

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 25, 2010

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

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 Exceptions to the Supplemental Proposal for Decision in the above-entitled matter.

Sincerely,


Amy Swanhelm, 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

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**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
EXCEPTIONS TO THE SUPPLEMENTAL
PROPOSAL FOR DECISION

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 Exceptions to the Supplemental Proposal for Decision, issued by Administrative Law Judge Roy Scudday on January 5, 2010.

I. INTRODUCTION

Waste Management of Texas, Inc. 9900 Giles Rd., Austin, TX 78754 (Waste Management 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. As the matter was directly referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing, no issues were specified by the Commission.

The Proposal for Decision (PFD) on this matter was issued on July 21, 2009. On October 7, 2009, the Commission considered the PFD, and decided to remand the matter to SOAH solely for the purpose of reopening the record to take additional evidence on operating hours. Specifically, the Commission has directed the ALJ to “allow all parties to present evidence on the appropriateness of the proposed operating hours.”¹

On December 2, 2009, the ALJ heard evidence from all parties. On January 5, 2010, Judge Scudday issued the Supplemental PFD, concluding that WM’s currently permitted operating hours are appropriate.

¹ *An Interim Order concerning the ALJ’s PFD and Order Regarding the Application of Waste Management of Texas, Inc. for Permit No. MSW-249D*; TCEQ Docket No. 2006-0612-MSW; SOAH Docket No. 582-08-2186, issued October 20, 2009 (*Interim Order*).

III. ARGUMENT

The Applicant has not met its burden of proof to show the appropriateness of allowing the facility to operate from 9:00 p.m. Sunday through 7:00 p.m. Saturday, and 7:00 a.m. to 4:00 p.m. on Sunday, if necessary, with no designated time for heavy machinery operation or transportation activities (commonly referred to as a 24-6 schedule). Instead, allowing waste acceptance from 5:00 a.m. to 5:00 p.m. on weekdays is more appropriate, as this would accommodate central Texas' needs for waste disposal and Waste Management's business goals to fill that need, while minimizing the impact on citizens who live and work in close proximity to the landfill site.² OPIC concedes that weekend hours as proposed by TJFA may indeed be appropriate to allow the general working public access to the landfill. But, OPIC takes exception to the ALJ's conclusion that evidence shows the Applicant's current operating hours are appropriate.

First, WM could provide safe, efficient, and cost-effective waste disposal to central Texas, while also operating in a manner that minimizes potential conflicts with surrounding landowners, and area land use generally. Evidence shows that the Applicant receives the majority of its waste, by volume and load, during daytime hours.³ The ALJ himself concluded that OPIC's proposed hours "would not have a tremendous impact upon Applicant's current operations."⁴ And Mark McAfee clearly stated that WM could continue to operate if restricted to the default operating hours listed in 30 TAC § 330.135.⁵

Second, OPIC takes exception with the ALJ's reasoning that the Applicant's choice to enter into a contract to pick up waste in downtown Austin during early morning hours justifies the TCEQ granting them the authorization to accept waste on a 24-6 hour basis. Applicant chose to enter into a contract to collect waste from downtown Austin,

² Please see Attachment A for a reproduction of *OPIC's Closing Arguments on Remand*.

³ *Id.* at 5-9.

⁴ *Supplemental Proposal for Decision*, TCEQ Docket No. 2006-0612-MSW, SOAH Docket No. 582-08-2186 (January 5, 2010) at 8.

⁵ Remand Transcript, pp. 2690, lns. 3-7.

knowing that its authorization for when it could then deliver that waste to its facility was undecided. The Applicant's risky choice to enter into such a contract does not create a legal basis for allowing them to fulfill that contract.

Furthermore, a copy of the contract that the ALJ relies upon was not entered as part of the record to these proceedings. The ALJ cites to App. Ex. 112, which is a copy of the City of Austin's Purchase Specifications for Refuse Collection Services in Downtown Austin, not the contract referenced by the ALJ.⁶ And the testimony relied upon by the ALJ is unclear as to what is contained in the actual contract.⁷

There is also nothing in the record discussing whether WM could or could not fulfill its contractual obligations to collect waste from downtown Austin, were it restricted to accepting waste beginning at 5:00 a.m., as OPIC has proposed. It may indeed be feasible for WM to begin collecting waste from its downtown customers before 5:00 a.m., begin delivering waste to the facility at 5:00 a.m., and finish delivering the waste to the facility before morning traffic picks up.

