To: Zero Waste Advisory Commission (ZWAC)

From: Gary Newton

Date: November 8, 2017

One of the recommendations of the Waste Management Policy Working Group issued on July 21, 2017 was item number 2. This recommendation says to direct materials away from certain landfills based on some criteria to be developed. Perhaps the Waste Management Policy Working Group was unaware the City of Austin had commissioned an expert to conduct an environmental study of Austin area landfills in 1999. After the study was released the City Council declined to approve a contract with the Waste Management Austin Community Landfill (ACL) due to the expert's statement "the ACL poses a substantial environmental risk and potential future liability to the owners and users of the site." This position was based on environmental conditions that existed prior to 1999 and still exist today.

The Draft Landfill Criteria attached as back-up material to Agenda item 3.C. does not include a review of the environmental issues of concern to the City's independent expert had then and that are still present today. Some of these environmental concerns include:

- A pre-RCRA industrial/hazardous waste unit with about 21,000 drums or approximately 80,000 tons of waste disposed in unlined pits and trenches.
- The boundaries of this industrial/hazardous waste unit are not accurately known.
- The groundwater monitoring plan for this industrial/hazardous waste unit is not sufficient to ensure detection of migration of contaminants.
- There is a lack of groundwater and landfill gas monitoring wells in a large area between the industrial/hazardous waste unit and the closed Travis County landfill where off-site migration of contaminants could occur without detection.

ZWAC also may be interested in what City of Austin experts and attorneys had to say about the ACL because they expressed a very definitive position against the ACL over many years. The comments below are excerpts from the 1999 Carter & Burgess Report and from filings made by the City of Austin as a protestant in the contested case seeking denial of an ACL expansion. The passage of time may have dimmed memories of these statements and people handling the matter on behalf of the City of Austin may have moved on to other endeavors. Despite the passage of time, the City of Austin statements remain valid today because nothing has changed with the conditions of concern existing back then at the landfill that were the basis of these criticisms.

February 16, 1999 Carter & Burgess ACL Environmental Assessment

Recommendations – It is Carter & Burgess team's opinion that the former IWMM site at the ACL poses a substantial environmental risk and potential future liability to the owners and users of the site.

May 17, 2007 Austin City Council Resolution

Austin City Council opposes the WMI ACL expansion and directs the City Manager to seek closure of the ACL by November 1, 2015.

May 8, 2009 City of Austin's Closing Arguments

P. 1 - The City of Austin is opposed to the issuance of a permit amendment to extend the size and life of the WMI landfill facility located in northeast Travis County.

P. 2 - The Applicant has failed to meet its burden to prove that its application complies with all requirements. Specifically, the Applicant has not demonstrated that the proposed permit is protective of human health, welfare and the environment; has not shown that the proposed permit is compatible with surrounding land uses; and has not shown that the proposed permit is in conformance with the Regional Solid Waste Management Plan.

P. 4 - The application does not include adequate protection of groundwater and surface water in relation to the effects of the IWU and Phase I areas. WMI did not adequately assess the boundaries of the phase one area or the IWU area. In addition, WMI failed to properly assess the site history, including leaks, or the municipal and industrial waste materials disposed in the units and the chemical fate and transport of associated contaminants.

P. 4 - Applicant did not properly assess this area and consequently critical characteristics were not taken into account in the groundwater monitoring system and point of compliance design.

P. 5 - The groundwater monitoring and point of compliance plans are insufficient to assess the effects of the IWU and Phase I on the groundwater.

P. 9 - The evidence therefore indicates that the design of WMI's proposed groundwater monitoring system all but ignores the IWU and Phase I areas.

P. 9 - There is baffling testimony on the part of ED witness Avakian that perhaps the IWU or Phase I areas do not need to be within the point of compliance because they were pre-Subtitle D areas.

P. 11 - In fact as Executive Director Expert Avakian testified, the IWU is not being monitored directly. Mr. Avakian explained that monitoring of the IWU was incidental to the monitoring program and not its objective, and he did not consider the contents of the IWU in his evaluation of the proposed groundwater monitoring system.

P. 13 - The evidence establishes that the IWU unit contains solvents, acids and saline water all of which may desiccate clays. Although WMI states that it is in light of these characteristics that they have monitoring wells around the IWU, in fact this is not the case. The groundwater monitoring plan proposed by the Applicant has only one well which will conceivably detect any of the potential contaminates in groundwater from the IWU. The plan does not have constituent testing for many of the materials in the IWU.

