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# State Office of Administrative Hearings

Kristofer S. Monson  
Chief Administrative Law Judge

June 13, 2024

Mary Smith  
General Counsel  
Texas Commission on Environmental Quality

**VIA EFILE TEXAS**

**RE: Docket Number 582-23-22765.TCEQ; TCEQ No. 2023-0265-MSW;  
*Application of USA Waste of Texas Landfills, Inc. for a Municipal Solid  
Waste Permit Amendment***

Dear Parties:

Please find attached a Proposal for Decision in this case.

Any party may, within 20 days after the date of issuance of the PFD, file exceptions or briefs. Any replies to exceptions, briefs, or proposed findings of fact shall be filed within 30 days after the date of issuance on the PFD. 30 Tex. Admin. Code § 80.257.

All exceptions, briefs, and replies, along with certification of service to the above parties and the ALJ, shall be filed with the Chief Clerk of the TCEQ electronically at <http://www14.tceq.texas.gov/epic/eFiling/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

CC: Service List

**BEFORE THE  
STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

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**APPLICATION OF USA WASTE OF TEXAS LANDFILLS, INC. FOR A  
MUNICIPAL SOLID WASTE PERMIT AMENDMENT**

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**PROPOSAL FOR DECISION**

USA Waste of Texas Landfills, Inc. (Applicant) withdrew its application for a permit amendment. Several of the Protestants objected to this withdrawal being without prejudice, and a dispute over reimbursement of expenses arose. The Administrative Law Judge (ALJ) recommends that Applicant be allowed to withdraw its application without prejudice once it has reimbursed Harris County \$207,623.30; Hope, Healing & Hooves, Inc. (Hope, Healing & Hooves) \$5,158.14; and Westwind Industries, LP (Westwind Industries) \$426,535.36.

## **I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY**

On September 12, 2023, the preliminary hearing was held via Zoom videoconference and the following were admitted as parties: Applicant; the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ); the Office of Public Interest Counsel (OPIC); Harris County; Westwind Industries; Hope, Healing & Hooves; Myra Wrenn Jefferson; Gregory Hudson; Revitalize America Partnership, Inc.; Carverdale Civic Club; Damien Lawson; Dr. Victor Hebert; and Greater Macedonia Baptist Church.

Following discovery, in January 2024, Applicant filed its motion to withdraw its application without prejudice. Many of the Protestants objected to this motion. Harris County; Westwind Industries; and Hope, Healing & Hooves submitted requests for repayment of their expenses. The record closed on April 15, 2024, after the parties submitted briefing on the extent to which expenses are recoverable.

## **II. APPLICABLE LAW**

Under 30 Texas Administrative Code section 80.25, an applicant may file a request to withdraw its application at any time before a PFD is issued. If the parties agree in writing, an applicant may move to withdraw without prejudice and is entitled to a remand.<sup>1</sup> If the parties do not agree in writing, an applicant nevertheless is entitled to an order dismissing an application without prejudice if:

1. the parties, or the applicant, executive director, and public interest counsel if no parties have been named, agree in writing;

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<sup>1</sup> 30 Tex. Admin. Code § 80.25(b).

2. the applicant reimburses the other parties all expenses, not including attorney’s fees, that the other parties have incurred in the permitting process for the subject application; or
3. the commission authorizes the dismissal of the application without prejudice.<sup>2</sup>

Applicant pursues dismissal without prejudice under the second provision. Although three Protestants have submitted requests for reimbursement, with supporting documentation, Applicant has not yet reimbursed any of the parties.

### III. ARGUMENT AND ANALYSIS

Westwind Industries; Hope, Healing & Hooves; and Revitalize America oppose Applicant’s motion to dismiss without prejudice or alternatively request reimbursement. Protestants Hudson and Jefferson have no expenses to be reimbursed, but they urge the Commission to dismiss with prejudice if Applicant is unable to reimburse the other Protestants.

There is no dispute over the amount of Harris County’s reimbursement, and the remaining Protestants have not requested reimbursement. The following chart summarizes the reimbursement requests:

| Party         | Status   |
|---------------|--|
| Harris County | Submitted requests and receipts for \$207,623.30; awaiting payment |

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<sup>2</sup> 30 Tex. Admin. Code § 80.25(e).

|                        |   |
|------------------------|---|
| Westwind Industries    | Originally requested \$364,236.98, but increased to \$426,535.36 in the reply, to account for consulting fees incurred after the motion to dismiss was filed; Applicant agreed to pay \$256,918.36 but contests \$140,625 (now increased by \$16,875) in requested expenses; awaiting payment |
| Hope, Healing & Hooves | Requested \$62,043.14. Applicant agreed to pay \$5,158.14, the total amount minus attorneys' fees; awaiting payment   |

**A. HOPE, HEALING & HOOVES**

Hope, Healing & Hooves argues that Applicant’s withdrawal should be with prejudice or, alternatively, that it should be reimbursed its attorneys’ fees, along with other expenses.

