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MONDAY, JANUARY 25, 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 Exceptions to the Supplemental Proposal for Decision and Supplemental 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 Exceptions to the Supplemental Proposal for Decision and Supplemental 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

ENCLOSURE

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

CHIEF CLERKS OFFICE

2010 JAN 25 PM 12: 35

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2010 JAN 25 PM 12:35

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

CHIEF CLERKS OFFICE

IN THE MATTER OF THE
APPLICATION OF WASTE
MANAGEMENT OF TEXAS, INC.
FOR A MUNICIPAL SOLID WASTE
PERMIT AMENDMENT
PERMIT NO. MSW-249D

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROTESTANT TJFA, L.P.'S

EXCEPTIONS TO THE SUPPLEMENTAL PROPOSAL FOR DECISION

AND SUPPLEMENTAL PROPOSED ORDER

JANUARY 25, 2010

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
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BEFORE THE STATE OFFICE

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ADMINISTRATIVE HEARINGS

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**PROTESTANT TJFA, L.P.'S EXCEPTIONS TO THE SUPPLEMENTAL
PROPOSAL FOR DECISION AND SUPPLEMENTAL 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 the following specific exceptions to the Supplemental Proposal for Decision¹ ("Supplemental PFD") and Supplemental Proposed Order² filed by the Administrative Law Judge in the above-referenced proceeding.

I. INTRODUCTION

As has previously been acknowledged in this matter, pursuant to the rules of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission"), in a contested case hearing involving a municipal solid waste ("MSW") landfill permit application, the burden of proof is squarely on the applicant.³ The applicant, here Waste Management of Texas, Inc. ("WMTX"), is required to demonstrate that its permit application meets or exceeds the applicable MSW rules and requirements of TCEQ and all applicable state statutory

¹ 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).

² 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).

³ See 30 TEX. ADMIN. CODE § 80.17(a).

requirements.⁴ WMTX is required to prove that the contemplated MSW landfill, if constructed and operated pursuant to the application, will be protective of human health and the environment. WMTX cannot selectively choose which state statutes and regulatory requirements it will meet, and WMTX cannot meet only those regulatory requirements for which compliance is feasible.

As TJFA has argued throughout this proceeding, 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 PFD and Supplemental Proposed Order, WMTX has again failed to meet its burden of proof.

One issue was remanded to the State Office of Administrative Hearings ("SOAH") for the taking of additional evidence: Whether the operational hours of the Austin Community Recycling and Disposal Facility, also known as the Austin Community Landfill ("ACL"), are appropriate. WMTX has the burden to demonstrate that the proposed expanded hours (*i.e.*, hours more expansive than the default hours defined in 30 TEX. ADMIN. CODE § 330.135(a)—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, also known as "24/6" plus the nine hours on Sunday ("24/6 plus")—are appropriate for the ACL facility if new Permit No. MSW-249D is issued. While WMTX presented new evidence during the Hearing on the Merits regarding the issue of operating hours, contrary to the findings outlined in the Supplemental PFD, WMTX presented no evidence that supports a finding that the "24/6 plus" proposed hours of operation are appropriate or justified for the ACL facility. In fact, just the opposite is true. WMTX's new evidence demonstrates how the "24/6 plus" proposed operating hours are not appropriate or necessary for the ACL facility.

⁴ *See id.*

An additional issue was raised by the Commission's Interim Order and the Supplemental Proposed Order. Through its Interim Order, the Commission instructed the Administrative Law Judge to modify specific substantive Findings of Fact and Conclusions of Law as set forth in his Revised Proposed Order⁵ relating to the addition of four ground water monitoring wells to the ground water monitoring system.⁶ In other words, the Commission directed the Administrative Law Judge to make substantive revisions to his Revised Proposed Order, in effect, revising certain substantive conclusions of the Administrative Law Judge's Proposal for Decision and Revised Proposed Order. Through the Supplemental Proposed Order, the Administrative Law Judge did just that. Neither the Commission's directive to the Administrative Law Judge nor the Administrative Law Judge's revisions to the Proposed Findings of Fact and Proposed Conclusions of Law are supported by applicable state law.

⁵ The Administrative Law Judge's original Proposed Order was issued on July 21, 2009. *See 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 (July 21, 2009). Following the filing of Exceptions and Replies to Exceptions by the parties to this proceeding, the Administrative Law Judge issued a revised Proposed Order ("Revised Proposed Order") and explanatory letter on September 8, 2009. *See Letter from The Honorable Roy G. Scudday, Administrative Law Judge, SOAH, to Les Trobman, General Counsel, TCEQ (Sept. 8, 2009)*, and attached revised Proposed Order [hereinafter Revised Proposed Order]. The Administrative Law Judge issued an additional explanatory letter on September 11, 2009, which included additional revisions to Findings of Fact Nos. 209 through 211. *See Letter from the Honorable Roy G. Scudday, Administrative Law Judge, SOAH, to Les Trobman, General Counsel, TCEQ (Sept. 11, 2009)*.

⁶ *An Interim Order Concerning the Administrative Law Judge's Proposal for Decision and Order Regarding the Application of Waste Management of Texas, Inc. for Permit No. MSW-249D*, TCEQ Docket No. 2006-0612-MSW, SOAH Docket No. 582-08-2186, at 2 (Oct. 20, 2009).

II. EXCEPTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. *Exceptions Related to the Hours of Operation.*

TJFA excepts to the following Proposed Findings of Fact and Proposed Conclusions of Law related to the Hours of Operation, as proposed by the Administrative Law Judge in the Supplemental Proposed Order:⁷

Finding of Fact No. 211. There is sufficient evidence to show that the Facility's current operational hours are appropriate to provide safe, efficient, and cost-effective waste disposal services to the community.

Conclusion of Law No. 5. WMTX submitted an administratively and technically complete permit amendment application, as required by TEX. HEALTH & SAFETY CODE ANN. §§ 361.066 and 361.068, that demonstrates that it will comply with all relevant aspects of the Application and design requirements as provided in 30 TEX. ADMIN. CODE ANN. §§ 330.71(a) and 330.5(d).

Conclusion of Law No. 7. The burden of proof was on the Applicant, in accordance with 30 TEX. ADMIN. CODE ANN. § 80.17(a). WMTX met its burden with respect to all referred issues.

Conclusion of Law No. 8. The evidence in the record is sufficient to meet the requirements of applicable law for issuance of the Draft Permit, including TEX. HEALTH & SAFETY CODE ANN. Chapter 361 and 30 TEX. ADMIN. CODE ANN. Chapter 330.

⁷ In this *Exceptions to the Supplemental PFD and Supplemental Proposed Order*, TJFA only is specifically excepting to those proposed Findings of Fact and Conclusions of Law related to the issues of hours of operation and the additional ground water monitoring wells. While other Findings of Fact and Conclusions of Law are not excepted to herein, TJFA continues to except to all Findings of Fact and Conclusions of Law previously addressed in TJFA's *Exceptions to the Proposal for Decision and Proposed Order*. 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 (Aug. 20, 2009). TJFA understands that the Findings of Fact and Conclusions of Law in the Supplemental Proposed Order have been renumbered when compared to the original Proposed Order and the Revised Proposed Order, but continues to except to all previously identified proposed Findings of Fact and Conclusions of Law as renumbered in the Supplemental Proposed Order. The complete list of proposed Findings of Fact and Conclusions of Law excepted to by TJFA, as currently numbered in the Supplemental Proposed Order is as follows: Findings of Fact Nos. 34, 35, 49-51, 59, 68, 73, 75-77, 80-82, 84-87, 93-96, 106, 108, 111, 112, 121-123, 126, 127, 131, 135, 137, 138, 140, 141, 145, 146, 148, 149, 155, 160-165, 167, 171, 172, 174, 175, 190-193, 195, 211, 213, 214, 219, 229, 232, 233, 235, 236, 246, 250, 252-257, and 260-264 (and former Findings of Fact Nos. 126, 262, 265, and 267-269, which have now been deleted), Conclusions of Law Nos. 2, 5-12, 15, 16, 19-28, 30-34, 37, 39, 40, 45-50, and 52, and Ordering Provisions Nos. 1 and 3.

Conclusion of Law No. 9. The expansion of the proposed Austin Community Recycling and Disposal Facility, if constructed and operated in accordance with the Solid Waste Disposal Act, 30 TEX. ADMIN. CODE ANN. Chapter 330, and the attached Draft Permit, will not adversely affect public health or welfare or the environment.

