>

30 TAC § 330.61(k) requires an applicant to submit "information demonstrating how the municipal solid waste facility will comply with applicable Texas Pollutant Discharge Elimination System (TPDES) storm water permitting requirements and the Clean Water Act, §402."<sup>28</sup> This information must include, but is not limited to, "a certification statement

---

<sup>25</sup> Tr. vol. 6 at pp. 1339 ln. 6 to pp. 1340, ln. 22;

<sup>26</sup> See Ex App-300, prefiled testimony of John Worrall, page 16, lines 4-11.

<sup>27</sup> See *Order No. 12*, page 3, section B, subsection 1.

<sup>28</sup> 30 TAC § 330.61(k).

indicating the owner/operator will obtain the appropriate TPDES permit coverage when required or a copy of the permit number for coverage under an individual wastewater permit.”<sup>29</sup>

According to the ED, their review of the application on this issue only addressed whether WM was planning to apply for a TPDES permit, not whether the application and draft permit drawn up in accordance with the information contained in the application would comply with TPDES rules.<sup>30</sup> For the Applicant, Mr. Dominguez was not aware that he had certified that the facility intended to comply with TPDES, although he does say that the current site has a TPDES permit.<sup>31</sup> When questioned, he stated that the benchmark for total suspended solids (TSS) in stormwater runoff from the site was 100 mg/l. When determining this number, though, he did not take into account studies showing the current facility is not always meeting this benchmark value.<sup>32</sup> Furthermore, he did not take into account required TSS values when designing the erosion and sedimentation plans for the proposed expansion,<sup>33</sup> nor the apparent difficulty in getting groundcover established on the current site. Therefore, although the applicant has submitted the minimal certification required by 30 TAC § 330(k)(3)(A), OPIC questions whether the applicant has sufficiently demonstrated how the proposed facility will comply with applicable TPDES stormwater runoff requirements.

**C. The application does not include adequate protection of groundwater, in compliance with agency rules, particularly in relation to the effects of the IWU and Phase I on the groundwater and surface water.<sup>34</sup>**

First, there has been significant testimony showing that the industrial waste unit (IWU) area contains a large amount of hazardous waste, deposited sometime during the early 1970s. Generally, wastes disposed of in the area include spent acids, caustics, solvents, waste

---

<sup>29</sup> Id.

<sup>30</sup> Tr. vol. 11 at pp. 2400-2401.

<sup>31</sup> Tr. vol. 3, at pp. 471, lns. 4-8.

<sup>32</sup> Tr. vol 3. at pp. 474-475.

<sup>33</sup> Tr. vol. 3 at pp. 488.

<sup>34</sup> See *Order No. 12*, page 3, section A, subsection 1.

hydrocarbons, and contaminated industrial process water.<sup>35</sup> In addition, municipal solid waste has been placed over the IWU area,<sup>36</sup> no liner is in place below the IWU, and no plan is in place to monitor landfill gas on the IWU and Phase I areas.<sup>37</sup> This is problematic considering that groundwater contamination may have and may continue to escape the current permitted boundary<sup>38</sup> and the IWU may not have ever been properly closed.<sup>39</sup>

Because there are substantial questions regarding whether the proposed facility will adequately protect groundwater, OPIC cannot recommend the permit be granted. Furthermore, the lack of groundwater protection increases OPIC's concern that this facility is incompatible with the surrounding land use.

**D. If the permit is approved, additional groundwater monitoring should be required.<sup>40</sup>**

There has been sufficient testimony presented to justify inserting additional groundwater monitoring requirements into the draft permit, should the permit not be denied. Even if the application's current provisions comply with the Chapter 330 requirements for monitoring wells, due to the myriad unknowns associated with the industrial waste unit (IWU) and Phase 1 areas, greater precautions should be taken to protect the quality of Texas' ever dwindling groundwater supply.<sup>41</sup>

---

<sup>35</sup> Tr. vol. 2 at pp. 102-103; Tr. vol. 7 at pp. 1335-1340.

<sup>36</sup> Tr. vol 3 at pp. 339.

<sup>37</sup> Tr. vol. 3 at pp. 442, lns. 15-21.

<sup>38</sup> Tr. vol. 6 at pp. 1295, ln 4 to pp. 1296, ln. 25.

<sup>39</sup> Tr. vol. 3. at pp. 329, lns. 8-17; tr. vol. 7 at pp. 1412-1420.

<sup>40</sup> See *Order No. 12*, page 3, section A, subsection 2.

