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582-23-22765  
7/15/2024 2:35 PM  
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582-23-22765  
7/15/2024 2:40:26 pm  
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**SOAH DOCKET NO. 582-23-22765**  
**TCEQ DOCKET NO. 2023-0265-MSW**

**APPLICATION OF USA WASTE OF § BEFORE THE STATE OFFICE**  
**TEXAS LANDFILLS, INC. §**  
**FOR A MUNICIPAL SOLID WASTE § OF**  
**PERMIT AMENDMENT; §**  
**PERMIT NO. 2185A § ADMINISTRATIVE HEARINGS**

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**WESTWIND INDUSTRIES, LP'S**  
**REPLY TO APPLICANT'S EXCEPTIONS TO**  
**THE ALJ'S PROPOSAL FOR DECISION**

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Pursuant to 30 TAC §80.257(a), Westwind Industries, LP (Westwind) respectfully files this Reply to Applicant's Exceptions to the Administrative Law Judge's Proposal for Decision. In support of this Reply, Westwind would show the following:

**I. INTRODUCTION**

The Honorable ALJ Smith has recommended that the Texas Commission on Environmental Quality allow Applicant USA Waste of Texas Landfills, Inc. (Waste Texas) to withdraw its application without prejudice, *assuming* Waste Texas makes full payment to Westwind in the amount of \$425,535.36. The Executive Director has agreed with this recommendation and filed a notice of no exceptions to the Proposal for Decision. Despite the detailed and reasoned analysis of the Honorable ALJ Smith, Waste Texas continues to dispute its obligation to reimburse Westwind. As of the date of this filing, Waste Texas has not reimbursed Westwind a single dollar, even though it admits to owing Westwind over 60% of its total request for reimbursement. Because Waste Texas has failed to reimburse Westwind, Waste Texas' Motion to Withdraw its

Application Without Prejudice should be denied, and its Application should be dismissed *with* prejudice.

To justify its failure to reimburse Westwind, Waste Texas regurgitates its arguments related to Westwind's entitlement to reimbursement of expenses related to Huntsinger Consulting.<sup>1</sup> These arguments were considered by the Honorable ALJ Smith, and each was rejected. Simply put, the plain language of the Rule requires reimbursement of expenses incurred by Westwind with Huntsinger Consulting. In that regard, the Honorable ALJ Smith found sufficient evidence that Westwind paid these expenses and that they were paid in connection with the permitting process. Accordingly, Westwind met its burden to entitle it to reimbursement.

In a last-ditch effort, Waste Texas now claims it would not be “just and reasonable” to require reimbursement of the Huntsinger Consulting expenses, which were only incurred because Waste Texas decided to pursue a shoddy landfill expansion application. Because Waste Texas' self-serving arguments lack merit, are against public policy, and contradict the plain language of the Rule on dismissals without prejudice, full reimbursement is due to Westwind, including those expenses incurred with Huntsinger Consulting.

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<sup>1</sup> Westwind incorporates by reference all of its previous arguments made in response to Waste Texas' complaints, including i) Westwind's Response to Applicant's Motion to Withdraw Application Without Prejudice filed on February 5, 2024, ii) Westwind's Reply to Applicant's Response in Opposition to Protestants' Motion for Reimbursement of Expenses and Sur-Reply to Applicant's Reply in Support of Motion to Withdraw Application Without Prejudice filed April 7, 2024, and iii) Westwind's Status Report as of Record Close Date.

## II. ARGUMENTS AND AUTHORITY

“An applicant is entitled to an order dismissing an application without prejudice *if* ... 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.” 30 TAC §80.25. Waste Texas attempts to circumvent the plain language of this Rule by citing the Texas Government Code and arguing that compliance with the Rule would be unjust or unreasonable. This position contradicts Texas precedent.

### **A. Reimbursement of the Huntsinger Consulting expenses is supported by the plain language of the Rule.**

Administrative rules are construed under traditional principles of statutory construction. *Tex. Telephone Assoc. v. P.U.C.*, 653 S.W.3d 227, 246 (Tex. App. – Austin 2022). When construing administrative rules, the primary objective is to ascertain and give effect to the drafter’s intent by reviewing the plain and ordinary meaning of the rule’s words. *Id.* There is a presumption that each word was purposefully included and that words not included were purposefully omitted. *Id.* Furthermore, when construing statutes, rendering any word or provision meaningless should be avoided. *Id.* The relief requested by Waste Texas contradicts these principles of construction and is not just and reasonable.

