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August 28, 2009

Via Federal Express

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
12100 Park 35 Circle
Austin, Texas 78753

Re: SOAH Docket No. 582-08-2186; TCEQ Docket No. 2006-0612 MSW Permitt
No. MSW-249-D; Waste Management of of Texas, Inc.

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 AUG 31 AM 11:37
CHIEF CLERKS OFFICE

Dear Ms. Castañuela:

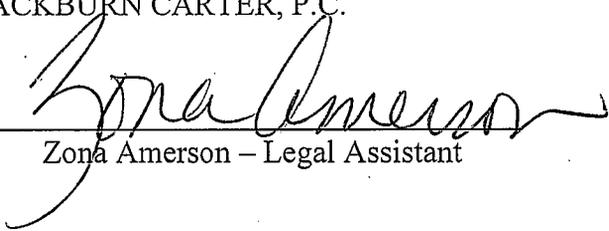
Pursuant to the July 30, 2009 notice, enclosed are an original and seven copies of *Northeast Neighbor Coalition's Reply To Exceptions* in connection with the above referenced matter.

Should you have any questions, please contact our office. Thank you for your attention to this matter.

Sincerely,

BLACKBURN CARTER, P.C.

by


Zona Amerson - Legal Assistant

Enclosure

c: *Via Federal Express:*
The Honorable Roy Scudday
Via U.S. First Class Mail:
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Amie Dutta Richardson, Staff Attorney
Angela K. Moorman
Annalynn Cox, Assistant County Attorney
Amy Swanholm
Erich M. Birch
Meitra Farhadi, Assistant City Attorney
Holly Noelke
John Riley
Paul Terrill
Timothy Reidy

AUSTIN COMMUNITY RECYCLING §
AND DISPOSAL FACILITY §
TCEQ PERMIT NO. MSW-249-D §
PERMIT AMENDMENT APPLICATION §

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

2009 AUG 3 10 AM
CHIEF CLERK'S OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

NORTHEAST NEIGHBORS COALITION'S REPLY TO EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION AND ORDER

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COME NOW Northeast Neighbors Coalition and aligned Parties (collectively "NNC") and file their Reply to Exceptions to the Administrative Law Judge's Proposal for Decision issued in the above referenced case on July 21, 2009. NNC continues to respectfully request that this permit application for Type I MSW Permit No. 249D be denied. However, in filing this Reply, we respectfully request that the position of the Applicant, to retain operating hours 24/7, be rejected, and that the Executive Director ("ED") support the Administrative Law Judge's ("ALJ") recommendation that the hours of operation be adjusted.

OPERATING HOURS

Sufficient Evidence of Nuisance Conditions:

The ALJ has proposed changing the hours of operation as follows:

The waste acceptance hours may be anytime 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 dates, times, and duration when any alternative operating hours are utilized.

If the permit application is issued, we respectfully request that the above provision be included and we respectfully request that the ED support this inclusion.

ALJ Scudday's recommendation limits hours of operation to those explicitly designated as default hours in Chapter 30 Section 330.105(a) of the Texas Administrative Code.¹ Any deviation from these default hours of operation requires authorization by the commission.² The ED correctly acknowledges in its Exceptions to the PFD that the Commission makes this determination whether the Applicant is entitled to additional operating hours on a "case by case basis considering the potential impact on the surrounding communities."³ We note that the Preamble to §330.135 rulemaking provided by the ED contains significant information regarding limiting the operational hours of a landfill. Specifically, the Commission has jurisdiction to regulate those activities inherent to managing waste that have the potential to be a nuisance to neighbors.⁴ This would include such issues as noise, odor, dust and lights, which were raised by the citizens in their testimony in this Waste Management case. If there has ever been a case where additional operating hours are inappropriate, it is the ACL facility.

An abundance of statistical data regarding the surrounding land use was presented at hearing. Expert opinions from Travis County and the City of Austin explained that the proximity of the facility was incompatible with the surrounding land use due to the nuisance conditions associated with the operation of this landfill. Additionally, as highlighted by ALJ Scudday, Mr. Word, Mr. McAfee, and Mr. Rogers testified to the noise problems.⁵ Mr. Mark McAfee testified regarding noise as follows:

¹ 30 TAC § 330.105(a).

