

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

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

**CITY OF AUSTIN’S RESPONSE TO EXCEPTIONS FILED BY
THE EXECUTIVE DIRECTOR AND WMI TO THE PROPOSAL FOR DECISION**

COMES NOW, Protestant, City of Austin (“City”) and files this, its Response to Exceptions to the Proposal for Decision and Order filed by the Executive Director and the Applicant, and respectfully shows the following¹:

I. INTRODUCTION

The parties filed Exceptions to the Proposal for Decision (“PFD”) on August 20, 2009. Both the Executive Director (“ED”) and the Applicant made essentially the same exceptions to specific Findings and Conclusions in the PFD. In this Response, Protestant City responds to the ED’s and the Applicant’s Exceptions and re-urges its Exceptions, as well as those filed by Travis County, NNC, OPIC, and TJFA, LP.

II. RESPONSE TO EXCEPTIONS

A. The ED’s exceptions to the modification of operating hours.

The ED excepts to the operating hours proposed by the Administrative Law Judge (“ALJ”), and requests that the Applicant be allowed to operate the facility 24/6, regardless of the testimony presented throughout the contested case hearing process. As support for this exception, the ED merely states that he does not believe the evidence regarding the negative impact of noise and lighting coming from the facility justify reducing the WMI facility’s

¹ References to exhibits are in the following format: Exhibit, Page:Line (or paragraph No.). References to the court reporter’s record are in the following format: CR. V.No., Page:Line.

operating hours.² The ED goes on to acknowledge, however, that the TCEQ may restrict operating hours on a case-by-case basis considering the impact on the surrounding communities.³ Instead of pointing to any evidence in the record that would indicate that the Applicant's need for 24/6 operating hours outweighs the community's interest in reduced impacts from noise and lighting emanating from the WMI facility in the evening and on the weekends; the ED just states that in his opinion, the operating hours should not be reduced.⁴ The ALJ's findings regarding limiting operating hours cannot be overturned by the TCEQ unless they were not supported by the great weight of the evidence.⁵ The ED has failed to point to any evidence that indicates the Applicant has a need for 24/6 operating hours, much less, that the Applicant's need outweighs that of the community.

B. WMI's exceptions to the modification of operating hours.

WMI excepts to the modification of its requested 24/6 operating hours to the ALJ's recommended operating hours of Monday through Friday from 7:00 am to 7:00 pm on the basis that (1) the burden of proof was on the protesting parties to prove that the operating hours should be modified, and (2) that the evidence presented was not sufficient to modify the WMI Facility's operating hours.⁶ This argument is flawed. The Applicant is the moving party on all issues, and has the burden to demonstrate by a preponderance of the evidence that the draft permit in its entirety complies with the TCEQ rules. The rule requires that the Applicant obtain approval to operate outside of the normal waste acceptance hours of 7:00 am to 7:00 pm Monday through Friday.⁷ Even though the Applicant never met its burden to demonstrate why additional

² ED at pg. 2.

³ ED at pg. 3.

⁴ ED at pg. 3.

⁵ Texas Health & Safety Code § 361.0832(c).

⁶ WMI at pg. 3.

⁷ 30 TAC § 330.135(a).

operating hours and days are necessary;⁸ Protestants put forth evidence demonstrating why the operating hours of the WMI facility should be limited.⁹ Therefore, under either burden shifting analyses, there is no evidence in the record as to why additional operational hours are necessary, and there is evidence in the record as to why additional operational hours should not be permitted at the WMI Facility.¹⁰

C. The ED's exceptions to the inclusion of additional wells into the groundwater monitoring system.

The ED argues in its exceptions that the point of compliance ("POC") should not be adjusted to include the four wells that are already in existence and being monitored pursuant to a voluntary agreement between the City and WMI. What is most troubling is the ED's rationale for its exceptions to adding these four wells to the point of compliance. The ED states that the Industrial Waste Unit ("IWU") should not be monitored because there were no regulations in place back when it was accepting hazardous wastes; and therefore it does not have to be monitored for releases at all.¹¹ The IWU is a part of the facility. The groundwater monitoring system proposed is a multi-unit system under §330.403(b).¹² As such, all of the MSW management units must be a part of the groundwater monitoring system. Moreover, the TCEQ can and should require monitoring of the IWU to protect human health, welfare, and the environment.¹³

The ED further urges that the wells should not be included in the POC because: (1) the ED already monitors the sampling results under the voluntary agreement between the City and WMI, which could trigger assessment monitoring; and (2) there have been no detectable releases

⁸ PFD at pg. 64.

