

BIRCH, BECKER & MOORMAN, LLP

7000 NORTH MOPAC EXPRESSWAY, SECOND FLOOR, AUSTIN, TEXAS 78731 ■ (512) 349-9300 ■ FAX (512) 349-9303

b|b|m

Mr. Birch's Direct Line: (512) 258-9199
E-mail: ebirch@birchbecker.com

MONDAY, AUGUST 31, 2009

VIA HAND DELIVERY

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

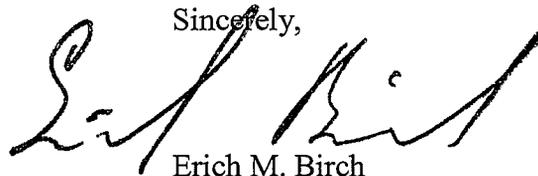
TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 AUG 31 PM 1:27
CHIEF CLERKS OFFICE

Re: Protestant TJFA, L.P.'s Replies to Applicant Waste Management of Texas, Inc.'s Brief in Response to the Administrative Law Judge's Proposal for Decision and the Executive Director's Exceptions, *Application of Waste Management of Texas, Inc. for a Municipal Solid Waste Permit Amendment; Permit No. MSW-249D, SOAH Docket No. 582-08-2186, TCEQ Docket No. 2006-0612-MSW.*

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced matter is an original and seven copies of *Protestant TJFA, L.P.'s Replies to Applicant Waste Management of Texas, Inc.'s Brief in Response to the Administrative Law Judge's Proposal for Decision and the Executive Director's Exceptions*. Please file this document on behalf of TJFA, L.P. If you have any questions, please telephone me at the above number.

Sincerely,



Erich M. Birch

ENCLOSURE

cc: Service List
Mr. Dennis Hobbs, TJFA, L.P.

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

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

PROTESTANT TJFA, L.P.'S

REPLIES TO EXCEPTIONS

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 AUG 31 PM 1:27
CHIEF CLERKS OFFICE

AUGUST 31, 2009

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

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
---	----------------------------	---

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENT AND AUTHORITIES.....	3
	<i>A. Hours of Operation.....</i>	3
	<i>B. Additional Ground Water Monitoring Wells.....</i>	9
III.	CONCLUSION AND PRAYER.....	18

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

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

**PROTESTANT TJFA, L.P.'S REPLIES TO
APPLICANT WASTE MANAGEMENT OF TEXAS, INC.'S
BRIEF IN RESPONSE TO THE ADMINISTRATIVE LAW JUDGE'S
PROPOSAL FOR DECISION AND THE EXECUTIVE DIRECTOR'S EXCEPTIONS**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY AND THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, Protestant, TJFA, L.P. ("TJFA") and presents the following *Replies to Applicant Waste Management of Texas, Inc.'s Brief in Response to the Administrative Law Judge's Proposal for Decision and the Executive Director's Exceptions* ("Replies") in the above-referenced proceeding.

I. INTRODUCTION

On Thursday, August 20, 2009, Applicant, Waste Management of Texas, Inc. ("WMTX") filed its Brief in Response to the Administrative Law Judge's Proposal for Decision ("WMTX Brief").¹ On the same day, the Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission"), filed his Exceptions ("Executive Director's Exceptions")² to the Proposal for Decision ("PFD"), which had been issued by the

¹ Applicant Waste Management of Texas, Inc.'s Brief in Response to the Administrative Law Judge's Proposal for Decision, *Application of Waste Management of Texas, Inc. for a Municipal Solid Waste Permit Amendment; Permit No. MSW-249D*, SOAH Docket No. 582-08-2186, TCEQ Docket No. 2006-0612-MSW (Aug. 20, 2009).

² Executive Director's Exceptions, *Application of Waste Management of Texas, Inc. for a Municipal Solid Waste Permit Amendment No. MSW-249D*, SOAH Docket No. 582-08-2186, TCEQ Docket No. 2006-0612-MSW (Aug. 20, 2009).

PROTESTANT TJFA, L.P.'S REPLIES TO APPLICANT WASTE MANAGEMENT OF TEXAS, INC.'S BRIEF IN RESPONSE TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION AND THE EXECUTIVE DIRECTOR'S EXCEPTIONS

Administrative Law Judge on July 21, 2009.³ In their responses to the Proposal for Decision, both WMTX and the Executive Director addressed two issues: (1) the proposed operating hours for the Austin Community Recycling and Disposal Facility, also known as the Austin Community Landfill (“ACL”); and (2) the proposed addition of four ground water monitoring wells to the Point of Compliance (“POC”) ground water monitoring system.⁴

While TJFA will address both of these issues in its *Replies*, the overall message of TJFA’s *Exceptions to the Proposal for Decision and Proposed Order* (“Exceptions”) cannot be forgotten or overlooked. In order to obtain Permit No. MSW-249D, WMTX is required to demonstrate, by a preponderance of the evidence, that its permit amendment application meets or exceeds the applicable municipal solid waste (“MSW”) rules and requirements of TCEQ and applicable state law.⁵ WMTX is required to prove, by a preponderance of the evidence, that the contemplated expanded ACL facility, if constructed and operated pursuant to the application, will be protective of human health and the environment. Exceptions to these criteria simply are not contemplated by state law or TCEQ rules. In other words, WMTX cannot selectively choose which state statutes and regulatory requirements it will meet, and it cannot meet only those regulatory requirements for which compliance is feasible. By submitting an application for a major amendment to its existing MSW permit, WMTX chose to open the design of the entire ACL facility and all of the operations of the ACL facility to review and evaluation and sought a

³ Proposal for Decision, *In the Matter of the Application of Waste Management of Texas, Inc., for a Municipal Solid Waste Permit Amendment, Permit No. MSW-249D*, SOAH Docket No. 582-08-2186, TCEQ Docket No. 2006-0612-MSW (July 21, 2009).

