

From: [Adam Gregory](mailto:Adam.Gregory@cityofaustin.gov)
To: bc-Gerard.Acuna@austintexas.gov; bc-Joshua.Blaine@austintexas.gov; BC-Ricardo.Rojo@austintexas.gov; bc-Heather-Nicole.Hoffman@austintexas.gov; bc-Cathy.Gattuso@austintexas.gov; BC-Philip.Howry@austintexas.gov; bc-Amanda.Masino@austintexas.gov; bc-Kendra.Bones@austintexas.gov; BC-Melissa.Rothrock@austintexas.gov; BC-B.Christopher@austintexas.gov; bc-Kaiba.White@austintexas.gov
Cc: [Bob Gregory](mailto:Bob.Gregory@cityofaustin.gov); [Ryan Hobbs](mailto:Ryan.Hobbs@cityofaustin.gov); [Gary Newton](mailto:Gary.Newton@cityofaustin.gov); [Whellan, Michael J.](mailto:Whellan.Michael.J@cityofaustin.gov); [Angoori, Sam](mailto:Angoori.Sam@cityofaustin.gov); [Russell Parish](mailto:Russell.Parish@cityofaustin.gov)
Subject: Please vote to REJECT Item #4c / Landfill Criteria Matrix
Date: Thursday, September 6, 2018 10:44:05 AM

Dear Chairman Acuna and Zero Waste Advisory Commission (ZWAC) Members:

Thank you for your service on ZWAC and your ongoing efforts to ensure that fairness, transparency and responsibility characterize the City of Austin's approach to waste management.

I'm writing on behalf of Texas Disposal Systems Landfill, Inc. (TDSL) to urge you to please REJECT Item #4c on your agenda, City staff's latest fatally flawed Landfill Criteria Matrix (LCM) and evaluation process proposal.

TDSL's strong opposition to staff's LCM is based on:

- **POLICY**: ERASING past policy positions established by City Council: Staff seeks to establish itself as the policymaker for which landfill(s) the City can and can't use, regardless of the landfill's past history.
- **PROCESS**: IGNORING stakeholder input by proposing that LCM scoring determine contractor eligibility rather than being advisory to policymakers.
- **CRITERIA**: IGNORING direction from the City Council and ZWAC by proposing to exclude Council's environmental priorities and the presence of hazardous materials from LCM scoring.
- **SCORING**: IGNORING the obvious origination of the entire LCM process by proposing to devalue other environmental factors in LCM scoring.
- **IMPACT**: ENABLING the probable expansion of Austin's most controversial landfill, and placing unregulated recycling and unauthorized waste disposal operations in a competitive advantage over landfill operations.
- **FAIRNESS**: CREATING an absurd difference in criteria between municipal solid waste (MSW) and construction and demolition (C&D) landfills, and excluding the landfills used by recycling, composting and transfer facilities from the evaluation, which was never discussed by stakeholders, and which would create an advantage for less regulated and frequently illegal waste transfer stations pretending to be recycling facilities.
- **AMBIGUITY**: FAILURE of staff to provide the actual code/ordinance language that would supposedly effect this criteria; and, FAILURE to define terms such as "city-controlled waste"

which could very well mean, or evolve to mean, all MSW and C&D waste generated in the City, resulting in FLOW CONTROL to staff's favored landfill facility.

BACKGROUND

You will recall that the LCM item has been before ZWAC twice previously and is the result of a [July 2017 recommendation by the City Council's Waste Management Policy Working Group](#) (PWG). The PWG process itself was launched after the City Council voted to reject every waste contract recommended by City staff in 2016 based on a range of policy concerns, including staff's plan to utilize the controversial Waste Management Austin Community Landfill (WM-ACL) facility in northeast Austin to process City-controlled MSW and C&D waste (even after numerous previous Council votes rejecting staff's proposed use of that facility).

Regarding landfill utilization, the policy question ultimately posed to the PWG by City staff was: "Should materials be directed to or away from certain landfills in future solicitations?" The full PWG response / recommendation follows:

- "Yes, materials should be directed to or away from certain landfills through the use of a landfill criteria matrix that reflects Council's environmental priorities"; and
- "Recommendation to Staff: Direct waste diversion by criteria not by landfill. Staff should develop criteria for waste diversion to include considerations such as: community impact and social equity, carbon footprint, amount and type of waste, existing levels of hazardous materials at landfill. Staff should prepare this matrix and it should come before the Council for approval before implementation."