<sup>41</sup> The Precautionary Principle as drafted and finalized at a conference at the Wingspread Conference Center, Racine, Wisconsin, 23-25 January 1998: Where an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. <http://www.gdrc.org/u-gov/precaution-3.html> United Nations Environment Programme (UNEP) Principle 15 of the Rio Declaration on Environment and Development states: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>

Donald Smith testified for WM that for the portion of Phase I within WM's responsibility, it was his general understanding that installation of groundwater monitoring equipment would be required.<sup>42</sup> Regarding monitoring a landfill unit within the permit boundary that has been closed, Mr. Hunt testified that this is required, and that closed units outside of the permit boundary would at the very least need post-closure monitoring.<sup>43</sup> Monitoring wells down gradient to Phase I and the IWU may be included in the draft permit, but opposing parties have raised significant questions about whether these wells would be enough to detect most releases from the IWU and Phase I. Further, monitoring equipment not included in the application currently exists and could be easily incorporated into the draft permit, although even these may not be sufficient to address all possible releases.

In addition, Jay Winters testified for WM that if there were a good technical reason for installing additional monitors between Well 11 and Well 51, cost would not preclude it.<sup>44</sup> Therefore, should this expansion be granted, additional monitoring requirements that sufficiently address issues raised by protesting parties should be included in the final permit.

**E. The Facility, as operated under the proposed site operating plan, may create a nuisance.<sup>45</sup>**

OPIC is concerned that, should the expansion be approved, it will create and maintain nuisance conditions in the area, specifically regarding offensive odors. If the draft permit and site operating plan are approved in their current state, the applicant may be in violation of the TCEQ rule which states "a person may not cause, suffer, allow, or permit the collection, storage, transportation, processing, or disposal of municipal solid waste (MSW), or the use or operation of a solid waste facility to store, process, or dispose of solid waste...in such a manner that causes...the creation and maintenance of a nuisance..."<sup>46</sup> Also, "the site operating plan must have an odor management plan that addresses the sources of odors and includes general

---

<sup>42</sup> Tr. vol. 2 at pp. 113, ln. 12 to pp. 114, ln. 17.

<sup>43</sup> Tr. vol. 6 at pp. 1208-1210.

<sup>44</sup> Tr. vol. 5 at pp. 1047-1048.

<sup>45</sup> See *Order No. 12*, page 3, section B, subsection 2.

<sup>46</sup> 30 TAC § 330.15(a)(2).

instructions to control odors or sources of odors. Plans for odor management must include the identification of wastes that require special attention such as septage, grease trap waste, dead animals, and leachate."<sup>47</sup>

Odor control can be achieved through proper site maintenance as well as proper maintenance and operation of the landfill gas collection system. But OPIC questions whether WM has sufficiently addressed how it will control odors to a level that would not create and maintain a nuisance to surrounding homes, businesses, schools and childcare facilities. Mr. Smith, testifying generally regarding WM's odor control mechanisms, stated that the landfill would use daily cover to mitigate odors.<sup>48</sup> However, he also stated that this was the only mechanism he was aware of to address nuisance concerns.<sup>49</sup> Mr. Smith, stated that any odor complaints received by WM would be thoroughly investigated to determine if the existence of nuisance odors could be confirmed.<sup>50</sup> But, Mr. Dominguez, who created the proposed site operating plan for the facility, did not make any attempt to address nuisance concerns, beyond preparing the application according to his understanding of TCEQ rules.<sup>51</sup>

It is undisputed in the record that landfills will have generalized odors and other potential unpleasant conditions associated with them. Odors will escape and neighbors will likely be impacted due to proximity. And it appears that WM has included the appropriate language in its application to meet the ED's technical review.

But, the record raises question as to whether the facility can expand operations without also creating odor and other nuisance conditions for individuals around the landfill. Jon White for Travis County stated that although the proposed site operating plan offers improvements over the existing site operating plan,<sup>52</sup> the language of the application and the draft permit provide

---

<sup>47</sup> 30 TAC § 330.149.

<sup>48</sup> Tr. vol. 2 at pp. 190-191.

<sup>49</sup> Tr. vol. 2 at pp. 192.

<sup>50</sup> Tr. vol. 2 at pp. 202-203.

<sup>51</sup> Tr. vol. 3 at pp. 442-444.

<sup>52</sup> Tr. v. 9 at pp. 1938, lns. 1-3.

WM with flexibility that may allow it to skirt the rules designed to protect against nuisance conditions.<sup>53</sup>

WM has provided little testimony to show how it will address the inherent incompatibility of expanding an already problematic odor source for an extended period of time in an area becoming increasingly urbanized. WM did not consider odor (or any other nuisance) complaints when creating the proposed site operating plan and the plan provides no concrete language for addressing nuisance concerns. Therefore, OPIC cannot find that WM has shown it will not create a nuisance, giving further weight to OPIC's argument that this landfill is incompatible with the surrounding land use.