⁴ WMTX also excepts to certain findings of fact related to the construction of the sedimentation and bio-filtration ponds. This issue has been addressed in detail in TJFA’s *Exceptions*. For further information regarding the sedimentation and bio-filtration ponds, TJFA incorporates herein for all purposes Section T, pages 172 through 177 of its *Exceptions*. See Protestant TJFA, L.P.’s *Exceptions to the Proposal for Decision and Proposed Order, In the Matter of the Application of Waste Management of Texas, Inc. for a Municipal Solid Waste Permit Amendment, Permit No. MSW-249D*, SOAH Docket No. 582-08-2186, TCEQ Docket No. 2006-0612-MSW, Vol. I § T at 172-77.

⁵ 30 TEX. ADMIN. CODE § 80.17(a).

determination regarding whether the design and operation, as described in the application, meets all applicable rules and statutes. As addressed in TJFA's *Exceptions* the overwhelming and clear answer to this question, based solely on the evidentiary record in this proceeding, is a simple "no." As such, while TJFA will address the two issues raised by WMTX and the Executive Director, only one fact is truly important to this proceeding: Because WMTX failed to carry its burden in this proceeding—because WMTX failed to demonstrate that the expanded ACL facility, if constructed and operated pursuant to the application, will be protective of human health and the environment and will be in compliance with all applicable rules and statutes—the application for Permit No. MSW-249D must be denied.

II. ARGUMENT AND AUTHORITIES

A. *Hours of Operation*

The Proposal for Decision recommends limiting the operating hours of the ACL facility in order to mitigate the noise conditions as well as odor and dust conditions that are inherent with the operation of a MSW landfill.⁶ The recommended hours of waste acceptance are 7:00 a.m. through 7:00 p.m., Monday through Friday. In addition, the Proposal for Decision recommends that transportation of materials and heavy equipment operation not be conducted between the hours of 9:00 p.m. and 5:00 a.m.⁷ These recommendations are intended to minimize the nuisance effects of WMTX's proposed hours of operation of 9:00 p.m. Sunday through 7:00 p.m. Saturday, and, if necessary, from 7:00 a.m. to 4:00 p.m. on Sunday, as identified in the application.⁸

⁶ See Proposal for Decision, *supra* note 3, at 64.

⁷ See *id.*

⁸ See Exh. APP-202, Austin Community Recycling & Disposal Facility, TCEQ Permit No. MSW-249D, Permit Amendment Application, Rev. 10 – May 2008, at Tech. Complete 3394 (Vol. VI, Pt. IV § 4.7 at 22).

As is made clear in TJFA's *Exceptions*, the weight of the evidence in the record in this proceeding demonstrates that the application for Permit No. MSW-249D should be denied, but to the extent that both WMTX and the Executive Director discussed the Proposal for Decision's recommendation regarding hours of operation, TJFA will address their arguments.

Both the Executive Director and WMTX seem to argue that the hours proposed in the application should not be revised, as recommended in the Proposal for Decision, because (1) WMTX demonstrated that such hours of operation were compatible with surrounding land uses; and (2) the existing hours of operation have previously been approved by the Commission. Neither argument is supported by a preponderance of the evidence in this proceeding, TCEQ's regulatory requirements, or the rulemaking history of 30 TEX. ADMIN. CODE § 330.135.

With regard to whether the great weight of the evidence in this proceeding demonstrates that the proposed hours of operation are compatible with surrounding land use, the answer is clearly "no." As argued in TJFA's *Exceptions*, there is clear evidence that the ACL facility is operated in such a manner as to cause the pollution of the surrounding land and the contamination of ground water and surface water. The definition of "nuisance" in TCEQ's MSW rules clearly contemplates that the operation of a MSW landfill facility in such a manner as to cause pollution of the surrounding land and contamination of ground water and surface water will be considered a nuisance by the Commission.⁹ Thus, because the operation of the ACL facility causes nuisance conditions—odor, ground water contamination, surface water contamination, dust, *et cetera*—it is completely proper for the Administrative Law Judge to recommend a reduction in the operating hours of the ACL facility.

In addition, while the hours of operation proposed by WMTX have previously been approved by the Commission, they have not been approved, or even previously considered, in

⁹ 30 TEX. ADMIN. CODE § 330.3(95).

the context of the application for Permit No. MSW-249D. Texas Administrative Code Title 30, Section 330.135 provides default waste acceptance hours and other operational hours for a MSW landfill.¹⁰ The default hours were included in the rule in order to regulate certain landfill-related activities “because of their potential to impact the public.”¹¹ With regard to the default hours, TCEQ wrote: “[T]he commission has amended the rule to regulate the hours when materials may be transported on or off site and the hours when heavy equipment may operate. The amended rule provides reasonable restrictions for protecting neighbors from being affected by the facility.”¹² In other words, the default hours were put in place to protect neighboring landowners from landfill operations and the resulting nuisance conditions, where necessary. Here, WMTX has proposed to laterally expand the ACL facility in a direction that will bring the land disposal operations in closer proximity to several adjacent landowners, including landowners who are protestant parties in this proceeding. The reduction in landfill hours recommended in the Proposal for Decision will minimize the nuisance conditions that would otherwise impact the activities of these landowners, *e.g.*, weddings being hosted on a Saturday afternoon at the Barr Mansion.