Third, OPIC is concerned that the ALJ rejects OPIC's arguments for alternate hours of operation because he concludes that as Austin grows, more expansive operating hours may be needed. The ALJ does not elaborate upon why he believes expanded operating hours may be needed in to accommodate economic recovery and area growth. Regardless of the operating hours granted by the Commission as a result of these remand proceedings, the volume of waste that the expanded facility could receive would remain unchanged.

It is also unclear whether the ALJ is referencing the need of the Austin area for waste disposal, or a need that WM has to operate a profitable business, or some other need the ALJ concludes outweighs the concerns raised by the City of Austin, Travis County, and other entities protesting this application and advocating for restricted operating hours. If the ALJ is indeed referencing the needs of the community, OPIC notes that the surrounding community, represented by the local governing bodies of

⁶ App. Ex. 112, the City of Austin's purchase specifications state that a successful bidder should empty waste containers between 2:00 a.m. and 6:00 a.m., but OPIC cannot verify whether this is included in the contract referenced by the Applicant and the ALJ.

⁷ Remand Transcript, pp. 2729, lns. 8-21.

Travis County and the City of Austin have and continue to actively protest this application. In the remand proceeding, they both argued that WM should not be allowed to operate on a 24-6 basis. These entities have a responsibility to plan for the long-term disposal needs of their growing areas. Further, WM is currently not the only option for waste disposal in the area, and although other competing waste disposal facilities in the area may close within several years, the community has time to establish alternative solutions, should WM not be able to meet the future waste disposal needs of the community.

If the ALJ is referring to WM's business needs, OPIC again notes that WM has presented testimony that it does not need 24-6 hours in order to survive and even prosper as a business entity. Mark McAfee clearly stated that WM could continue to operate if restricted to the default operating hours listed in 30 TAC § 330.135.⁸

IV. CONCLUSION

The Applicant has not shown that 24-6 operating hours are appropriate. But, due to concerns with early morning traffic and safety issues, Applicant's evidence presented on historic waste acceptance, and potential conflicts with surrounding landowners, the default operating hours in 30 TAC § 330.135 are not appropriate either. Therefore, in order to appropriately accommodate surrounding residents and businesses, the waste disposal needs of the surrounding community and Waste Management desire to successfully operate its business, OPIC continues to recommend the following changes to page 3 of the Updated Draft Permit:

A. Days and Hours of Operation.

~~The operating hours for receipt of waste and for all landfill related operations at the municipal solid waste facility shall be from 9 p.m. Sunday through 7:00 p.m. Saturday, and if necessary, from 7:00 a.m. to 4:00 p.m. Sunday. The waste acceptance hours of the facility may be any time between the hours of 7:00 5:00 a.m. and 7:00 5:00 p.m., Monday through Friday. Waste Acceptance hours within the 7:00 5:00 a.m. to 7:00 5:00 p.m. weekday span do not~~

⁸ Remand Transcript, pp. 2690, lns. 3-7.

require other specific approval. Transportation of materials and heavy equipment operation must not be conducted between the hours of 9:00 p.m. to 5:00 a.m. Operating hours for other activities do not require specific approval. The Commission's regional offices may allow additional temporary waste acceptance or operating hours to address disasters, other emergency situations, or other unforeseen circumstances that could result in the disruption of waste management services in the area. The facility must record in the site operating record the sites, times, and duration when any alternative operating hours are utilized.

OPIC recommends the Commission find these operating hours are appropriate, and adopt them as part of its final Order on this matter.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 

Amy Swanholm
Assistant Public Interest
Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2010, the *Office of the Public Interest Counsel's Exceptions to the Supplemental Proposal for Decision* was 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 Swannholm
Assistant Public Interest Counsel

Appendix A

OPIC's Closing Arguments on Remand

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 15, 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

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 on Remand in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Amy Swanhorn".

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

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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 ON REMAND

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 (Waste Management 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. As the matter was directly referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing, no issues were specified by the Commission.

The PFD on this matter was issued on July 21, 2009. On October 7, 2009, the Commission considered the PFD, and decided to remand the matter to SOAH solely for the purpose of reopening the record to take additional evidence on operating hours. Specifically, the Commission has directed the ALJ to “allow all parties to present evidence on the appropriateness of the proposed operating hours.”¹

On December 2, 2009, the ALJ heard evidence from all parties.