May 29, 2009 City of Austin's Reply to Closing Arguments

P. 1 - The Applicant postulates that if the permit application meets he regulatory requirements then it is automatically deemed to "safeguard the health, welfare, and physical property of the people and the environment." This argument however, is fatally flawed in that the entity charged with reviewing the permit application to determine if it meets the regulatory requirements, the ED, (A) does not consider at all whether or not the application will safeguard the health, welfare, and physical property of the people

and the environment when performing its review; and (B) does not make any determination with regards to key issues such as land use compatibility or conformance with the regional solid waste management plan, that are determinative as to whether or not a permit application safeguards the health, welfare, and physical property of the people and the environment.

P. 2 - The Applicant argues that its application is protective of groundwater and surface water because the IWU and the ACRD Facility are not unique. This is not true. There was no testimony or evidence indicating the presence of another facility in Texas or the U.S. with an operating MSW facility with the presence of a large industrial or hazardous waste facility located in the middle of it. The site characteristics clearly presents unique hazards and challenges that require that this be clearly addressed in the facilities permit to protect the environment and public health and safety as per the regulatory requirement to consider site history and site specific conditions in designing the monitoring system.

P. 2 & P. 3 - Much of the City's testimony regarding the IWU was focused on concerns regarding the possibility of migration and discharge of leachate from the IWU. This is directly a concern about the IWU leachate management system, and yet neither the IWU nor the Phase I areas has a liner or leachate collection system.

P. 3 - The Executive Director states that all parties agree that the property line must be monitored as the regulations require from the entirety of the facility. The exclusion of part of the facility from monitoring and point of compliance systems is not consistent with this requirement.

P. 4 - The Applicant claims that the proposed monitoring system and wells are sufficient because there are more wells than the prior system, and that the voluntary agreement with the City enhances their claim. This doesn't make sense.

P. 5 - The Executive Director implies that because WMI has provided copies of reports of contaminants detected under the voluntary agreement it has with the City to the TCEQ, that somehow this supports the monitoring system efficacy. This is illogical. The Executive Director acknowledges the report of dioxane detection and yet would not agree that this documented, site specific condition, warrants additional monitoring requirements. In fact, releases of dioxane are documented in the voluntary monitoring reports, as well as repeatedly detected from PZ-26, but were deleted from the reports provided to the TCEQ and the City.

P. 16 - The very purpose of this evidentiary contested case hearing is to determine whether or not the permit application provides sufficient information that the proposed expansion will not "cause, suffer, allow, or permit the collection, storage, transportation, processing, or disposal of municipal solid waste . . . in such a manner that causes . . . the creation or maintenance of a nuisance, or the endangerment of the human health and welfare or the environment." The Applicant cannot overcome its burden of proof by only providing self-serving conclusionary testimony.

P. 16 - In this case, the ED has gone out of its way to support the Applicant's burden of proof via it's prefiled testimony, questions during the hearing, and finally in its closing argument, and it's argument must be viewed in light of its skewed participation in favor of the Applicant.

August 20, 2009 City of Austin's Exceptions to the Proposal for Decision

P. 1 - The City of Austin disagrees with Administrative Law Judge ("ALJ") Roy Scudday's proposal for decision ("PFD"), in which he recommends that Permit No. MSW-249D be issued. The Applicant failed to demonstrate that Permit No. MSW-249D meets or exceeds all applicable statutory and regulatory requirements.

P. 2 - If ever there was a case where an MSW landfill permit amendment to extend the life of the 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. 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. By virtue of its record of operation, the Applicant has failed to demonstrate that the facility will not adversely impact human health or the environment, as required by 330.61 (h).

P. 2 & P. 3 - 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 recommends inclusion of the wells in the permit. 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.

P. 5 - Finding of Fact No. 215: "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.

P. 12 - 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.

August 31, 2009 City of Austin's Response to Exceptions

P. 3 - The ED argues in its exceptions that the point of compliance ("POC") should not be adjusted to include the four wells that are already in existence and being monitored pursuant to a voluntary agreement between the City and WMI. What is most troubling is the ED's rational for its exceptions to adding these four wells to the point of compliance. The ED states that the Industrial Waste Unit ("IWU") should not be monitored because there were no regulations in place back when it was accepting hazardous wastes; and therefore it does not have to be monitored for releases at all. The IWU is a part of the facility. The groundwater monitoring system proposed is a multi-unit system under §330.403(b). As such, all of the MSW management units must be a part of the groundwater monitoring system. Moreover, the TCEQ can and should require monitoring of the IWU to protect human health, welfare, and the environment.

P. 4 - Finally, the ED incorrectly claims that the TCEQ rules do not apply to the IWU because it is not a "waste management unit". Although it stopped taking materials in the 1970's the IWU is still in place and is part of the facility.