As set out above, Hope, Healing & Hooves submitted itemized invoices that total \$62,043.14.<sup>3</sup> Of that total, \$56,885.00 consist of attorneys’ fees. The other amounts, which total \$5,158.14, include amounts for legal assistant time, prints, postage, filing fees, and expert fees. Applicant does not challenge the reimbursement for that \$5,158.14.

TCEQ’s rule expressly excludes attorneys’ fees from reimbursement.<sup>4</sup> Although Hope, Healing & Hooves may believe that this provision is inequitable, it does not cite any authority that this rule may be ignored. Instead, it contends that the

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<sup>3</sup> Hope, Healing & Hooves’ Submission of Fees and Expenses (Feb. 5, 2024).

<sup>4</sup> 30 Tex. Admin. Code § 80.25(e)(2).

Commissioners have discretion to require reimbursement of attorneys' fees because they have broad discretion to authorize dismissal without prejudice.<sup>5</sup> Thus, they argue, the Commissioners have discretion in the matter. The ALJ is unconvinced that another basis for withdrawal supports disregarding express language in the part of the rule being relied on. Hope, Healing & Hooves may not recover its attorneys' fees.

Nor does Hope, Healing & Hooves cite any authority, other than equity, for its alternative claim that Applicant's motion to withdraw without prejudice may be converted into a motion to withdraw with prejudice. The ALJ recommends rejecting the argument that dismissal without prejudice is generally unfair.<sup>6</sup>

The ALJ finds that Hope, Healing & Hooves is entitled to reimbursement of \$5,158.14 for its expenses. As set out in TCEQ's rule, it is not entitled to reimbursement of its attorneys' fees.

## **B. WESTWIND INDUSTRIES**

The primary dispute regarding Westwind Industries' request for reimbursement involves payments totalling \$140,625 made to a company called Huntsinger Consulting, LLC for Bill Huntsinger's work as a consulting expert. Applicant contends that these payments are insufficiently supported because a) there

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<sup>5</sup> See Hope, Healing & Hooves' Submission of Fees and Expenses at 2 (citing 30 Tex. Admin. Code § 80.25(e)(3) ("An applicant is entitled to an order dismissing an application without prejudice if: . . . (3) the commission authorizes the dismissal of the application without prejudice.")).

<sup>6</sup> Revitalize America and Westwind Industries made similar arguments. The ALJ also finds their arguments unpersuasive.

was no written contract between Westwind Industries and Huntsinger; b) the accounting program printout included in Westwind Industries' request indicates the payment was from Westwind Industries, Inc., not Westwind Industries;<sup>7</sup> c) Huntsinger's invoices are for a flat rate; d) the \$5,625 monthly expert payment was only a portion of the \$7,500 total amount Huntsinger was paid by the company each month, sometimes before he produced invoices;<sup>8</sup> e) Huntsinger was paid as an expert during the three months this matter was abated; f) Westwind Industries' other consulting expert was retained and paid by a law firm, whereas Huntsinger was paid directly by the company; and g) Huntsinger's expert fees are significantly larger than the amounts paid to other experts in this case.

Westwind Industries argues that it is entitled to recover the payments to Huntsinger Consulting. It presented an affidavit from Bill Huntsinger, who attested that he had an oral consulting agreement for a monthly flat rate and that he performed work and submitted invoices.<sup>9</sup> Those invoices are attached to Westwind Industries' reply.<sup>10</sup> It also presented evidence that the company's name changed from Westwind Industries, Inc. to Westwind Industries, LP, but that the QuickBooks heading had not changed.

As the ALJ reads it, the Commission's rule does not provide authority to analyze the wisdom of the payments to Huntsinger Consulting. The rule speaks to

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<sup>7</sup> Westwind Industries' Reply Ex. 12.

<sup>8</sup> Westwind Industries' Reply Exs. 11, 13.

<sup>9</sup> Westwind Industries' Reply Ex. 4.

<sup>10</sup> Westwind Industries' Reply Ex. 4.

reimbursing expenses, not including attorneys' fees, incurred in the permitting process. It does not provide for analyzing the reasonableness of the expenses or contain any requirement that the expenses be incurred under a written contract. The ALJ finds sufficient evidence that these expenses were paid<sup>11</sup> and that they were paid in connection with the permitting process. That is all Westwind Industry was required by the rule to show.

