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THURSDAY, FEBRUARY 4, 2010

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

Re: Protestant TJFA, L.P.'s Reply to Applicant Waste Management of Texas, Inc.'s Brief in Response to the Administrative Law Judge's Supplemental Proposal for Decision and to the Executive Director's Exceptions to the Supplemental Proposal for Decision and Proposed Order, *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 Reply to Applicant Waste Management of Texas, Inc.'s Brief in Response to the Administrative Law Judge's Supplemental Proposal for Decision and to the Executive Director's Exceptions to the Supplemental Proposal for Decision and Proposed Order*. 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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2010 FEB -4 PM 2:13
CHIEF CLERKS OFFICE

ENCLOSURE

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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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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 REPLY TO APPLICANT WASTE MANAGEMENT OF TEXAS, INC.'S BRIEF IN RESPONSE TO THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL PROPOSAL FOR DECISION AND TO THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE SUPPLEMENTAL PROPOSAL FOR DECISION AND PROPOSED ORDER

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 this its *Reply to Applicant Waste Management of Texas, Inc.'s Brief in Response to the Administrative Law Judge's Supplemental Proposal for Decision and to the Executive Director's Exceptions to the Supplemental Proposal for Decision and Proposed Order* ("Reply") in the above-referenced proceeding:

I. INTRODUCTION

On January 25, 2010, Waste Management of Texas, Inc. ("WMTX") filed its *Brief in Response to the Administrative Law Judge's Supplemental Proposal for Decision*[1] ("WMTX Brief"), and the Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission") filed his *Exceptions to the Supplemental Proposal for Decision*

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1 Applicant Waste Management of Texas, Inc.'s Brief in Response to the Administrative Law Judge's Supplemental 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 (Jan. 25, 2010) [hereinafter WMTX Brief].

and Proposed Order[2] ("Executive Director's Exceptions"). In the WMTX Brief, WMTX endorses the recommendation of the Administrative Law Judge regarding the operating hours issue without addressing the merits of the case and disagrees with the Administrative Law Judge's recommendation regarding the allocation of transcript costs. WMTX also points out a number of typographical type errors in the Supplemental Proposed Order.[3] The Executive Director also endorses the Administrative Law Judge's recommendation regarding the operating hours issue.[4]

In this *Reply*, TJFA will briefly address the two issues of operating hours and allocation of transcript costs. In general, though, the overall message as set out in previous TJFA pleadings must be restated: WMTX has not demonstrated that its application meets all applicable statutory and regulatory requirements. The preponderance of the evidence in this proceeding clearly demonstrates that WMTX's application for Permit No. MSW-249D fails to comply with numerous applicable statutory and regulatory requirements. With regard to the issues specifically raised by the Supplemental Proposal for Decision[5] ("Supplemental PFD") and Supplemental Proposed Order,[6] WMTX again failed to meet its burden of proof, and as such, if the Administrative Law Judge recommends approval of the amendment application, any such

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2 Executive Director's Exceptions to the Supplemental Proposal for Decision and Proposed Order, *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 (Jan. 25, 2010) [hereinafter Executive Director's Exceptions].

3 *See* WMTX Brief, *supra* note 1.

4 *See* Executive Directors Exceptions, *supra* note 2.

5 Supplemental 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 (Jan. 5, 2010).

6 Supplemental 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 (Jan. 5, 2010).

recommendation should include an additional proposal to limit the waste acceptance hours and operating hours of the Austin Community Recycling and Disposal Facility, also known as the Austin Community Landfill ("ACL") to the following:

Waste Acceptance Hours	Monday through Friday	5:00 a.m. through 5:00 p.m.
	Saturday	6:00 a.m. through 1:00 p.m.
Operational Hours	Monday through Friday	4:00 a.m. through 7:00 p.m.
	Saturday	5:00 a.m. through 2:00 p.m.

II. REPLIES TO EXCEPTIONS

A. The Operating Hours Issue

TJFA has written at length in its *Closing Argument Regarding the Issue of Operating Hours*,[7] its *Reply Brief Regarding the Issue of Operating Hours*,[8] and its *Exceptions to the Supplemental Proposal for Decision and Supplemental Proposed Order*[9] regarding the operating hours issue. TJFA will not repeat its arguments in detail in this *Reply*, but instead incorporates those pleadings by reference into this *Reply*.