² *Id.*

³ ED Exceptions, p. 3.

⁴ 29 TEX. REG. 11069 (Nov. 26, 2004).

⁵ PFD at 63.

MARK MCAFEE

Q: Are there other complaints about the site?

A: Yes, noise.

Q: What type of noise?

A: There is a grinding noise – the noise of gigantic heavy equipment. It seems to be coming from both landfills. I would characterize this as equipment noise. During the day it is drowned out a bit by general street noise, but it is pronounced at night.⁶

As a whole, ALJ Scudday held that Protestants had met their burden to show the hours of operation should be changed. Specifically, the Court found that “Protestants offered testimony to show that limiting the operational hours to daylight hours would serve to mitigate the noise inherent in the operations of a landfill. [Furthermore,] 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.”⁷ Although NNC disagrees that this permit for the proposed expansion is a compatible land use with the surrounding neighborhoods, having the hours limited to those suggested by the ALJ will aide towards making this land use somewhat less incompatible. This is especially true because, as the Preamble notes, the default hours of operation – 7:00 a.m. to 7:00 p.m. – are used because they include the time when most people are likely to be out of their residences at work or social activities. . . . waste facility operations outside of these hours are more likely to disturb people in residential areas.⁸ We agree with the Preamble that the “adopted rule is a reasonable exercise of the commission’s responsibility to protect the community around municipal solid waste facilities.”⁹ If ever there was a community that has suffered impacts from their landfill

⁶ NNC Exh. MM-1 at 3, *ll.* 24-29.

⁷ PFD at 64.

⁸ *Id.*

⁹ 29 TEX. REG. 11070 (Nov. 26, 2004).

neighbors, it is this one. These suggested hours are “reasonable restrictions” for protecting these neighbors.¹⁰

Inherent Nuisances:

Applicant argues that “if ... noise that may be inherent in the operation of any landfill is a sufficient basis to preclude landfills from operating beyond the default hours specified in § 330.135, then, because all landfills share this inherent quality, no facility in the state could ever obtain the ‘specific approval’ expressly authorized by § 330.135 for operations outside the default operating hours.”¹¹ However, Applicant’s application of “inherent” nuisances is in a vacuum without regard to the surrounding circumstances specific to the ACL facility. For example, in some circumstances, where “inherent” nuisance conditions would be less offensive, additional operating hours may be appropriate and potentially authorized by the Commission. However, given the circumstances of the ACL facility expansion, it is hard to imagine a worse candidate for such authorization.

Consider the following ACL land use data collected by Applicant’s own expert:

- Blue Trail Elementary School, located about 4,823 feet from the site¹²;
- an historic site (the Barr Mansion), located approximately 2,400 feet from the site¹³;
- a day care center (the Children’s Courtyard) located approximately 3,445 feet from the site¹⁴;
- a golf course (Bluebonnet Hill Golf Course) located approximately 2,400 feet from the site¹⁵;
- 1,447 existing residential units within one mile of the ACL facility¹⁶;

¹⁰ *Id.*

¹¹ Applicant’s Exceptions at 4.

¹² ED. Exh. 1 at 18:1 - 2.

¹³ ED. Exh. 1 at 18:3 - 4.

¹⁴ ED. Exh. 1 at 18:6 - 7.

¹⁵ ED. Exh. 1 at 18:8 - 9.

¹⁶ APP-302 at 00004.

- Five recreational areas (including the golf course)¹⁷;
- anticipated increased growth within one mile of the facility¹⁸ and “substantial residential growth” within a five-mile radius of the facility.¹⁹

It is simply not true that limiting operation of the ACL facility to the default hours due to inherent nuisances associated with the ACL facility would preclude every other facility in the state from obtaining such authorization. It is simply inappropriate for the expansion of the ACL.