The previous approval by the Commission (*i.e.*, for Permit No. MSW-249C) of the hours proposed in the application is not controlling in this situation. WMTX’s application for a major amendment to its existing MSW landfill permit opened the entirety of the permit application to

¹⁰ *Id.* § 330.135.

¹¹ 29 Tex. Reg. 11,054, 11,055 (Nov. 26, 2004) (adoption of 30 TEX. ADMIN. CODE § 330.118, now 30 TEX. ADMIN. CODE § 330.135).

¹² *Id.* at 11,070.

review and evaluation by the Commission.¹³ This review includes every design and operational facet of the ACL facility and the application that is governed by Commission rules, including the hours of operation. Thus, WMTX was required to prove that each and every part of the application is in compliance with applicable agency rules, including the hours of operation. That the hours of operation must be shown to be compatible with surrounding land uses at the time of a major amendment is also supported by the Commission's adoption of the facility operating hours rule. Specifically, when the applicable rule was first adopted by the Commission in 2004, the Commission wrote:

In regard to comments that there should be a process that includes public input and a five- year review period as to authorized operating hours, the commission has not changed the rule. There is already an opportunity for public input in the permitting process, including the right to a hearing for a new permit or major amendment. The commission does not agree that a five-year review process is needed to reconsider authorized operating hours for a facility.¹⁴

In determining that a new review process was not necessary to periodically evaluate operating hours, the Commission correctly determined that operating hours would be subject to review, evaluation, and justification when an application for a major amendment was filed with the Commission. With regard to a justification for expanded operating hours, the Commission wrote: "The commission will continue to make these decisions on a case-by-case basis considering the potential impact on surrounding communities."¹⁵

¹³ A recent TCEQ rulemaking reinforced that certain revisions to existing permits, including lateral expansions such as is proposed for the ACL facility, require an application for a major amendment for which a *full permit application* must be submitted. See 33 Tex. Reg. 4157, 4157 (May 23, 2008) (identifying that a full permit application is required for lateral expansions, but that other types of revisions require submittal of only those permit documents specifically related to the proposed change, *i.e.*, a limited application).

¹⁴ 29 Tex. Reg. at 11,070.

¹⁵ *Id.*

Here, while the Proposal for Decision correctly decides that the hours of operation should be limited, it mistakenly shifts the burden of proof on this issue to protestants.¹⁶ The rule in question, 30 TEX. ADMIN. CODE § 330.135, as discussed above, identifies default hours,¹⁷ and, also as previously discussed, in MSW permitting cases the burden of proof is generally on the “moving party” by a preponderance of the evidence.¹⁸ The burden of proof, then, for most issues falls on the applicant in a MSW permitting proceeding. The discussion in the Court of Appeals decision in *BFI Waste Systems of North America, Inc. v. Martinez Environmental Group*¹⁹ addressed the issue of the burden of proof and the potential shifting of that burden and is instructive in this instance.

In *Martinez*, the protestants appealed the issuance of a MSW landfill permit for the “life of the site,” where they had argued that the permit should be issued for a shorter term.²⁰ The rule in question included a default “life of the site” duration for MSW permits, subject to the Executive Director’s authority to shorten the permit term at his discretion.²¹ The Court held that the burden of proof fell on the *Martinez* protestants to show by a preponderance of the evidence that a shorter permit term, as opposed to the default “life of the site” permit term, was proper for the facility because the protestants were the party seeking something other than the default regulatory provision.²²

¹⁶ The Proposal for Decision states: “Applicant did not seek a change in the operating hours, so the burden of proof to show that they should be changed is on the Protestants who seek such a change.” Proposal for Decision, *supra* note 3, at 64.

¹⁷ See 30 TEX. ADMIN. CODE § 330.135.

¹⁸ See *id.* § 80.17(a).

¹⁹ *BFI Waste Sys. of North America, Inc. v. Martinez Env'tl. Group*, 93 S.W.3d 570 (Tex.App.—Austin 2002, pet. denied).

²⁰ See *id.* at 576-77.

²¹ See *id.* at 576.

²² See *id.* at 577-78.

The *Martinez* situation is similar to that presented in this proceeding. Here, the default standard in 30 TEX. ADMIN. CODE § 330.135 is for the limited hours of operation, as defined in the rule itself. WMTX is the “moving” party seeking approval of longer hours of operation than those defined in the rule, and thus, as addressed in *Martinez*, is the party with the burden to show by a preponderance of the evidence why longer operating hours are appropriate for the ACL facility. While the rule clearly contemplates that longer hours can be approved, WMTX must affirmatively meet its burden and demonstrate that such longer hours are necessary and appropriate and will not result in potential adverse impacts on the surrounding communities.

WMTX’s application for a major amendment to its existing MSW landfill permit required it to demonstrate, by a preponderance of the evidence, that the proposed hours were necessary and appropriate and would not adversely affect neighboring landowners. The application contains no stated reason or justification for the extended hours of operation, making no case whatsoever to demonstrate that the extended hours of operation will not affect neighboring landowners.²³ Because of WMTX’s failure to carry that burden, as contemplated both by the rulemaking history of the hours of operation rule and 30 TEX. ADMIN. CODE § 80.17(a), the Proposal for Decision is correct in recommending that the hours of operation for the ACL facility should be revised as identified in the Proposal for Decision, but as identified above and as identified in TJFA’s *Exceptions*, because of all of the deficiencies in the application, it must instead be denied.