The PWG additionally noted: "Prior Council has established environmental priorities relative to landfills. The City is in a unique position to be a culture maker around environmental practices. Although the City cannot single handedly affect the closure of any one landfill, the City can uphold and apply best positive practices relative to area sustainability, adhering to (Council) policy with contract requirements and designations. A matrix reflecting these best positive practices would provide a transparent scoring mechanism to determine the use of any particular landfill."

In response, in late 2017 and early 2018, City staff developed and presented initial LCM drafts for ZWAC review. [After staff's LCM drafts met with widespread opposition from stakeholders, ZWAC passed a resolution in February 2018](#) proposing specific matrix revisions; reiterating support for each of the PWG-recommended LCM criteria; urging staff to add new environmental measures to the LCM including "commitment to waste diversion"; and recommending that staff convene a community / industry stakeholder process to gather input to inform a revised LCM draft.

TDSL actively participated in the resulting stakeholder process in March, April and May 2018. While all of the meetings were professionally facilitated by an independent contractor, **the unfortunate end result is yet another fatally flawed LCM proposal by City staff**, whose primary purpose appears to be to minimize the decision-making authority of policymakers while maximizing staff's own ability to continue recommending utilization of the WM-ACL facility for City-controlled waste.

As noted above, staff's LCM proposal: 1) ignores the consensus of stakeholders that the LCM should provide policymakers with MORE INFORMATION rather than FEWER CHOICES, and instead grants new decision-making authority to staff; 2) ignores specific direction from both the Council PWG and ZWAC for the revised LCM to reflect "Council's environmental priorities" and account for "existing levels of hazardous materials"; and 3) ignores the obvious origination of the entire LCM process by proposing LCM point assignments that devalue environmental factors, making it possible for environmentally inferior facilities to score higher than environmentally superior facilities. Basically staff's matrix focuses on less important issues to the exclusion of major issues such as effective landfill design, perimeter groundwater and methane gas monitoring, the presence of toxic waste within the landfill, prudent operational practices, impacts to surrounding neighbors, etc. These are the important issues a rational consumer of landfill services is concerned with when evaluating a particular landfill.

Perhaps most importantly, not only would staff's draft LCM effectively "greenwash" the WM-ACL facility in the near term, it would also ultimately create the potential for Waste Management to pursue a dramatic expansion of the ACL facility – an expansion very likely to include the immediately adjacent "closed" Republic-Sunset Farms Landfill and/or the "closed" Travis County landfill – and make it politically impossible for the City Council to CONTINUE to oppose such an expansion before state regulators and particularly the joint expansion of the City landfill and the adjacent IESI/Progressive/Waste Connections Type IV landfill. Further, it would provide non-landfill C&D waste recycling facilities, unauthorized C&D waste disposal facilities, and MSW and C&D waste transfer stations a competitive advantage over the TDS Landfill.

To be clear, if ZWAC and Council were to adopt staff's proposed LCM and evaluation process as proposed, TDSL would NOT participate in the periodic landfill scoring qualification for future City solicitations involving landfill utilization given the misguided focus on peripheral issues rather than paying attention to greater environmental concerns. Our concerns are further detailed below.

PROCESS: GIVING POLICYMAKERS FEWER CHOICES INSTEAD OF MORE INFORMATION

TDSL believes that all community / industry LCM stakeholders and the independent facilitator would agree that our meeting process in March, April and May 2018 established an important "big picture" question about City staff's Landfill Criteria Matrix (LCM) evaluation process – namely, would staff's proposed process result in City policymakers having MORE INFORMATION or having FEWER CHOICES?

It was understood by stakeholders that giving policymakers MORE INFORMATION would mean that staff's LCM evaluation would be advisory to policymakers – a factor to consider when weighing staff recommendations. By contrast, giving policymakers FEWER CHOICES would grant staff the authority to administratively eliminate landfill contractors from consideration based on their LCM score, shifting the power to establish environmental policy from elected policymakers (i.e. ZWAC and the City Council) to City staff.

To establish environmental policy in contradiction to the clear consensus among stakeholders that

staff's LCM evaluation should be advisory to policymakers and provide MORE INFORMATION ([see the notation at the top of the 5-23-18 stakeholder landfill criteria](#)), staff's draft [Request for Council Action](#) for Item #4c indicates that **“staff's proposed process is to utilize the landfill criteria matrix to identify landfills eligible to receive City-controlled MSW or C&D”** – in other words, use the LCM evaluation to give policymakers FEWER CHOICES. This could result in staff only allowing one landfill to do business with the City which would establish a monopoly in violation of the Texas Constitution Article 1, Section 26.

