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January 25, 2010

Via Facsimile: 512-239-3311 and 1st Class Mail

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

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

Dear Chief Clerk:

Regarding the above reference matter, enclosed is the original and one copy of **Protestant, City of Austin's Exceptions to the Supplemental Proposal for Decision**, which was also faxed to you on the date of this letter. Please file and enter the original and return the filed stamped copy in the SASE provided.

Thank you for your attention to this matter.

Sincerely,

Meitra Farhadi
Assistant City Attorney
512-974-2310

Enclosures

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2010 JAN 25 PM 3:03
CHIEF CLERKS OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2010 JAN 25 PM 3:03

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

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

CITY OF AUSTIN'S EXCEPTIONS TO
THE SUPPLEMENTAL PROPOSAL FOR DECISION

COMES NOW, Protestant, City of Austin ("City") and files this, its Exceptions to the Supplemental Proposal for Decision and Order, and respectfully shows the following¹:

I. INTRODUCTION

The City of Austin disagrees with Administrative Law Judge ("ALJ") Roy Scudday's supplemental proposal for decision ("SPFD"), in which he recommends that Permit No. MSW-249D be issued; that Waste Management of Texas, Inc. ("WMI" or "Applicant") be allowed to operate 24/6 hours; and that no additional monitoring wells be added to the groundwater management system. The Applicant has continued to fail to demonstrate that Permit No. MSW-249D meets or exceeds all applicable statutory and regulatory requirements, and it therefore must be denied.² The evidence in total showed that the WMI landfill is no longer compatible with surrounding land uses, is not in conformance with the Regional Solid Waste Management Plan, is not protective of human health, welfare, and the environment, will not comply with Texas Pollution Discharge Elimination System ("TPDES") storm water requirements, does not include adequate provisions for erosion control, fails to demonstrate improved operational controls to prevent past violations from occurring again, and does not have all required permits to construct

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

² 30 TEX. ADMIN. CODE §80.17(a).

the expansion it is seeking. The City hereby adopts the exceptions filed in this matter by Travis County. The City specifically excepts to Findings of Fact Nos. 47, 48, 55, 56, 123, 124, 127, 131, 141, 145, 165, 167, 189, 192, 193, 195, 211, 214, 218, 219, 229, 231, 245, 246, 248, 249, 253, and to Conclusions of Law Nos. 5, 7, 8, 9, 11, 28, 32, 37, 39, 42, 45, 46, 47, 48, 49, and 50.

II. SUMMARY OF EXCEPTIONS

If ever there was a case where an MSW landfill permit amendment to extend the life of a facility should be denied, this is that case. In 2004 WMI was assessed the largest fine ever levied by the TCEQ on a MSW operator in the State of Texas.³ One of the many reasons this application should be denied, is that the operation of this facility has and will continue to impact the surrounding neighborhoods, as evidenced by the repeated and voluminous complaints regarding odors, traffic, litter, dust, erosion and sedimentation of streams.⁴ By virtue of its record of operation, the Applicant failed to demonstrate that the facility will not adversely impact human health or the environment, as required by 330.61(h).

Land use compatibility is the key issue in this permit amendment application. It is significant to note that three governmental entities: Travis County, the City of Austin, and the Capital Area Council of Governments ("CAPCOG"), the regional solid waste planning agency recognized by the TCEQ for the ten county region that the WMI facility is located in, are all opposed to the issuance of this permit amendment to extend the size and life of the WMI landfill facility because it is an incompatible land use. Without being able to establish that the proposed permit amendment is compatible with surrounding land uses, the application fails. Every other issue is irrelevant if it is not a compatible land use, because a permit for expansion of a MSW

³ Jon White 1, 18:11-12; 19:6-7; Joe Word 1, 6:129-130.

⁴ Joe Word 1, 6:121-124 & 7:150-156; TC 6; MM 1, 3:5-29 & 4:1-3.

facility may not be granted unless it is compatible with surrounding land uses.⁵ To approve this application sets the stage for an exacerbation of effects of the ongoing nuisances on the surrounding community.

The ALJ properly considered the evidence presented concerning the voluntary groundwater monitoring agreement between the City and WMI and the placement of the wells to monitor for potential discharges from the Industrial Waste Unit ("IWU"). Accordingly he recommended inclusion of the wells in the permit. The City excepts to the October 20, 2009 Interim Order issued by the TCEQ Commissioners directing the ALJ to change his recommendations to not include the additional monitoring wells in the Facility's point of compliance.⁶ The ALJ failed to properly consider the fact that the wells in the voluntary agreement are sampled for a specific list of constituents, which were chosen by WMI as representative of potential contaminants in the groundwater that could originate from the IWU. In light of this uncontroverted evidence, and the fact that the sampling is already being done by WMI, it is unreasonable to not include the same parameters in the permit monitoring regime.