**F. The application should be denied if WM began construction of the proposed lateral extension prior to the issuance of the draft permit, in violation of agency rules.<sup>54</sup>**

If indeed construction has commenced on the proposed expansion of the Facility, and the feature constructed is not within the definitional exception,<sup>55</sup> than WM violated 30 TAC § 330.7(a) and the application should be denied.<sup>56</sup> Beginning construction before a permit has been issued shows a blatant disregard for TCEQ's permitting process. Further, if Applicant is willing to disregard this rule, OPIC has little faith that WM will comply with other, less verifiable rules. Allowing the expansion of a landfill that is managed in this manner, so close to a growing population center, is contrary to the public interest of the state of Texas and the TCEQ's responsibility to ensure landfills are constructed and managed in a manner that meets the solid waste needs of Texas, while also minimizing the landfill's impact on human health and the environment.

---

<sup>53</sup> Tr. v. 9 at pp. 1938, lns. 7-13.

<sup>54</sup> See *Order No. 12*, page 3, section D.

<sup>55</sup> See 30 TAC § 330.3(26).

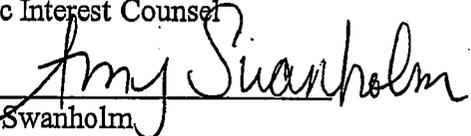
<sup>56</sup> "No person may commence physical construction of a new municipal solid waste (MSW) management facility, a vertical expansion, or a lateral expansion without first having submitted a permit application in accordance with §§330.57, 330.59, 330.61, 330.63, and 330.65 of this title (relating to Permit and Registration Application Procedures) and received a permit from the commission, except as provided otherwise in this section." 30 TAC § 330.7(a). This facility would not qualify for any of the permit-by rule exceptions contained in this section.

#### IV. CONCLUSION

OPIC recommends the ALJ find that WM did not demonstrate by a preponderance of the evidence that the expansion of this landfill would be compatible with the surrounding commercial and residential land uses. OPIC also recommends finding that WM failed to establish that the proposed expansion will not create a nuisance, and further failed to demonstrate that the draft permit adequately protects groundwater. If the proposal for decision recommends granting the application, OPIC recommends requiring additional groundwater monitoring wells, testing for additional constituents, and altering the Point of Compliance to accurately reflect possible release pathways. Furthermore, if the permit is granted, the site operating plan should specifically address how WM will prevent nuisance conditions.

Respectfully submitted,

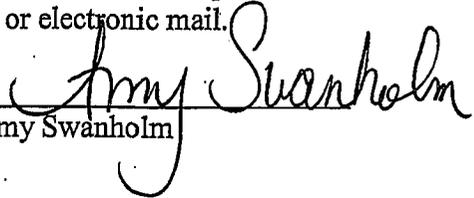
Blas J. Coy, Jr.  
Public Interest Counsel

By   
Amy Swanholm

Assistant Public Interest Counsel  
State Bar No. 24056400  
P.O. Box 13087 MC 103  
Austin, Texas 78711  
(512) 239-6363 PHONE  
(512) 239-6377 FAX

**CERTIFICATE OF SERVICE**

I hereby certify that on May 8, 2009, the foregoing document was served to all persons listed on the attached mailing list via deposit in US mail, hand delivery or electronic mail.

  
\_\_\_\_\_  
Amy Swanholm

# Attachment B

City of Austin's Closing Argument  
Pages 23-26

the roadways will not be adversely impacted by mud trafficked onto them during wet weather conditions at the facility.<sup>85</sup> The City is concerned that landfill traffic will cut through the nearby Harris Branch Parkway, which is not designed for the potential volume of heavy vehicles generated by the landfill facility, and that the ongoing operation of this facility will continue to degrade the quality of Blue Goose Road, which is already a structurally failing facility.<sup>86</sup> The Applicant did not meet their burden of demonstrating the adequacy of roadways accessing the facility as required by 30 T.A.C. §330.61(i)(1), since they did not investigate the structural capacity of the roadways, but merely made assumptions.

**B. Whether the application provides assurance that operation of the site will pose no reasonable probability of adverse effects on the health, welfare, environment, or physical property of nearby residents or property owners.**

The application fails to provide assurance that the WMI facility will not pose a reasonable threat of adverse impacts on the health, welfare, environment, or physical property of nearby residents and property owners. The mere fact that WMI has chosen to seek this application for extension is proof that the public cannot rely on *any* assurances given by WMI.<sup>87</sup> The City, nearby property owners, businesses, developers, and residents had an expectation that the WMI landfill would close upon reaching its currently permitted capacity, at which point the landfill's impacts on their quality of life and potential uses of their property would no longer be a significant factor.

**1. Whether the application includes adequate information regarding the compatibility of land use to show that the MSW facility will not adversely impact human health or the environment.**

---

<sup>85</sup> CR. V. No. 6, 1080:9-17 & 1081:6-25.

<sup>86</sup> CR. V. No. 6, 1098:14-24.