²³ The application simply identifies the extended hours, and WMTX did not present any evidence that the proposed extended hours would not adversely impact neighboring landowners. See Exh. APP-202, *supra* note 8, at Tech. Complete 3394 (Vol. VI, Pt. IV § 4.7 at 22).

B. Additional Ground Water Monitoring Wells

The Proposal for Decision recommends the addition of four ground water monitoring wells to the POC ground water monitoring system proposed in the application.²⁴ Specifically, the Proposal for Decision recommends that the ground water monitoring wells included in a voluntary agreement between WMTX and the City of Austin²⁵—ground water monitoring wells MW-29A and MW-32 and piezometers PZ-26 and PZ-31—be incorporated into the POC ground water monitoring system and that the POC itself be reconfigured to include those four wells.²⁶

As addressed in detail in TJFA's *Exceptions*, the great weight of the evidence in the record of this proceeding clearly demonstrates that the POC ground water monitoring system proposed for the ACL facility fails to meet applicable TCEQ rules. The same evidentiary record does not support addition of the four ground water monitoring wells identified above to the POC ground water monitoring system. While ground water monitoring wells do need to be added to the POC ground water monitoring system to ensure that the Industrial Waste Unit ("IWU") and the Phase I Unit—both solid waste management units within the ACL facility—are adequately and properly monitored as required by Commission rules, there is no evidence in the record to demonstrate that the simple addition of the four ground water monitoring wells in question would result in the POC ground water monitoring system being in compliance with Commission rules. To the contrary, the evidentiary record shows that the four ground water monitoring wells from the City of Austin/WMTX agreement were located based on negotiations and

²⁴ See Proposal for Decision, *supra* note 3, at 29-30.

²⁵ See Exh. City of Austin 6, WMTX, "Voluntary Groundwater Monitoring Plan for the Industrial Waste Unit at Austin Community Landfill" (Mar. 15, 2002), at COA 1761

²⁶ See Proposal for Decision, *supra* note 3, at 30.

compromises.²⁷ The evidentiary record does not identify any scientific or technical basis for the locations of the four ground water monitoring wells identified in the City of Austin/WMTX agreement.²⁸

The evidentiary record demonstrates that the POC ground water monitoring system fails to comply with TCEQ's applicable rules because it cannot monitor all of the solid waste management units at the ACL facility, but it can only be revised after additional technical consideration by TCEQ. The POC ground water monitoring system in the current application is fatally flawed and cannot be saved by the addition of the four ground water monitoring wells in question. The issues associated with the POC ground water monitoring system's ability to ensure detection of contaminants from the entirety of the ACL facility are highly technical and require detailed characterization and evaluation. The simple addition of four wells cannot correct these deficiencies in the application, and as such, the Commission should revise the proposed findings of fact, as suggested in TJFA's *Exceptions*,²⁹ and deny the application.

The *WMTX Brief* and the *Executive Director's Exceptions* raise a number of issues that have previously been addressed at length in TJFA's *Exceptions*, as well as TJFA's previous pleadings in this proceeding. Both WMTX and the Executive Director again argue that the IWU

²⁷ See Transcript of the Hearing on the Merits [hereinafter "Tr."] at Vol. 10 at 2136 ln.25 – 2138 ln.8 (Cross Exam (by Erich Birch) of Charles Lesniak III) (Apr. 9, 2009). Mr. Charles Lesniak III, who testified on behalf of the City of Austin regarding the agreement between the City of Austin and WMTX, identified that he had been the lead negotiator working with WMTX and developing the agreement. See *id.* at Vol. 10 at 2131 lns.23-24.

²⁸ In fact, WMTX's own expert witness regarding ground water monitoring testified that he did not know how the locations of the ground water monitoring wells identified in the City of Austin/WMTX agreement were selected. See *id.* at Vol. 5 at 996 lns.12-16 (Cross Exam (by Erich Birch) of Jay A. Winters, P.G.) (Apr. 2, 2009).

²⁹ See *Exceptions*, *supra* note 4, § D. at 74-76.

and the Phase I Unit are closed.³⁰ This issue was addressed in TJFA's *Exceptions*, where the operational and regulatory history of the IWU and the Phase I Unit are described in detail, and the one conclusion supported by the preponderance of the evidence in the record of this proceeding is identified: There is no substantiated or documentary evidence that the IWU and the Phase I Unit were ever closed pursuant to applicable agency rules, and thus, neither unit can be considered "closed" in a regulatory sense at this time.³¹ While WMTX has repeatedly claimed that the simple fact neither unit no longer receives waste indicates that they are both closed units, TCEQ's rules do not support such a claim. The Commission's MSW rules recognize that until the affirmative act of completing closure and obtaining a certification of

³⁰ In arguing that the IWU and the Phase I Unit are "closed" and are not "solid waste management units," the Executive Director contradicts evidence presented by his own expert witnesses. Mr. Matthew Udenenwu, testifying for the Executive Director, identified that he did not know whether the IWU and the Phase I Unit were closed. *See* Tr. at Vol. 11 at 2384 ln.13 – 2385 ln.8 (Cross Exam (by Sharon Talley) of Matthew Udenenwu) (Apr. 10, 2009). Mr. Udenenwu only knew what WMTX had represented in the application, so it must be noted that Mr. Charles G. Dominguez, P.E., engineer of record for the application, testified that he did not intend the word "closed" on the drawings to indicate that the IWU and the Phase I Unit were closed pursuant to applicable regulations, stating: "I just intended that to mean that it was no longer accepting waste." *Id.* at Vol. 2 at 316 ln.24 – 317 ln.4 (Cross Exam (by Erich Birch) of Charles G. Dominguez, P.E.) (Mar. 31, 2009). Similarly, Mr. Arten J. Avakian, another witness for the Executive Director, testified that both the IWU and the Phase I Unit would be considered "waste management units," and thus were both part of the ACL facility. *See id.* at Vol. 11 at 2471 ln.13 – 2472 ln.1 (Cross Exam (by Erich Birch) of Arten J. Avakian, P.G.) (Apr. 10, 2009); *see also id.* at Vol. 11 at 2471 lns.1-8.