Conclusion of Law No. 11. The approval of the Application and issuance of Permit No. MSW-249D, will not violate the policies of the State of Texas, as set forth in § 361.002(a) of the Solid Waste Disposal Act, to safeguard the health, welfare, and physical property of the people of Texas, and to protect the environment by controlling the management of solid waste.

Conclusion of Law No. 23. Part IV of the Application, the SOP, meets the requirements of 30 TEX. ADMIN. CODE ANN. § 330.57(c)(4) and 330.127.

Conclusion of Law No. 24. Applicant has shown that it will comply with the operational prohibitions and requirements in 30 TEX. ADMIN. CODE ANN. §§ 330.5, 330.111 – 330.139.

Conclusion of Law No. 45. The operating hours proposed in the Application have been shown to be appropriate.

As previously identified, one issue was remanded to SOAH for the taking of additional evidence: Whether the operational hours of the ACL facility are appropriate. WMTX has the burden to demonstrate that the proposed hours 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, *i.e.*, the “24/6 plus” hours, are appropriate for the ACL facility if the new Permit No. MSW-249D is issued. While the Supplemental PFD relies heavily on testimony provided by WMTX’s witnesses during the December 2009 Hearing on the Merits, the pleadings previously filed by all protestants in this proceeding have debunked WMTX’s testimony, showing what it really was: self-serving testimony that simply served to bolster WMTX’s current business model. WMTX’s testimony failed to demonstrate that the proposed “24/6 plus” hours were appropriate and was not even supported by WMTX’s own documentary evidence.

The Supplemental PFD claims that WMTX provided evidence on the following factors:

- The current operating hours are appropriate to provide safe, efficient, and cost-effective waste disposal services to the community.

- Applicant is contractually obligated to service Downtown Austin and other customers in the early morning hours.
- Weekend operations are necessary to meet the community's waste disposal demands and safely accommodate the general public's access to the landfill.
- Historically, the Facility's operating hours have been determined by the Commission to be appropriate.
- The Commission has approved similar operating hours at other Travis County landfills.⁸

While WMTX made certain claims through the testimony of its witnesses, the preponderance of the evidence presented at the operational hours Hearing on the Merits—evidence that was largely presented by WMTX itself—failed to support any of these conclusions. Each erroneous conclusion will be addressed in turn.

1. The current operating hours are appropriate to provide safe, efficient, and cost-effective waste disposal services to the community.

The preponderance of the evidence in this proceeding did not show that the current operating hours are appropriate to provide, safe, efficient, and cost-effective waste disposal services to the community. Instead, witnesses for WMTX repeatedly testified that the purpose of the “24/6 plus” proposed operating hours was to ensure flexibility to accommodate its customer base and community needs. The preponderance of the evidence presented by WMTX clearly shows that the proposed operating hours are not appropriate, necessary, or even justified, to accommodate the current or historical customer base. A review of the entirety of the evidentiary record makes clear that WMTX is seeking the flexibility to operate the ACL facility whenever it chooses simply for its benefit as a business and to the detriment of the people living near the ACL facility. Such flexibility was not supported by WMTX's own operational records and cannot be deemed appropriate for the operation of a MSW landfill in a largely residential area.

In support of its contention that the “24/6 plus” proposed operating hours are necessary to meet existing and future customer and community needs “while maintaining safe, efficient, and

⁸ Supplemental PFD, *supra* note 1, at 4.

cost-effective waste collection and disposal operations,” WMTX relies on records from waste disposal activities (*i.e.*, number of loads of waste received and waste received by weight) and certain existing transportation contracts, as well as testimony regarding safety concerns associated with running waste disposal trucks during those hours when a larger population is expected to be active in, for example, the City of Austin’s Central Business District (“CBD”). While TJFA agrees that safety considerations are very important and that WMTX should clearly take such considerations into account when determining when to pickup waste in Austin’s CBD, neither WMTX’s waste load activity data nor the contracts it references demonstrate the appropriateness, or the necessity, of the “24/6 plus” proposed operating hours.

First, only a very limited amount of waste is received at the ACL facility in the early morning hours, *i.e.*, before 5:00 a.m. While the Supplemental PFD relies heavily on particular numbers offered specifically by WMTX’s witnesses, WMTX’s cherry-picked data points do not tell the whole story. In fact, the Fast Lane Report database relied upon by WMTX fails to demonstrate that the proposed “24/6 plus” operating hours are appropriate for the ACL facility.

When the weekday data, *i.e.*, data regarding waste loads received Monday through Friday, for the ACL facility are considered, it shows:

- Only 0.11% of the loads received at the ACL facility come in between 1:00 a.m. and 2:00 a.m., Monday through Friday.
- Only 0.61% of the loads received at the ACL facility come in between 1:00 a.m. and 3:00 a.m., Monday through Friday.
- Only 3.51% of the loads received at the ACL facility come in between 1:00 a.m. and 4:00 a.m., Monday through Friday.
- 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.

- Only 14.38% of the loads received at the ACL facility come in between 1:00 a.m. and 6:00 a.m. Monday through Friday.⁹

In other words, the data presented by and relied upon by WMTX demonstrate that only a very small percentage of the loads received at the ACL facility are received in the early morning (or the “middle-of-the-night”) hours. Specifically, approximately 8% of the loads received at the ACL facility come in between 1:00 a.m. and 5:00 a.m., Monday through Friday. If the ACL facility were opened at 5:00 a.m. for waste disposal, only around 8% of the waste loads would have to be received later than they are currently received. No evidence was presented by WMTX to dispute this conclusion.¹⁰

The Supplemental PFD also concludes that “24/6 plus” hours are appropriate because the ACL facility will need to be available more for waste disposal as Austin grows and the economy improves. WMTX presented evidence, *i.e.*, portions of the Fast Lane Report database, that its own witnesses testified was meant to illustrate operation of the ACL facility in better economic

⁹ See Exh. APP-1201, Fast Lane Report, Waste Loads Accepted for Disposal at ACL Facility, Aug. 1, 2007 – Oct. 17, 2009.

¹⁰ The same database can also be used to define the appropriate time to close the ACL facility to waste acceptance Monday through Friday. Overall (*i.e.*, 2007 through 2009), no loads were received after 5:00 p.m., and only 0.27% of the loads were received between 4:00 p.m. and 5:00 p.m. See *id.* TJFA recognizes that 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 Ins.13-15 (Clarifying Exam by the Honorable Roy Scudday of James Smith) (Dec. 2, 2009); see also *id.* at Vol. 13 at 2842 Ins.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 Ins.5-19 (Cross Exam (by Adam Friedman) of James Smith) (Dec. 2, 2009). Because such a miniscule amount of waste is received at the ACL facility even between the hours of 4:00 p.m. and 5:00 p.m., TJFA believes that waste disposal activities at the ACL facility should end at 5:00 p.m. The data presented by WMTX does not justify the ACL facility remaining open later in the evening for waste disposal activities. As such, the appropriate hour to close the ACL facility to the acceptance of waste loads is 5:00 p.m., Monday through Friday.

times.¹¹ As shown in TJFA’s previous pleadings, when the data presented in Exhibit APP-1201 are broken down to analyze the percentage of loads received at the ACL facility per hour of waste receipt by year, the percentage of loads received during each hour of waste acceptance does not change dramatically. When only the early morning hours are considered for each year, the percentage of loads received from 12:00 a.m. through 6:00 a.m. is consistent in 2007, 2008, 2009, and over the entire time period, as shown in the tables below.¹²

2007		2008		2009		2007-2009	
Period of Time	Percentage of Loads						
12:00 a.m. – 1:00 a.m.	0.00%	12:00 a.m. – 1:00 a.m.	0.00%	12:00 a.m. – 1:00 a.m.	0.01%	12:00 a.m. – 1:00 a.m.	0.00%
12:00 a.m. – 2:00 a.m.	0.00%	12:00 a.m. – 2:00 a.m.	0.12%	12:00 a.m. – 2:00 a.m.	0.16%	12:00 a.m. – 2:00 a.m.	0.11%
12:00 a.m. – 3:00 a.m.	0.16%	12:00 a.m. – 3:00 a.m.	0.69%	12:00 a.m. – 3:00 a.m.	0.76%	12:00 a.m. – 3:00 a.m.	0.61%
12:00 a.m. – 4:00 a.m.	2.87%	12:00 a.m. – 4:00 a.m.	4.18%	12:00 a.m. – 4:00 a.m.	3.01%	12:00 a.m. – 4:00 a.m.	3.51%
12:00 a.m. – 5:00 a.m.	6.67%	12:00 a.m. – 5:00 a.m.	9.6%	12:00 a.m. – 5:00 a.m.	6.80%	12:00 a.m. – 5:00 a.m.	8.03%
12:00 a.m. – 6:00 a.m.	12.12%	12:00 a.m. – 6:00 a.m.	15.5%	12:00 a.m. – 6:00 a.m.	14.23%	12:00 a.m. – 6:00 a.m.	14.38%

Thus, a consideration of the early morning loads per year provides no further justification for waste acceptance hours prior to 5:00 a.m. and does not support that the ACL facility will need to have longer operating hours as the economy improves.

