CAUSE NO. D-1-GN-08-004503

TJFA, L.P. and CONCERNED CITIZENS AND LANDOWNERS, *Plaintiffs,*	§	IN THE DISTRICT COURT OF
	§	TRAVIS COUNTY, TEXAS
v.	§	
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, *Defendant.*	§	53 JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, TJFA, L.P. (TJFA) and Concerned Citizens and Landowners (CCL), hereinafter "Plaintiffs", and file this their Original Petition against the Texas Commission on Environmental Quality, hereinafter "Commission" or "TCEQ", and for cause of action would respectfully show the Court as follows:

I. DISCOVERY CONTROL PLAN

This cause of action is a judicial review of an action by an administrative agency and therefore will be based on the administrative record. Designation of a level of discovery is not applicable.

II. BACKGROUND

This lawsuit arises out of a decision by the TCEQ to grant the permit application by Waste Management of Texas, Inc. (hereinafter WMTX) for an expansion of a municipal solid waste landfill, known as the Mesquite Creek Landfill (Permit MSW-66B), which lies in Comal and Guadalupe Counties. Substantial rights of the Plaintiffs have been prejudiced because the decision is in violation of statutory provisions, and is in excess of the Commission's statutory authority and is arbitrary or capricious. *Tex. Gov't. Code* § 2001.174. Because WMTX failed to

meet its burden of proof that the application complies with all legal requirements, the application should have been denied by the TCEQ. Instead, it was granted.

III. PROCEDURAL BACKGROUND

A preliminary hearing was held on April 13, 2007 that established jurisdiction and named parties, including TJFA and CCL, to the contested case hearing. The hearing on the merits was held October 22, 2007 through October 29, 2007 and the Proposal for Decision (PFD) was issued by Administrative Law Judge Sarah G. Ramos on March 18, 2008. At its agenda meeting on September 10, 2008, the Commission granted WMTX its permit after having changed the Administrative Law Judge's Proposal for Decision, Findings of Fact and Conclusions of Law. The Commission's Order was signed on October 1, 2008 and mailed on October 3, 2008. Plaintiffs herein timely filed their Motion for Rehearing. The TCEQ failed to rule on said motion and thus it has been overruled by operation of law. All conditions precedent to the filing of this review of administrative action have been accomplished.

Plaintiffs seek judicial review of the final decision by the TCEQ in this matter pursuant to the Administrative Procedure Act, Texas Government Code § 2001.171 and Texas Health & Safety Code § 361.321.

IV. VENUE

Venue properly exists in Travis County, Texas pursuant to Texas Government Code § 2001.176 and Texas Health & Safety Code § 361.321.

V. PARTIES

TJFA is an entity that owns property in close proximity to the WMTX landfill in Comal/Guadalupe Counties, Texas.

CCL is a group of nearby landowners that own interest in property in very close proximity to the WMTX landfill. CCL's representative is one of its members, Nancy Schwarzlose.

The TCEQ is an agency of the State of Texas. Service on the Commission may be accomplished by delivering a copy of this instrument to Mark R. Vickery, Executive Director of the TCEQ at 12100 Park 35 Circle, Austin, Texas 78753.

Other parties participating in the underlying administrative hearing were:

1) Waste Management of Texas, Inc. represented by Bryan J. Moore of Vinson & Elkins, located at 2801 Via Fortuna, Suite 100, Austin, Texas 78746;

2) The TCEQ Office of Public Interest Counsel ("OPIC"), represented by Garrett Arthur, P.O. Box 13087, MC-103, Austin, Texas 78711-3087.

3) The TCEQ Executive Director, represented in the contested case hearing by Anthony C. Tatu, Staff Attorney, P.O. Box 13087, MC-173, Austin, Texas 78711-3087.

Copies of this Plaintiffs' Original Petition have been sent by U.S. Certified Mail, return receipt requested, to each of the parties in the underlying administrative hearing as indicated on the attached Certificate of Service.

Additionally, a copy of this Original Petition has been sent to the CT Corporation System, Registered Agent of Waste Management of Texas, Inc., at 350 N. St. Paul, Dallas, Texas 75201, and to Judge Sarah Ramos of the State Office of Administrative Hearings at 300 W. 15th Street, Ste. 504, Austin, Texas 78701.

