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February 1, 2009

**The implications and consequences of the “*Order Authorizing Agreement*”
to be considered by the Williamson County (Texas) Commissioners Court
as posted for the Court's agenda on February 3, 2009**

The *Order Authorizing Agreement* (Order) which is proposed for approval by the Williamson County Commissioners Court (WCCC) on February 3, 2009, appears to serve as a validating instrument for a new Landfill Operating Agreement (LOA-2009), which is also under consideration on the same agenda for approval by the WCCC. However, more than merely serving as a validating instrument for the newly-proposed LOA-2009, the Order, if adopted by the WCCC, would also validate and ratify by this WCCC the existing October 28, 2003 Landfill Operating Agreement (LOA-2003), if Waste Management of Texas, Inc. (WMI) does not agree to and execute LOA-2009. The Order states positions on LOA-2003 that are directly contrary to the positions the WCCC took in the district court case, *Williamson County v. Waste Management of Texas, Inc.*, and in other positions and assertions made publicly. These contrary and erroneous positions include: (a) The county's hands are tied by the trial court's ruling, which is not true; (b) The county owns fee simple title to the entire landfill, which is not true; (c) Waste Management is not presently the “site operator” for the landfill, which is not true; (d) That the 2003 contract is not a perpetual contract, which is not true; (e) Waste Management is the sole source contractor that could run the landfill, which is not true; (f) The matter has been settled that the landfill contract does not have to be bid, which is not true, and other items, which are itemized in Williamson County's attached *Order*, with accompanying notes to explain the discrepancies.

If the WCCC approves the *Order*, and also approves submitting LOA-2009 to WMI for acceptance and execution, but WMI refuses to enter into a new agreement, Williamson County (WC) will have taken official action which, among other things, declares the validity of LOA-2003 as an appropriate sole source, no bid in perpetuity, contract, without WC having any recourse¹ to extract itself from this contract which clearly is adverse to WC's interest. And if WMI does not agree to LOA-2009 or a similar new contract, assuming the WCCC submits that proposal to WMI, then WC will be left with LOA-2003 as a validated and ratified never-ending No Bid contract.

Despite WC's unnecessary and totally inappropriate validating embrace of the LOA-2003 (in the absence of an executed LOA-2009 to replace it), the Order also admits that LOA-2003 (and its two predecessor agreements of 1985 and 1990) are “far inferior (for WC) to the terms of the attached Agreement” (LOA-2009).

However, if the WCCC adopts the Order with the unnecessary and inappropriate findings regarding the merits and justifications for not bidding the series of contracts, and yet fails to achieve WMI's signed agreement to LOA-2009, WC will have locked in its own finding regarding the legal validation of the “inferior” LOA-2003.

The WCCC should not **take this ill-advised step of validating LOA-2003 by approving the Order because LOA-2003 would disadvantage WC and its taxpayers far into the future and the intervenors may yet be successful in overturning the Court's ruling concerning the LOA-2003 No Bid contract. The WCCC should consider the process by which LOA-2003 was adopted in the first place. The insight provided by knowing the facts behind this process provides a strong argument for making sure that the “inferior” LOA-2003 should not continue as the agreement between WC and WMI for the 575-acre landfill, which would be created if the Texas Commission on Environmental Quality (TCEQ) approves landfill permit amendment application 1405-B on February 11, 2009.**

The circumstances surrounding and the process by which the 2003 contract was approved has been under-publicized and is not generally known. The 2003 contract was generated for the most part and sponsored

¹ Nos. 16, 17, 18 and 19 in the *Order*.

by Dwight Pittman, the WC Assistant County Engineer, and former Precinct 4 Commissioner Frankie Limmer,² together with WMI's Steve Jacobs, who stood with Pittman at the podium when the contract was proposed to the WCCC on October 28, 2003. It appears that Gene Taylor, the County Attorney at that time, had little involvement in the negotiations of LOA-2003.

Pittman had come to his position of employment with the county after leaving his private engineering practice, which had included a long-standing business relationship with WMI as a major and perhaps primary client. Pittman provided professional engineering services to WMI involving the WC landfill and other WMI landfills. Pittman's wife has also worked for WMI managing the WC landfill gatehouse for over 15 years. The commissioners court members (at that time) have reported that they did not see a redlined version of the contract and did not know that their primary county point of contact for landfill contract negotiations and audits, concerning whether the landfill was being operated properly and royalty payments were correct, had such a significant conflict of interest.