It should also be noted that WMTX’s highest average number of loads per day occurred in May and June of 2009 – 405.38 loads per day and 400.86 loads per day, respectively.¹³

¹¹ James Smith testified that the data presented by WMTX went back to dates in 2007 in order to provide an example of the number of loads received when the Austin economy was doing well. *See id.* at 2838 Ins.16-23 (Cross Exam (by Adam Friedman) of James Smith) (Dec. 2, 2009). With regard to why data from 2007 were included in Exhibit APP-1201, Mr. Smith testified: “Well, I mean, one of the good representative sample of, I guess, the good times and the bad times. In August of ’07, the Austin area was still doing fairly well. . . . Just wanted to catch that window where we wouldn’t be looking at any short-term or – basically, that’s what it is. *Id.*”

¹² See Exh. APP-1201, Fast Lane Report, Waste Loads, *supra* note 9.

¹³ *See id.*

During that same time period, as with the other longer time periods previously discussed, only 9.68% of the waste loads were received prior to 5:00 a.m., and only 15.25% of the waste loads were received prior to 6:00 a.m.¹⁴

The same is true, with regard to the time periods during which waste was received at the ACL facility, for the days when the most waste, by tonnage, was received at the ACL facility. On May 8, 9, and 12, 2008, the ACL facility received the largest amount of waste—by tonnage—for disposal of any of the days identified in Exhibit APP-1202, with 3,692.61 tons, 4,239.57 tons, and 4,265.97 tons, respectively.¹⁵ When the time periods during which this waste was received at the ACL facility are analyzed, the trends identified above hold true: 0.28% of the waste was received between 1:00 a.m. and 2:00 a.m.; 0.76% of the waste was received between 1:00 a.m. and 3:00 a.m.; 3.5% of the waste was received between 1:00 a.m. and 4:00 a.m.; 7.65% of the waste was received between 1:00 a.m. and 5:00 a.m.; and 11.56% of the waste was received between 1:00 a.m. and 6:00 a.m.¹⁶ Again, only a small percentage of the waste—less than 8%—was received prior to 5:00 a.m., even when these extremely large volumes of waste were received at the ACL facility.

The waste received over that time period is also instructive with regard to the hours during which the ACL facility will need to operate if increasingly larger volumes of waste are received at the ACL facility. If the average for those three days is extrapolated across an entire year (including average, lesser volumes for Saturdays and no waste received on Sundays), the total volume of waste accepted for disposal in that hypothetical year would be over 1.1 million tons. Pursuant to the information contained in the application, WMTX has projected that the

¹⁴ *See id.*

¹⁵ Exh. APP-1202, Fast Lane Report, Tonnage of Waste Accepted for Disposal at ACL Facility, Aug. 1, 2007 – Oct. 17, 2009, at 9.

¹⁶ *See id.*

largest volume of waste received at the ACL facility in a particular year will occur in 2024 and will be 661,800 tons.¹⁷ Thus, the ACL facility is never projected to receive more than one million tons of waste annually. But yet, in one weekend in May 2008, the ACL facility was able to accept for disposal a daily amount of waste that would result in the receipt and disposal of over one millions tons of waste in one year. Most importantly, WMTX accepted 92.35% of that waste between the hours of 5:00 a.m. and 5:00 p.m. In other words, an improving economy, growth in Austin, and even the potential closure of a competitor landfill cannot provide an explanation for a finding that the “24/6 plus” hours of operation are appropriate when the ACL facility can clearly handle its future rates of disposal during the hours of 5:00 a.m. and 5:00 p.m. WMTX’s own evidence supports this conclusion.

While growth in the Austin area is likely to occur over time, no evidence was presented estimating the volume of waste that might be associated with that future growth, nor was evidence presented identifying that such potential additional volumes would be received at different times of day than when waste is currently received at the ACL facility. Based on the evidence presented by WMTX regarding past operational practices at the ACL facility, and based on the data presented in the Fast Lane Report, as discussed above, there is no reason to infer that even an increase in waste disposal at the ACL facility would result in a need for increased waste acceptance hours. As discussed above, a comparison of waste acceptance during strong economic times in Austin to current waste acceptance did not indicate any difference in the times of day during which waste was actually received for disposal. Over ninety percent of the waste loads received at the ACL facility on weekdays were received between the hours of 5:00 a.m. and 5:00 p.m. regardless of the strength of the economy and the volume of waste received. Good economic times, and thus greater volumes of waste, did not result in greater

¹⁷ Exh. APP-202, Austin Community & Recycling Disposal Facility, TCEQ Permit No. MSW-249D, Permit Amendment Application, Rev. 10 – May 2008, at Tech. Complete 962 (at Vol. II, Att. 3 at app. A).

rates of waste disposal in the “middle-of-the-night” hours; thus, there is no basis to determine that the “24/6 plus” proposed operating hours are necessary for the future operation of the ACL facility.

Similarly, there is no evidence to support a determination that the closure of the BFI Sunset Farms Landfill in 2015 will result in the need for increased waste acceptance hours at the ACL facility. No evidence was presented to show that the waste currently disposed at the Sunset Farms Landfill would be disposed in the ACL facility in the future, and even if it was, how that additional disposal would result in a need for increased waste acceptance hours at the ACL facility

The great preponderance of the evidence supports only one conclusion: The appropriate waste acceptance hours at the ACL facility, Monday through Friday, should be 5:00 a.m. through 5:00 p.m. If the ACL facility opens for waste acceptance at 5:00 a.m., WMTX’s concerns regarding safety considerations in the downtown and campus areas will be addressed. Those waste collection activities could still be accomplished before times of heavier traffic when people are arriving at work, walking to class, or patronizing restaurants or other businesses.

With regard to operational hours, *i.e.*, those hours for the transportation of materials and heavy equipment operation, a WMTX witness testified that operations normally begin one-half hour to one hour before waste acceptance to prepare the ACL facility for the incoming waste.¹⁸ Similarly, a WMTX witness testified that daily closure operations normally occur from one to two hours after the last acceptance of waste.¹⁹ As such, and based on waste acceptance hours of 5:00 a.m. to 5:00 p.m., TJFA believes that operational hours of 4:00 a.m. to 7:00 p.m., Monday through Friday, have been shown to be appropriate.

¹⁸ See OH Tr. at Vol. 13 at 2829 lns.4-6 (Cross Exam (by Meitra Farhadi) of James Smith) (Dec. 2, 2009).

¹⁹ See OH Tr. at Vol. 13 at 2829 lns.9-10 (Cross Exam (by Meitra Farhadi) of James Smith) (Dec. 2, 2009).

The preponderance of the evidence in this proceeding simply does not demonstrate that the “24/6 plus” proposed operating hours are appropriate, or even necessary, to meet historical, existing, and future customer and community needs while maintaining safe, efficient, and cost-effective waste collection and disposal operations.

2. *Applicant is contractually obligated to service Downtown Austin and other customers in the early morning hours.*

It is accurate to state that WMTX, or WMTX’s hauling company, is contractually obligated to service the CBD and other customers in the early morning hours. For example, Exhibit APP-0112, the City of Austin’s Purchase Specifications for Refuse Collection Services for the Downtown Area, identifies that the normal refuse collection service hours are 2:00 a.m. to 6:00 a.m.²⁰ However, the data provided by WMTX regarding when the waste is actually received at the ACL facility for disposal, as discussed in detail above, do not support a finding that the ACL facility actually needs to be open prior to 5:00 a.m. to accept such waste pursuant to WMTX’s contractual obligations.