The fact of the matter is that the area surrounding the WMI facility is one of the fastest growing areas in the City, and the more it grows so will the complaints for nuisances felt from the WMI facility. The application does not address the continued negative affects created by WMI facility on the existing and proposed residential and civic land uses in the adjacent area.⁷ The approval of this application will allow WMI to continue to adversely impact human health and the environment for another decade.

⁵ See 30 Tex. Admin. Code §§ 330.15, 330.61(h).

⁶ See October 20, 2009 TCEQ Interim Order.

⁷ GG 1, 6:1-3.

III. EXCEPTIONS

The City of Austin objects to all Findings of Fact or Conclusions of Law that find or conclude in any way that: (1) the WMI landfill is compatible with surrounding land uses, (2) the proposed expansion has sufficient erosion control measures, (3) the Applicant has demonstrated that it will meet the TPDES storm water permitting requirements, (4) the proposed expansion conforms to the Regional Solid Waste Management Plan ("RSWMP"), (5) the Applicant has demonstrated that its proposed monitoring system will protect human health and the environment in compliance with 30 TAC 330.631, (6) there is insufficient evidence under § 330.419(c) to add additional constituents to the list of constituents the Applicant is required to sample for, or (7) the permit should be granted.

Former Finding of Fact No. 125: "The incorporation of the wells covered by the voluntary agreement – MW-29A, MW-11, 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."

Former Finding of Fact No. 127: "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."

Former Conclusion of Law 28: "With the incorporation of the wells covered by the voluntary agreement with the City of Austin, MW-29A, MW-11, 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 Applicant will meet the requirements of 30 TAC §§ 330.63(b)(4), 330.401, 330.403, 330.405, and 330.407 concerning groundwater protection."

Former Conclusion of Law 48: "The incorporation of the wells covered by the voluntary agreement – MW-29A, MW-11, 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 IWU and protects human health and the environment in compliance with 30 TAC §§ 330.63(b)(4), 330.401, 330.403, 330.405, and 330.407."

Former Conclusion of Law 50: "The incorporation of the wells covered by the voluntary agreement – MW-29A, MW-11, 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 protects human health and the

environment in compliance with 30 TAC §§ 330.63(b)(4), 330.401, 330.403, 330.405, and 330.407.”

The City objects to and takes exception with the modifications ordered to be made by the ALJ to his original PFD at the direction of the TCEQ Commissioners in their Interim Order issued October 20, 2009. Specifically, the complete removal of Former FOF 125 and the modification of Former FOF 127 and Former COL 28, 48, and 50 and Former Ordering Provision No. 1 are not supported by the evidence. Moreover the command to make these changes to Former FOFs 125 and 127; Former COLs 28, 48, and 50; and Former Ordering Provision No. 1 is improper under Section 2001.058 of the Texas Government Code.

Finding of Fact No. 47: “WMTX has coordinated with all appropriate agencies, officials, and authorities that may have a jurisdictional interest in the Application.”

Finding of Fact No. 48: “WMTX has provided complete information concerning governmental permits, authorizations, and construction approvals it has received or applied for.”

These Findings are not supported in the record. The uncontested evidence shows that WMI has failed to obtain all permits required by the City of Austin.⁸ WMI has not obtained, nor even applied for a permit for the expansion of the landfill.⁹

Finding of Fact No. 55: “WMTX obtained approval by the City of Austin of its Erosion and Restoration Plan (ERP) authorizing the construction of two sedimentation and detention/wetland mitigation ponds that are in the same location and have the same configuration as the new sedimentation/water quality pond that is being proposed in the permit application.”

This Finding is in direct contradiction to the evidence. The evidence specifically shows that WMI has obtained a permit from the City to construct a sedimentation/detention pond with wetland mitigation; that the pond proposed in the application differs from the pond permitted by

⁸ Exhibits COA-13 and TF 1, 4:74-76 & 10:225-229.

⁹ Exhibit COA-13.

the City of Austin, and that both of these proposed ponds differ from the pond currently constructed at the site.¹⁰

Finding of Fact No. 56: "WMTX operates its storm water controls pursuant to the Texas Pollution Discharge Elimination System (TPDES) General Multi-Sector Permit."

