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2009 AUG 31 PM 4:11

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

August 31, 2009

Via Hand Delivery

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

Re: SOAH Docket No. 582-08-2186
TCEQ Docket Number 2006-0612-MSW
Waste Management of Texas, Inc. Permit Amendment Application

Dear Ms. Castañuela:

Enclosed please find the original and seven copies of Travis County's Reply to Exceptions filed by the Executive Director and Applicant Waste Management of Texas, Inc., in the above-referenced matter pursuant to the July 30, 2009 notice in the above-referenced proceeding. All parties have been served with copies pursuant to the attached Certificate of Service. If you have any questions, please call our office at (512) 854-9513.

Sincerely,

Annalynn Cox
Assistant Travis County Attorney

cc: Service List

SOAH Docket No. 582-08-2186
TCEQ Docket Number 2006-0612-MSW

2009 AUG 31 PM 4:11

IN THE MATTER OF THE	§	CHIEF CLERKS OFFICE
APPLICATION OF WASTE	§	BEFORE THE STATE
MANAGEMENT OF TEXAS, INC.	§	OFFICE OF ADMINISTRATIVE
PROPOSED SOLID WASTE PERMIT	§	HEARINGS
AMENDMENT No. 249D	§	

**TRAVIS COUNTY'S REPLY TO EXCEPTIONS FILED BY
THE EXECUTIVE DIRECTOR AND
APPLICANT WASTE MANAGEMENT OF TEXAS, INC.**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW Travis County and files this, its Reply to Exceptions filed by the Executive Director and the Applicant, Waste Management of Texas, Inc., to the Administrative Law Judge's (ALJ's) Proposal for Decision issued in the above-referenced case on July 21, 2009.

Travis County agrees with the Exceptions to the ALJ's PFD filed by the City of Austin, the Office of Public Interest Counsel, Northeast Neighbors Coalition and T.J.F.A., and hereby adopts their arguments as its own.

The Executive Director

Travis County objects to the entirety of the Executive Director's (ED's) Exceptions, as the Executive Director has blatantly overstepped the boundaries of his role in this process as it is set forth in the Texas Administrative Code by filing Exceptions to the ALJ's Proposal for Decision.

The Texas Administrative Code clearly states that “the Executive Director’s participation as a party under subsection (b) or (c) of this section shall be for *the sole purpose of providing information to complete the administrative record.*”¹ As if this were not a clear enough directive, the Texas Administrative Code further dictates that “when the executive director is a party in a contested case hearing concerning a permitting matter before the commission or SOAH, the executive director may not assist an applicant in meeting its burden of proof unless the applicant is eligible to receive assistance...”²

Nowhere in the statutes or rules governing the role of the ED in such proceedings is there authority directing the ED to advocate on behalf of the applicant. By filing Exceptions, the ED is blatantly attempting to bolster WMTX’s application and to advocate that the Applicant meets its burden of proof. For example, on page 2 of his Exceptions, the ED even goes so far as to state that he “respectfully recommends the ALJ’s findings of fact relating to operating hours should be overturned because the great weight of evidence demonstrated...,”³ a statement that is neither respectful of the ALJ or this process nor is it keeping with the great weight of the evidence. The ED has absolutely no authority to review the weight of the evidence or make a determination, or even a recommendation, on the evidence presented during a SOAH proceeding. That is the ALJ’s role.

In his Exceptions, the ED states that he has “reviewed the evidence,”⁴ and then offers that his review of the evidence and precedent support overturning the ALJ’s

¹ 30 TEX. ADMIN. CODE §80.108 (d) (emphasis added).

² 30 TEX. ADMIN. CODE §80.108 (e).

³ Executive Director’s Exceptions, *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, filed August 20, 2009, at 2.