WMTX also relied on the contract with the Round Rock Independent School District (“RRISD”) as another example of why the “24/6 plus” proposed operating hours were appropriate and necessary, but that contract provides even less support for WMTX’s claim. Exhibit APP-0113, the Round Rock Independent School District Facility Maintenance Service – Waste Management Services Request for Proposal Number PE10-009, identifies: “Pick-up at school facilities shall not be made between 7:30 a.m. and 4:30 p.m. Other facilities may be picked up at any time, including normal business hours.”²¹ It continues: “The Contractor shall be cognizant of the time of day and the location of the container related to nearby residents and

²⁰ See APP-0112, City of Austin’s Purchase Specifications for Refuse Collection Services, at 3.

²¹ APP-0113, Round Rock Independent School District Facility Maintenance Service – Waste Management Services Request for Proposal Number PE10-009, at 7 (page 3 of 5).

the noise levels produced by the pick-up, and attempt to not be disruptive.”²² Pursuant to this contract, WMTX can pick up waste from the school sites until 7:30 a.m. and must be cognizant of the noise levels produced by pick-up as to not disrupt nearby residents. In that many schools are located in close proximity to residences, it seems unlikely that WMTX’s waste hauler would be picking up waste in those areas in the early morning (*i.e.*, middle-of-the-night”) hours, and thus, the related waste disposal would not be necessary at the ACL facility in the early morning hours.

In addition, WMTX witnesses also testified that WMTX, or WMTX’s waste hauler, had other contracts requiring early morning service, but they could not, with any specificity, identify the number of such contracts or the early morning time periods during which those contracts required waste pickup. For example, Mr. Marcel Darby, testifying for WMTX, identified that Longhorn Hauling routinely directs its trucks to pickup waste before 6:00 a.m., but could not give any estimate of how many customers require this early morning service, instead stating that it may be a choice that is made by Longhorn Hauling for convenience.²³ Mr. Darby was also unaware as to the earliest pickup time requested by any of Longhorn Hauling’s customers. Even if multiple contracts require pickup before 6:00 a.m., WMTX’s database regarding loads of waste received at the ACL facility, as addressed in detail above, clearly shows that only a very small percentage of those pickups arrive at the ACL facility for disposal prior to 5:00 a.m.

While there are contracts in place, there is no evidence that WMTX must operate in the middle-of-the-night—or that it would even be allowed to pick up waste pursuant to certain of these contracts during such hours—to fulfill its contractual requirements. Instead, the

²² *Id.*

²³ See OH Tr. at Vol. 13 at 2789 ln.20 – 2790 ln.12 (Cross Exam (by Annalynn Cox) of Marcel Darby) (Dec. 2, 2009).

preponderance of the evidence shows that WMTX has not operated the ACL facility in the middle-of-the-night but apparently has met the requirements of its existing contracts.

3. *Weekend operations are necessary to meet the community's waste disposal demands and safely accommodate the general public's access to the landfill.*

TJFA agrees that weekend operations are necessary to meet the community's waste disposal demands and to accommodate the general public's access to the ACL facility, but what are basically unlimited weekend hours on both Saturday and Sunday are not necessary and have not been demonstrated as appropriate for the ACL facility.

As previously addressed, the data contained in Exhibit APP-1201, when analyzed to consider only Saturdays from August 4, 2007, through October 17, 2009, demonstrate:

- Only 0.02% of the loads received at the ACL facility come in between 2:00 a.m. and 3:00 a.m. on Saturdays.
- Only 0.39% of the loads received at the ACL facility come in between 2:00 a.m. and 4:00 a.m. on Saturdays.
- Only 2.67% of the loads received at the ACL facility come in between 2:00 a.m. and 5:00 a.m. on Saturdays.
- 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.
- And, only 18.9% of the loads received at the ACL facility come in between 2:00 and 7:00 a.m. on Saturdays.²⁴

In other words, the evidence demonstrates that only a very small percentage of the loads received at the ACL facility are received in the early morning (or the "middle-of-the-night") hours. The data show that opening the ACL facility to waste disposal at 6:00 a.m. on Saturdays would

²⁴ See Exh. APP-1201, Fast Lane Report, Waste Loads, *supra* note 9.

properly and appropriately accommodate WMTX's customer base. If the ACL facility were opened at 6:00 a.m. on Saturdays for waste disposal, only around 8% of the waste loads would have to be received for disposal later than they are currently received.

The same database can also be used to define the appropriate time to close the ACL facility to waste acceptance on Saturdays. An analysis of the overall database for Saturday acceptance of waste loads shows:

- Only 0.29% of the loads received at the ACL facility come in between 2:00 p.m. and 3:00 p.m. on Saturdays.
- 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.
- Only 16.08% of the loads received at the ACL facility come in between 12:00 p.m. and 3:00 p.m. on Saturdays.²⁵

As such, the appropriate hour to close the ACL facility to the acceptance of waste loads is 1:00 p.m. on Saturdays. Closing at 1:00 p.m. on Saturdays would properly and appropriately accommodate WMTX's customer base and the community. If the ACL facility were closed at 1:00 p.m. on Saturdays for waste disposal, less than 8% of the waste loads received on Saturday afternoons would have to be received at a different time than currently received.

With regard to operational hours, *i.e.*, those hours for the transportation of materials and heavy equipment operation, based on the evidence-supported waste acceptance hours of 6:00 a.m. to 1:00 p.m., TJFA believes that operational hours of 5:00 a.m. to 2:00 p.m. on Saturdays have been shown to be appropriate.²⁶

²⁵ *See id.*

²⁶ Significantly less waste is received on Saturdays at the ACL facility. Based on WMTX's witness testimony that one to two hours is spent on an average day to complete closure operations for that day, it seems reasonable that only one hour would be needed on light waste acceptance days like Saturdays. This would also better serve the residents living around the ACL facility who are more likely to be home on Saturdays than weekdays.

There is no evidence that Sunday hours of operation are appropriate. Instead, the proposed Sunday hours simply appear to be another example of WMTX seeking to obtain the greatest level of flexibility possible to the detriment of the neighbors of the ACL facility. The only evidence presented by WMTX regarding acceptance of waste—Exhibits APP-1201 and APP-1202—clearly shows that WMTX has never accepted waste on Sundays during the entire time period represented.²⁷ WMTX’s witnesses testified that Sunday hours were only used to deal with such things as emergencies, natural catastrophes, or special event-type customer or community needs.²⁸

While the flexibility to deal with these types of events is important, TCEQ rules already build in that flexibility. Specifically, 30 TEX. ADMIN. CODE § 330.135(c) provides: “The commission’s regional offices may allow additional temporary waste acceptance or operating hours to address disasters, other emergency situations, or other unforeseen circumstances that could result in the disruption of waste management services in the area.”²⁹ Similarly, 30 TEX. ADMIN. CODE § 330.135(b) provides: “In addition to the requirements of subsection (a) of this section, the permit may include alternative operating hours of up to five days in a calendar-year period to accommodate special occasions, special purpose events, holidays, or other special occurrences.”³⁰

No evidence was presented to justify the appropriateness or necessity of Sunday permitted waste acceptance or operational hours. The ACL facility has not received waste on Sundays in the more than two years relied upon by WMTX as evidence of the past operational history of the ACL facility. No contracts between WMTX and its customers were presented that

²⁷ See Exh. APP-1201, Fast Lane Report, Waste Loads, *supra* note 9; see also Exh. APP-1202, Fast Lane Report, Tonnage Received, *supra* note 15.

²⁸ See OH Tr. at Vol. 13 at 2660 lns.14-25 (Cross Exam (by Erich Birch) of Donald J. Smith) (Dec. 2, 2009).

²⁹ 30 TEX. ADMIN. CODE § 330.135(c).

³⁰ *Id.* § 330.135(b).

required pick up of waste resulting in Sunday disposal. Instead, WMTX is seeking an unreasonable level of flexibility in order to potentially alter its business model in the future to the detriment of its neighbors. The provisions of 30 Tex. Admin. Code § 330.135(b) and (c) will allow WMTX to deal with the emergency-type of situations and community events that its proposed Sunday hours are intended to address. As such, no Sunday hours should be authorized in a permit for the ACL facility.