³¹ In addition, TCEQ's MSW rules plainly recognize the status of the IWU and the Phase I Unit in relation to the other portions of the ACL facility. The MSW rules define three terms, "active disposal area," "active life," and "active portion," distinguishing between portions of a MSW landfill that are active disposal areas and portions of a MSW landfill that are still active because they have not been closed. *See* 30 TEX. ADMIN. CODE §§ 330.3(2), (3), & (4). The term "active disposal area" is defined as "[a]ll landfill working faces and areas covered with daily and alternative daily cover." *Id.* at § 330.3(2). The term "active life" is defined as "[t]he period of operation beginning with the initial receipt of solid waste and ending at certification/completion of closure activities in accordance with §§330.451 – 330.459 of this title (relating to Closure and Post-Closure)." *Id.* § 330.3(3). The term "active portion" is defined as "[t]hat part of a facility or unit that has received or is receiving wastes and that has not been closed in accordance with §§330.451 – 330.459 of this title (relating to Closure and Post-Closure)." *Id.* § 330.3(4).

closure have been finalized, these units of the ACL facility are still “active.”³² Because neither the IWU nor the Phase I Unit is closed, WMTX is clearly required to demonstrate that the POC ground water monitoring system is designed to ensure that contaminants released from these solid waste management units—where hazardous waste, industrial solid waste, and MSW were disposed—is properly monitored.³³

WMTX also argues that new wells have been added to the POC ground water monitoring system to monitor the IWU. Specifically, WMTX argues that newly proposed ground water monitoring wells MW-30 and MW-44, as well as existing ground water monitoring well MW-11, will monitor the IWU. As detailed in TJFA’s *Exceptions*, these wells will not adequately monitor contaminants migrating from the IWU. While WMTX’s witness, Mr. Jay A. Winters, P.G., testified that ground water monitoring wells MW-30 and MW-44 would monitor the IWU, Mr. Winters’ own “Groundwater Flow Path Map,” which is part of the application itself, as well as Mr. Winters’ deposition testimony, contradicts Mr. Winters’ testimony at the Hearing on the

³² The substantive definitions of “active life” and “active portion” have been in effect since at least the adoption of the federal Subtitle D regulations in Texas in 1993, and the consequences of WMTX’s failure to close these units at that time were clear in 1993 and are still clear today. *See* 18 Tex. Reg. 4030, 4030-43 (June 18, 1993).

³³ Again it must be noted, even if the IWU and the Phase I Unit were considered closed under applicable agency regulations, they are still two solid waste management waste units within the permit boundary of the ACL facility. As such, the POC ground water monitoring system for the entire ACL facility must be designed to ensure detection of contaminants migrating from those two solid waste management units. If WMTX does not want to provide appropriate monitoring for the IWU and the Phase I Unit, it should seek to redraw the facility boundary of the ACL facility, removing both units from the ACL facility, and thus from required ground water monitoring and landfill gas monitoring.

Merits.³⁴ Additionally, ground water monitoring well MW-11 cannot reliably monitor releases from the IWU because of the presence of the creek between the IWU and the Phase I Unit.³⁵

Finally, WMTX argues that if additional ground water monitoring wells are added to the POC ground water monitoring system, as recommended in the Proposal for Decision, piezometer PZ-31 should not be included, writing: “one of the four wells at issue (piezometer PZ-31) is used only to obtain groundwater level measurements; it is not monitored, and was never intended to be monitored, for groundwater quality data.”³⁶ This statement misrepresents the agreement between the City of Austin and WMTX. While, piezometer PZ-31 is not routinely monitored pursuant to the agreement between the City of Austin and WMTX, the agreement contemplates that piezometer PZ-31 may be used to monitor ground water quality, and, in fact, piezometer PZ-31 has been used pursuant to the agreement to monitor ground water quality in the vicinity of the IWU.

The agreement between the City of Austin and WMTX states, with regard to piezometer PZ-31:

Any piezometers installed to collect supplemental potentiometric head data in the vicinity of the IWU (besides those designated as monitoring wells within this plan) will not be used to collect groundwater samples for analytical testing

³⁴ See Exh. APP-202, *supra* note 8, at Tech. Complete 3022 (Vol. V, Pt. III, Att. 5 at Fig. ATT5-4); *see also id.* at Tech. Complete 3023 (Vol. V, Pt. III, Att. 5 at Fig. ATT5-5); Exh. TJFA 11, Oral Deposition of Jay Arthur Winters, at Depo. Exh. 4, Fig. ATT4-19A, Potentiometric Surface Map May 2005, signed and sealed by Mr. Jay A. Winters, P.G., Feb. 18, 2008; *id.* at Depo. Exh. 7, Fig. 2, IWU Potentiometric Map April 2008, signed and sealed by John R. Hultman, Jr., June 23, 2008.