⁴ *Id* at 3.

decision. Again, the ED has far exceeded his authority in purporting to review the evidence and/or precedent in this proceeding. The ED is a party to this contested case hearing with a clearly and definitively circumscribed purpose: to complete the administrative record. At no time in this proceeding did the ALJ transfer his right to review the evidence and applicable laws to the ED, nor could he have done so. Nothing in the ED's Exceptions completes the administrative record, and therefore it should be stricken in its entirety.

Hours of Operation

Travis County finds it baffling that the ED, who stated in his Closing Arguments that he was not opposed to limiting the hours of operation or waste acceptance to address the Protestants' concerns with the current MSW-249C facility⁵, has suddenly reversed his position in the filing of Exceptions. When he filed his Closing Argument, the ED clearly believed that the evidence presented by the Protestants supported limiting the hours of operation. But in his Exceptions, the ED suddenly joins the Applicant in arguing that the weight of the evidence does not warrant a restriction on WMTX's hours of operation, with no explanation for the reversal in his position.

In their Exceptions, both WMTX and the ED argue that WMTX's operating hours are acceptable because the Applicant is not proposing to expand the Facility's currently permitted hours. This is irrelevant under the Agency's rules. Section 330.135 of the Texas Administrative Code simply states that the hours of waste acceptance are to be limited to between the hours of 7:00 a.m. and 7:00 p.m., unless otherwise approved in the

⁵ Executive Director's Closing Argument, , *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, filed May 8, 2009, at 57.

authorization for the facility.⁶ In this permitting process, the Applicant is seeking a new permit for its facility. The Applicant has the burden to demonstrate that a variance from the standard rule adopted by the TCEQ is appropriate for this permit – not to demonstrate that the hours provided for in a *previous* permit were appropriate.

The TCEQ adopted this rule in 2004. The preamble to this new rule stated that the new rules “*do not change the operating hours authorized in a facility’s current permit.*”⁷ In other words, as is common when new rules are adopted, the TCEQ made it clear that adoption of the rule did not amend currently existing permits and suddenly require facilities operating under those currently existing permits to change their operational hours. However, WMTX is applying to operate under a **new** permit, MSW-249D. This is not a change to the operational hours authorized for WMTX under its current permit, MSW-249C. No one has argued that for as long as WMTX operates under its current permit, it may not continue to operate during its currently authorized hours. MSW-249D is a new application with no established operational hours, and WMTX is required by Sec. 330.135 to demonstrate that hours other than the standard hours prescribed by the rule are appropriate for its new permit. WMTX’s reliance on the preamble language for the premise that it should not have to comply with the new rule in pursuing this new application is misplaced. MSW-249D is not its current permit.

WMTX also asserts in its Brief that it should not be subject to the new rule because the new rule’s “default operating hours were not intended to ‘normalize’ operating hours at

⁶ See 30 Tex. ADMIN. CODE §330.135.

⁷ See 29 TEX. REG. 11,059, 11,060 (emphasis added).

all MSW facilities statewide,”⁸ and that the agency should “continue to make decisions regarding the appropriateness of a facility’s operating hours on a ‘case-by-case basis’ considering the potential impact that the facility at issue may have on the surrounding community.”⁹ That is precisely what has been done here. The ALJ has taken into account specific testimony regarding impact on the increasingly urban community surrounding this specific landfill, and has determined that in this specific case, the standard hours are most appropriate.

Applicant implies that it is being treated improperly by pointing to other landfills that have been authorized to operate for more extended hours. However, there is no evidence in the record before this court to suggest that any of the landfills to which Applicant has compared itself are similarly situated with respect to surrounding land use and compatibility, much less with respect to evidence presented to justify their permitted hours.

The Agency’s intent in promulgating this new operational rule should not be discounted by the ALJ. WMTX’s current permit will, by all accounts, reach the end of its life sometime between 2013 and 2015. WMTX is applying for a new permit. In the event a new permit is issued, there is no better time than now to ensure that the intent of the rule is honored by restricting WMTX’s operational hours, and Travis County re-urges the ALJ to maintain his finding, and urges the Commission to approve the ALJ’s finding that WMTX’s proposed operational hours are inappropriate, and that there is no evidence in the

⁸ Applicant Waste Management’s Brief in Response to the Administrative Law Judge’s 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, filed August 20, 2009, at 11.