4. *Historically, the Facility's operating hours have been determined by the Commission to be appropriate.*

As previously addressed by TJFA, the current operating hours of the ACL facility have been approved by the TCEQ and its predecessor agencies, but those prior approvals provide very little support regarding the appropriateness of such operating hours for the ACL facility today and in the future under new Permit No. MSW-249D.

During its direct case, WMTX pointed to two historical agency letters through which the current operating hours were approved as a justification for the currently proposed operating hours. These two letters identified the Texas Department of Health's ("TDH") (a predecessor agency of TCEQ) concern regarding WMTX's Sunday operations.³¹ Contrary to WMTX's claims that these letters are evidence regarding the appropriateness of the "24/6 plus" proposed operating hours, there is no evidence presented in either letter regarding the type of review performed by the TDH in approving the proposed hours or the standard applied to such approval. In other words, while the hours of operation were approved, there is no evidence of how, or even whether, the "appropriateness" of the hours was determined, or whether such hours are would continue to be appropriate in the face of today's changed conditions.

³¹ See Exh. APP-0105, Letter from Hans J. Mueller, Acting Chief, Div. of Solid Waste Mgmt., Texas Dep't of Health, to Kevin D. Yard, P.E., Regional Engineering Manager, Waste Mgmt. of N. Amer., Inc. (Mar. 14, 1989) [hereinafter 1989 TDH Letter]. The 1989 TDH Letter stated: "We are particularly concerned about the operation on Sunday and will be giving particular attention to the public reaction to this activity." *Id.*

WMTX also relied on TCEQ's 2007 approval of the operating hours identified in the current ACL facility Site Operating Plan ("SOP").³² The 2007 SOP did not propose any changes to operating hours from those approved in 1992 by TDH. That there was no change is of particular importance because it appears there was no substantive review of the operating hours identified in the 2007 SOP precisely because no change was proposed.

Evidence presented in the hearing on operating hours supports this interpretation of the 2007 SOP approval. Public comments regarding the operating hours proposed by WMTX in the 2007 SOP identified the concerns of a group of citizens living near the ACL facility with the "24/6 plus" operating hours.³³ The NorthEast Action Group wrote: "Waste Management proposes to continue operating NONSTOP from Sunday 9:00 PM to Saturday 7:00 PM. We are totally opposed to this schedule. Residents have consistently requested that this should not be a 24/7 operation."³⁴ TCEQ's response simply stated: "The proposed SOP states the same hours of operation as the current SOP for the facility. The applicant did not indicate that they shut down operations in the evening."³⁵ TCEQ provided no explanation regarding its review of the operating hours, seemingly accepting the proposed hours without question *because no change to operating hours had been proposed by WMTX.*

As previously addressed by TJFA, a review of the evidence presented in this proceeding by the Executive Director fails to identify that any substantive review was conducted by TCEQ

³² See Exh. APP-0107, Letter from Richard C. Carmichael, Ph.D., P.E., Manager, Municipal Solid Waste Permits Section, TCEQ, to Timothy J. Champagne, P.E., Market Area Environmental Protection Mgr., Waste Mgmt. of Texas, Inc. (Apr. 2, 2007), and attached Site Operating Plan at 20 (dated Rev. 3 Aug. 2006).

³³ Exh. TJFA 32, Letter from B. Trek English, NorthEast Action Group, to Mr. Glenn Shankle, Executive Director, TCEQ (Nov. 20, 2006), at ED 0006976.

³⁴ *Id.* at 3 (ED 0006978).

³⁵ Exh. NNC 5, Letter from Jeff Davis, P.G., Team Leader, Municipal Solid Waste Permits Section, TCEQ, to B. Trek English, NorthEast Action Group at 3 (Apr. 2, 2007).

of the operating hours proposed in the application.³⁶ Based particularly on the testimony of the Executive Director's witness, Mr. Matthew Udenenwu, along with the *Executive Director's Response to Comments*, it seems clear that all that was expected of WMTX to meet the requirements of 30 TEX. ADMIN. CODE § 330.135 was that WMTX identify the waste acceptance and operating hours in the SOP and that WMTX make clear it did not propose to change the hours of operation.

Significantly, the Executive Director, in his *Closing Argument in Remand Proceeding*, restated his standard for evaluating the operational hours' issue. The Executive Director stated: "The ED recognizes that, in contested case hearings, the Commission may restrict the hours based on considerations, such as potential impacts on the community, weighed against an

³⁶ The *Executive Director's Response to Comments* included the following: "The facility currently operates from 9:00 p.m. Sunday through 7:00 p.m. Saturday and, if necessary, from 7 a.m. to 4 p.m. on Sunday. The Application proposes to maintain these hours of operation. The Executive Director is not aware of any information to justify restricting the proposed operating hours. . . ." Exh. ED3, Executive Director's Response to Comments, *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, at 35-36 (June 13, 2009). Similarly, in his prefiled testimony in this proceeding, the Executive Director's witness, Mr. Matthew Udenenwu, testified as follows:

Q. Does the WMTX Application include provisions for operating hours that meet the MSW management rules in 30 TAC §330.135?

A. Yes. WMTX detailed the operating hours for the Austin Community Recycling and Disposal Facility in Section 4.6 (Operating Hours) of the SOP. Mr. Charles G. Dominguez, P.E., Texas Licensed Professional Engineer No. 83247, sealed the SOP.

The rule regarding operating hours, in 30 TAC §330.135(a), states that the waste acceptance hours and operating hours must be specified. The rule indicates that the hours specified may be the hours stated in the rule, or any other times proposed and subsequently approved in an authorization.

The Austin Community Recycling and Disposal Facility as currently permitted operates from 9:00 p.m. Sunday through 7:00 p.m. Saturday and, if necessary, from 7 a.m. to 4 p.m. on Sunday. The Applicant proposes to maintain these hours of operation.

Exh. ED1, The Executive Director's Direct Written Testimony of Matthew Udenenwu, at 53 Ins.27-43.

applicant's need for the proposed hours."³⁷ It is clear based on the totality of the evidentiary record that WMTX cannot demonstrate a "need" for the proposed hours. As addressed in detail above, WMTX presented substantial amounts of evidence regarding its business practices and the waste loads that are received at the ACL facility (by day and hour), but none of that evidence demonstrated that the proposed hours were appropriate. Instead, the great weight of the evidence demonstrated that WMTX could fully meet the needs of its customer base and the community with hours very similar to the default waste acceptance hours for Monday through Friday, with an allowance for additional waste acceptance hours on Saturday. Thus, when the Executive Director's standard of "applicant's need" weighed against potential impacts on the community is utilized, the proposed operating hours clearly are not appropriate.

For all of the above reasons, the preponderance of the evidence does not support the conclusion that the past approvals of the proposed operational hours are evidence of the current appropriateness of such hours.

5. *The Commission has approved similar operating hours at other Travis County landfills.*

The Commission's approval of particular operating hours for the BFI Sunset Farms Landfill or for the Texas Disposal Systems Landfill ("TDS Landfill") is also not instructive in determining the appropriateness of the proposed "24/6 plus" operating hours for the ACL facility. While operating hours for the BFI Sunset Farms Landfill were recently approved, such approval was made knowing that the Sunset Farms Landfill must close in 2015. Since it is required to close in 2015, the impact of the Sunset Farms Landfill on the neighbors is limited and clearly defined. On the other hand, while operating hours other than the TCEQ-default waste

³⁷ 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).

acceptance hours have been approved for the TDS Landfill, as previously identified by NNC, the TDS Landfill is not located in an urban area as is the ACL facility.

The great weight of the evidence does not support the conclusion that the “24/6 plus” hours of operation are appropriate for the ACL facility. While such hours may be helpful to WMTX because they further the current business model and provide the greatest level of flexibility available, they have not been shown to be appropriate for the ACL facility based on the current customer base, future growth, and safety concerns, or for the community most directly affected by the ACL facility. TJFA respectfully requests that the Administrative Law Judge revise the Supplemental PFD and Supplemental Proposed Order to recommend the following hours for the ACL facility:

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.

TJFA’s Proposed Modified Findings of Fact and Conclusions of Law:

Finding of Fact No. 211. There is insufficient evidence to show that the Facility’s current operational hours are appropriate to provide safe, efficient, and cost-effective waste disposal services to the community.