Finding of Fact No. 131: "The Application complies with the MSW rule requirements for demonstrating that it has complied with TPDES storm water permitting requirements."

These Findings are not supported by the evidence. The Applicant failed to demonstrate how the facility will comply with applicable TPDES storm water permitting requirements.¹¹ WMI did file a sworn conclusory statement that they will obtain the appropriate TPDES coverage¹², but they did not demonstrate how the proposed expansion will be able to comply with the TPDES permit.¹³ In designing the proposed facility, the Applicant's engineer testified that he did not performed any calculations as part of the application to determine if the facility will be able to meet the TPDES benchmark values for total suspended solids ("TSS"), despite the fact that he has seen reports demonstrating that the facility currently has trouble meeting the 100 mg/L benchmark value for TSS.¹⁴ In fact, the evidence presented actually demonstrated that the proposed expansion will not comply with the TPDES storm water permitting requirements.¹⁵

Finding of Fact No. 123: "It is highly unlikely that potential contaminants from the IWU would not reach MW-11 because there is very slow groundwater movement at the Facility site, meaning that any plumes that would emanate from the IWU would tend to be quite wide rather than narrow, thereby facilitating the detection of those plumes."

Finding of Fact No. 214: "Operation of the expanded landfill as requested in the Application will not result in contamination of groundwater and surface water."

These Findings are not supported by the evidence. In fact, the record demonstrates that the opposite is true. For MW 11 to detect all possible releases emanating from the IWU and

¹⁰ Exhibit TF 1, pgs. 5-7.

¹¹ 30 Tex. Admin. Code §330.61(k)(3).

¹² APP 202, tech. comp. 105.

¹³ CR. V. No. 3, 476:2-8.

¹⁴ CR. V. No. 3, 465:8-12.

¹⁵ Exhibit TF 1, 9:187-191.

Phase 1 areas, one would have to assume a very broad groundwater pathway resulting from low velocity of the groundwater flow. However, if groundwater is contaminated, the groundwater velocity will increase and the pathway may very well be narrower.¹⁶ In addition, the fact that shallow groundwater levels reported near the IWU are higher than the bottom of the tributary indicate that groundwater could flow off-site without intersecting MW11 which is placed below the shallow levels.¹⁷ The groundwater could be released to the surface as leachate, which has been previously reported, or travel through shallower, more pervious soils or waste.¹⁸ Either of these mechanisms provides a pathway for contaminated groundwater to travel undetected off-site.¹⁹

Finding of Fact No. 124: "In 2002, WMTX entered into a voluntary agreement with the City in which WMTX agreed to incorporate two existing wells (MW-29A and PZ-26) as downgradient groundwater sampling points. MW-29A is between the IWU and the drainage tributary to the west of the IWU, and PZ-26 is between the southwest corner of the IWU and the drainage tributary to the south of the IWU. WMTX also agreed to install a monitoring well (MW-32) along the trace of the drainage tributary downgradient from PZ-26 and to place a piezometer between the south boundary of the IWU and the south drainage tributary (PZ-31) to monitor water levels."

Protestant, City, agrees that WMI entered into a voluntary agreement with the City to install groundwater sampling wells and water level monitoring wells. This finding should also include the fact that the groundwater sampling was to determine if contaminants were emanating from the IWU. In addition this finding should be modified to add that the voluntary monitoring by WMI was for a specific list of constituents chosen by WMI as representative for the type of materials which were in the IWU.

Finding of Fact No. 127: "There is insufficient evidence to support the addition of a sampling requirement to the groundwater monitoring system for additional constituents."

¹⁶ CR. V. No. 5, 1064:19 -1065:5.

¹⁷ CR. V. No. 10, 2149:14-2150:4.

¹⁸ CR. V. No. 5, 1008:10-20.

¹⁹ CR. V. No. 10, 2146:7-12.