⁹ NNC at 9-13; Joe Word 1, 11:244-247; CR. V. No. 10, 2252:22 to 2253:14; 2280:20-21 (Judge Scudday: "He's indicated there's noise out there during the activities. There's noise."); NNC 2, 22:2-7.

¹⁰ PFD at pgs. 63 – 64.

¹¹ ED at pg. 4.

¹² ATT 5-4 and ATT 5-5.

¹³ Texas Health & Safety Code § 361.002; 30 TAC § 330.15(a)(3) and § 330.463(a)(3).

of constituents of concern. These contentions are both incorrect. Although the ED's expert witness testified at the hearing that he reviews the sampling results that come in pursuant to the voluntary monitoring agreement between the City and WMI; nothing in the voluntary monitoring agreement, including the submission of sampling events, is enforceable by the TCEQ.¹⁴ Secondly, the evidence demonstrated that there have been detectable releases under the voluntary monitoring agreement for 1, 4 dioxane, which is not naturally occurring, and is evidence of human-induced contamination.¹⁵ What is even more perplexing, is that the sampling results showing a detection of 1,2,4 trichlorobenzene, as well as the highest levels of 1,4 dioxane were not submitted to the TCEQ. The ED is correct that there have not been any detectable releases of Appendix 1 constituents in any of the current POC wells; however the chemical constituents that were detected at WMI and reported in the JD Consulting/Thermoretec report, including 1,4 dioxane and 1,2,4 trichlorobenzene, are not Appendix 1 constituents.¹⁶

Finally, the ED incorrectly claims that the TCEQ rules do not apply to the IWU because it is not a "waste management unit".¹⁷ Although it stopped taking materials in the 1970's the IWU is still in place and is part of the facility. At the hearing, ED expert Avakian clarified that although he had previously opined that the IWU was not a municipal solid waste unit, the rules actually provide that if a landfill contains household waste, then by definition it would be a municipal solid waste landfill unit.¹⁸ In fact, it appears that this misconception during the ED's review resulted in a perception that monitoring of the IWU was incidental to the monitoring program and not its objective; and further that no plume of contamination had entered the groundwater from an MSW unit. This conclusion appears to be based on the reviewer, Mr.

¹⁴ CR. V. No. 11, 2443:1-25.

¹⁵ CR. V. No. 5, 1042:11-16.

¹⁶ APP 1.

¹⁷ ED at pg. 5.

¹⁸ CR. V. No. 11, 2491:5-13 and 2486:13-17.

Avakian's, notion that he should not consider data concerning releases from the IWU. Although Mr. Avakian acknowledged that the IWU area is part of the permitted facility, he did not know if groundwater monitoring should include the IWU. Consequently and in evaluating the monitoring system, the ED reviewer did not consider the IWU or the 1,4-dioxane reports.¹⁹ All MSW landfill units however, must be monitored and the IWU is one of these units as described by the ED's testifying expert.²⁰

D. WMI's exceptions to the inclusion of additional wells into the groundwater monitoring system.

WMI asserts that there is no basis to tie the four voluntary wells into WMI's POC.²¹ They base this assertion on the same argument as the ED; that the IWU was closed in 1973, and therefore WMI does not have to monitor the IWU at all.²² There is no evidence in the record that the IWU has ever been "closed".²³ Additionally, given the fact that we know the IWU accepted a plethora of chemicals and industrial waste materials, many of which are considered hazardous materials under the existing regulations, the TCEQ can and should require monitoring of the IWU to protect human health, welfare, and the environment.²⁴

The Applicant argues that MW-11, MW-30, and MW-44 are adequate to detect a release from the IWU. The Applicant is incorrect. The evidence demonstrated that those three monitoring wells are not even sampled for 1,4 dioxane, which appears to be the primary contaminant leaking from the IWU. It does little good to rely on a monitoring well to inform you of a release of hazardous waste, and then not test that well for the types of contaminants that are leaking.