Finding of Fact No. 211A. Only 0.11% of the loads received at the ACL facility come in between 1:00 a.m. and 2:00 a.m., Monday through Friday. Only 0.61% of the loads received at the ACL facility come in between 1:00 a.m. and 3:00 a.m., Monday through Friday. Only 3.51% of the loads received at the ACL facility come in between 1:00 a.m. and 4:00 a.m., Monday through Friday. 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. Only 14.38% of the loads received at the ACL facility come in between 1:00 a.m. and 6:00 a.m. Monday through Friday.

Finding of Fact No. 211B. Applicant’s highest average number of loads received per day at the ACL facility occurred in May and June of 2009. During those two months, only 9.68% of the waste loads were received prior to 5:00 a.m. and only

15.25% of the waste loads were received prior to 6:00 a.m., Monday through Friday—which is very similar to the percentages of waste loads received during those timeframes across the entire time frame in the evidentiary record.

Finding of Fact No. 211C. Overall (i.e., 2007 through 2009), no loads were received after 5:00 p.m., and only 0.27% of the loads were received between 4:00 p.m. and 5:00 p.m., Monday through Friday.

Finding of Fact No. 211D. Only 0.02% of the loads received at the ACL facility come in between 2:00 a.m. and 3:00 a.m. on Saturdays. Only 0.39% of the loads received at the ACL facility come in between 2:00 a.m. and 4:00 a.m. on Saturdays. Only 2.67% of the loads received at the ACL facility come in between 2:00 a.m. and 5:00 a.m. on Saturdays. 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. And, only 18.9% of the loads received at the ACL facility come in between 2:00 and 7:00 a.m. on Saturdays.

Finding of Fact No. 211E. Overall, only 0.29% of the loads received at the ACL facility come in between 2:00 p.m. and 3:00 p.m. on Saturdays. 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. Only 16.08% of the loads received at the ACL facility come in between 12:00 p.m. and 3:00 p.m. on Saturdays.

Finding of Fact No. 211F. Changes in the economy in the Austin area from a strong economy in 2007 to a weaker economy in 2009 did not alter the hours during which waste loads are received at the ACL facility.

Finding of Fact No. 211G. With regard to operational hours, i.e., those hours for the transportation of materials and heavy equipment operation, the evidentiary record demonstrates that operations normally began one-half hour to one hour before waste acceptance to prepare the ACL facility for the incoming waste and daily closure operations normally occurred from one to two hours after the last acceptance of waste.

Finding of Fact No. 211H. WMTX has never accepted waste on Sundays during the entire time period represented in the evidentiary record.

Finding of Fact No. 211I. TCEQ's rules, 30 TEX. ADMIN. CODE § 330.135(c), provide the flexibility to address such events as disasters, emergency situations, or other unforeseen situations.

Finding of Fact No. 211J. Neither the hauling contracts nor the previous agency authorizations of the current operating hours support a finding that the proposed operating hours are appropriate for the ACL facility.

Finding of Fact No. 211K. Protestants presented evidence that they 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 neighboring residents are more likely to be at home.

Finding of Fact No. 211L. Waste acceptance hours and operating hours more limited than those proposed in the application would limit the negative impacts of the ACL facility on neighboring residents and businesses.

Finding of Fact No. 211M. Based on the evidentiary record, the waste acceptance hours for the ACL facility should be 5:00 a.m. to 5:00 p.m., Monday through Friday, and 6:00 a.m. to 1:00 p.m. on Saturdays, and the operational hours should be 4:00 a.m. to 7:00 p.m., Monday through Friday, and 5:00 a.m. to 2:00 p.m. on Saturdays.

Conclusion of Law No. 5. WMTX failed to submitted an administratively and technically complete permit amendment application, as required by TEX. HEALTH & SAFETY CODE ANN. §§ 361.066 and 361.068, that demonstrates that it will comply with all relevant aspects of the Application and design requirements as provided in 30 TEX. ADMIN. CODE ANN. §§ 330.71(a) and 330.57(d).

Conclusion of Law No. 7. The burden of proof was on the Applicant, in accordance with 30 TEX. ADMIN. CODE ANN. § 80.17(a). WMTX failed to meetmet its burden with respect to a number of all-referred issues, including the proposed hours of operation.

Conclusion of Law No. 8. The evidence in the record is not sufficient to meet the requirements of applicable law for issuance of the Draft Permit, including TEX. HEALTH & SAFETY CODE ANN. Chapter 361 and TEX. ADMIN. CODE ANN. Chapter 330.

Conclusion of Law No. 9. The expansion of the proposed Austin Community Recycling and Disposal Facility, even if constructed and operated in accordance with the Solid Waste Disposal Act, 30 TEX. ADMIN. CODE ANN. Chapter 330, and the attached Draft Permit, will not-adversely affect public health, or-welfare, and or-the environment.

Conclusion of Law No. 11. The approval of the Application and the issuance of Permit No. MSW-249D, will-not-violates the policies of the State of Texas, as set forth in § 361.002(a) of the Solid Waste Disposal Act, to safeguard the health, welfare, and physical property of the people of Texas, and to protect the environment by controlling the management of solid waste.

Conclusion of Law No. 23. Part IV of the Application, the SOP, does not meets the requirements of 30 TEX. ADMIN. CODE ANN. §§ 330.57(c)(4) and 330.127.

Conclusion of Law No. 24. Applicant has failed to showa that it will comply with the operational prohibitions and requirements in 30 TEX. ADMIN. CODE ANN. §§ 330.5, 330.12111 – 330.139.

Conclusion of Law No. 45. The operating hours proposed in the Application have been shown to not be appropriate.

Conclusion of Law No. 45A. Pursuant to the authority of, and in accordance with applicable laws and regulations, the following changes should be made to Section III.A. on page 4 of the Permit:

A. Days and Hours of Operation

The operating hours for receipt of waste and for all landfill related operations at the municipal solid waste facility shall be from 9 p.m. Sunday through 7 p.m. Saturday, and if necessary, from 7 a.m. to 4 p.m. Sunday. The waste acceptance hours of the facility may be any time between the hours of 5:00 a.m. and 5:00 p.m., Monday through Friday, and 6:00 a.m. to 1:00 p.m., Saturdays. Transportation of materials and heavy equipment operation may be conducted any time between the hours of 4:00 a.m. and 7:00 p.m., Monday through Friday, and 5:00 a.m. to 2:00 p.m., Saturdays. The Commission's regional offices may allow additional temporary waste acceptance or operating hours to address disasters, other emergency situations, or other unforeseen circumstances that could result in the disruption of waste management services in the area. The facility must record in the site operating record the dates, times, and duration when any alternative operating hours are utilized.

B. Exceptions Related to the Addition of Ground Water Monitoring Wells.

TJFA excepts to the following Findings of Fact and Conclusions of Law related to the Addition of Ground Water Monitoring Wells, as revised by the Administrative Law Judge in the Supplemental Proposed Order:

Finding of Fact No. 126. The Draft Permit will include adequate provisions for groundwater monitoring.

Conclusion of Law No. 28. The application will meet the requirements of 30 TEX. ADMIN. CODE ANN. §§ 330.63(b)(4), 330.401, 330.403, 330.405, and 330.407, concerning groundwater protection.

Conclusion of Law No. 47. The proposed groundwater monitoring system will adequately monitor the IWU and protect human health and the environment in compliance with 30 TEX. ADMIN. CODE ANN. §§ 330.63(b)(4), 330.401, 330.403, 330.405, and 330.407.

Conclusion of Law No. 49. The proposed groundwater monitoring system will adequately monitor the Phase I Unit area of the Facility and protect human health and the environment in compliance with 30 TEX. ADMIN. CODE ANN. §§ 330.63(b)(4), 330.401, 330.403, 330.405, and 330.407.

Ordering Provision No. 1. The attached Type I Municipal Solid Waste Permit no. MSW-249D, is granted to Waste Management of Texas, Inc. with the following change

As discussed above, through its Interim Order, the Commission instructed the Administrative Law Judge to modify specific substantive proposed Findings of Fact and Conclusions of Law as set forth in his Revised Proposed Order relating to the addition of four ground water monitoring wells to the ground water monitoring system.³⁸ Specifically, the Interim Order instructed the Administrative Law Judge to revise his September 8, 2009 Revised Proposed Order as follows:

(b) Delete the addition of the four wells specified by the private agreement between the City of Austin and WMTX to the permit's groundwater monitoring system and reconfiguration of the Point of Compliance to include those wells in proposed Finding of Fact Nos. 125 and 127, Conclusion of Law Nos. 28, 48, and 50, and Ordering Provision No. 1.³⁹

The Commission directed the Administrative Law Judge to make substantive revisions to his Revised Proposed Order, in effect, revising certain substantive conclusions of the Administrative Law Judge's Proposal for Decision and Revised Proposed Order. Through the Supplemental Proposed Order, the Administrative Law Judge did just that, although he did include the following note in his transmittal letter regarding the revisions: "It should also be noted that the following deletions from the Proposed Order issued by me on July 21, 2009 are made at a

³⁸ Interim Order, *supra* note 6, at 2.