First, the Commission purposefully chose to use the words “all expenses.” There is not a definition for “all expenses” in Chapter 30 of the Texas Administrative Code. When a statute or rule uses a word that is undefined, the common and ordinary

meaning must be determined. *Jaster v. Comet II Construction, Inc.*, 438 S.W.3d 556, 563 (Tex. 2014). To determine a word's common and ordinary meaning, dictionaries are often referenced. *Id.*

Webster's New World Dictionary defines "all" as "the whole quantity of" and "every one of," "everything," and "every part or bit." It defines "expense" as "financial cost or charge." The Huntsinger Consulting invoices meet this definition. It is undisputed that failing to reimburse Westwind for expenses incurred with Huntsinger Consulting is a failure to reimburse Westwind for *all* expenses incurred in the permitting process. Waste Texas' position would render the words "all expenses" meaningless.

Second, the Commission purposefully excluded limitations on the reimbursement of expenses, other than prohibiting the reimbursement of attorney's fees. Mr. Huntsinger and Huntsinger Consulting are not attorneys and do not fall within the only limitation on the recovery of expenses. The Rule does not require expenses to have been incurred via a written contract. It does not prohibit the payment of flat monthly fees to consultants. It does not limit reimbursement to technical experts only. Because conditions such as these were purposefully omitted, they cannot serve as a basis to deny Westwind its reimbursement request.

Waste Texas effectively asks the Commission to amend the Rule by adding words or conditions that are not contained in the plain language. This is not allowed. *See Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015) (stating a court may not judicially amend a statute by adding words that are not contained in the language

of the statute). To accept Waste Texas' argument would be to engage in unlawful rule making by setting new conditions for reimbursement without complying with the proper rule-making procedures. *See El Paso Hospital District v. Texas Health and Human Services Commission*, 247 S.W.3d 709, 715 (Tex. 2008) (noting that when an agency promulgates a rule without complying with the proper rule-making procedures, the rule is invalid).

**B. It is just and reasonable to reimburse Westwind for expenses incurred with Huntsinger Consulting.**

Waste Texas is in its current predicament because of its own actions in filing a shoddy landfill expansion application and choosing to withdraw that application before the full extent of those deficiencies were exposed. Accordingly, the requested reimbursement is just and reasonable as discussed in more detail below.

**1. Waste Texas refused to engage in discovery.**

Waste Texas is in its current position because of various orders compelling discovery, and its desire to avoid that discovery, which is ironic considering its current allegations that Westwind somehow prevented discovery. Specifically, Westwind sought to conduct a site visit and sampling on the proposed site consisting of groundwater sampling and analysis, gas sampling and analysis, and a drone flyover. Waste Texas objected to this site visit for multiple reasons, including but not limited to its claim that whether radioactive materials existed at its facility was

irrelevant to the issues in dispute.<sup>2</sup> Because of this opposition, Westwind was required to file a motion to compel on November 1, 2023.

At the time the Motion to Compel was filed, all Westwind's experts had been scheduled for deposition. The first expert was deposed on November 8, 2023, during which time it was apparent that Waste Texas' refusal to allow the site inspection was hindering Westwind's expert from fully completing his expert report.<sup>3</sup> Later that same day, Honorable ALJ Smith's order granting Westwind's Motion to Compel was issued requiring the site visit. In response to that order, Waste Texas sought to continue deadlines within the Scheduling Order allegedly to get the site visit scheduled, data from that site visit analyzed, and expert reports updated.

Rather than make good faith efforts to schedule the site visit, Waste Texas decided, instead, to file a Motion to Certify Question to the TCEQ arguing that whether to allow the site visit and requested testing/sampling was a policy decision. The filing of this motion led to a second motion for continuance. On January 2, 2024, the Honorable ALJ Smith issued her order denying Waste Texas' Motion to Certify Question. *Eight days later*, Waste Texas decided to withdraw its application rather than allow the ordered discovery. But for Waste Texas's decision to withdraw its

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<sup>2</sup> This was truly an outrageous position considering some of the referred issues included i) whether the proposed landfill expansion would be protective of surface water and groundwater, ii) whether the proposed facility would adversely affect the health of the requesters or their families, animal life or vegetation, or the environment, and iii) whether the application and draft permit contain adequate procedures to detect and prevent the disposal of prohibited waste.

<sup>3</sup> Deposition of Pierce Chandler, 174:12-19.

application, Waste Texas would have been afforded all the discovery and answers to questions it now complains are lacking.

Contrary to Waste Texas' argument, it would be unjust and unreasonable to deny reimbursement for expenses incurred with Huntsinger Consulting when all information Waste Texas claims it did not have could have been discovered but for Waste Texas' own refusal to participate in the discovery process leading to the withdrawal of its application.