On October 28, 2003, the WCCC commissioners court approved the LOA-2003 by a 4-0 vote³ after only about six minutes of public discussion and deliberation. The presentation of the LOA-2003 to the WCCC was made by Pittman and Steve Jacobs, the local representative for WMI. According to the official audio recording of the session,⁴ some members of the WCCC didn't know about major revisions in the agreement made by LOA-2003, such as the removal of the restriction against large volumes of waste being imported into the landfill from outside WC. If there was ever any doubt about whether the WCCC was not fully informed regarding the provisions and contents of LOA-2003, that doubt was removed after the Hutto Citizens Group (HCG) published the audio recording and transcript of the commissioners court session in which the agreement was passed. That transcript, and the accompanying audio tract, are available at the HCG website, www.huttocg.com, under the "Current Issues" link. The lack of full disclosure--and the misrepresentations by omission--become obvious after listening to the audio recording while following the transcript. Some members of commissioners court apparently took these representations in good faith, assuming they were being told all the important details without omissions, but that was not the case.

Several key elements not disclosed in the official presentation by Pittman and Jacobs include:

(1) WMI had submitted permit amendment 1405-B with WMI named as the "Site Operator," which is defined as the holder of and applicant for the permit, and as an "Applicant" for the landfill expansion permit; (2) the agreement would be perpetual and have no end term; (3) WMI would retain ownership and control of all recyclables; (4) WMI would not have to pay the county a royalty percentage on recyclables received or sold; (5) WMI could provide tipping fee discounts (with no minimum) to its own waste hauling company and would not have to pay the county royalties for those volumes of self-hauled waste based on the gate-rate tipping fees (but rather on the discounted rates); (6) there would be no limit on the volume of waste that might be received at the landfill from outside WC, allowing it to become a major regional waste disposal facility.

WMI's basis for submitting permit amendment 1405-B as a co-applicant for the permit and operator of the landfill was that WMI already was the "Site Operator" on the 1405-A permit, which was being amended. A thorough analysis of the records involving that 1405-A permit amendment process, which occurred in 1995 and expanded the landfill from 122 acres to 202 acres, reveals that the county never requested that WMI be named as the "Site Operator" on the permit. The action appears to have been a unilateral decision made within TCEQ. It was later learned that in 1995, two of the TCEQ employees involved with permitting, left the agency a few months before WMI's name was added to permit 1405-A as "Site Operator". Both men, John Hall and Chris Macomb, became consultants for WMI in 1995.

2 Other members of the 2003 commissioners court in addition to Limmer were: Mike Heiligenstein (Precinct 1), Greg Boatright (Precinct 2), John Doerfler (county judge), and David Hays (Precinct 3).

3 Voting to approve the LOA-2003 were County Judge John Doerfler and Commissioners Greg Boatright, David Hays and Frankie Limmer. Commissioner Mike Heiligenstein was absent from the meeting.

4 The recording was provided by the County Clerk of WC in response to an Open Records Request.

It is clear from the audio recording and the transcript that members of the WCCC relied on the representations made by Pittman and Jacobs for their understanding of the LOA-2003. The representations, which we believe essentially amounted to misrepresentation by omission, explain how the LOA-2003 was adopted by the 2003 WCCC, despite the fact that the terms of the agreement favored WMI substantially.

In light of these suspicious circumstances, by which LOA-2003 was approved by the WCCC, it stretches credulity to conclude that the current WCCC would approve the proposed 2009 Order which validates the LOA-2003, especially in light of the possibility that WMI might not agree to sign LOA-2009.⁵

⁵ Also called into question is why WC has removed itself from the appeal of District Judge Burt Carnes' ruling on whether LOA-2003 should have been competitively bid (which was rendered in favor of WMI) and at the same time has sought to preserve its right to brief the appeal, in an apparent effort to remove other intervenors in the case, such as the HCG, from pursuing a legal conclusion which might render the LOA-2003 as invalid because it was not competitively bid. (REDO)