This Finding is not supported by the evidence. There is ample evidence that the materials that WMI is currently sampling for under the voluntary agreement with the City should be added to the sampling required in the groundwater monitoring. In fact there was uncontroverted testimony presented on all of the factors which are to be considered in determining if the addition of sampling constituents would be beneficial. Specifically, WMI is already testing for additional constituents, WMI suggested the constituents and they are the ones indicated as being present at the IWU in the RUST report, there has been detection of several of the constituents on repeated sampling events, and the appendix one constituent list will not detect these contaminants. To conclude that there is insufficient evidence to conclude that testing for a non-naturally occurring chemical that has already been a part of a testing regime and has in fact been detected in 27 of the reported sampling events done by WMI is absurd. MW 11 is not being monitored for 1, 4, dioxane. MW 11 is only being monitored for the Appendix 1 list and the appendix 1 list does not contain dioxane. A study by J.D. Consulting, L.P. ["Human Health Risk Evaluation Report, Closed Industrial Waste Unit, Austin Community Landfill", Feb. 9, 2001], provided information concerning the type of materials historically dumped at the IWU. The evidence establishes that the IWU unit contains solvents, acids and saline water all of which may desiccate clays.²⁰ Under the WMI/COA monitoring agreement WMI tests for a list of constituents which was proposed by WMI based on sampling done in the J.D. Consulting Thermotec Report because WMI agreed that the Appendix 1 constituents did not include a number of the contaminants that were found in the sampling of the industrial waste unit. While the results of the sampling from the "WMI/COA Agreement" are informative, they do not provide regulatory oversight, the terms are not enforceable by TCEQ, and the results are not used by TCEQ for detection of leaks as a part of the permitted groundwater monitoring system. Adding the sampling to the permit does not add

²⁰ CR. V. No. 5, 1043:2-9.

any burden to the applicant because they are already doing it but it does provide regulatory oversight by the TCEQ and the added protection to the public.

Therefore Finding of Fact No. 127 should be deleted and the following Findings of Fact should be added:

*The City of Austin received groundwater sampling results for 2003 through 2008 from WMI as required under the voluntary agreement.

*After repeated groundwater level elevations above the base of the tributary between the IWU and the Phase 1 areas, WMI agreed to sample PZ 31. Sampling of PZ-31 in May 2004 detected 1, 4 Dioxane.

*WMI resampled PZ 31 on October 20, 2004 and much higher levels of 1, 4 Dioxane as well as trichlorobenzene were found in PZ 31.

*WMI did not report the October 20, 2004 sampling results from PZ-31 to the City of Austin and WMI deleted those sampling results from its annual sampling result report issued December 19, 2004.

*1,4 Dioxane should be added to the list of constituents required in the groundwater monitoring for the TCEQ.

Finding of Fact No. 141: "The Application includes: (1) structural controls for capturing sediment before it leaves the site in both interim and final configurations, (2) erosion control practices to prevent erosion in both interim and final configurations, and (3) calculations to show that erosion in the final configuration will be below permissible levels."

Finding of Fact No. 145: "The erosion control methods identified in the Application are sufficient to comply with agency rules."

Finding of Fact No. 165: "The Application proposes adequate protection of surface water."

Finding of Fact No. 253: "The Application proposes sufficient provisions to protect groundwater and surface waters."

These Findings are not supported by the evidence. The evidence shows that the WMI landfill has historically had poor erosion and sedimentation control and, in particular, poor revegetation of intermediate cover and problems with other source control methodologies such as silt fencing, mulching, or limiting areal coverage of disturbed soil.²¹ Neither the Erosion and

²¹ CL 1, 4:67-70.

Sedimentation Control Plan²² nor any other part of the application or associated TPDES Stormwater Pollution Prevention Plan substantively improves upon the current and historical erosion and sedimentation control practices sufficiently to prevent the ongoing problems at the facility from continuing to occur.²³

The application states that “the sequencing of drainage and runoff controls” are described in detail in Part I/II of the application²⁴, when in fact there is a complete lack of detail in the application (including Part I/II) regarding what, when, how, and where temporary erosion and sedimentation controls will be used at the facility.²⁵ The evidence shows that the Applicant failed to follow TCEQ guidance, which requires an operator to provide a “plan to minimize erosion during all phases of landfill operations with the intent of controlling soil loss and sediment transport from top dome surfaces and external embankment side slopes.” By only focusing its controls on catching sediment at the facility boundaries and not on preventing “soil loss and transport”, this application fails to meet the requirements of the TCEQ guidance document on Addressing Erosional Stability During All Phases of Landfill Operation.²⁶

Furthermore, the ALJ states in his initial PFD on all issues, that he made his determination based upon the testimony of the ED’s witness that if the Applicant follows the erosion control measure in the Application, they will comply with § 330.305.²⁷ However, as stated in Section 5.228(e) of the Water Code, neither the Executive Director nor any of its staff may sustain the Applicants’ burden of proof, by testimony or evidence. The Executive

²² APP 202, tech. comp. 602-606.

²³ CL 1, 5:105-109.

²⁴ App 202, tech. comp. 602:¶4.

²⁵ CL 1, 5-6:110-122.