This bad idea is made worse by staff's further proposal to institute a new annual RFI and evaluation process to implement it. If each proposing contractor's LCM score were instead only advisory to policymakers during each contracting process rather than being used to create a standing eligibility list, it could instead be established only on an as-needed basis. In those instances where landfill utilization is contracted for more than once per year, a proposed facility's LCM score assigned within the previous 12 months could suffice to inform policymakers.

There can simply be no question that to allow staff to fully control landfill contractor eligibility will ultimately yield more, rather than less, conflict and controversy. Staff's past actions within this industry should preclude them from obtaining the unchecked authority over landfill eligibility that their proposed matrix would grant them.

CRITERIA: IGNORING COUNCIL ENVIRONMENTAL PRIORITIES AND EXISTING HAZARDOUS MATERIALS

As noted, both the City Council and ZWAC provided specific direction and recommendations to staff to develop a draft LCM that “reflects Council's environmental priorities” and accounts for “existing levels of hazardous materials.” The Council PWG further noted “Prior Council has established environmental priorities relative to landfills” and advocated for “upholding (Council) policy with contract requirements.”

Indeed, both the Austin City Council and ZWAC have voted REPEATEDLY over a period of many years to establish clear environmental priorities, especially relative to the proposed use of the WM-ACL facility. Most significantly, this includes:

- [Austin City Council's May 2007](#) resolution opposing the expansion of the WM-ACL and seeking its permanent closure by November 1, 2015; and
- [ZWAC's January 2010 resolution](#) recommending that the City Council “enter into no further contracts, contract extensions, or other contractual obligations” with Waste Management based WM-ACL operations.

In addition, both the City Council and ZWAC have voted numerous times in recent years to reject staff-recommended contracts proposing utilization of the WM-ACL. Most recently, both the City Council and ZWAC voted unanimously in February 2017 to reject a staff proposal to utilize the WM-ACL for waste from City facilities; and the City Council voted unanimously in December 2015 to reject a staff proposal to utilize the WM-ACL for waste from Austin Energy facilities.

Importantly, Council and ZWAC opposition to utilization of the WM-ACL has not only been in response to widespread community opposition to the facility but in fact derives largely from the findings of a [1999 City-commissioned environmental study of Austin-area landfills](#) which concluded that the WM-ACL facility “poses a substantial environmental risk and potential future liability to the owners and users of the site.” This conclusion from a City-commissioned independent expert was based in part on **“existing levels of hazardous materials”** on-site at the WM-ACL, specifically **a hazardous waste unit with approximately 21,000 drums and several acid ponds (about 60,000 to 80,000 tons) of industrial and toxic waste disposed of in unlined pits and trenches.** (See also the [2003 assessment of the WM-ACL by Robert Kier Consulting](#) which dubbed the facility “Austin’s Love Canal” and noted that “the aggregate capacity of the unlined pits into which bulk quantities of spent acids, paints, solvents and industrial process water were placed was in excess of 1.8 million gallons.”)

In fact, based on the findings of the City-commissioned environmental study and Council’s subsequent direction, [City of Austin attorneys explicitly stated the following in 2009 court filings contesting a proposed WM-ACL expansion](#):

- “...the [WM-ACL] Industrial Waste Unit (IWU) accepted a plethora of chemicals and industrial waste materials, many of which are considered hazardous materials under the existing regulations ... although it stopped taking materials in the 1970’s, the IWU is still in place and is part of the facility ... there is no evidence in the record that the IWU has ever been ‘closed’...”
- “...the record is replete with evidence that the [WM-ACL] is currently adversely impacting human health and the environment; and since [Waste Management] is not proposing to do anything different under its proposed permit for expansion, the facility will continue to adversely impact human health and the environment...”

Yet despite this clear history of both Council and ZWAC rejecting utilization of the WM-ACL based on **environmental priorities** (including votes resulting in the formation of the Council PWG, and the PWG’s direction to staff to develop the LCM) and the well documented presence of **“existing levels of hazardous materials”** at the WM-ACL site, staff’s proposed LCM contains NO criteria reflecting either measure, despite specific direction and recommendations to the contrary.

