Vinson&Elkins

Bryan J. Moore bmoore@velaw.com
Tel 512.542.8729 **Fax** 512.236.3257

April 7, 2008

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 APR -7 AM 11: 36
CHIEF CLERKS OFFICE

Via Hand Delivery

Ms. La Donna Castañuela
Chief Clerk (MC-105)
ATTN: Agenda Docket Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle, Bldg. F
Austin, Texas 78753

Re: SOAH Docket No. 582-07-0863; TCEQ Docket No. 2006-1931-MSW
Application of Waste Management of Texas, Inc. for a Municipal Solid Waste Permit Amendment; Permit No. MSW-66B

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced docket, please find one original and twelve copies of Applicant's Brief in Response to the Administrative Law Judge's Proposal for Decision. Please return one file-stamped copy to the courier. Thank you.

Respectfully submitted,

Bryan J. Moore

Enclosures
cc: Service List

ORIGINAL

SOAH DOCKET NO. 582-07-0863
TCEQ DOCKET NO. 2006-1931-MSW

APPLICATION OF	§	**BEFORE THE STATE OFFICE**
WASTE MANAGEMENT OF TEXAS, INC.	§	
FOR A MUNICIPAL SOLID WASTE	§	**OF**
PERMIT AMENDMENT;	§	
PERMIT NO. MSW-66B	§	**ADMINISTRATIVE HEARINGS**

2008 APR -6 AM 11:37
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

APPLICANT WASTE MANAGEMENT OF TEXAS, INC.'S BRIEF IN RESPONSE TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION

COMES NOW Applicant Waste Management of Texas, Inc. ("***Applicant***" or "***WMTX***") and, per 30 Tex. Admin. Code § 80.257(a), files this brief in response to the Administrative Law Judge's ("***ALJ's***") Proposal for Decision ("***PFD***") in the above-captioned matter. WMTX believes that the PFD is thorough and well reasoned. Furthermore, the findings and recommendations in the PFD are supported by the evidence put forth in this proceeding. Accordingly, WMTX accepts – with a single limited exception – the ALJ's PFD and proposed order ("***Proposed Order***"). This exception, and the attendant conforming changes, are set forth below.

I.
ARGUMENT

A. IF LIMITATIONS ARE TO BE PLACED ON OPERATING HOURS, PER THE APPLICABLE REGULATORY REQUIREMENTS, THE PERMIT SHOULD DISTINGUISH BETWEEN WASTE ACCEPTANCE HOURS AND OTHER HOURS OF OPERATION

As discussed in the ALJ's PFD, in its application, WMTX requested the flexibility to operate the Mesquite Creek Landfill, as necessary, without limitations on the facility's operating hours.[1] In the PFD, the ALJ reasoned that "continuous operations could be disturbing to nearby residents" and that the evidence put forward did not support a finding that "waste management

---

1 *See* PFD at 55-56.

operations" at the facility required such flexibility.[2] The ALJ also took note that WMTX chose to accept some limitations on its operating hours in order to reach agreement with Guadalupe County on a number of other issues, which are set forth in the parties' settlement agreement.[3] In light of the foregoing, the PFD proposes to limit the facility's "operating hours" to the hours specified in the agreement between WMTX and Guadalupe County.

While WMTX maintains that the facility can be operated with the flexibility requested in the application without disturbing area residents, WMTX nevertheless accepts – and does not take exception to – the ALJ's proposal to limit the facility's operating hours to the hours specified in the agreement with Guadalupe County. However, WMTX respectfully submits that the ALJ's proposal regarding "operating hours" should be clarified to recognize the regulatory distinction between waste acceptance hours and other hours of operation. Specifically, the regulation applicable to facility operating hours expressly distinguishes between (1) waste acceptance hours, (2) hours for transportation of materials on- or off-site and operation of heavy equipment, and (3) operating hours for other activities.[4] The third category of operating hours – hours for "other activities" – does not require specific approval from the Texas Commission on

---

2 *Id.* at 57-58.

3 *See id.* at 56; Ex. CCL-5. The first sentence in paragraph 2.2 of the settlement agreement with Guadalupe County specifically states the hours that the facility is currently open and accepting "Waste Material for disposal." Ex. CCL-5 at 2. The second sentence in that paragraph modified only those hours – i.e., only the facility's waste acceptance hours. Although the agreement uses the words "Landfill operation hours" in the second sentence of paragraph 2.2, the agreement was not drawn with regulatory definitions or distinctions in mind. *Id.* The first and third sentences of paragraph 2.2., read in conjunction with the second sentence, demonstrate that the parties' intent was only to address the facility's "waste acceptance hours," not the operating hours for other activities recognized and discussed in 30 Tex. Admin. Code § 330.118(a) (e.g., transportation of materials on- or off-site and operation of heavy equipment).

4 *See* 30 TEX. ADMIN. CODE § 330.118(a) (distinguishing between "waste acceptance hours and the hours when materials will be transported on or off site, and the hours when heavy equipment may operate," as well as "[o]perating hours for other activities").