²⁶ CL 1, 10-11:221-228.

²⁷ PFD at pg. 38.

Director's participation or determination may be used to complete the administrative record, but not to carry the burden of proof.²⁸ Therefore the ALJ's determination is improper.

Finding of Fact No. 167: "The Application includes adequate provisions for cover, in compliance with agency rules."

This Finding is not supported by the record. The TCEQ regulations require the landfill owner or operator to submit a report demonstrating their plan to minimize erosion *during all phases* of landfill operations with the intent of controlling soil loss and sediment transport from top dome surfaces and external embankment side slopes.²⁹ Landfill cover phases are defined as daily cover, intermediate cover, and final cover.³⁰ The Application fails to address the daily cover phase at all. The complete lack of detail regarding the implementation of erosion and sedimentation controls during the daily cover phase of the site operations is unacceptable.³¹ Moreover, the application only provides for *final* cover soil to have a 6" layer of topsoil "capable of supporting native vegetation"³². There is no such specification for intermediate cover soils.

Furthermore, the ALJ states in his initial PFD on all issues, that he made his determination based upon the testimony of the ED's witness that if the Applicant follows the measures in the Application, they will comply with § 330.165.³³ However, as stated in Section 5.228(e) of the Water Code, neither the Executive Director nor any of its staff may sustain the Applicants' burden of proof, by testimony or evidence. The Executive Director's participation or determination may be used to complete the administrative record, but not to carry the burden of proof.³⁴ Therefore the ALJ's determination is improper.

²⁸ 30 TAC 80.108(d) and (e) and 30 TAC 80.127(h).

²⁹ 30 T.A.C. § 330.305(d).

³⁰ APP-15 at 1.

³¹ CR. V. No. 10, 2189:4-14.

³² APP 202, tech. comp. 607:¶4.4.2.

³³ PFD at pg. 48.

³⁴ 30 TAC 80.108(d) and (e) and 30 TAC 80.127(h).

Finding of Fact No. 189: “The ACRD Facility has not deterred growth in the vicinity of the landfill.”

This Finding is not supported by the evidence. The fact that the area surrounding the WMI landfill is the fastest growing area in the City is by no means a reflection that the WMI landfill has not deterred and is not deterring further growth. In fact, the evidence presented at hearing was that the WMI landfill has deterred, and is deterring, development in the area.³⁵ Specifically, the development of detached single family homes within the Harris Branch Planned Unit Development (“PUD”) and the Pioneer Crossing PUD has not occurred on parcels approved for single family uses closest to the existing landfill sites, but has occurred on other parcels further away.³⁶

Finding of Fact No. 192: “The existing ACRD facility is compatible with surrounding land uses.”

Finding of Fact No. 195: “The proposed expansion is compatible with land use in the surrounding area.”

These Findings are not supported by the evidence. The evidence demonstrates that the area surrounding the WMI facility is one of the fastest growing areas in the City, and the more it grows so will the complaints for nuisances felt from the WMI facility. The evidence also shows that the application does not address the continued negative affects created by WMI facility on the existing and proposed residential and civic land uses in the adjacent area.³⁷

The WMI landfill and the adjacent property are located within the City’s Desired Development Zone, which is an area that the City has designated for future growth and development. It is anticipated that additional residential uses will be built within the Pioneer Crossing PUD and the Harris Branch PUD located to the north, northwest and northeast over the

³⁵ CR. V. No. 9, 1979:9-12.

³⁶ GG 1, 4:7-16, 23-24 & 5:1-2.

³⁷ GG 1, 6:1-3.

next five to ten years. Even if the WMI landfill operations are in compliance with the minimum standards established by the TCEQ, those minimum standards as set forth in the application are not sufficient to mitigate the multitude of negative impacts created by an active landfill located adjacent to the residential area. Specifically, the application does not mitigate all negative impacts from odor, traffic, litter, noise, visual aesthetics or the loss of additional property tax revenue by the City of Austin created by the delay in land development adjacent to the land fill site.³⁸

The City specifically excepts to these Findings, as in his initial PFD on all issues, the ALJ recited sections of a PFD issued in a separate contested case hearing, regarding the BFI landfill which has agreed to improved operational controls and to cease operations by November 2015, for purposes of finding that the expansion of the WMI Facility is a compatible land use.³⁹ The PFD in the BFI matter was never entered into evidence in this contested case hearing, and therefore it is improper for the ALJ to rely upon material not a part of the record in making his decision.

Finding of Fact No. 193: "The continued use of the land for an MSW site will not adversely impact human health, safety, or welfare."