⁹ *Id.*, at 5.

record to support Applicant's request to vary from the default hours as set forth in the rules.

WMTX states that "weekday-only operating hours are not the 'norm' for Central Texas landfills," in its Brief.¹⁰ Travis County objects to all references to the operating hours of the other facilities in Central Texas, to the extent that those operating hours are not in evidence in this proceeding. Alternatively, Travis County responds to WMTX with its reminder to the Commission that the preamble to the rule specifically stated that "the rules do not change the operating hours authorized in a facility's current permit."¹¹ Thus, the Texas Disposal Systems (TDS) facility and the Browning-Ferris Industrial, Inc. (BFI) facility are continuing to operate under their current permits, which were authorized under the old rules. While BFI is currently involved in a contested case hearing to expand its facility, no final decision has been rendered by the Commission, and as such it is legally improper for WMTX to compare *possible* operating hours of BFI to this matter.

In its Exceptions, WMTX also argues that it should be allowed to operate for the same hours as under its previous permit because limiting its hours of operation would create nuisance conditions – increased noise and traffic for the residents who live around the WMTX ACRD Facility, or for residents who live around other WMTX facilities not the subject of this permit application. WMTX's experts prepared a traffic study on their behalf as part of this application, and declared that this expansion would not create

¹⁰ Applicant Waste Management's Brief in Response to the Administrative Law Judge's 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, filed August 20, 2009, at 10.

¹¹ See 29 TEX. REG. 11,059, 11,060.

nuisance traffic conditions.¹² Other experts for WMTX declared that the expansion of the Facility would not create nuisance noise levels. It appears that WMTX is admitting in its arguments that the operation of the ACRD facility will create nuisance conditions, or “negative consequences,” as termed by WMTX. If WMTX is unable to operate its Facility in such a way as it has promised in its application, Travis County can see no stronger reason for the denial of this application, and respectfully urges the ALJ and the Commission to deny the expansion application accordingly.

Groundwater Monitoring Network

WMTX persists in its false claims that it is exempt from monitoring the IWU and Phase I area because they are closed, pre-subtitle D units. Despite the Applicant’s frequent protestations that both the IWU and Phase I Unit were are closed units, there is no evidence in the record reflecting that these portions of the WMTX facility were closed according to the applicable regulatory requirements. WMTX is applying for a permit to expand its current facility, which includes multiple landfilled areas such as the IWU, Phase I, East Hill and West Hill – none of which have been officially closed pursuant to the TCEQ’s Rules and Regulations. As such, the rules require that a groundwater monitoring system be installed for its entire facility, not simply for the parts of the facility WMTX selectively chooses.

Both the ED and WMTX tout the proposed increase in monitoring wells from MSW-249C to MSW-249D as one of the reasons why WMTX should not be required to include the additional four monitoring wells covered by the Voluntary Agreement with the

¹² See generally, testimony of John Michael McInturff, P.E., PTOE.

City of Austin and recommended for inclusion by the ALJ. The fact remains, however, that the proposed increase of wells by the Applicant does little or nothing to detect releases from the IWU. PZ-31 has detected numerous constituents that MW-11 has not detected. WMTX also states that the ALJ made no finding in his PFD that MW-11, MW-30, and MW-44 are inadequate to detect a release of contaminants from the IWU. Travis County urges the ALJ to include a Finding of Fact that MW-11, MW-30 and MW-44 are inadequate to detect a release of contaminants from the IWU, and that additional monitoring is necessary.