¹ *An Interim Order concerning the ALJ's PFD and Order Regarding the Application of Waste Management of Texas, Inc. for Permit No. MSW-249D; TCEQ Docket No. 2006-0612-MSW; SOAH Docket No. 582-08-2186, issued October 20, 2009 (Interim Order).*

III. ANALYSIS

The Commission has directed the ALJ to reopen the record to determine the appropriateness of the proposed operating hours.² In his PFD, Judge Scudday proposed the following changes to page 3 of the Updated Draft Permit:

A. Days and Hours of Operation.

~~The operating hours for receipt of waste and for all landfill-related operations at the municipal solid waste facility shall be from 9 p.m. Sunday through 7:00 p.m. Saturday, and if necessary, from 7:00 a.m. to 4:00 p.m. Sunday. The waste acceptance hours of the facility may be any time between the hours of 7:00 a.m. and 7:00 p.m., Monday through Friday. Waste Acceptance hours within the 7:00 a.m. to 7:00 p.m. weekday span do not require other specific approval. Transportation of materials and heavy equipment operation must not be conducted between the hours of 9:00 p.m. to 5:00 a.m. Operating hours for other activities do not require specific approval. The Commission's regional offices may allow additional temporary waste acceptance or operating hours to address disasters, other emergency situations, or other unforeseen circumstances that could result in the disruption of waste management services in the area. The facility must record in the site operating record the sites, times, and duration when any alterative operating hours are utilized.~~³

He also stated that the Applicant had provided no evidence to support its need for operating hours in excess of the default hours set forth in the rule and that "limiting the operating hours will mitigate the noise conditions as well as odor and dust conditions that are inherent with the operation of a MSW landfill."⁴

Upon remand, the Applicant argued that the Facility should be permitted to operate from 9:00 p.m. Sunday through 7:00 p.m. Saturday, and 7:00 a.m. to 4:00 p.m. on Sunday, if necessary, with no designated time for heavy machinery operation or

² OPIC does not address what the legal standard would be for an Applicant to receive a permit condition more permissive than standards set forth by TCEQ rule or Texas statute, but instead uses the standard of "appropriateness" as requested by the Commission.

³ *Proposal for Decision*, TCEQ Docket No. 2006-0612-MSW; SOAH Docket No. 582-08-2186, issued July 21, 2009, page 64 (PFD).

⁴ PFD at 64.

transportation activities, commonly referred to as a 24-6 schedule. It presented evidence from Donald Smith, vice president of Waste Management's south Texas operations, Marcel Dalby, the operations improvement manager for the Facility, and James Smith, senior district manager for the Facility. In support of this assertion, Waste Management presented evidence showing the percentage of waste brought in by the hour, from August 1, 2007 to October 17, 2009, by volume as well as by load.⁵ It also presented testimony that several of its customers request early morning trash pickup,⁶ and that early morning pickup may alleviate problems with safety and efficiency that may arise in urban areas, were the trash to be collected later in the morning during heavy pedestrian and vehicle traffic.⁷

Protestants incorporated testimony from the earlier hearing regarding possible nuisance conditions and presented further testimony from John Wilkins, a nearby landowner, and Mark McAfee, a nearby landowner and manager of the Barr Mansion.

A. OPIC's Proposed Operating Hours

For the reasons set forth in OPIC's closing arguments and exceptions to the PFD, OPIC still holds the position that the application should be denied. However, should the Commission choose to grant the permit, OPIC finds that the following operating hours would be appropriate. Balancing Waste Management's desire to operate a profitable, efficient and safe landfill, with the Protestant's right to not be nuisanced by the landfill and to conduct their own businesses, OPIC proposes the following changes to page 3 of the Updated Draft Permit:

A. Days and Hours of Operation.

~~The operating hours for receipt of waste and for all landfill related operations at the municipal solid waste facility shall be from 9 p.m. Sunday through 7:00 p.m. Saturday, and if necessary, from 7:00~~

⁵ Ex. # APP-1201, page 1.

⁶ Preile Testimony of Marcel Dalby (Dalby Prefile), p. 5, lns. 24-25; *see also* EX. # 1101.