SCORING: DEVALUING ENVIRONMENTAL FACTORS

Even more broadly, staff’s proposed LCM devalues the overall impact of environmental factors, making it possible for environmentally inferior landfill facilities to score higher than environmentally superior landfill facilities.

For example, staff’s proposal assigns a total of just 10 (out of 100 possible) points for “Zero Waste / beneficial waste diversion” activities (a criteria specifically recommended for inclusion in the LCM by ZWAC), but assigns a total of 25 possible points for operational safety factors, including on-site injuries – a set of criteria that neither the Council or ZWAC recommended for inclusion in the LCM.

Similarly, simply providing affirmative hiring policies (not even proof of compliance with those policies) is assigned 10 points, while providing a living wage and having a collective bargaining labor agreement in place are together worth 15 points.

While TDSL of course agrees that operational safety and fair wages and working conditions are important, **none of these concerns have been the motivation for Council / ZWAC opposition to the WM-ACL, the formation of the Council PWG, or the PWG direction to staff to “direct waste diversion by criteria not by landfill.”** Instead, it has been exclusively environmental concerns, and the impact of those environmental concerns on surrounding neighbors, that have resulted in this effort to seek policy clarity. (It should be recalled that [Waste Management’s operation of the WM-ACL resulted in the largest fines ever levied by the Texas Commission on Environmental Quality](#) – a non-factor in staff’s proposed LCM.)

IMPACT: EXPANDING THE WM-ACL

Perhaps most importantly, TDSL urges ZWAC to recognize the potential of staff’s proposed LCM to not only “greenwash” the WM-ACL facility in the near term but to ultimately enable the facility’s expansion, despite the City’s past opposition.

That is, by enabling utilization of the WM-ACL facility for City-controlled waste, the LCM could potentially result in long-term City waste contracts that ACL’s operator, Waste Management, would undoubtedly present to state regulators to justify a future proposed expansion. At the same time, utilization of the WM-ACL would plainly invalidate the City’s political position in opposition to the facility’s expansion and in favor of its permanent closure.

Further, any proposed expansion of the WM-ACL facility is likely also to include the immediately adjacent “closed” Republic-Sunset Farms Landfill, and could also include the officially still active adjacent Travis County landfill.

You may recall that in 2008 City staff unilaterally entered into a Rule 11 agreement based on restrictive covenants that removed the City Council’s opposition to the Republic-Sunset Farms Landfill expansion in exchange for the facility’s “permanent” closure by November 1, 2015. You may also recall that TDSL previously informed ZWAC and the City Council that while the Republic-Sunset Farms facility did indeed “close” to the receipt of waste as scheduled, the 2008 restrictive covenants engineered by Assistant City Attorney Robert Goode were **executed by entities that did not own the land comprising the landfill, but instead with the owners of the landfill permit.** As a result the covenants are not binding on the land itself, meaning a simple transfer of the landfill permit from the bound entity to any non-bound entity could easily result in resumption of full operations at the Republic-Sunset Farms Landfill.

Given the [dramatic increase in the volume of material received by the WM-ACL since the closure of the Republic-Sunset Farms Landfill](#) and the resulting decrease in the remaining life of the WM-ACL, it should be of utmost concern to the City of Austin that Waste Management could seek to receive the permit authority for the “closed” facility from Republic. With that permit authority, Waste Management would be positioned to seek a permit amendment to combine and expand both

adjacent landfills, fill in the valley between, and raise the approved height of the landfill over the combined disposal footprint. Such an expansion could potentially **add over 110 million cubic yards of disposal capacity to Austin's most controversial landfill.**

- [Please review the analysis by TDSL General Counsel Gary Newton for more details about City staff's 2008 Rule 11 agreement and flawed restrictive covenants.](#)

COMMENTS ON SPECIFIC CRITERIA

1a. Estimated landfill gas collection emissions, 18 points.

This criteria will award 18 points for a certain level of “normalized emissions” which is a number that is not real. It is an amount calculated by a formula based on assumptions since there is no known method to measure actual emissions from a landfill. The formula can be manipulated by the assumptions made by the landfill operator. The formula does not take into consideration operational methods that limit actual emissions. To calculate normalized emissions you divide the formula generated emissions by the landfill's waste in place. Some facilities have been operating long before accurate records were kept about waste in place so certain estimates have to be made that are probably not accurate. This calculation will result in a number that could penalize a landfill operator that does not represent actual landfill emissions.