¹⁹ CR. V. No. 11, 2483:21 – 2484:7; 2488:4-23; 2494:17 – 2495:16.

²⁰ CR. V. No. 11, 2491:5-13.

²¹ WMI at pg. 17.

²² WMI at pg. 20.

²³ 30 TAC § 330.5(c).

²⁴ Texas Health & Safety Code § 361.002; 30 TAC § 330.15(a)(3) and § 330.463(a)(3).

Finally, the Applicant urges that under no circumstances should PZ-31 be included in the POC to monitor for leaks from the IWU.²⁵ As support, WMI alleges that PZ-31 was never intended to be monitored for groundwater quality data, and therefore any data obtained from it would be unreliable simply because it was installed as a piezometer. This is not true. It is common practice to convert a piezometer to a monitoring well; and in fact the Applicant's expert witness, Mr. Winters, testified that there is essentially no difference between a piezometer and a monitoring well.²⁶ Moreover, the voluntary agreement itself states "[a]ny 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 purposes, unless an imminent threat of a release of leachate from the IWU to surface water is identified...".²⁷ Clearly, the voluntary agreement specifically considered and provided for the possibility of monitoring PZ-31. Furthermore, a piezometer (PZ-26) previously installed by WMI is one of the primary wells being regularly sampled as part of the voluntary monitoring program.

E. WMI's exception to Finding of Fact No. 237 regarding construction of two ponds prior to approval of the application.

WMI excepts to the ALJ's characterization of its construction of two ponds prior to obtaining a permit to commence physical construction of its requested lateral expansion from the TCEQ, as required by 30 TAC § 330.7(a).²⁸ As support for this exception, WMI cites to its closing argument, wherein it argued that because the ponds were required wetlands mitigation by the City of Austin, they needed no approval from the TCEQ to commence construction of their

²⁵ WMI at pg. 25.

²⁶ CR. V. No. 5, 944:1-16.

²⁷ COA 6 at pg. 14.

²⁸ WMI at pg. 27.

lateral expansion.²⁹ This reasoning is flawed. The ponds were a necessary appurtenance to the construction of the lateral expansion of the landfill because they were required for mitigation and detention requirements caused by the development of the proposed expansion.³⁰

III. CONCLUSION

Protestant City prays that the Exceptions filed by the Applicant and the Executive Director be denied. Protestant City re-urges its Exceptions and prays that As they are not supported by the record, Protestant City requests that Findings 48, 49, 56, 57, 124, 128, 133, 143, 147, 167, 169, 191, 192, 194, 195, 197, 215, 219, 220, 230, 246, 247, 249, 250, and 254 be deleted, and that Findings of Fact 125, 129, and 232 be modified. As a result, Protestant City, requests that Conclusions of Law 5, 8, 9, 11, 32, 37, 39, 42, 47, 48, 49, 50, and 51 be deleted since these Conclusions of Law can not stand if the Findings are deleted. Protestant City requests that the draft permit be denied

RESPECTFULLY SUBMITTED,

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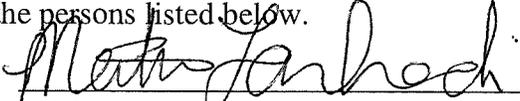
ATTORNEYS FOR CITY OF
AUSTIN, TEXAS

²⁹ WMI Closing Argument at pg. 67.

³⁰ APP 16 at pgs. 48-49.

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2009, a true and correct copy of the City of Austin's Responses to Exceptions to the Proposal for Decision was served via facsimile, electronic mail, hand-delivery or regular first-class mail to the persons listed below.


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August 31, 2009

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RE: SOAH Docket No. 582-08-2186; TCEQ Docket No. 2006-0612-MSW;
Application of Waste Management of Texas, Inc. for a Municipal Solid Waste
Permit Amendment; Permit No. MSW-249D

Dear Clerk:

Enclosed for filing is a scanned copy of the original of the City of Austin's Response to
Exceptions Filed by the Executive Director and WMI to the Proposal for Decision.

Thank you for your attention to this matter.

Sincerely,

Mona Light Being/Legal Secretary to
Meitra Farhadi
Assistant City Attorney
512-974-2310

Enclosure

cc: (Via hand delivery)
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(Via regular U.S. Mail and email)

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