⁷ Dalby Prefile, p. 5, ln 26 to p. 6, ln. 1.

~~a.m. to 4:00 p.m. Sunday.~~ The waste acceptance hours of the facility may be any time between the hours of ~~7:00~~ 5:00 a.m. and ~~7:00~~ 5:00 p.m., Monday through Friday. Waste Acceptance hours within the ~~7:00~~ 5:00 a.m. to ~~7:00~~ 5:00 p.m. weekday span do not require other specific approval. Transportation of materials and heavy equipment operation must not be conducted between the hours of 9:00 p.m. to 5:00 a.m. Operating hours for other activities do not require specific approval. The Commission's regional offices may allow additional temporary waste acceptance or operating hours to address disasters, other emergency situations, or other unforeseen circumstances that could result in the disruption of waste management services in the area. The facility must record in the site operating record the sites, times, and duration when any alterative operating hours are utilized.

In the absence of any evidence on the matter, it was appropriate for the ALJ to impose the default operating hours.⁸ But based on the evidence presented during the remand hearing, and that evidence already within the record on this issue, OPIC concludes that these operating hours are appropriate.

B. The waste acceptance hours should be restricted to 5:00 a.m. to 5:00 p.m.

OPIC recommends restricting the morning operating hours to 5:00 a.m. because Waste Management has shown that between 5:00 a.m. and 5:00 p.m., it collects 92.51% of all the loads⁹ and 86.14% of all trash by volume,¹⁰ and that collecting waste from waste producers before rush hour traffic may alleviate safety and traffic issues. Also, Protestants have presented evidence that the landfill may conflict with surrounding residential and business land uses, if operated on a 24-6 schedule.

WM has shown that several of their customers request early morning pickup.¹¹ Also, it has presented testimony that there may be traffic congestion if operating hours

⁸ See 30 § TAC 330.135 for the rule governing default operating hours for an MSW facility.

⁹ Ex. # APP-1201, page 1.

¹⁰ Ex. # APP-1202, p. 27.

¹¹ Dalby Prefile, p. 5, lns. 24-25; see also EX. # 1101.

did not begin until 7:00 a.m. and nothing else about its operations changed, such as the pickup schedule or amount of trucks employed by Longhorn Hauling.¹² Waste Management testified that if it were to begin waste acceptance at 7:00 a.m., it might run into problems with morning commuter traffic and maneuvering large vehicles through precarious alleyways during morning commuter traffic.¹³ By allowing Waste Management to begin collection at 5:00 a.m. instead of at 7:00 a.m., as previously proposed, many of these issues may be mitigated, while not disrupting a significant portion of Waste Management's business.

Furthermore, Waste Management's data on the percentage of waste picked up by time shows that between August 1, 2007 to October 17, 2009,¹⁴ only 7.49% of all loads were received before 5:00 a.m.¹⁵ The amount of waste by volume received before 5:00 a.m. is 13.86%.¹⁶ In other words, restricting Waste Management to receiving waste after 5:00 a.m. would leave undisturbed 92.51% of all the loads received,¹⁷ and 86.14% of all the trash by volume received.¹⁸

Waste Management has expressed that it could still operate its business if the TCEQ imposed the previously proposed 7:00 a.m. to 7:00 p.m. operating hours, although this could hurt its ability to compete¹⁹ and there may be more trucks on the road. But, there would be less of an impact upon Waste Management with OPIC's proposed start time if 5:00 a.m. instead of 7:00 a.m., as proposed in the PFD.²⁰ With operating hours

¹² *Id.*

¹³ *Id.*

¹⁴ This two-year time-period was chosen by Waste Management, because it represents the Facility's operations in times of economic prosperity, as well as operations during the current economic downturn. Transcript, p. 2838, lns. 16-23.

¹⁵ Ex. # APP-1201, page 1.

¹⁶ Ex. # APP-1202, p. 27.

¹⁷ Ex. # APP-1201, page 1.

¹⁸ Ex. # APP-1202, p. 27.

¹⁹ Transcript, p. 2777, ln. 4 to p. 2778, ln. 6.