<sup>87</sup> CR. V.No. 10, 2260:24-25 & 2264:20-22.

The Applicant's one and only witness, the very same witness who created their land use analysis, John Worrall, predicates his opinion on the lack of credibility of the Travis County Commissioner's findings and the CAPCOG's nonconformance determination on his personal definition of "adjacent". Specifically, Mr. Worrall urged that the above entities' findings and recommendations should not be considered, as they are based on an incorrect use of the term "adjacent". Mr. Worrall testified that in his opinion "adjacent" means touching.<sup>88</sup> However, the two dictionaries that were presented for review during the hearing on the merits, Black's Legal Dictionary and the American Heritage Dictionary, both defined "adjacent" as "close to" or "lying near."<sup>89</sup>

Mr. Worrall additionally predicates much of his determination of compatibility on the fact that "from 1980 to 2007, the City's population more than doubled . . . A significant portion of that growth has occurred in northeast Austin, including the areas within one mile of the [WMI] facility. This area is expected to continue to grow into the future."<sup>90</sup> However, in granting WMI's current permit to operate, Permit No. 249C, the TCEQ stated in a finding of fact that "[t]here has been little growth in the area as compared with other parts of the City."<sup>91</sup> It is inapposite to argue that if there is slow growth in the area the WMI landfill is compatible with surrounding land uses, as well as if there is robust growth in the area it also demonstrates that the WMI landfill is compatible with surrounding land uses. The fact of the matter is that the area surrounding the WMI facility is one of the fastest growing areas in the City, and the more it grows so will the complaints for nuisances felt from the WMI facility.

---

<sup>88</sup> CR. V. No. 4, 735:25 – 738:8.

<sup>89</sup> CR. V. No. 4, 805:21 – 806:25.

<sup>90</sup> APP 300, 17:27-30.

<sup>91</sup> Jon White 5, 44:¶17.

The application does not address the continued negative affects created by WMI facility on the existing and proposed residential and civic land uses in the adjacent area.<sup>92</sup> The approval of this application will allow WMI to continue to adversely impact human health and the environment for another decade. The WMI landfill and the adjacent property are located within the City's Desired Development Zone, which is an area that the City has designated for future growth and development. It is anticipated that additional residential uses will be built within the Pioneer Crossing PUD and the Harris Branch PUD located to the north, northwest and northeast over the next five to ten years. Even if the WMI landfill operations are in compliance with the minimum standards established by the TCEQ, those minimum standards as set forth in the application are not sufficient to mitigate the multitude of negative impacts created by an active landfill located adjacent to the residential area. Specifically, the application does not mitigate all negative impacts from odor, traffic, litter, noise, visual aesthetics or the loss of additional property tax revenue by the City of Austin created by the delay in land development adjacent to the land fill site.<sup>93</sup>

There is evidence that the presence of the WMI facility has deterred, and is deterring, development in the area.<sup>94</sup> Specifically, the development of detached single family homes within the Harris Branch Planned Unit Development ("PUD") and the Pioneer Crossing PUD has not occurred on parcels approved for single family uses closest to the existing landfill sites, but has occurred on other parcels further away.<sup>95</sup> The development community needs to be able to rely on closure once permit capacity is

---

<sup>92</sup> GG 1, 6:1-3.

<sup>93</sup> GG 1, 6:3-15; Joe Word 1, 5:110-113.

<sup>94</sup> CR. V. No. 9, 1979:9-12.

<sup>95</sup> GG 1, 4:7-16, 23-24 & 5:1-2.

reached. Granting a substantial increase in capacity, particularly with no time-certain closure date in the near future, will continue to adversely affect development, and enjoyment of property, in this vicinity for decades. The old Travis County Landfill is now closed. BFI has committed to close their landfill no later than November 1, 2015. After November 1, 2015, WMI will be the only active landfill in the area.<sup>96</sup> The operation of the WMI landfill has and will continue to impact the surrounding neighborhoods, as evidenced by repeated and voluminous complaints regarding odors, traffic, litter, dust, erosion and sedimentation of streams, and other complaints. By virtue of its recent record of operation, and failure to make any significant changes to its site operating plan (“SOP”) in this application, the applicant has failed to demonstrate that the facility will not adversely impact human health or the environment, as required by 330.61(h).<sup>97</sup>

2. **Whether the application includes adequate provisions to prevent the creation or maintenance of a nuisance including odors, control of spilled and windblown waste, dust control and maintenance of site access roads, in compliance with agency rules.**

This application should be denied because it fails to meet the requirements of 30 TAC §330.15(a)(2); which specifically prohibits the operation of a municipal solid waste (“MSW”) facility in such a manner that causes the creation and maintenance of a nuisance. The term “nuisance” is defined in the regulations as being, among other things, the processing or storage of MSW in a way that causes the pollution of surrounding land, contamination of ground or surface water, or the creation of odors adverse to human health, safety, or welfare.<sup>98</sup> The Applicant has failed to demonstrate that the application

---

<sup>96</sup> Joe Word 1, 5:114 – 6:115.