³⁵ As discussed at length in TJFA’s *Exceptions*, MSW is buried under the creek and in the areas between the IWU and the Phase I Unit and between the IWU and the Phase I Unit and the West Hill, and the buried waste will operate as a “French drain” in that contaminants will be collected in and migrate through the waste. The creek and the buried MSW would be the preferential flow paths for contaminants released from the IWU and the Phase I Unit, and the contaminants would leave the ACL facility boundary without ever being detected by ground water monitoring well MW-11. *See* Tr. at Vol. 7 at 1472 lns.12-18 (Redirect (by Erich Birch) of Robert S. Kier, Ph.D., P.G. (Apr. 6, 2009).

³⁶ WMTX Brief, *supra* note 1, at 25.

purposes, unless an imminent threat of a release of leachate from the IWU to surface water is identified³⁷

Clearly the agreement does contemplate utilizing piezometer PZ-31 for other purposes, including monitoring the water quality in the area of the IWU, and it has been used for that purpose. As identified in Exhibit TJFA 24, piezometer PZ-31 was monitored for ground water quality purposes in May and October of 2004.³⁸ In May 2004, both barium and 1,4-dioxane were detected in piezometer PZ-31.³⁹ In October 2004, arsenic, barium, 1-4-dioxane, methylene chloride, and 1,2,4-trichloro-benzene were detected in piezometer PZ-31. In fact, the highest levels of 1,4-dioxane, methylene chloride, and 1,2,4-trichloro-benzene measured pursuant to the City of Austin/WMTX agreement were measured in piezometer PZ-31 in October 2004.⁴⁰ It is particularly interesting that WMTX would argue that piezometer PZ-31 should not be utilized for ground water monitoring purposes, when contaminants have been detected repeatedly in piezometer PZ-31 and when WMTX has apparently found those results concerning enough to

³⁷ Exh. City of Austin 6, *supra* note 25, at 14 (COA 1776).

³⁸ See Exh. TJFA 24, Summary of Available IWU Analytical Data.

³⁹ *Id.*

⁴⁰ *Id.*

fail to provide monitoring results to the City of Austin and to the Commission, as required by the City of Austin/WMTX agreement.⁴⁰

With regard to the actual monitoring results pursuant to the City of Austin/WMTX agreement, the Executive Director writes:

[T]he ED does and will continue to monitor sampling results for any significant releases, which might trigger assessment monitoring and/or a TCEQ corrective

⁴⁰ WMTX monitored piezometer PZ-31 on October 20, 2004, but failed to report the results of such monitoring to the City of Austin or to TCEQ. *See id.* Instead, WMTX's correspondence to both agencies clearly inferred that while piezometer PZ-31 had been sampled on May 26, 2004, it was not monitored during the October 2004 monitoring event. *See* Exh. TJFA 29, Letter from Tim Champagne, WMTX, to Richard Carmichael, Ph.D., P.E., CIH, TCEQ, at 1 (Dec. 19, 2004). The December 19, 2004 WMTX letter states:

Groundwater conditions in the vicinity of the IWU facility are monitored by three downgradient wells (MW-29A, MW-32, and PZ-26). Six additional monitoring wells and piezometers (MW-03, MW-06, MW-23, MW-30, PZ-25, and PZ-31) are gauged to determine the potentiometric head in the vicinity of the IWU. These will not be used to collect groundwater samples for analytical testing purposes, unless an imminent threat of release of leachate to surface water is identified (a condition that was not identified during the previous site investigation study).

Id.; *see also* Exh. TJFA 28, Letter from Arthur Denny, TCEQ, to Tim Champagne, WMTX, at 1 (Jan. 13, 2005). The January 13, 2005 TCEQ letter identifies that TCEQ received IWU-related ground water monitoring information for May 25-26, 2004, for MW-29A, MW-32, PZ-26, and PZ-31, and IWU-related ground water monitoring information for October 20, 2004, for MW-29A, MW-32, and PZ-26. No ground water monitoring data is noted for PZ-31 from the October 24, 2004 sampling event. *See id.* at 1. The two reports attached to the correspondence to TCEQ clearly do not account for the sampling of piezometer PZ-31 that occurred in October 2004, and also infer that such sampling did not occur or that it did occur but was not reported, respectively. *See* Exh. TJFA 29, MFG, Inc., "Groundwater Monitoring Report, Second Semi-Annual 2004 Monitoring Event, Austin Community Landfill, Industrial Waste Unit" (Dec. 19, 2004); *see also* Exh. TJFA 29, Rachele Delimont, STL Denver, "Analytical Report" (Nov. 8, 2004, Revised Dec. 20, 2004). The "Analytical Report," which was prepared by STL Denver for Waste Management Inc., identifies that it is the report for seven samples received at the STL Denver laboratory on October 21, 2004. *See* Exh. TJFA 29, *supra* note 40, "Analytical Report," at "2." While the "Analytical Report" does not include sampling results for piezometer PZ-31, it does include the following statements related to piezometer PZ-31:

- "The analysis by Method 8260B for *sample PZ-31* was performed at a dilution due to the high presence of target compounds. The dilution factor has been applied to the MDL to provide the lowest possible RL. The MDL can be found in the corresponding Method Blank."
- "This report is being revised to turn off the results for *sample PZ-31* per client request."