Environmental Quality ("***TCEQ***" or the "***Commission***"), thus the relevant distinction is between waste acceptance hours and hours for transportation of materials on- or off-site and operation of heavy equipment.[5]

To give effect to this regulatory distinction, WMTX respectfully requests that the ALJ's proposed limitation on the facility's operating hours be clarified to provide that the limitation applies only to the hours during which the facility may accept waste – i.e., that the facility's authorized hours of waste acceptance are limited to Monday through Friday, 4:00 a.m. to 8:00 p.m., and Saturday 4:00 a.m. to 3:00 p.m., and that such limitation does not apply to any other facility activities, such as transportation of materials on- or off-site and operation of heavy equipment. WMTX further requests, in accordance with the ALJ's findings and TCEQ's rules, that transportation of materials on- or off-site and operation of heavy equipment be allowed Monday through Saturday, from 4:00 a.m. to 9:00 p.m., and on Sunday from 5:00 a.m. to 9:00 p.m.[6] Per TCEQ's rules, operating hours for other activities do not require the Commission's approval and, therefore, should not be limited by the facility's permit.[7]

These clarifications would (1) honor and effectuate the ALJ's proposal to limit the hours of "normal operations" and "waste management operations;"[8] (2) properly distinguish between waste acceptance hours and other hours of operation, in accordance with the regulatory

---

5 *See id.* ("Operating hours for other activities do not require other specific approval."); *see also* 29 TEX. REG. 11,054, 11,069 (Nov. 24, 2004) ("[F]acility operating hours include waste acceptance hours, hours when materials may be transported on or off site, and hours when heavy equipment may operate.").

6 *See* 30 TEX. ADMIN. CODE § 330.118(a) (establishing a default 9:00 p.m. curfew for "[t]ransportation of materials and heavy equipment operation").

7 *See id.* ("Operating hours for other activities do not require other specific approval.").

8 PFD at 58.

distinction in TCEQ's rules;[9] (3) honor and effectuate the intent of the settlement agreement with Guadalupe County, which was intended to address only waste acceptance hours; (4) allow the facility to make full use of its waste acceptance hours, and safely transport non-waste materials and operate equipment for purposes other than waste acceptance outside of waste acceptance hours when the facility is less busy and personnel are available and not tasked with managing disposal activities;[10] and (5) effectuate, at least in part, WMTX's stated intentions regarding operation of the facility.[11]

While the ALJ is correct that the "operating hours" in WMTX's agreement with Guadalupe County will provide for extended operations beyond the hours authorized in WMTX's current permit, it should be recognized that WMTX's existing permit was issued prior to TCEQ's 2004 revisions to its rules for site operating plans for municipal solid waste facilities ("***SOP Rules***").[12] Prior to those revisions, TCEQ's SOP Rules – and permits issued pursuant to those rules – specified only the facility's "operating hours" and did not otherwise specifically limit the hours when materials may be transported on- or off-site, and when heavy equipment may be operated.[13] As TCEQ recognized in the preamble to its revised SOP Rules, prior to those rules specifying standard hours for such activities, facilities may not have interpreted their

---

9 *See* 30 TEX. ADMIN. CODE § 330.118(a); *see also* 29 TEX. REG. at 11,069.

10 *See* 29 TEX. REG. at 11,069 ("The standard operating hours for when materials may be transported on or off site, and when heavy equipment may operate have been adopted in consideration of comments requesting flexibility and extended operating hours."); *id.* ("The extended operating hours for when materials may be transported on or off site, and hours when heavy equipment may operate enables a facility to make full use of its waste acceptance hours. A facility can use those hours outside of its waste acceptance hours so it can be ready to receive waste upon opening the gates and can continue to receive waste up until closing its gate.").

11 *See* PFD at 55-56.

12 *See id.* at 5 (noting that WMTX's current, existing permit was issued in 2003).

13 *See* 30 TEX. ADMIN. CODE § 330.118 (2003) (limiting a facility's "operating hours" only).

authorized "operating hours" as a limit on the hours when materials may be transported on- or off-site, and when heavy equipment may be operated.[14]

For the foregoing reasons, WMTX respectfully requests that proposed Findings of Fact 97 through 99 in the Proposed Order[15] be clarified as follows:

> 97. The operating hours in the settlement agreement will provide Applicant with several more hours per day for ~~landfill~~ waste acceptance activities than Applicant currently has.
>
> 98. Applicant has been operating for many years with fewer ~~operating~~ waste acceptance hours than those described in the settlement agreement.
>
> 99. Applicant's ~~operating~~ waste acceptance hours should be limited to those stated in its agreement with Guadalupe County.

On the same grounds, WMTX also respectfully requests that proposed Conclusion of Law 14[16] be revised as follows:

> 14. The facility's ~~operating~~ waste acceptance hours should be Monday through Friday from 4:00 a.m. to 8:00 p.m. and Saturday from 4:00 a.m. to 3:00 p.m., unless an emergency requires extended ~~operating~~ waste acceptance hours. Transportation of materials on- or off-site and operation of heavy equipment should be allowed Monday through Saturday, from 4:00 a.m. to 9:00 p.m., and on Sunday from 5:00 a.m. to 9:00 p.m. Other activities should not be limited to specified hours and may be conducted by the facility, as necessary, at any time.