²⁰ Note that per Ex. # APP-1201, page 1, between August 1, 2007 to October 17, 2009, only 7.49% of all loads were received before 5:00 a.m. while 22.54% were received before 7:00 a.m.

from 5:00 a.m. to 5:00 p.m., only 7.49% of all the loads entering the site will be disrupted.²¹

Although arguably, the waste currently received before 5:00 a.m. would be impacted, Waste Management has other options for accommodating those customers that require early morning pickup. It could hire additional personnel. Customers requiring early morning pickup could potentially still have waste disposed of right after the Facility opens at 5:00 a.m. Furthermore, it is unclear exactly how many of the entities that dispose of waste at the Facility actually require early morning trash pickup. Marcel Dalby testified that Longhorn Hauling routinely directs their trucks to pickup waste before 6:00 a.m., but could not give any estimate as to how many customers require predawn service, instead stating that it may be a choice that Longhorn Hauling makes for convenience.²² He also was unsure as to the earliest pickup time requested by any of Longhorn Hauling's customers.²³

Protestants have been vocal about their conflicts with the landfill. During the comment period of this application, numerous comments were received raising issue with Waste Management's evening operations, specifically noise and light pollution from operating at night.²⁴ In addition to testimony from NNC during the previous hearing, John Wilkins testified that he visits his property about once every other month after 7:00 p.m.²⁵ He opines that homeowners may be able to tolerate noise and dust during weekdays, but having no peace from those disturbances in the evenings and on weekends,

²¹ This assumes that historical load data as presented in Ex. # APP-1201 is predictive of future load data.

²² Transcript, p. 2789, ln. 20 to p. 2790, ln. 12.

²³ *Id.*

²⁴ See Executive Director's Response to Comments (ED's RTC) TCEQ Docket No. 2006-0612-MSW; SOAH Docket No. 582-08-2186, page 35-36, June 28, 2008, for a brief summary of the numerous comments received on this issue.

²⁵ Transcript, p. 2856, lns. 15-19.

when residents are normally home, would be intolerable.²⁶ Mark McAfee is also concerned with nuisance conditions in the evenings and on weekends.²⁷

Regarding the close of waste collection hours, OPIC proposes that the Facility stop accepting waste at 5:00 p.m. Waste Management presented evidence showing that in last two years, a time-period that captures typical operations in times of economic prosperity as well as during the current economic downturn,²⁸ it has not collected any waste after 5:00 p.m.²⁹ Indeed, only 0.24% of waste by load³⁰ and 0.31% of waste by volume³¹ entered the site after 4:00 p.m. Waste Management would have to change nothing about its current waste collection schedule to comply with permitted operating hours mandating waste receipt end at 5:00 p.m.

This restriction would ensure neighbors that Waste Management will continue to end receipt of waste at 5:00 p.m., and that the operation of all heavy equipment will cease soon after. Mark McAfee testified during the remand hearing that although he cannot recall the last time he heard landfill noise after 7:00 p.m.,³² roughly the time that Waste Management currently ends all daily operations, he is concerned that if it can extend evening operations in the future, it will.³³ Considering Donald Smith's testimony that Waste Management would prefer 24-6 operating hours so it could in the future expand operating hours to the maximum permitted hours, if it has the business to accommodate 24-6 operations,³⁴ Mark McAfee's concern seems justified.

²⁶Profile Testimony on Remand of John Wilkins (Wilkins Profile), p. 2, lns. 16-18.

²⁷ Profile Testimony on Remand of Mark McAfee (McAfee Profile), p. 2, lns. 24-29.

²⁸ Transcript, p. 2838, lns. 16-23.

²⁹ Transcript, p. 2822, lns. 9-16.

³⁰ Ex. # APP-1201, page 1.

³¹ Ex. # APP-1202, p. 27.

³² Transcript, p. 2869, lns. 3-7.

³³ Transcript, p. 2891, ln. 17 to p. 2892, ln. 1; transcript, p. 2898, lns. 9-17.

³⁴ Transcript, p. 2664, ln. 25 to p. 2665, ln. 3.

Adopting OPIC's proposed hours would alleviate many evening conflicts with neighbors and ensure neighboring businesses that the landfill will not be operating in the evenings.