This Finding is not supported by the evidence. The record is replete with evidence that the WMI facility is currently adversely impacting human health and the environment; and since WMI is not proposing to do anything different under its proposed permit for expansion, the facility will continue to adversely impacting human health and the environment. There is an abundance of testimony to the effect that nuisance conditions of odors, windblown waste, mud

³⁸ GG 1, 6:3-15; Joe Word 1, 5:110-113.

³⁹ PFD at pgs. 59-60.

on roadways, noise, and vectors are all affecting the residents who live near the facility.⁴⁰ There is also evidence that development would be even more robust in this location if there was not an active landfill in the area.⁴¹ Further the record is replete with evidence that the area around the facility is growing at a very rapid pace and that as such more and more receptors are near the facility so as to be adversely impacted by the nuisances generated by the WMI facility.⁴² By virtue of its recent record of operation, and failure to make any significant changes to its site operating plan ("SOP") in this application, the applicant has failed to demonstrate that the facility will not adversely impact human health or the environment, as required by 330.61(h).⁴³

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."

This Finding is not supported by the evidence. At the one day hearing on remand, WMI's Area Vice President for South Texas Operations testified that that last time the TCEQ considered the appropriateness of WMI's operating hours was in 1992 – over 17 years ago.⁴⁴ Since that time, per the Applicant's land use expert, the area surrounding the WMI facility has seen a dramatic increase in population.⁴⁵ WMI's Area Vice President went on to state in response to a question as to whether the number of residences near the facility would change his analysis in regards to appropriateness of the facility's operating hours that, "[i]t has no bearing. You're either a nuisance or you're not."⁴⁶ And indeed the evidence demonstrates that WMI's

⁴⁰ Jon White 1, 10:22 to 11:6; MM-1, 2:13-15, 20-23, 24-29, 3:5-8, 21-28, 4:1-3; AN-1, 10:27-31, 11:4-18; DR-1, 2:20-31, 3:1-20, 27-31, 4:1-21, 24-30, 5:1-14.

⁴¹ NNC 4, 13:21 to 14:5 ("About two years ago, someone made an offer in writing to purchase the property, and then when they found out that Waste Management had purchased this Wilder Tract . . . they withdrew their offer."); NNC 3, 23:19 to 24:17; CR. V. No. 9, 1978:25 to 1979:12 ("one of the developers out there indicated that that area hasn't been developed because of the landfill situation in this area.")

⁴² Jon White 1, 14:14-17; APP 202, 20 & 179.

⁴³ Joe Word 1, 6:121-126 & 8:180-183.

⁴⁴ CR. V.13, 2695:2-15.

⁴⁵ APP-302, pg. 6 (133.2% increase); CR.V.13, 2697:2-7.

⁴⁶ CR.V.13, 2733:5-23.

operations *are* a nuisance to the surrounding community. Testimony throughout the initial two week hearing, as well as the one day hearing to allow the Applicant to present evidence that they failed to put on in their initial case in chief, confirmed that the sound of heavy equipment backing up creates a beeping noise that can be disturbing to nearby property owners.⁴⁷ Additionally, the evidence showed that 24/6 operating hours are not necessary for WMI -- WMI's Area Vice President specifically testified at the hearing on remand that if the facility's hours were limited to the standard hours in the TCEQ rules (Monday through Friday, 7am to 7pm) the WMI facility would still be able to operate.⁴⁸ Moreover, per WMI's Senior District Landfill Manager the landfill currently only accepts waste from 5:00 am to 5:00 pm Monday through Friday, and from 6:00am to 1:00pm on Saturdays.⁴⁹ The hours of operation should be limited to the standard operating hours per 30 TAC § 330.135.

Finding of Fact No. 218: "Noise from the Facility does not and will not rise to a level that would constitute a nuisance."

Finding of Fact No. 219: "The Application proposes sufficient provisions to avoid causing a nuisance."

These Findings are not supported by the evidence. The term "nuisance" is defined in the regulations as being, among other things, the processing or storage of MSW in a way that causes the pollution of surrounding land, contamination of ground or surface water, or the creation of odors adverse to human health, safety, or welfare.⁵⁰ The Applicant has failed to demonstrate that the application includes adequate provisions to prevent the creation or maintenance of a nuisance. In fact, the Applicant failed to provide testimony from any witness with knowledge of

⁴⁷ Joe Word 1, 7:148-150 ("noise . . . travel[s] distances much greater than 125 feet."), 11:244-247 ("A person standing 125 feet from this activity will still consider it to be a very noisy location."); CR. V. No. 10, 2252:22 to 2253:14; 2280:20-21 (Judge Scudday: "He's indicated there's noise out there during the activities. There's noise."); NNC 2, 22:2-7; John Wilkens 2, 2:7-26; MM-2, 2:22-29.