1c. Landfill gas beneficial use, 2 points

This criteria gives an unfair advantage to older landfills because it takes a lot of waste in place to generate a reliable quantity of landfill gas to produce electricity, supply landfill gas to a pipeline, or some other beneficial use.

2a. Permit Compliance, 15 points

Points are only awarded for a High compliance rating by TCEQ. Currently all the landfills in the Austin area have a High compliance rating. However, any landfill can be reduced to a Satisfactory rating without points awarded due to a minor violation. These minor violations will cause a landfill to lose these points for the next five years that this NOV remains part of the compliance history.

The other problem with relying only on the TCEQ compliance rating is it does not take into consideration the effectiveness of design of the various landfill cells or the effectiveness of the groundwater and methane gas migration monitoring to protect the environment. The TCEQ permit compliance rating does not evaluate the effectiveness of the operation to control odor, windblown debris, dust, flies, birds, etc.

2b. Zero Waste/beneficial waste diversion, 10 points

This criteria will award maximum points for minimum effort. A landfill operator would only have to divert one ton in five categories to receive the full 10 points. This pales in comparison to TDSL which diverts hundreds of thousands of tons from the landfill, but yet one ton of diversion by another landfill will receive the same credit.

3a. Safety Record, 10 points

This relies on the OSHA 300 report to determine if points are awarded. The problem is this report is

not based on just landfill operations. The report is based on each location the entity operates. This means an entity may have many different activities in addition to the landfill operations that affect the incidence rate for accidents and illness. There is no accurate method for just reporting accidents and illness from landfill activities only in this situation.

3b. Onsite fatalities or catastrophes, 15 points

Most landfills will not lose points for fatalities because fatalities are rare. However, severe injuries are more common so the landfill operator will lose the points for at least five years under the staff's approach. This would also ignore the fact that in many instances fatalities or severe injuries that have to be reported are not caused by the negligence of the landfill operator.

4a. Workforce Diversity Hiring and Advancement Policy, 10 points

This criteria may violate the Texas Constitution's "Due Course of Law" Provision in Article 1, Section 19 because it is not rationally related to a governmental interest.

4b (1). Living wage and health care benefits, 10 points

This criteria may violate state law that says minimum wage law is reserved for the Texas Legislative to establish, not by a city.

4b (2). Collective bargaining or labor peace agreement, 5 points

This criteria may violate the same Texas Constitution provision listed above because there is no legitimate governmental interest in favoring a private business that have unionized labor forces or that have a labor peace agreement.

Finally, please note that while Waste Management and its allies have frequently suggested throughout the LCM process that if the WM-ACL facility were to be denied contracts for City-controlled waste, the result would be a TDSL Type I landfill monopoly in the Austin area. This is either misinformed or designed to deceive. [This map](#) clearly indicates that Waste Management operates a total of six Type I landfill facilities within 100 miles of Austin City Hall – meaning that TDSL's Creedmoor landfill is the only facility currently PREVENTING a Waste Management Type I landfill monopoly.

REQUEST FOR ZWAC ACTION

In sum, TDSL believes that staff's LCM proposal as presented in Item #4c plainly demonstrates a transition of the Council's policy making authority regarding the award of City contracts utilizing specific landfills to City staff. This is entirely unacceptable. Further, it appears specifically designed to qualify all Austin area landfills as acceptable to receive City controlled waste and the scoring will favor award of contracts going to WMI, Waste Connections and to composting, recycling and transfer station operators not on landfill sites. **TDSL thus urges ZWAC to REJECT staff's LCM proposal based on each of the aforementioned concerns.**

Alternatively, TDSL would support a proposed LCM and evaluation process that is advisory to policymakers and that APPROPRIATELY scores environmental considerations, including, as noted, previous Council / ZWAC opposition to any facility based on environmental priorities, and the

presence of hazardous waste at any facility; and, which properly defines the operative terms and applicability limitations of the matrix in a final code/ordinance that can be reviewed by stakeholders prior to Council approval.

Thank you in advance for your consideration. For your further review we have compiled key LCM documents, including all LCM drafts and stakeholder meeting transcripts, [on our website](#). As always, please do not hesitate to contact me directly with questions or concerns.

Sincerely,
Adam Gregory
Texas Disposal Systems Landfill, Inc.
Cell: 512-689-8833