³⁹ *Id.* ¶ 2)(b) at 2.

convenience to the Commission and are not part of my recommendation.”⁴⁰ Neither the Commission’s directive to the Administrative Law Judge nor the Administrative Law Judge’s revisions to the Proposed Findings of Fact and Proposed Conclusions of Law, even if made only for the convenience of the Commission, is supported by applicable state law.

Pursuant to the Texas Government Code, the Commission has the authority to “amend the proposal for decision, including any finding of fact, but any such amendment thereto and order shall be based solely on the record made before the administrative law judge.”⁴¹ The Commission’s authority to review specific proposed Findings of Facts and Conclusions of Law as set out in the Administrative Law Judge’s Proposal for Decision and Proposed Order is found in the Texas Solid Waste Disposal Act. Specifically, Section 361.0832 of the Texas Health and Safety Code provides, in relevant part:

⁴⁰ Letter from The Honorable Roy G. Scudday, Administrative Law Judge, SOAH, to Less Trobman, General Counsel, TCEQ (Jan. 5, 2010). The Administrative Law Judge identified the following specific revisions that were made for the convenience of the Commission:

It should also be noted that the following deletions from the Proposed Order issued by me on July 21, 2009 are made as a convenience to the Commission and are not part of my recommendation:

Finding of Fact No. 125;

The first two lines of Finding of Fact No. 127 ending with the phrase “those four wells;”

The first four lines of Conclusion of Law No. 28 ending with the phrase “those four wells;”

The first four lines of Conclusions of Law Nos. 48 and 50 beginning with the phrase “as revised to incorporate” and ending with the phrase “those four wells;” and

The paragraph in Ordering Provision No. 1 regarding Groundwater Characterization and Monitoring Report.

Id. at 1. It appears the specific numbers for Proposed Findings of Facts and Proposed Conclusions of Law identified by the Administrative Law Judge refer to their numbers in the Revised Proposed Order. As previously discussed, the Proposed Findings of Facts and Proposed Conclusions of Law have been renumbered in the Supplemental Proposed Order and thus differently-numbered Proposed Findings of Fact and Proposed Conclusions of Law are excepted to herein.

⁴¹ TEX. GOV’T CODE § 2003.047(m).

(c) The commission may overturn an underlying finding of fact that serves as the basis for a decision in a contested case only if the commission finds that the finding was not supported by the great weight of the evidence.

(d) The commission may overturn a conclusion of law in a contested case only on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules.

(e) If a decision in a contested case involves an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgment of the commission by law, the commission may reject a proposal for decision as to the ultimate finding for reasons of policy only.

(f) The commission shall issue written rulings, orders, or decisions in all contested cases and shall fully explain in a ruling, order, or decision the reasoning and grounds for overturning each finding of fact or conclusion of law or for rejecting any proposal for decision on an ultimate finding.⁴²

The entirety of Section 361.0832 addresses the Commission's authority to accept or reject the Administrative Law Judge's proposed Findings of Fact and Conclusions of Law through issuance of its own Final Order. It does not address, and thus the Commission does not have, the authority to instruct the Administrative Law Judge to revise his own Proposal for Decision and Proposed Order. The Commission, if it wishes to reject the findings of the Administrative Law Judge, must do so pursuant to the authority granted to it, *i.e.*, pursuant to Texas Health and Safety Code Section 361.0832. It cannot instruct the Administrative Law Judge to do so. Such an action is outside the Commission's authority, and thus, the Commission's directive to the Administrative Law Judge to make certain substantive revisions to the Revised Proposed Order in this proceeding are in violation of its authority under state law.

Similarly, while the Administrative Law Judge apparently has only made the revisions to the Commission-identified Proposed Findings of Fact and Proposed Conclusions of Law for the convenience of the Commission, the revisions are not authorized for the simple fact that the Commission does not have the authority to instruct him to make such revisions. The

⁴² TEX. HEALTH & SAFETY CODE ANN. § 361.0832(c)-(f); *see also Hunter Indus. Facilities, Inc. v. Texas Natural Res. Conservation Comm'n*, 910 S.W.2d 96, 102 (Tex. App.—Austin 1995, writ denied).

Commission's actions in instructing the Administrative Law Judge to revise certain proposed Findings of Fact and Conclusions of Law are outside its statutory authority and are simply an attempt by the Commission to evade its statutory responsibility to meet certain evidentiary criteria to overturn an Administrative Law Judge's proposed Findings of Fact and Conclusions of Law.

As such, TJFA excepts to the Administrative Law Judge's revisions to Proposed Finding of Fact 126, Proposed Conclusions of Law 28, 47, and 49, and Proposed Ordering Provision No. 1. The Supplemental Proposed Order should instead be written to properly reflect the recommendations of the Administrative Law Judge, *i.e.*, with regard to these Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Ordering Provision No. 1, the Supplemental Proposed Order should be identical to the Revised Proposed Order.

It must also be noted that while TJFA is excepting to the revision of the above-referenced Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Ordering Provision No. 1, as identified in the Supplemental Proposed Order, and is requesting that the remedy be a reversion back to the language of the Revised Proposed Order, TJFA has not abandoned its previously-stated exceptions to the substance of these Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Ordering Provision No. 1, as originally set out in the Proposed Order and the Revised Proposed Order.⁴³ As previously addressed by TJFA in its *Exceptions to the Proposal for Decision and Proposed Order*, the Point of Compliance ("POC") ground water monitoring system proposed in the application is inadequate, and it can only be revised after additional technical consideration by TCEQ. The POC ground water monitoring system proposed in the application is fatally flawed and cannot be saved by the simple addition of four monitoring wells that have not been considered by TCEQ MSW staff, especially when

⁴³ See TJFA's Exceptions, *supra* note 7, at 71-74.

the addition of such wells does not even address all of the 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 consideration. Simply adding additional wells—wells that were placed based on a negotiated agreement, not sound technical review pursuant to TCEQ rules—cannot produce a technically sufficient correction to the problem.⁴⁴ As such, while TJFA believes that the Supplemental Proposed Order should revert back to the language of the Revised Proposed Order with regard to these Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Ordering Provision No. 1 because the Commission overstepped its statutory authority in instructing the Administrative Law Judge to make certain revisions, TJFA continues to except to these portions of the Proposed Order and Revised Proposed Order as it has previously addressed in detail.

TJFA's Proposed Modified Findings of Fact and Conclusions of Law:

Finding of Fact No. 124A. The incorporation of the wells covered by the voluntary agreement—MW-29A, MW-32, PZ-26, and PZ-31—into the groundwater monitoring system covered by the permit and the reconfiguration of the POC to include those four wells will serve to mitigate the potential threat to human health and the environment should contaminants from the IWU and/or the Phase I Unit migrate towards the boundaries of the Facility.

Finding of Fact No. 126. With the incorporation of the additional four wells into the groundwater monitoring system and the realignment of the POC to incorporate those four wells, the Draft Permit will include adequate provisions for groundwater monitoring.

⁴⁴ As noted by the Executive Director, significant alterations to the application cannot be made through the instant proceeding. See Executive Director's Closing Argument, *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. 2206-0612-MSW at 24 (May 8, 2009). The Executive Director wrote that revisions cannot significantly alter the design of the landfill, stating: "The concern about significant alterations is to address the possibility that the previous declaration of technical completeness would be undone and thereby requiring re-notice and another hearing on the entire Application . . ." *Id.*

Conclusion of Law No. 28. With the incorporation of the wells covered by the voluntary agreement with the City of Austin, MW-29A, MW-32, PZ-26, and PZ-31, into the groundwater monitoring system covered by the permit and the reconfiguration of the point of compliance to include those four wells, the Application will meet the requirements of 30 TEX. ADMIN. CODE ANN. §§ 330.63(b)(4), 330.401, 330.403, 330.405, and 330.407, concerning groundwater protection.