<sup>97</sup> Joe Word 1, 6:121-126 & 8:180-183.

<sup>98</sup> 30 TEX. ADMIN. CODE §330.3(95).

# Attachment C

Travis County's Closing Argument  
Pages 17-27

overwhelmingly shows that this facility is not compatible with the surrounding residential land use, and that the application for expansion should be denied.

**The WMTX Landfill is an Incompatible Land Use**

Several statutes are relevant to this matter, and specify a minimum of information which the Applicant must provide to assist the Commission in making a determination on land use compatibility. 30 TAC§330.61(g) and 30 TAC§330.61(h) However, simply including this information does not make a landfill compatible; rather, it is only the very beginning to an extremely involved determination to be made by CAPCOG, the ALJ and the TCEQ on land use compatibility.

To that end, the Texas Legislature provided for the creation of area-specific Councils of Governments (“COG”s) and granted them the authority to develop regional solid waste management plans and to make determinations on land use compatibility with respect to solid waste facilities in their respective areas. In this matter, the Applicant was required to submit its expansion application to the Capital Area Council of Governments (“CAPCOG”) so that CAPCOG could review the proposed expansion and make its determination as to land use compatibility and as to whether or not the proposed expansion conformed with CAPCOG’s Regional Solid Waste Management Plan (“RSWMP”). The COG’s recommendation is presented to the Commission as a supplement to the information provided by the Applicant to assist the Commission in making a determination on the issue of compatibility. The ED makes no finding on this issue; this decision rests solely with the Commission.

During this process, Dan Eden, Deputy Director of the TCEQ, instructed CAPCOG that an evaluation of the land use/impact study submitted by WMTX as part of

the Application was within its role as a regional planning entity. (Exhibit APP-9) Thus, CAPCOG proceeded to review Waste Management's expansion request and made a determination that it did not conform to its RSWMP, and that the expansion of this facility was incompatible with surrounding land use in the area.

While the facility may well have been compatible with surrounding land use when it was originally permitted, over thirty years have passed since this location first began accepting waste and operating as a landfill. At that time, the surrounding land was "rural and sparsely developed," (Travis County Exhibit JW-1, p. 11., l. 23 – p. 12. l. 1), there were only 170 residences within one mile of the site, and there were no schools or daycare centers. By 2008, however, this one-mile area contained 1,487 residential homes, the Bluebonnet Trails Elementary School, and a daycare center, The Children's Courtyard – all of which are uses that are incompatible with expansion of this landfill. (Exhibit APP-302, p. 7) There has been considerable growth in this area since the landfill was first permitted, particularly in the last decade. The evidence presented by Waste Management's own expert in this area, John Worrall, demonstrates this growth, particularly the series of photographs contained in APP-302, pages 00026 – 00032. (see also the photographs contained in Travis County Exhibit JW-9, pp. 1-12; and TJFA Exhibit 206, pp. 1-19) The difference in the land use depicted in the twenty-six years captured by these photographs is staggering. Clearly, the land use has undergone dramatic change during this time, and what was once an open, rural area is now urban and residential.

The WMTX facility is located in Austin Planning Area 22, which had the largest population growth in the entire City of Austin between 1990 and 2000. The population

grew 133.2%, from 40,528 to 94,522. (Exhibit APP-302, p. 00006) From 2000 through May 2008, the area within a five mile radius of the landfill added 7,835 new households, and accounted for nearly 9% of all households formed within Travis County during this timeframe. (Exhibit APP-300, p. 16, l. 4-7) Developers have planned a total of 17,963 lots for single family housing, as well as an additional 8,778 multi-family housing units in the ACRD landfill area. (Exhibit APP-302, page 00018) Mr. Worrall estimates that almost 10,000 new households will be added to this area by 2017. (Exhibit APP-302, p. 00021) These are shockingly large numbers, and in light of their magnitude, it is inconceivable how anyone could believe that the operation of this facility would be compatible with such overwhelmingly residential land use. Both Jon White, Travis County's expert in this matter, and Greg Guernsey, the City of Austin's expert in this matter, strongly disagree with Mr. Worrall's conclusions, and both believe the continued operation of this facility is incompatible with existing and future land use in this area. (Travis County Exhibit JW-1, p. 10, l. 18 –p. 11, l. 14; City of Austin Exhibit GG-1, p. 3, ll. 16-27; City of Austin Exhibit GG-1, p. 5, l. 22 – p. 6, l.15)