⁴⁸ CR. V.13. 2690:3-7.

⁴⁹ CR.V.13, 2828:18-25.

⁵⁰ 30 TEX. ADMIN. CODE §330.3(95).

the facility's operational practices.⁵¹ Testimony was presented, however, that the beeping noise from trucks backing up on the WMI facility can be heard from neighboring properties.

Additionally, the application and supporting testimony from the Applicant fail to demonstrate that the WMI facility will be able to meet the TPDES 100 mg/L benchmark value. Coupled with the fact that residential areas are adjacent to the facility, the granting of this proposed expansion would subject the neighboring landowners to increased localized flooding and degraded water quality.⁵² The Applicant has also failed to demonstrate how its operating practices will vary in any meaningful way so as to prevent the current nuisance conditions of foul odors and windblown waste felt on the adjacent properties.

There is nothing in the Applicant's proposed site operating plan that is significantly different from their existing plan. Based upon the nuisance impacts that have historically occurred, either the site operating plan itself is insufficient to prevent impacts to nearby neighborhoods, or the site operator has been inconsistent in operating in compliance with that plan.⁵³ For example, merely complying with the 125 foot buffer requirement is not sufficient to mitigate the nuisance impacts on surrounding properties. Nuisances such as odors, litter, dust, noise, and sediment-laden storm water runoff, can and do travel distances much greater than 125 feet.⁵⁴ For these reasons alone, this facility is in dire need of much larger buffer zones to minimize the impacts on the surrounding community from the poor operational practices currently in place and proposed under the application.

Finding of Fact No. 229: "The Facility's compliance history does not warrant denial of the Application."

⁵¹ CR. V.No. 2, 186:21 – 190:2.

⁵² TF 1, 11:234-239.

⁵³ Joe Word 1, 8-9:180-193

⁵⁴ Joe Word 1, 7:144-156; 12:256-272.

This Finding is not supported by the record. In 2004 WMI was assessed the largest fine ever levied by the TCEQ on a MSW operator in the State of Texas.⁵⁵ Over 10 violations, which contributed to serious odor nuisances to the surrounding communities, were documented by the TCEQ in just one enforcement action.⁵⁶ The nuisances generated by the WMI facility continue to this day. The absence of ongoing TCEQ investigations and enforcement orders against WMI, does not mean that there are not violations occurring at the facility. Specifically, there have been a lack of complaints to the TCEQ and an increase in complaints made to the local authorities as a direct result of the TCEQ Region 11 enforcement director informing the citizens that it would do no good for them to complain about the facility to the TCEQ anymore.⁵⁷ This Facility's compliance history consists of more than just a number derived from a formula; it consists of the actual and continuous nuisances to the neighboring property owners, coupled with WMI's failure to mitigate and/or prevent them from occurring.

Finding of Fact No. 231: "The two ponds in the northwest corner of the Facility expansion area are substantially the same as the ponds that are described in the Erosion and Restoration Site Plan (ERSP) approved by the City on July 19, 2006."

This Finding is misleading. To say that the ponds currently on the expansion area are "substantially the same" as the ponds described in the ERSP to the City, is to say that the specifications are unimportant. The evidence is that the ponds currently in place in the expansion area are different than what was presented to the City, and also different than what WMI's engineer designed. This Finding should be modified to state: "The two ponds in the northwest corner of the Facility expansion area are not the same as the ponds that are described in the Erosion and Restoration Site Plan (ERSP) approved by the City on July 19, 2006, nor the same as what is described in the application."

⁵⁵ Jon White 1, 18:11-12; 19:6-7; Joe Word 1, 6:129-130.

⁵⁶ Jon White 6, 7-8; Jon White 1, 18:12-14; Joe Word 1, 6-7:130-139.

⁵⁷ MM 1, 4:4-14; TC 6; CR. V.No. 10, 2114:23-25 & 2115:1-2.; CR. V.No. 9, 2071:12-17.

Finding of Fact No. 245: “The CAPCOG’s determination is merely advisory.”

Finding of Fact No. 246: “None of the specific bases for the CAPCOG’s non-conformance determination are a sufficient basis to support a denial of the Application.”