Id. at "3" (emphasis added).

action under any number of regulatory programs, including the Texas Risk Reduction Program at 30 TAC Chapter 350 or the MSW Corrective Action as required by 30 TAC Chapter 330. Since the voluntary, private agreement has been in effect, there have been no such triggering events, namely no detectable releases of constituents of concern of such a level to be applicable to these TCEQ programs.⁴¹

These statements are misleading with regard to how the City of Austin/WMTX agreement, and even TCEQ's review, addresses detections of ground water contaminants in the monitoring wells near the IWU. Contrary to the inferences made by the Executive Director, the monitoring protocol identified in the agreement between the City of Austin and WMTX is vastly different than what would be required by TCEQ's MSW rules. The MSW monitoring requirements under federal and state law are intended to detect whether *a release of any contaminant* has occurred at a MSW landfill. If a potential release is detected, the operator is required to notify regulatory officials and take specific actions to confirm whether a release has actually occurred, and if so, take corrective actions.⁴² These "detection monitoring rules" do not apply to the monitoring of the IWU conducted by WMTX.⁴³ By contrast, under the voluntary monitoring agreement, WMTX is monitoring to determine whether contaminants have been detected in ground water at levels that exceed certain remediation cleanup levels established in the Texas Risk Reduction

⁴¹ Executive Director's Exceptions, *supra* note 2, at 4.

⁴² See 30 TEX. ADMIN. CODE §§ 330.407 – 330.415; see also Tr. at Vol. 11 at 2447 ln.2 – 2449 ln.13 (Cross Exam (by Erich Birch) of Arten J. Avakian, P.G.) (Apr. 10, 2009).

⁴³ See Tr. at Vol. 11 at 2450 lns.9-15 (Cross Exam (by Erich Birch) of Arten J. Avakian, P.G.) (Apr. 10, 2009).

Rules (“TRRP”).⁴⁴ In other words, the voluntary monitoring is *already* showing contamination⁴⁵ that would indicate releases from the ACL facility and would mandate response actions by WMTX under TCEQ’s MSW detection monitoring rules. Remarkably, even though contaminants, including volatile organic compounds (VOCs) and semi-volatile organic compounds (SVOCs), are routinely being detected in the area of the IWU, no action is being taken, or required to be taken, under the agreement between the City of Austin and WMTX.

⁴⁴ See Exh. City of Austin 6, *supra* note 25, at 16-17 (COA 1778 – COA 1779). As identified by Mr. Robert S. Kier, Ph.D., P.G., the ground water monitoring performed pursuant to the agreement between WMTX and the City of Austin is based on the Texas Risk Reduction Program (“TRRP”) standards, “assuming an industrial classification for land use, a combined aquifer, and TERP [*sic*] standards for Class III water, water that is not usable for drinking water.” Tr. at Vol. 7 at 1347 lns.7-10 (Cross Exam (by Annalynn Cox) of Robert S. Kier, Ph.D., P.G.) (Apr. 6, 2009). Dr. Kier also discussed why the assumptions just identified are incorrect with regard to the ACL facility. See *id.* at Vol. 7 at 1446 ln.8 – 1447 ln.6 (Redirect (by Erich Birch) of Robert S. Kier, Ph.D., P.G.) (Apr. 6, 2009) (discussing the potential mischaracterization of the ground water as Class III and the future uses of the ACL facility and surrounding areas as industrial/commercial). Dr. Kier testified:

Q. What is the difference between the monitoring – groundwater monitoring for MSW and groundwater monitoring – or monitoring for the TERP [*sic*] rules?

A. . . . In groundwater monitoring for MSW, you are looking for detections that are statistically significant differences from background.

Now, usually that means an increase. . . . And you’re looking for something that might differ from background. And, generally speaking, then, if you detect a volatile organic or a semivolatile, particularly a chlorinated one, the presumption is that you have contaminant – a release of contaminants. . . .

* * *

Now, with the – with the TERP [*sic*] list, that’s based on protection standards. There’s industrial and there’s residential and there’s Class I, II and III waters, and each one can have differences.

And so the mere detection of a contaminant, be it chlorinated or non-chlorinated – say a hydrocarbon – may not in itself raise a red flag if it’s not above whatever the groundwater protection standard is. Under the MSW rules it would.

See *id.* at Vol. 7 at 1369 ln.10 – 1370 ln.9 (Cross Exam (by Holly Noelke) of Robert S. Kier, Ph.D., P.G.) (Apr. 6, 2009).

⁴⁵ See Tr. at Vol. 7 at 1347 lns.11-12 (Cross Exam (by Annalynn Cox) of Robert S. Kier, Ph.D., P.G.) (Apr. 6, 2009) (stating that the IWU monitoring program “consistently shows the presence of volatiles and semivolatiles”).

As identified above, the evidentiary record demonstrates that the POC ground water monitoring system fails to comply with TCEQ's applicable rules because it cannot monitor all of the solid waste management units at the ACL facility. The simple addition of four ground water monitoring wells will not address the fatal flaws in the POC ground water monitoring system. The issues associated with the POC ground water monitoring system's ability to ensure detection of contaminants from the entirety of the ACL facility are highly technical and require detailed characterization and evaluation. For further information regarding the deficiencies in the POC ground water monitoring system and the technical and scientific problems associated with the proposed incorporation of the four additional ground water monitoring wells into the POC ground water monitoring system, TJFA incorporates herein for all purposes the following sections of its *Exceptions*: Section B, pages 16-30; Section C.1., pages 35 through 39; Section C.2., pages 39 through 42; Section C.3., pages 43 through 51; and Section D., pages 62 through 74.⁴⁶ The Commission should revise the proposed findings of fact, as suggested in TJFA's *Exceptions*,⁴⁷ and deny the application.