In addition, evidence established that through 2004, more than 800 complaints concerning landfill operations in this area have been filed with the TCEQ and hundreds of additional complaints have been filed with the Travis County Commissioners Court and the Austin City Council. (TJFA Exhibit 27; TC Exhibit 6; TR p. 2246, ll. 6-18; and Travis County Exhibit JW-1, p. 1936, l. 21 - p. 1937, l. 21; City of Austin Exhibit JW-1, p. 6, ll.122-124) Many of these complaints were odor-related. Evidence was presented that both Bluebonnet Trail Elementary School and the Children's Courtyard daycare center have made multiple reports of odors, and have even had to keep the children inside

due to complaints of children and teachers being ill from the effects of the odors. (City of Austin Exhibit JW-1, p. 7, ll. 148-156) In his testimony, Delmer Rogers discussed the odors he personally smelled and the loud noises he personally heard while on the school, daycare and park properties in the Harris Branch area. (NNC Exhibit DR-1, p. 5, ll. 10-14). Delmer Rogers also provided testimony regarding complaints from one of his tenants about skin rashes, discomfort and odor. (NNC Exhibit DR-1, p. 5, ll. 21-23) Evan Williams, Delmer Rogers, and Mark McAfee also provided testimony about the odors they have smelled in the vicinity of the landfill. Mr. Rogers stated that the odor problems were at a peak in the summers of 2007 and 2008, and that the heat and the south winds seemed to magnify the problems from the odors. (NNC Exhibit DR-1, p. 2, ll. 29-30). Mr. Williams testified that “when there is a breeze or heat or both, there can be an overpowering stench that smells of rotting garbage. This interferes with my enjoyment of the property and my guests’ enjoyment of the property and negates any reasonable development scenario.” (NNC Exhibit EW-1, p. 2, ll. 11-14) Mr. Williams, Mr. Wilkins, Mr. Rogers and Mr. McAfee all testified they believed these odors to come from the WMTX landfill rather than from the BFI landfill based on the direction the wind was blowing at the times they smelled the odors. (NNC Exhibit DR-1, p. 2, ll. 29-30; NNC Exhibit EW-1, p. 2, ll. 15-17; NNC Exhibit JW-1, p. 2, l. 27-29; and NNC Exhibit MM-1, p. 3, ll. 5-20)

There are other incompatibilities associated with the landfill that are nuisances for the adjacent residents and property owners. Mr. Williams, whose family has owned their property since the 1960s, (NNC Exhibit EW-1, p.1, l. 22) was greatly concerned about the windblown trash and dust, and testified that when the winds are strong, he finds

numerous plastic bags caught in trees on his property. (NNC Exhibit EW-1, p. 3, ll. 9-13) He also expressed his concerns about the birds and buzzards that circle above the landfill and come onto his property (NNC Exhibit EW-1, p.2, ll. 23-24), the dust generated by the daily operation of the landfill, and about the loud noise caused by the large, rumbling garbage trucks, especially as they “constantly tear up the road because of the weight. They hit the bumps that they create and it causes a very loud noise, almost like some type of gunshot.” (NNC Exhibit EW-1, p. 3, ll. 1-3) Mr. Williams testified about his fears that these nuisances will only increase if the landfill is allowed to increase its size. (NNC Exhibit EW-1, p. 3, ll. 9-13)

Even more troubling with respect to the nuisances confronting adjacent landowners is the fact that the operation of the WMTX landfill has resulted in trespass and harm to the property of nearby residents. Mr. Williams produced photographic evidence of the runoff from the WMTX landfill onto his property. (see NNC Exhibits EW-6, EW-7, and EW-8) NNC Exhibit EW-8 shows what at first glance appears to be a road, but per Mr. Williams, “is in fact a drainage swale that collects runoff. The runoff then flows over the rocks and concrete ‘riprap’ you can see in front of the fence. This water then flows onto my property and into the creek.” (NNC Exhibit EW-1, p. 4, ll. 27-31) Mr. Williams has also found “many tens” of dead bird carcasses on his property. (see NNC Exhibits EW-4 and EW-5)

Testimony was provided establishing that there have been years of adverse interactions between WMTX and its residential neighbors, and that evidence of this adverse interaction, dates back to at least the time of the 1990 Agreed Order between WMTX and several neighbors. (Travis County Exhibit No. 7; Travis County Exhibit JW-

1, p. 10, l. 18; and TR p. 1936, ll. 16-24) This is a clear indication of incompatibility. Such adversity would not exist were this landfill a compatible land use. Indeed, as the number of residences in this area continues to grow, this incompatibility will be greatly exacerbated. (TR p. 2006, ll. 14-17) Of additional note in this regard is the fact that the Applicant's expert in this area, Mr. Worrall, refused to identify any number of residences or residential structures that could be used as a benchmark for determining when such residential use would become incompatible with an adjacent landfill. (TR, p. 717, l. 16 – p. 725, l. 23)