TJFA believes it is important to reply directly to issues raised by the Executive Director in his Exceptions. Specifically, the Executive Director had previously stated a standard for evaluating the operating hours issue: "The ED recognizes that, in contested case hearings, the

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7 Protestant TJFA, L.P.'s Closing Argument Regarding the Issue of Operating Hours, *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 (Dec. 15, 2009).

8 Protestant TJFA, L.P.'s Reply Brief Regarding the Issue of Operating Hours, *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 (Dec. 22, 2009).

9 Protestant TJFA, L.P.'s Exceptions to the Supplemental Proposal for Decision and Supplemental 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 (Jan. 25, 2010).

Commission may restrict the hours based on considerations, such as potential impacts on the community, weighed against an applicant's need for the proposed hours."[10] The Executive Director again restated this standard in his Exceptions.[11] In his most recent restatement of this standard, the Executive Director summarily identifies that he has reviewed the evidence and believes that it supports the acceptance of WMTX's proposed operating hours. He does not evaluate the evidence in his Exceptions, he does not explain how "applicable precedent and intent of the applicable rules" support such a conclusion, and he does not explain how his own standard of weighing applicant's need versus impact on the community supports the proposed expansive operating hours.

The recommendation of the Administrative Law Judge and the summary conclusion of the Executive Director are not supported by the great weight of the evidence in this proceeding. Without rehashing the numerous deficiencies in WMTX's case to justify the proposed operating hours, TJFA believes that the following facts are important to remember:

- Only 8.03% of the loads received at the ACL facility come in between 1:00 a.m. and 5:00 a.m., Monday through Friday.
- The number of loads of waste received and the tonnage of waste received at the ACL facility, when considered by time of day received, do not change dramatically when both good economic times and slow economic times are considered.

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10 Executive Director's Closing Argument in Remand Proceeding, *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, at 2 (Dec. 15, 2009) (emphasis added).

11 *See* Executive Director's Exceptions, *supra* note 2, at 2.

- The contracts relied upon by WMTX do not require waste receipt at the ACL facility in the early morning hours, and WMTX's historic receipt of waste at the ACL facility, as shown by WMTX's own evidence, demonstrates that early morning receipt has been unnecessary to support such contracts.
- When WMTX has received its highest average number of loads per day at the ACL facility—in May and June of 2009—the times of day during which such waste was received did not change. Early morning receipt was not necessary for the ACL facility to manage the additional waste.
- In May 2008, WMTX demonstrated that it could manage and dispose of significantly larger volumes of waste than even projected for WMTX's busiest year (*i.e.*, 2024), and it received over 92% of that waste between the hours of 5:00 a.m. and 5:00 p.m.
- Based on data from May 2008, WMTX demonstrated that it could handle over 1,000,000 tons of waste per year—well over the 661,800 tons projected for the year 2024—largely during the hours of 5:00 a.m. to 5:00 p.m.
- WMTX's records, as introduced into evidence, identify that WMTX has received no waste after 5:00 p.m. over the entirety of the time period presented in evidence by WMTX.[12]
- Only 8.39% of the loads received at the ACL facility come in between 2:00 a.m. and 6:00 a.m. on Saturdays.

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12 WMTX provided witness testimony that the ACL facility closes to the acceptance of waste at 5:00 p.m., but there was also testimony that "WMTX-internal" trucks occasionally arrive after 5:00 p.m. and are allowed to unload their waste. *See* Transcript of the Operating Hours Hearing [hereinafter "OH Tr."] at Vol. 13 at 2837 lns.13-15 (Clarifying Exam by the Honorable Roy Scudday of James Smith) (Dec. 2, 2009); *see also id.* at Vol. 13 at 2842 lns.5-19 (Cross Exam (by Adam Friedman) of James Smith (Dec. 2, 2009). Such trucks are clocked in as having arrived at 5:00 p.m. *See id.* at Vol. 13 at 2842 lns.5-19 (Cross Exam (by Adam Friedman) of James Smith) (Dec. 2, 2009).