These Findings are not supported by the evidence. The application fails to conform with the Regional Solid Waste Management Plan (“RSWMP”) as required by state law.⁵⁸ The Capital Area Council of Governments (“CAPCOG”) is the regional solid waste planning agency recognized by the TCEQ for the ten county region that the WMI facility is located in.⁵⁹ CAPCOG determined that WMI’s application is not compatible with land use in the area, does not conform with the RSWMP, and that there are significant local concerns about the site.⁶⁰ CAPCOG also supports the Travis County request that the WMI facility cease operations by November 15, 2015, and that WMI include adequate buffer zones and other safeguards around any new landfills in the eastern portion of Travis County. CAPCOG also expressed concern about the applicant’s compliance history, the applicant’s failure to go beyond minimum operating requirements in its site operating plan, future land use compatibility, and inadequate programs to support community cleanup events and curtail or clean up illegal dumping.⁶¹ Per Section 363.066 of the Texas Health and Safety Code, “...public and private solid waste management activities must conform to that plan.” The only exception in statute is for cases in which the TCEQ grants a variance from the adopted RSWMP.⁶² WMI has not sought an exception to the RSWMP.⁶³ Pursuant to this section of the Health and Safety Code, and CAPCOG’s determination of nonconformance with the RSWMP, this application must be denied.

⁵⁸ COA 2; TEX. HEALTH & SAFETY CODE ANN. §363.066

⁵⁹ Joe Word 1, 7:158-160.

⁶⁰ COA 2.

⁶¹ COA 2; Joe Word 1, 8:168-177.

⁶² TEX. HEALTH & SAFETY CODE ANN. §363.066(b).

⁶³ CR. V.No. 2, 209:7 – 210:4.

Finding of Fact No. 248: “The 1992 RSWMP anticipated that the ACRD Facility would continue operations until 2025, even without the proposed expansion.”

This Finding is misleading and should be stricken. The evidence shows that the WMI Facility would reach capacity and cease operations by 2016 if this expansion is not granted. WMI has repeatedly represented this fact in it’s filings to the TCEQ, as well as in its prefiled testimony, in its application, and in it’s presentations to the community. To allude that the facility can already operate until 2025 without this expansion is misleading to say the least.

Finding of Fact No. 249: “There is no evidentiary or legal basis to support the inclusion of an arbitrary November 2015 closing date in the Permit.”

This Finding is not supported by the evidence. The development community needs to be able to rely on closure once permit capacity is reached. Granting a substantial increase in capacity, particularly with no time-certain closure date in the near future, will continue to adversely affect development, and enjoyment of property, in this vicinity for decades. The old Travis County Landfill is now closed. BFI has committed to close their landfill no later than November 1, 2015. After November 1, 2015, WMI will be the only active landfill in the area.⁶⁴

In addition to the exceptions noted above, the City of Austin objects to Conclusion of Law Numbers 5, 7, 8, 9, 11, 28, 32, 37, 39, 42, 45, 46, 47, 48, 49, and 50 for the reasons stated in the discussion and argument above, and requests that the Commission order that the permit be denied.

IV. CONCLUSION

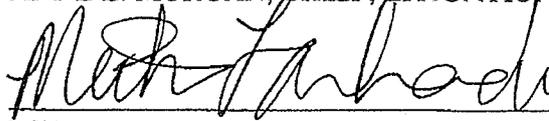
Protestant prays that Findings of Fact 47, 48, 55, 56, 123, 124, 127, 131, 141, 145, 165, 167, 189, 192, 193, 195, 211, 214, 218, 219, 229, 231, 245, 246, 248, 249, 253, and Conclusions

⁶⁴ Joe Word 1, 5:114 – 6:115.

of Law Nos. 5, 7, 8, 9, 11, 28, 32, 37, 39, 42, 45, 46, 47, 48, 49, and 50 be modified or deleted in accordance with the above exceptions. Protestant City requests that the draft permit be denied.

RESPECTFULLY SUBMITTED,

DAVID ALLAN SMITH, CITY ATTORNEY
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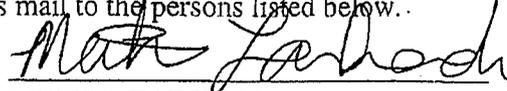
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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2010, a true and correct copy of the City of Austin's Exceptions to the Supplemental Proposal for Decision was served via facsimile, electronic mail, hand-delivery, e-service or regular first-class mail to the persons listed below.


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

Accompanying this cover sheet is *Protestant, City of Austin's Exceptions to the Supplemental Proposal for Decision* in the referenced matter.

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