**2. Waste Texas' continued opposition is increasing expenses incurred by Westwind.**

Waste Texas complains about Westwind seeking reimbursement for amounts paid to Huntsinger Consulting after it filed its Motion to Withdraw. However, Waste Texas' actions have necessitated additional work to bring the permitting process to conclusion.

Section 80.25 allows for reimbursement of expenses "incurred in the *permitting process* for the subject application." It does not limit reimbursement of expenses to those incurred prior to the filing of a motion to withdraw. Although Waste Texas has filed a Motion to Withdraw, and agreed to reimburse expenses, the permitting process is ongoing due to Waste Texas' opposition to Westwind's reimbursement request. Had Waste Texas not opposed Westwind's reimbursement request, the judge would have remanded the application and requested the executive director to enter an order dismissing the application without prejudice. 30 TAC §80.25(c). That would have

been a more expeditious procedure and the final order dismissing the application would have concluded the “permitting process.”

Currently, there is no final order and Westwind is continuing to incur expenses with Huntsinger Consulting. Specifically, the fact that Waste Texas is seeking an order of dismissal without prejudice implies that Waste Texas intends to fix its shoddy application and reapply for the landfill expansion in the future. With the assistance of Mr. Huntsinger, Westwind has documented efforts by Waste Texas to conceal evidence as discussed in Westwind’s Response to Waste Texas’ Motion to Certify. As noted therein, there has been significant activity with earth moving equipment at the site that historically had no daily personnel and was not open to the public.

Waste Texas should not be rewarded by limiting Westwind’s reimbursement claim when Waste Texas has been the cause of the delay in concluding the permitting process.

### **3. The results speak for themselves.**

Waste Texas continues to attack the services provided by Huntsinger Consulting; however, the results speak for themselves. It is no secret that the TCEQ has a high approval rate of landfill applications.<sup>4</sup> Based on information provided by the TCEQ, scholars have estimated a 94% approval rating of filed landfill

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<sup>4</sup> *Texas Landfills: The Need for Administrative Reform of the TCEQ’s Permitting Process*, 51 St. Mary’s L.J. 187, 202



applications.<sup>5</sup> That means only 6% of landfill applications are withdrawn, returned, or denied. As set forth in Westwind's prior briefing, Huntsinger Consulting is 3 for 3 in having landfill applications returned, denied, or withdrawn for matters in which he has consulted.<sup>6</sup> That is not to say those matters concluded favorably for the protestants based solely on Mr. Huntsinger's work, but his work was certainly a factor in the extraordinary results.

The type of results obtained is often a factor in deciding reasonableness, and given the results obtained in this case, it is absolutely reasonable and just to require full reimbursement of Westwind's claim.

**4. The only reasonable and just result is to require full reimbursement or dismiss the application with prejudice.**

The benefit of a contested case hearing is to leverage private resources to supplement limited state resources. It is no secret, and the TCEQ admits, that the TCEQ relies, almost exclusively, on the information and representations made by an applicant. Through the process of a contested case hearing and related discovery, impacted citizens with greater knowledge of relevant facts can provide a more thorough analysis for the benefit of the State of Texas and all its citizens. In doing so, protestants have discretion on the type of consultants to employ. They should be able to rely on the plain language of the Rule when selecting its experts and consultants

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<sup>5</sup> *Id.*

<sup>6</sup> Previously, Mr. Huntsinger was the president of Citizens Against the Landfill in Hempstead, which opposed 2 landfill applications filed by Pintail Landfill, LLC.

under the assumption that all expenses will be reimbursed should an applicant decide to withdraw its application without prejudice later.

On the other hand, it is not just and reasonable to allow an applicant to file a shoddy landfill application in hopes that a worthy adversary will not contest it. It is not just and reasonable to allow an applicant to withdraw its application without prejudice, without complying with the Rules, after the protestants have identified major deficiencies in the application. To Westwind's knowledge, neither Waste Texas nor its counsel have ever withdrawn a landfill application. Waste Texas is clearly upset about needing to start its application over and is seeking to punish Westwind for using its available resources for the opposition. However, it is not just and reasonable to punish Westwind by denying it full reimbursement when Westwind is serving the public interest through its opposition.

The only just and reasonable result is to require reimbursement of all Westwind's expenses, including those related to Huntsinger Consulting. Because Waste Texas failed to reimburse Westwind's expenses as ordered by the Honorable ALJ Smith, its Motion to Withdraw Application without Prejudice should be denied. Instead, the application should be dismissed with prejudice, which would require the immediate closure of the Hawthorn Park Landfill. Alternatively, Waste Texas should be ordered to reimburse Westwind \$425,535.36 within three business days of the Commission's Order if dismissal without prejudice is allowed.

Respectfully submitted,

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