- Only 7.52% of the loads received at the ACL facility come in between 1:00 p.m. and 3:00 p.m. on Saturdays.
- The ACL facility has not received waste on Sundays over the entirety of the time period presented in evidence by WMTX.
- Neighbors of the ACL facility are negatively impacted by the odors, dust, traffic, light, unsightliness, and noise from the ACL facility, all of which would be particularly disturbing during the evening and nighttime hours and on weekends when residents are at home. Such nuisance conditions will only increase if WMTX operates the ACL facility throughout the night.
- The waste disposal activities in the area of the lateral expansion will be closer to neighbors of the ACL facility, including Mark McAfee and the Barr Mansion, than the waste disposal activities at the currently permitted ACL facility.[13] As such, the waste disposal activities at the ACL facility's expansion area will be more visible from the Barr Mansion and thus will have a greater negative impact on Mr. McAfee's business.

While all businesses strive for the greatest flexibility possible, in a highly regulated business such as municipal solid waste disposal that desire for flexibility, and more importantly the applicant's need for the proposed hours, should be, and as noted by the Executive Director must be, weighed against potential impacts on the community. Here, WMTX simply has not shown a "need" for the proposed "24/6 plus" operating hours. The expansive proposed hours have not been used by WMTX at the ACL facility, and the evidentiary record fails to demonstrate that

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13 *See* Exh. TJFA 34, Fig. 1-3, Aerial Photograph, from APP-202, Austin Community & Recycling Disposal Facility, TCEQ Permit No. MSW-249D, Permit Amendment Application, Rev. 10 – May 2008, at Tech. Complete 112, with location of Barr Mansion as marked by Mark McAfee.

such expansive hours would ever by justified for the safe operation of the ACL facility for the benefit of WMTX, its customers, the neighbors, and the Austin community.

B. Allocation of Transcript Costs

Contrary to WMTX's claims in its *Closing Argument Regarding Operating Hours*, WMTX did not prove in the initial contested case hearing that operation of the ACL facility under existing operating hours would not negatively impact surrounding communities. In the original Proposal for Decision, as revised, the Administrative Law Judge correctly found that WMTX failed to meet its burden of proof to demonstrate why the expansive "24/6 plus" proposed operating hours were appropriate for the ACL facility. It was WMTX's failure to make that case that led to the Commission's referral of the operating hours issue back to the State Office of Administrative Hearings ("SOAH") to allow WMTX a second chance to meet its burden. As such, and as correctly found by the Administrative Law Judge, WMTX should be responsible for 100% of the transcript costs of the operating hours Hearing on the Merits.

III. CONCLUSION AND PRAYER

As previously addressed in TJFA's *Exceptions to the Supplemental Proposal for Decision and Supplemental Proposed Order*, the Proposed Findings of Fact and Proposed Conclusions of Law, as discussed in the Proposal for Decision and Supplemental PFD and as set out in the Revised Proposed Order and Supplemental 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 great weight of the evidentiary record. Information in the evidentiary record which addresses the issues underlying the proposed Findings of Fact and Conclusions of Law has been highlighted in the two sets of Exceptions filed

by TJFA. This is especially true in this particular proceeding specifically related to the issue of hours of operation of the ACL facility. The Administrative Law Judge should now have more than adequate bases to modify the Supplemental PFD and Supplemental Proposed Order accordingly and recommend the operating hours previously identified by TJFA. TJFA respectfully requests that the Administrative Law Judge do so.

If the Administrative Law Judge chooses not to make the revisions necessary to either recommend denial of proposed Permit No. MSW-249D or, in the alternative, modify the operating hours as identified above, TJFA respectfully requests that the Commission issue its own Order, fully supported by the great weight of the evidence, adopting Findings of Fact and Conclusions of Law denying proposed Permit No. MSW-249D, or in the alternative, adopting the operating hours identified above.

Respectfully submitted,

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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:

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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On this the 4th day of February, 2010.

ANGELA K. MOORMAN