P. 5 - WMI asserts that there is no basis to tie the four voluntary wells into WMI's POC. They base this assertion on the same argument as the ED; that the IWU was closed in 1973, and therefore WMI does not have to monitor the IWU at all. There is no evidence in the record that the IWU has ever been "closed". Additionally, given the fact that we know the IWU accepted a plethora of chemicals and industrial waste materials, many of which are considered hazardous materials under the existing regulations, the TCEQ can and should require monitoring of the IWU to protect human health, welfare, and the environment.

P. 5 - The evidence demonstrated that those three monitoring wells are not even sampled for 1, 4 dioxane, which appears to be the primary contaminant leaking from the IWU. It does little good to rely on a monitoring well to inform you of a release of hazardous waste, and then not test that well for the types of contaminants that are leaking.

November 10, 2009 City of Austin's Motion for Rehearing

P. 1 – II. ERRORS IN THE INTERIM ORDER

P. 2 - "Delete the addition of the four wells specified by the private agreement between the City of Austin and WMTX to the permit's groundwater monitoring system and reconfiguration of the Point of Compliance to include those wells in proposed Finding of Fact Nos. 125 and 127, Conclusions of Law Nos. 28, 48, and 50, and Ordering Provision No. 1."

P. 3 - Although it stopped taking materials in the 1970's the Industrial Waste unit ("IWU") is still in place and is part of the facility. Additionally, there is no evidence in the record that the IWU has ever been "closed". Therefore, under a multi-unit groundwater monitoring system, under §330.403(b), all of the MSW management units must be a part of the groundwater monitoring system. Moreover, given the fact that we know the IWU accepted a plethora of chemicals and industrial waste materials, many of which are considered hazardous materials under the existing regulations, the TCEQ can and should require monitoring of the IWU to protect human health, welfare, and the environment.

June 4, 2010 City of Austin Original Petition to Travis County District Court

P. 6 – VII. COMMISSION ERRORS

P. 6 & P. 7 – (2.) The Commission erred in instructing the ALJ to make substantive revisions to those portions of his Revised Proposed Order relating to the addition of four groundwater monitoring wells to the Point of Compliance groundwater monitoring system. The Commission's instructions to the ALJ to revise his Revised Proposed Order are contrary to Commission precedent, TCEQ rules, and the laws of the State of Texas.

P. 9 - VIII. ISSUES

p. 12 - E. The failure of Applicant, WMI, to demonstrate that the expansion of the ACL facility will be protective of groundwater and surface water. The Commission's failure to acknowledge and address the significant issues with current and future threats to groundwater and surface water quality are contrary to Commission precedent and rules.

The Commission's acceptance of the Revised Proposed Order ignores the overwhelming evidence of ongoing and potential groundwater and surface water contamination at the ACL facility. The

preponderance of evidence showed: (1) that there was a history of disposal of hazardous and industrial wastes at the ACL facility; (2) that there is a continuum of waste from the IWU to the permit boundary; (3) that the continuum of waste creates a preferential pathway for contaminants to leave the ACL facility; (4) that there is evidence of groundwater contamination both at the ACL facility and on adjacent property; (5) that there is evidence of surface water contamination; and (6) that the geological characterization in the application for permit amendment is deficient. The Commission's failure to deny the application is contrary to the evidentiary record and is legal error.

P. 12 - F. The failure of Applicant, WMI to develop an adequate groundwater monitoring system that is in compliance with TCEO rules, particularly with regard to the location of the groundwater monitoring wells, which are not located as to detect groundwater contamination from all portions of the ACL facility. The Commission's approval of the deficient groundwater monitoring system is contrary to Commission precedent, rules, and regulatory guidance on this issue.

P. 13 - The Commission, in directing the ALJ to revise substantive findings of fact and conclusions of law regarding the placement of groundwater monitoring wells, is contrary to Commission precedent, TCEQ rules, and the laws of the State of Texas. The commission further erred by accepting the Revised Proposed Findings of Fact and Conclusions of Law regarding the placement of the groundwater monitoring wells, because the Applicant failed to prove by a preponderance of the evidence that it would protect the groundwater at the ACL facility as required by the TCEQ's MSW rules because the application for permit amendment fails to meet the standards set out in 30 TAC § 330.403(a)(2), regarding monitoring at the point of compliance. The evidence demonstrated that the point of compliance groundwater monitoring system proposed in the application and approved by the Commission will not detect groundwater contamination in the uppermost aquifer at the ACL facility.

P. 14 - X. CONCLUSION

In conclusion, Plaintiff contends the TCEQ Interim Order addressed is fatally flawed and in error for the reasons set forth herein.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that the Commission be cited and required to answer and appear herein, that a hearing be held, and that on final hearing hereof, Plaintiff City of Austin have judgment of the Court as follows:

1. Reversing and vacating the decision of the Commission and remanding the matter back to the Commission for further proceedings; and,

2. Awarding Plaintiff costs incurred, together with all other relief to which Plaintiff may be entitled.