#### **The Applicant's Land Use Analysis is Faulty**

Several faulty conclusions are contrived by the Applicant's land use expert, John Worrall, in his land use analysis. First, Mr. Worrall testified that his land use analysis is premised on the assumption that the WMTX facility will operate in compliance with the TCEQ rules and the laws of the State of Texas. (TR, p. 575, ll. 20-25) This, however, is an abjectly false premise, as the Applicant, in direct violation of the Texas Administrative Code and the Texas Health and Safety Code, began construction on the landfill expansion before it had a permit.<sup>2</sup> More importantly, it was established during cross examination that Mr. Worrall did no research into WMTX's compliance history (beyond reading the 2004 Agreed Order between the TCEQ and WMTX. (TR, p. 579, l. 7 – p. 580, l. 6) He did not review the hundreds of complaints filed with the TCEQ, Travis County or the City of Austin, and did not believe this was necessary to make a determination as to compatibility – it being apparently more important to Mr. Worrall's opinion to simply assume his client was always compliant with the law. Mr. Worrall was thus blissfully (or

---

<sup>2</sup> Discussed more fully in Item D below.

deliberately) ignorant of the number of complaints filed against the Applicant, and the Applicant ensured this ignorance by failing to provide him with any copies of the complaints, or to discuss the number or the substance of those complaints with him. (TR, p. 582, l. 7 – p. 583, l. 7) Worrall made no attempt whatsoever to speak with any member of the public, or to the school or daycare center located near the Facility about their concerns. (TR, p. 580, l. 14; TR, p. 673, ll. 3-7) Mr. Worrall stated that if nuisance conditions were occurring, it could be a factor in his analysis, but that he couldn't state for certain without knowing what other factors existed. (TR, pp. 575, l. 24 - - p. 578, l. 13) And, of course, "knowing what other factors existed" would be impossible without researching them, asking for them, or discussing them with the neighboring community. The fact that Mr. Worrall assumed the facility would always be compliant with state laws and not operate in any manner that could cause nuisances, yet performing absolutely no research into its compliance history or the complaints levied against it, must cast doubt on any conclusions reached by Mr. Worrall. Travis County believes that in order to conduct any meaningful analysis of land use and compatibility issues, it is imperative to consider all possible nuisance issues and to closely examine the facility's compliance history with respect to those issues. Mr. Worrall considered neither.

Second, Mr. Worrall is more concerned about historical land use than about current or future land use, and he takes the position that because the landfill existed first, it will always be a compatible land use. He refuses to acknowledge that compatibility in this area has changed since 1970. Multiple witnesses testified that land use can change over time, and that as it does, compatibility can change; and that in this situation, compatibility clearly had changed over time. (City of Austin Exhibit GG-1, p. 6, ll. 3-8;

City of Austin Exhibit JW-1, p. 9, l. 204 – p. 10, l. 221; Travis County Exhibit JW-1, p. 13, l. 3 – p. 14, l. 17; and Travis County Exhibit JW-5) Mr. Guernsey stated that “as the number of rooftops or number of households that are – living next to a landfill increases, the incompatibility would also increase.” (TR, p. 2019, ll. 13-20) The fact that residences and businesses moved to the area after the landfill does not confirm compatibility, nor does it mean that those residents or businesses find the operation of the landfill to be compatible. 30 TAC§330.61(h) states that “a primary concern is that use of any land for a municipal solid waste facility not adversely impact human health and environment.” Nowhere in Chapter 330 does it state that compatibility is a function of who arrived first in the area. Instead, the focus for the Commission in making its land use determination is on human health and the environment. Contrary to Mr. Worrall’s apparent conclusion that concerns of residents should be discounted because they moved to the landfill, the fact that ever-growing numbers of people now live in close proximity to the landfill makes the consideration of impacts on human health and the environment even more important.

Thus, we reach a third failing in Mr. Worrall’s analysis – he did not consider the impact this facility and its IWU would have on human health and the environment. Mr. Worrall simply or deliberately ignored this issue and provided no testimony as to whether this facility would impact human health and the environment. He performed no research regarding the IWU located in the facility (TR, p. 660, l. 23 – p. 661, l. 1) and did not consider it at all when he performed his land use analysis, (TR, p. 664, ll. 15-18) although when pressed on cross examination, he testified that if he knew that a hazardous waste facility was causing groundwater contamination, he would have “difficulty determining

that we've got land use compatibility." (TR, p. 793, ll. 12-20) Again, Mr. Worrall's failure to perform even the most basic, independent, research into the potential for releases from the IWU casts doubt on the validity of his conclusions. This is especially so, in light of the evidence presented during the course of this hearing indicating that there is contamination of the groundwater in this area, and that its likely source is from the IWU. (TJFA Exhibit 200, p. 55, l. 19 – p. 68, l. 18)