Conclusion of Law No. 47. The proposed groundwater monitoring system as revised to incorporate the wells covered by the voluntary agreement with the City of Austin – MW-29A, MW-32, PZ-26, PZ-31 – into the groundwater monitoring system covered by the permit and the reconfiguration of the POC to include those four wells will adequately monitor the IWU and protect human health and the environment in compliance with 30 TEX. ADMIN. CODE ANN. §§ 330.63(b)(4), 330.401, 330.403, 330.405, and 330.407.

Conclusion of Law No. 49. The proposed groundwater monitoring system as revised to incorporate the wells covered by the voluntary agreement with the City of Austin—MW-29A, MW-32, PZ-26, and PZ-31—into the groundwater monitoring system covered by the permit and the reconfiguration of the POC to include those four wells will adequately monitor the Phase I Unit area of the Facility and protect human health and the environment in compliance with 30 TEX. ADMIN. CODE ANN. §§ 330.63(b)(4), 330.401, 330.403, 330.405, and 330.407.

Ordering Provision No. 1. The attached Type I Municipal Solid Waste Permit No. MSW-249D, is granted to Waste Management of Texas, Inc. with the following change:

* * *

Groundwater Characterization and Monitoring Report

The groundwater monitoring system should be revised to incorporate the wells MW-29A, MW-32, PZ-26, and PZ-31 and to reconfigure the point of compliance to include those four wells.

C. *Exceptions Related to Jurisdiction*

As previously argued by TJFA and other protestants, because the Commission entered an Interim Order that was subject to the Commission’s rule regarding motions for rehearing, the Administrative Law Judge did not have jurisdiction to take additional evidence in this proceeding until the Interim Order became final. Because multiple motions for rehearing had been filed, the Administrative Law Judge did not have jurisdiction until those motions for

rehearing had been denied by the Commission or had been denied by operation of law.⁴⁵ As such, TJFA excepts to the Administrative Law Judge's conclusion that SOAH had jurisdiction to hear the issue on remand.⁴⁶

III. STANDARD OF REVIEW

The Administrative Law Judge has the regulatory authority to file an amended proposal for decision, including amended proposed Findings of Fact and Conclusions of Law, in response to Exceptions, Replies to Exceptions, or briefs submitted by the parties.⁴⁷ Should the Administrative Law Judge decide not to amend the Supplemental PFD and Supplemental Proposed Order, the Commission may decline to adopt the Supplemental PFD and Supplemental Proposed Order as proposed by the Administrative Law Judge, and, in the alternative, adopt its own order, including its own Findings of Fact and Conclusions of Law, denying the permit being sought by WMTX.⁴⁸ The provisions of such a modified order are proposed by TJFA in these Exceptions to the Supplemental PFD and Supplemental Proposed Order and in its previously filed *Exceptions to the Proposal for Decision and Proposed Order*. The provisions of such a modified order are supported by the clear weight of the evidence presented in this proceeding.

The Commission may reject the Administrative Law Judge's proposed Order and approve its own Order, but the Commission's Order must be based solely on the record made before the Administrative Law Judge.⁴⁹ The Commission must also explain the basis of its Order.⁵⁰ The Commission's authority to review specific proposed Findings of Fact and

⁴⁵ See 30 TEX. ADMIN. CODE § 80.273.

⁴⁶ See Supplemental PFD, *supra* note 1, at 2.

⁴⁷ See 30 TEX. ADMIN. CODE § 80.259.

⁴⁸ See TEX. GOV'T CODE ANN. § 2003.47(m).

⁴⁹ See *id.*

⁵⁰ See *id.*

Conclusions of Law as set out in the Administrative Law Judge's Proposal for Decision and Proposed Order is found in the Texas Solid Waste Disposal Act. Specifically, Section 361.0832 of the Texas Health and Safety Code, as identified above, provides, in relevant part:

- (c) The commission may overturn an underlying finding of fact that serves as the basis for a decision in a contested case only if the commission finds that the finding was not supported by the great weight of the evidence.
- (d) The commission may overturn a conclusion of law in a contested case only on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules.
- (e) If a decision in a contested case involves an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgment of the commission by law, the commission may reject a proposal for decision as to the ultimate finding for reasons of policy only.
- (f) The commission shall issue written rulings, orders, or decisions in all contested cases and shall fully explain in a ruling, order, or decision the reasoning and grounds for overturning each finding of fact or conclusion of law or for rejecting any proposal for decision on an ultimate finding.⁵¹

Adoption of the Administrative Law Judge's Proposal for Decision, Supplemental Proposal for Decision, Revised Proposed Order, and Supplemental Proposed Order would result in approval of an application that, as discussed in detail above, is in violation of multiple Commission rules; thus, modification of the Revised Proposed Order and Supplemental Proposed Order in accordance with the above-referenced statutory standards is well within the Commission's statutory authority.

As identified above, to overturn a proposed finding of fact, the Commission may exercise its discretion to revise those findings that "do not find support in the 'great weight' of the evidence in the record."⁵² In reversing a proposed conclusion of law, the clearly erroneous

⁵¹ TEX. HEALTH & SAFETY CODE ANN. § 361.0832(c)-(f); *see also Hunter Indus. Facilities, Inc. v. Texas Natural Res. Conservation Comm'n*, 910 S.W.2d 96, 102 (Tex. App.—Austin 1995, writ denied).

⁵² *Hunter Indus.*, 910 S.W.2d at 103.

standard applies.⁵³ This simply means that the Commission must have the “definite and firm conviction that a mistake has been committed.”⁵⁴ The Commission may change an “ultimate finding” for reasons of policy.⁵⁵ Therefore, should the Commission decide to modify the Administrative Law Judge’s proposed Findings of Fact and Conclusions of Law, it must articulate a rationale and legal basis for each change.⁵⁶

TJFA has specifically identified in these Exceptions to the Supplemental PFD and Supplemental Proposed Order and its previously filed *Exceptions to the Proposal for Decision and Proposed Order* those proposed Findings of Fact and Conclusions of Law that should be modified based on applicable statutes and regulations, current Commission policy, and the great weight of the evidence in the record. TJFA has also suggested modified Findings of Fact and Conclusions of Law that will achieve this result. The Commission will need to include in its adoption of TJFA’s proposed modification an analysis of its decision suitable to pass judicial scrutiny.

IV. CONCLUSION AND PRAYER

The Proposed Findings of Fact and Proposed Conclusions of Law, as discussed in the Proposal for Decision and Supplemental Proposal for Decision 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 to increase the size of the ACL facility, are not supported by applicable

⁵³ The clearly erroneous standard grants the reviewing agency, *i.e.*, the Commission, great latitude in reversing legal conclusions. The courts and the legislature recognize that forcing the Commission to accept an Administrative Law Judge’s proposed conclusions of law would destroy the Commission’s discretion to interpret its own rules. *See id.* at 104.

⁵⁴ *Id.* (quoting *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542 (1948)).

⁵⁵ *See* TEX. HEALTH & SAFETY CODE ANN. § 361.0832(e).

⁵⁶ *See id.* § 361.0832(f).

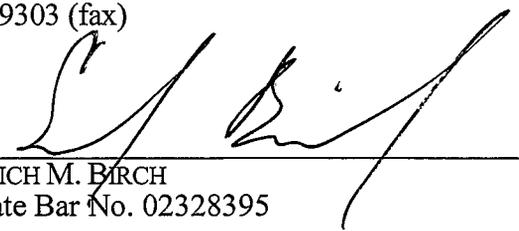
statutes and regulations, Commission precedent and policy, or the great weight of the evidentiary record. Information in the record which addresses the issues underlying the proposed Findings of Fact and Conclusions of Law has been highlighted in the two sets of Exceptions filed by TJFA. This is especially 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, as presented by TJFA, or in the alternative, adopting the operating hours identified above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

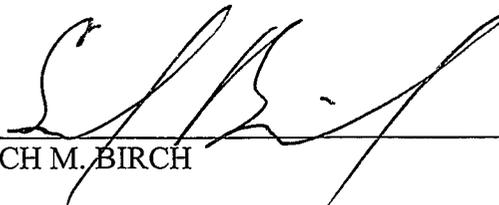
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On this the 25th day of January, 2010.



 ERICH M. BIRCH