#### IV. CONCLUSION

Applicant has agreed to reimburse Harris County \$207,623.30; Hope, Healing & Hooves \$5,158.14; and Westwind Industries \$256,918.36, although it has not yet actually paid any of the Protestants. Applicant also must pay Westwind Industries the additional money requested for payment to Huntsinger Consulting, for a total of \$426,535.36. Assuming those payments occur, then the ALJ recommends that the Commission allow Applicant to withdraw its application without prejudice.

**Signed June 13, 2024**

ALJ Signature:



Rebecca Smith

Presiding Administrative Law Judge

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<sup>11</sup> Although the QuickBooks register shows Westwind Industries, Inc., the actual checks were issued by Westwind Industries. Westwind Industries' Reply Ex. 13.



# **TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

## **AN ORDER GRANTING THE MOTION OF USA WASTE OF TEXAS LANDFILLS, INC.**

### **TO WITHDRAW APPLICATION WITHOUT PREJUDICE**

**SOAH DOCKET NO. 582-23-22765, TCEQ DOCKET NO. 2023-0265-MSW**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the motion of USA Waste of Texas Landfills, Inc. (Applicant), to withdraw without prejudice its application for a municipal solid waste permit amendment, Permit No. 2185A. A Proposal for Decision (PFD) was prepared by Administrative Law Judge (ALJ) Rebecca S. Smith with the State Office of Administrative Hearings (SOAH).

After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

#### **I. FINDINGS OF FACT**

1. On February 23, 2021, Applicant USA Waste of Texas Landfills, Inc. filed an Application with the Texas Commission on Environmental Quality for a major amendment to its permit, seeking authorization to change the name of its Type IV municipal solid waste landfill and expand the facility both laterally and vertically.
2. The Executive Director declared the application administratively complete and technically complete.

3. On May 15, 2023, the Commission referred the Application to SOAH.
4. A preliminary hearing was held on September 12, 2023. The following were admitted as parties: Applicant; the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ); the Office of Public Interest Counsel (OPIC); Harris County; Westwind Industries, LP (Westwind Industries); Hope, Healing & Hooves, Inc. (Hope, Healing & Hooves); Myra Wrenn Jefferson; Gregory Hudson; Revitalize America Partnership, Inc.; Carverdale Civic Club; Damien Lawson; Dr. Victor Hebert; and Greater Macedonia Baptist Church.
5. After several months of discovery, Applicant moved to withdraw its application without prejudice.
6. The parties did not all agree to the withdrawal without prejudice.
7. Harris County's expenses, not including attorneys' fees, that it incurred in the permitting process for the application total \$207,623.30.
8. Hope, Healing & Hooves' expenses, not including attorneys' fees, that it incurred in the permitting process for the application total \$5,158.14.
9. Westwind Industries' expenses, not including attorneys' fees, that it incurred in the permitting process for the application total \$426,535.36.

## **II. CONCLUSIONS OF LAW**

1. TCEQ has jurisdiction over this matter. Tex. Health & Safety Code §§ 361.061, .088.
2. SOAH has jurisdiction to conduct a hearing and to prepare a PFD in contested cases referred by the Commission under Texas Government Code section 2003.047.
3. Notice was provided in accordance with Texas Health and Safety Code sections 361.0665, 361.081; Texas Government Code sections 2001.051 and .052; and 30 Texas Administrative Code chapter 39.

4. Under 30 Texas Administrative Code section 80.25(a), an applicant may file a request to withdraw its application at any time before a PFD is issued.
5. An applicant is entitled to an order dismissing an application without prejudice if the applicant reimburses the other parties all expenses, not including attorneys' fees, that the other parties have incurred in the permitting process for the application. 30 Tex. Admin. Code § 80.25(e)(2).
6. Once Applicant has reimbursed the amounts set out above in Findings of Fact 7-9, it is entitled to an order dismissing an application without prejudice.

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. Contingent upon proof of payment, the motion of USA Waste of Texas Landfills, Inc. to withdraw without prejudice its application for a municipal solid waste permit amendment, Permit No. 2185A is granted.
2. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
3. The effective date of this Order is the date the Order is final, as provided by Texas Government Code section 2001.144 and 30 Texas Administrative Code section 80.273.
4. TCEQ's Chief Clerk shall forward a copy of this Order to all parties.
5. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Jon Niermann, Chairman For the Commission**

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Associated Case Party: USA Waste of Texas Landfills, Inc.

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Associated Case Party: Westwind Industries, LP

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