Fourth, Mr. Worrall proffered an erroneous assumption that the growth occurring in this area is an indicator that the landfill is compatible with existing and future land use. In fact, there is no way of knowing if the presence of the landfill has deterred growth, because we have no idea how differently, or how much more, this area might have developed were the landfills closed or not there. (City of Austin Exhibit GG-1, p. 4, ll. 5-16) In that regard, Mr. Guernsey testified that the developers of the two planned unit developments closest to the landfill, the Harris Brach subdivision and the Pioneers Crossing subdivision, had intentionally developed the lots furthest away from the landfill first. (City of Austin Exhibit GG-1, p. 4, l. 5 – p. 5 – l. 12; City of Austin Exhibit GG-3, pp. 1-2) In addition, Mr. Williams, Mr. McAfee and Mr. Wilkins all testified it was their understanding that the WMTX landfill was to cease operating in the 2010-2015 timeframe. (NNC Exhibit JW-1, p. 3, l. 29 – p. 4, l. 2; TR, p. 2230, ll. 4-24; and NNC Exhibit EW-1, p. 5, ll. 15-16) Both Mr. Williams and Mr. Wilkins testified they have been unable to sell their property to developers because the WMTX landfill is still in operation. (NNC Exhibit EW-1, p. 5, ll. 16-27; NNC Exhibit JW-1, p. 3, l. 24 – p. 4, l. 2)

Finally, Mr. Worrall has incorrectly stated that the use of this land by WMTX as an MSW facility represents a compatible land use because municipal and regional growth

policies suggest its siting to be consistent with their major goals and concerns. (Exhibit APP 302, p. 10). This is patently false. CACPCOG is the primary governmental body that articulates regional growth policies in this area, and they have firmly stated that they have local facility siting concerns relating to WMTX: it being their position that the siting of this facility poses a nuisance to neighbors and communities. (Travis County Exhibit JW-4; City of Austin Exhibit 2) Both Travis County and the City of Austin are on record as opposing the expansion of this facility due to their concerns that it is an incompatible land use and that it does not comply with their individual municipal and regional growth policies. Yet Mr. Worrall espouses that he is more qualified to evaluate policies of CAPCOG, Travis County and the City of Austin than those entities themselves. As he stated, "I don't think they have examined it as carefully as I have." (TR p. 592, ll. 21-22) His statement that the use of this land for the disposal of municipal solid waste is consistent with local policies is mere bolstering, and a tortured misreading of those policies. All testimony presented at this hearing by the entities who adopted, maintain and enforce those policies unambiguously asserts that the expansion of this landfill is incompatible with those policies and with land use in this area.

### **Conclusion**

To conclude, Travis County believes the overwhelming weight of the evidence shows that this facility is incompatible with existing and future land use. Mr. Worrall did absolutely no research into whether the use of the facility would pose a risk to human health and the environment. Indeed, the only relevant evidence presented at this hearing demonstrates that the use of this land as a landfill has caused nuisance conditions in the past, and based on the Applicant's poor compliance history, it will likely continue in the

future if this expansion is authorized. It is true that Mr. Worrall did collect some information regarding land use in the area – he simply or deliberately failed in his analysis of the data he collected. CAPCOG, a neutral, unbiased, governmental body (that has not been paid over \$20,000 by Waste Management (TR, p. 657, l. 10 – p. 658, l. 18), and which is the entity tasked by the State of Texas to analyze compatibility in light of local policies, and to determine whether the expansion of this facility is consistent with its RSWMP, believes the use of this site for a MSW facility to be an incompatible land use; and a use which adversely impacts human health and environment. Travis County therefore urges the ALJ to adopt the findings of CAPCOG on this matter.

In the alternative, if the ALJ finds that the permit amendment should be approved, Travis County urges the inclusion of a closure date of November 1, 2015, to be mandated in the permit. The landfill immediately adjacent to the north of the WMTX facility, BFI's Sunset Farms, entered into a binding agreement with the City of Austin to cease accepting waste and operating as a transfer station no later than November 1, 2015<sup>3</sup>. Travis County believes that if WMTX were to be mandated the same closure date in this matter, the incompatibility with surrounding residential, business and open land use would be ameliorated on that date.

- 2. Whether the application includes adequate provisions to prevent the creation or maintenance of a nuisance including odors, control of spilled and windblown waste, dust control and maintenance of site access roads, in compliance with agency rules.**

While WMTX's Site Operating Plan ("SOP") contains several provisions designed to help prevent or minimize nuisance odors, many of the measures described in

---

<sup>3</sup> A decision from Judge Newchurch is due in the next month on BFI's expansion application, and in that proposed draft permit, BFI agreed to stop accepting waste at their landfill no later than November 1, 2015.