CONFORMITY WITH REGIONAL SOLID WASTE MANAGEMENT PLAN

TEX. HEALTH & SAFETY CODE § 363.066(a) requires that “... private solid waste management activities ... *conform to*” the Regional Solid Waste Management Plan (“RSWMP”). As thoroughly discussed in NNC’s Closing Arguments and Exceptions to the PFD, the Capital Area Council of Government (“CAPCOG”) determined that the expansion of the ACL facility is incompatible with the surrounding land use and does not conform to the RSWMP.²⁰ The ED and Applicant both argue CAPCOG’s determination is merely advisory to the Commission. Given Commission precedent pursuant to the Spring-Cypress Order, NNC did not dispute the Applicant’s and ED’s characterization of CAPCOG’s role. However, it has become clear that no statutory authority exists that expressly grants the Commission power to disregard the findings of CAPCOG on the issue of conformance with the RSWMP and compliance with TEX. HEALTH & SAFETY CODE § 363.066. In fact, the language of TEX. HEALTH & SAFETY CODE § 363.066 strongly suggests the contrary, that findings by a COG are binding on the Commission. To the best of our knowledge, no court has held COG determinations to be merely advisory and NNC urges the Commission to revisit this issue at this time.

¹⁷ *Id.*

¹⁸ 4 TR. 725:1 – 4 (Worrall).

¹⁹ APP-300 at 15:29 – 30.

²⁰ COA Exh. JW-5 at 5.

The ED testified that “the Commission is the ultimate decision maker as to whether an application for a solid waste management permit or facility is in compliance with an adopted RSWMP.”²¹ The Applicant and ED cite TEX. HEALTH & SAFETY CODE §§ 361.011, 361.066 and 361.089 in support of this proposition. However, neither party points to any one provision that provides express veto power of a COG determination. Instead, Applicant has simply adopted a self-serving interpretation from a myriad of broad statutory regulations in order to circumvent the CAPCOG finding of non-conformance with the RSWMP.

Moreover, adopting Applicant’s interpretation that the Commission has veto power over a COG would render TEX. HEALTH & SAFETY CODE § 363.066(b) superfluous. Section 363.066(b) establishes that when and if private solid waste management activities do not conform to the RSWMP, the “commission may grant a variance from the adopted plan under procedures and criteria adopted by the commission.”²² This provision provides a mechanism to the Commission if it determines solid waste management activity should be permitted despite nonconformance with the RSWMP. If Applicant and ED are correct and the Commission possesses the authority to veto a COG determination, the Commission could merely veto the COG’s recommendation. Therefore, the only consistent interpretation with the language of TEX. HEALTH & SAFETY CODE § 363.066 is that CAPCOG’s findings are binding. The appropriate avenue would have been for Applicant to apply for a variance, but it did not do so.²³ Accordingly, NNC respectfully requests the Commission deny this permit application for nonconformance with the RSWMP and violation of TEX. HEALTH AND SAFETY CODE § 363.066.

At a minimum, NNC reiterates its position that the credible evidence put forth by the City of Austin, Travis County and NNC favors a finding of nonconformance with the RSWMP based

²¹ ED-1 at 27, lines 31 -35.

²² TEX. HEALTH & SAFETY CODE § 363.066(b).

²³ 2 TR. 209:7 – 210:4.

on land use incompatibility issues, and that the CAPCOG determination be given its appropriate weight.

In sum, the ACL facility is incompatible with the surrounding land use and the application violates TEX. HEALTH & SAFETY CODE § 363.066. NNC respectfully requests that the Texas Commission on Environmental Quality afford the community surrounding this landfill protection by denying Waste Management's permit application for Type I MSW Permit No. 249D. However, if the TCEQ is inclined to grant this permit, NNC requests that at a minimum some relief be afforded the community surrounding this landfill by adopting the hours of operation recommended by the ALJ.

Respectfully submitted,

BLACKBURN CARTER, P.C.

by 

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CERTIFICATE OF SERVICE

On this 28th day of August, 2009, the undersigned hereby certifies that a true and correct copy of the foregoing instrument was served on all attorneys/parties of record as indicated below for each.

Adam M. Friedman
Adam M. Friedman

The Honorable Roy Scudday
Administrative Law Judge
State Office of Administrative Hearings
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Austin, Texas 78711
Via Federal Express

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2009 AUG 31 AM 11:38
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