---

[14] *See* 29 TEX. REG. at 11,060 ("If a facility elects to continue a current practice of allowing materials to be transported on or off site, or operating heavy equipment beyond the standard hours expressed in the rules o*r outside the hours currently authorized in the facility permit*, it may submit a request to modify its site operating plan under §330.111(b).") (emphasis added).

[15] *See* Proposed Order at 23-24.

[16] *See id.* at 32.

Additionally, WMTX also respectfully requests that proposed Ordering Provision 1.a.[17] be revised as follows:

a. the facility's ~~operating~~ waste acceptance hours should be Monday through Friday from 4:00 a.m. to 8:00 p.m. and Saturday from 4:00 a.m. to 3:00 p.m., unless an emergency requires extended ~~operating~~ waste acceptance hours; transportation of materials on- or off-site and operation of heavy equipment may be conducted Monday through Saturday, from 4:00 a.m. to 9:00 p.m., and on Sunday from 5:00 a.m. to 9:00 p.m.; other activities are not limited to specified hours and may be conducted by the facility, as necessary, at any time.

B. PROPOSED MODIFICATIONS TO CORRECT INADVERTENT TYPOGRAPHICAL ERRORS

In a few instances in the Proposed Order there are, what appear to be, simple, inadvertent, typographical errors that, if left uncorrected, could be potentially misleading or otherwise confusing. To address these inadvertent typographical errors, WMTX proposes the following modifications to the ALJ's Proposed Order:

PAGE NO. (Proposed Order)	PARAGRAPH NO.	PROPOSED MODIFICATION	BASIS FOR MODIFICATION
4	20	Delete "Suite 502"	"Suite 502" refers to the ALJs' offices rather than the actual hearing room.
7	32	"th" should be "the"	Typo.
9	37.b	Replace first "ft/bgs" with "feet below ground surface (ft/bgs)"	Clarification. The term "ft/bgs" is not defined prior to this paragraph.
15	58.b	Replace "from" with "form"	Typo.

[17] *See id.* at 33.

PAGE NO. (Proposed Order)	PARAGRAPH NO.	PROPOSED MODIFICATION	BASIS FOR MODIFICATION
30	143	Delete "a" between "As" and "statutory"	Typo.

II.
CONCLUSION

For the foregoing reasons, Applicant WMTX respectfully requests that the ALJ's Proposed Order be modified as proposed above and issued by the Commission with those modifications.

Respectfully submitted,

VINSON & ELKINS L.L.P.
2801 Via Fortuna, Suite 100
Austin, Texas 78746
Telephone: 512.542.8729
Facsimile: 512.236.3257

Bryan J. Moore/SBN 24044842
John A. Riley/SBN 16927900
M. Nicole Adame Winningham/SBN 24045370

COUNSEL FOR APPLICANT
WASTE MANAGEMENT OF TEXAS, INC.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been served on the following on this the 7th day of April, 2008:

Anthony C. Tatu Amie Dutta Richardson Texas Commission on Environmental Quality P.O. Box 13087, MC-173 Austin, Texas 78711-3087 Phone: 512.239.0600 Fax: 512.239.0606	*Representing the Executive Director of the Texas Commission on Environmental Quality*
Garrett Arthur Office of Public Interest Counsel Texas Commission on Environmental Quality P.O. Box 13087, MC-103 Austin, Texas 78711-3087 Phone: 512.239.6363 Fax: 512.239.6377	*Representing the Texas Commission on Environmental Quality Office of Public Interest Counsel*
James Ballowe Solid Waste Manager 424 S. Castell Avenue New Braunfels, Texas 78130 Phone: 830.221.4044 Fax: 830.608.2109	*Representing City of New Braunfels*
Lawrence G. Dunbar Dunbar Harder, PLLC One Riverway, Suite 1850 Houston, Texas 77056 Phone: 713.782.4646 Fax: 713.782.5544	*Representing TJFA, L.P.*
Nancy Schwarzlose 2041 Schwarzlose Road New Braunfels, Texas 78130 Phone: 830.372.1500 Fax: 830.372.4233	*Representing Concerned Citizens and Landowners*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 APR -7 AM 11:37
CHIEF CLERKS OFFICE

John Holtman 1520 Schwarzlose Road New Braunfels, Texas 78130 Phone: 210.364.4618	*Representing Concerned Citizens and Landowners*
Hon. Sarah G. Ramos State Office of Administrative Hearings 300 West 15th St., Suite 502 Austin, Texas 78701 Phone: 512.475.4993 Fax: 512.475.4994	*Administrative Law Judge, State Office of Administrative Hearings*
LaDonna Castañuela, TCEQ Chief Clerk Office of the Chief Clerk, MC-105 Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 Phone: 512.239.3300 Fax: 512.239.3311	*Chief Clerk, Texas Commission on Environmental Quality*
Les Trobman, General Counsel Office of General Counsel, MC-101 Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 Phone: 512. 239.5525 Fax: 512.239.5533	*General Counsel, Texas Commission on Environmental Quality*

Bryan J. Moore

970267_1.DOC