WMTX claims in its Exceptions that its Voluntary Agreement with the City of Austin does not concern the pending application. This is patently false. Jay Winters, the architect of WMTX's groundwater monitoring system, stated in his testimony and in his Groundwater Characterization and Monitoring Report that he did not design his groundwater monitoring system to provide coverage for the IWU specifically because that section of the facility was already covered by the Voluntary Agreement with the City of Austin, and already had its own monitoring system.¹³ In relying on the Voluntary Agreement to monitor releases from the IWU, WMTX specifically made that agreement with the City of Austin a crucial piece of evidence which directly relates to its pending permit amendment application.

The Applicant also claims that PZ-31 should not be included for monitoring "on technical grounds." Travis County disagrees. While PZ-31 may not have originally been installed to monitor for groundwater quality data, through its agreement with the City of

¹³ See Exhibit TJFA-11, page 117, 120-21; *see also* Exhibit APP-202.

Austin, WMTX has tested this piezometer multiple times, and PZ-31 has consistently shown unacceptable levels of dangerous constituents.¹⁴ For the safety of the citizens of Travis County, PZ-31 must be included in WMTX's groundwater monitoring system.

WMTX argues that PZ-31 is inherently unreliable for monitoring because "it is likely installed through waste." PZ-31 is located in the drainage way between the IWU and the Phase I area. The ALJ has made a finding that there is no evidence that waste is buried in the drainage way where PZ-31 is located.¹⁵ WMTX can't have it both ways. Although Travis County disagrees with this finding, and believes the evidence presented at this hearing shows that waste is buried in the drainage way, the real problem with WMTX's argument is that the records presented at this hearing reflect numerous hits at PZ-31 of unacceptable levels of dangerous constituents, including 1,4-Dioxane.¹⁶ Whether these constituents are coming from the IWU or from waste through which PZ-31 is buried, the fact remains that any release of these constituents should be monitored.

Therefore, in the event the Commission decides to issue the permit to WMTX, Travis County requests the Commission follow the ALJ's recommendation to require the Applicant to move the point of compliance of its groundwater monitoring system to include the four wells covered by the Voluntary Agreement with the City of Austin.

Comparisons with BFI

Finally, Travis County objects to any arguments raised by the Applicant or the ED in their Exceptions which reference the BFI landfill, the TDS landfill, and any other

¹⁴ See, Exhibit COA-6.

¹⁵ Proposal for Decision, Finding of Fact #87, *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, filed July 21, 2009.

¹⁶ See, Exhibit COA-6.

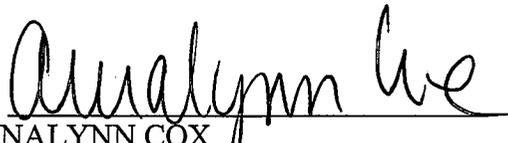
landfill, to the extent that this evidence is not part of the record in this proceeding. Specifically, there is no evidence in the record concerning the operating hours of any other landfill, and all arguments discussing those operating hours should be stricken from the record. Travis County further objects to any and all references to the proposed PFD in the BFI Sunset Farms matter, which is still pending before the Commission, and which is most certainly not in evidence in this matter.

Conclusion

Respectfully, Travis County reiterates its request that the Commission deny WMTX's application in its entirety as this facility is simply not compatible with surrounding land use. In the alternative, Travis County urges the Commission to follow the recommendations of the ALJ to limit the operating hours of the WMTX facility to 7:00 a.m.–7:00 p.m., Monday–Friday, in an attempt to mitigate the nuisance factors associated with this facility for the thousands of residents living in close proximity to the landfill. Travis County further requests any groundwater monitoring system for the facility include the monitoring wells covered by the Voluntary Agreement with the City of Austin.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2009, a true and correct copy of Travis County's Exceptions was served via facsimile, Electronic Delivery, First-Class Mail and/or Hand Delivery to the persons listed below.

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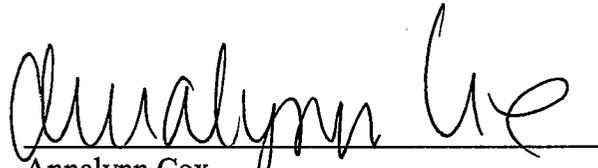
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