C. Waste Management should not be allowed to operate on Saturdays.

Protestants have shown that, were the Facility allowed to operate on Saturday, it would inappropriately conflict with residential uses and surrounding businesses, such as the Barr Mansion, and could possibly rise to the level of creating a nuisance. Furthermore, this restriction will not weigh heavily upon Waste Management, as it only collects 9.55% of all loads³⁵ and 5.64% of all waste by volume on Saturdays.³⁶

Restricting Waste Management from operating on Saturdays is appropriate, as a means of limiting the impact on surrounding landowners and businesses. Considering that homeowners tend to spend more time at home on Saturdays than during weekdays, this may serve to alleviate some of the numerous complaints that individuals have expressed during these proceedings, regarding the operation of the Facility.³⁷ Also considering the large volume of residences within one mile,³⁸ barring Saturday waste collection may alleviate some of the inherent conflicts with operating a landfill in an increasingly urban area.

Mark McAfee, testifying on behalf of NNC, stated that roughly 95% of the events held at the Barr Mansion occur on the weekends, beginning around Friday at 7:00 p.m.³⁹ He also stated that, in the course of booking events at the Barr Mansion, people

³⁵ Ex. # APP-1201, page 1.

³⁶ Ex. # APP-1202, p. 27.

³⁷ See ED's RTC for a summary of and preliminary response to the large volume of comments received during the comment period, specifically Comment Nos. 6, 10, 12, 20, 28, 29, 30, 31, and 32.

³⁸ PFD at 53.

³⁹ Transcript, p. 2895, ln. 23 to p. 2896, ln. 4.

have raised concerns to him regarding the landfill.⁴⁰ If he were to bring a potential client to the Barr Mansion during a weekday, though, it would help his business if he could inform potential customers that if they booked their wedding or scheduled an event on a weekend, the landfill will not be operating then.⁴¹

This restriction will not overly impact Waste Management's operations. It receives little of its business from Saturday waste disposal, as only 9.55% of all loads⁴² and 5.64% of all waste by volume⁴³ is collected on Saturdays. Also, John Smith testified that roughly 50% to 60% of the loads collected on Saturdays come from homeowners, small businesses, and small scale construction.⁴⁴ Although there tends to be more homeowner waste on Saturdays, Waste Management currently accepts this type of waste every day,⁴⁵ and could direct homeowners to drop off trash during weekdays. Therefore, when examining the significant impact that Waste Management's Saturday operations have on its neighbors, in contrast to the amount of waste it receives on Saturdays and that Waste Management could redirect that waste receipt to weekdays, it is appropriate to restrict Waste Management from operating on Saturdays.

IV. CONCLUSION

In order to appropriately accommodate surrounding landowners, residences and business while also allowing Waste Management to operate its business, OPIC recommends the following changes to page 3 of the Updated Draft Permit:

A. Days and Hours of Operation.

~~The operating hours for receipt of waste and for all landfill related operations at the municipal solid waste facility shall be from 9 p.m.~~

⁴⁰ Transcript, p. 2913, lns. 8-12.

⁴¹ Transcript, p. 2909 lns. 8-15.

⁴² Ex. # APP-1201, page 1.

⁴³ Ex. # APP-1202, p. 27.

⁴⁴ Transcript, p. 2826, lns. 16-25.

⁴⁵ Transcript, p. 2827, lns. 23-25.

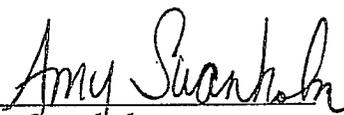
~~Sunday through 7:00 p.m. Saturday, and if necessary, from 7:00 a.m. to 4:00 p.m. Sunday.~~ The waste acceptance hours of the facility may be any time between the hours of ~~7:00~~ 5:00 a.m. and ~~7:00~~ 5:00 p.m., Monday through Friday. Waste Acceptance hours within the ~~7:00~~ 5:00 a.m. to ~~7:00~~ 5:00 p.m. weekday span do not require other specific approval. Transportation of materials and heavy equipment operation must not be conducted between the hours of 9:00 p.m. to 5:00 a.m. Operating hours for other activities do not require specific approval. The Commission's regional offices may allow additional temporary waste acceptance or operating hours to address disasters, other emergency situations, or other unforeseen circumstances that could result in the disruption of waste management services in the area. The facility must record in the site operating record the sites, times, and duration when any alternative operating hours are utilized.

OPIC recommends the ALJ find that these operating hours are appropriate, and adopt them as part of the supplemental PFD.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2009, the *Office of the Public Interest Counsel's Closing Argument on Remand* was 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.

A handwritten signature in cursive script, appearing to read "Amy Swarholm".

Amy Swarholm
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