III. CONCLUSION AND PRAYER

As previously addressed in TJFA's *Exceptions*, the Findings of Fact and Conclusions of Law, as discussed in the Proposal for Decision and as set out in the Proposed Order, which were the bases of the Administrative Law Judge's recommendation to approve the amendment application by WMTX for proposed Permit No. MSW-249D, are not supported by applicable statutes and regulations, Commission precedent and policy, or the preponderance of the evidence in the record. Information in the evidentiary record which addresses the issues underlying the proposed Findings of Fact and Conclusions of Law was highlighted in TJFA's *Exceptions* and in

⁴⁶ See *Exceptions*, *supra* note 4, §§ B., C.1., C.2., C.3., & D. at 16-31, 35-51, & 62-74 (Aug. 20, 2009).

⁴⁷ See *id.* § D. at 74-76.

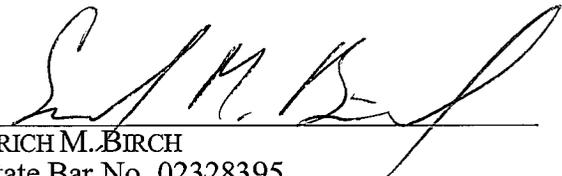
these *Replies*. After review of these pleadings, the Administrative Law Judge should now have more than adequate bases to modify the Proposal for Decision accordingly and recommend denial of proposed Permit No. MSW-249D. TJFA respectfully requests that the Administrative Law Judge do so.

If the Administrative Law Judge chooses not to make the revisions necessary to recommend denial of proposed Permit No. MSW-249D, TJFA respectfully requests that the Commission issue its own Order, fully supported by the preponderance of the evidence, adopting Findings of Fact and Conclusions of Law denying proposed Permit No. MSW-249D, as presented by TJFA.

Respectfully submitted,

BIRCH, BECKER & MOORMAN, LLP
7000 North MoPac Expressway
Plaza 7000, Second Floor
Austin, Texas 78731
Phone: (512) 514-6747
Fax: (512) 514-6267

By:



ERICH M. BIRCH
State Bar No. 02328395

ANGELA K. MOORMAN
State Bar No. 24007700

CINDY L. BECKER
State Bar No. 00789148

ATTORNEYS FOR TJFA, L.P.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served upon all counsel of record via facsimile, e-mail transmission, first class mail, Federal Express overnight delivery, or hand-delivery addressed to:

<p>Mr. Les Trobman General Counsel (MC-101) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (mail) 12100 Park 35 Circle, Building A Austin, Texas 78753 (delivery)</p>	
<p>The Honorable Roy Scudday Administrative Law Judge State Office of Administrative Law 300 W. 15th Street, Suite 504 P.O. Box 13025 Austin, Texas 78711 Fax: (512)</p>	<p style="text-align: center;">2009 AUG 31 PM 1:27 CHIEF CLERKS OFFICE</p>
<p>Mr. Bryan J. Moore Mr. John A. Riley Vinson & Elkins, LLP 2801 Via Fortuna, Suite 100 Austin, Texas 78746-7568 Fax: (512) 236-3257 bmoore@velaw.com jriley@velaw.com</p>	<p><i>Representing Waste Management of Texas, Inc.</i></p>
<p>Ms. Amy Swanholm Office of Public Interest Counsel (MC-103) Texas Commission on Environmental Quality PO Box 13087 Austin, Texas 78711-3087 (mail) 12100 Park 35 Circle, Building F Austin, Texas 78753 (delivery) Fax: (512) 239-6377 aswanhol@tceq.state.tx.us</p>	<p><i>Representing the Office of Public Interest Counsel of the Texas Commission on Environmental Quality</i></p>

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

<p>Ms. Amie Richardson Litigation Division (MC-175) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (mail) 12100 Park 35 Circle, Building A Austin, Texas 78753 (delivery)</p> <p>Mr. Timothy Reidy Environmental Law Division (MC-173) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (mail) 12100 Park 35 Circle, Building A Austin, Texas 78753 (delivery)</p> <p>Fax: (512) 239-3434 arichard@tceq.state.tx.us treidy@tceq.state.tx.us</p>	<p><i>Representing the Executive Director of the Texas Commission on Environmental Quality</i></p>
<p>Ms. Meitra Farhadi Assistant City Attorney City of Austin 301 West 2nd Street P.O. Box 1088 Austin, Texas 78767-1088</p> <p>Fax: (512) 974-6490 meitra.farhadi@ci.austin.tx.us</p>	<p><i>Representing the City of Austin</i></p>
<p>Ms. Annalynn Cox Assistant Attorney Travis County 314 West 11th Street P.O. Box 1748 Austin, Texas 78767</p> <p>Fax: (512) 854-4808 annalynn.cox@co.travis.tx.us</p>	<p><i>Representing Travis County</i></p>

Ms. Mary Carter Mr. Jim Blackburn Mr. Adam Friedman Blackburn Carter PC 4709 Austin Houston, Texas 77004 Fax: (713) 524-5165 mcarter@blackburncarter.com jbb@blackburncarter.com	<i>On behalf of Protestant Group 1 (Northeast Neighbors Coalition, Harris Branch Homeowners Association, individuals)</i>
Mr. Paul M. Terrill The Terrill Firm, P.C. 810 West 10th Street Austin, Texas 78701 Fax: (512) 474-9888 pterrill@terrill-law.com	<i>Representing Giles Holdings</i>
Docket Clerk Office of Chief Clerk (MC-105) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (mail) 12100 Park 35 Circle, Building F Austin, Texas 78753 (delivery) Fax: (512) 239-3311	
Ms. Bridget Bohac Office of Public Assistance (MC-108) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (mail) 12100 Park 35 Circle, Building F Austin, Texas 78753 (delivery) Fax: (512) 239-4007	

On this the 31st day of August, 2009,


ERICH M. BIRCH