VI. TRANSMISSION OF RECORD

Pursuant to Texas Government Code § 2001.175, demand is hereby made that the Commission transmit the original or a certified copy of the entire record of the proceeding to the Court within the time permitted by law.

VII. GROUNDS FOR REVERSAL OR REMAND

Plaintiffs would show that the decision of the Commission is in violation of statutory provisions and in excess of the agency's statutory authority and is arbitrary or capricious. Substantial rights of the Plaintiffs have been prejudiced because of the agency decision to grant its permit to the Applicant, WMTX, in spite of its failure to comply with all of the rules, regulations and laws for obtaining such a permit.

VIII. COMMISSION ERRORS

The Commission erred in granting this permit to WMTX due in part to the following:

A. SUMMARY OF ERRORS

(1) the failure of the Applicant to present an adequate surface water protection and drainage plan that is in compliance with Commission rules, and especially:

(a) the TCEQ's incorrect legal conclusion that the Applicant has complied with TCEQ rules by having identified that the site is not located in the 100-year floodplain of Mesquite Creek (even though the evidence is to the contrary), by improperly relying on the FEMA floodplain map which shows no floodplain for this creek (since FEMA never studied or determined the floodplain for this creek). This legal conclusion is contrary to Commission rules and recent precedent; and

(b) the TCEQ's incorrect legal conclusion that a doubling in the amount of storm water runoff volume at the permit boundary (due to the diversion of the natural flow of surface water as a result of drainage areas being redirected by the proposed landfill design) is not a significant alteration of natural drainage patterns, regardless of the potential adverse impacts on downstream properties and the lack of any analysis or discussion to support such conclusion. This is contrary to Commission precedent, rules and regulatory guidance on this issue.

(2) the failure of the Applicant (WMTX) to properly test and characterize the geology, and related groundwater, associated with the uppermost aquifer (that fails to but should include Stratum IV), in clear violation of TCEQ rules;

(3) the failure of the Applicant to develop an adequate groundwater monitoring system that is in compliance with the TCEQ rules, particularly with regards to the location and depth of the wells; and

(4) the failure of the Applicant to present an adequate Site Operating Plan (SOP) since it does not include a safe site entrance design.

These issues are of particular concern to Plaintiffs, being nearby landowners, and are contrary to Commission rules and precedent and/or unsupported by or contrary to the evidence in the Application and presented at the hearing, producing reversible error in the Order as adopted by the Commission. A more detailed discussion of each of these issues is presented below.

B. INADEQUACY OF GROUNDWATER AND SURFACE WATER PROTECTION PLAN AND DRAINAGE PLAN

1. Applicant Used Unreliable FEMA Floodplain Map

Plaintiffs complain as legal error the TCEQ's findings and conclusion that the evidence demonstrates that the landfill would comply with requirements regarding protections from flooding, because the TCEQ allowed the Applicant to erroneously rely on an inapplicable FEMA floodplain map to make the requisite determination that this site is not in the 100-year floodplain of Mesquite Creek.

The TCEQ rules require that a permit application identify whether a landfill will be located within a 100-year floodplain (e.g. see 30 TAC § 330.56(f)(3), 30 TAC §

330.56(f)(4)(B)(i) and 30 TAC § 330.301). "Floodplain" is defined by the TCEQ as essentially areas inundated by the 100-year flood (30 TAC § 330.2(48)). If a site is determined to be located within a 100-year floodplain, then the Applicant must provide the specific 100-year flooding levels and any other special flooding factors that need to be considered in designing the landfill or that may impact the flood protection of the facility (see 30 TAC § 330.56(f)(4)(b)(i) and (ii)). The Applicant must also demonstrate that the landfill design will not restrict the flow of the 100-year flood associated with that floodplain, reduce the temporary water storage capacity of that floodplain, or result in the washout of solid waste so as to pose a hazard to human health and the environment (see 30 TAC § 330.301).

While it is true that it is generally acceptable to TCEQ to rely on the FEMA map to make the requisite determination of floodplain areas, this is only true when the FEMA map is useful for that purpose, i.e. FEMA has actually studied and determined the floodplain of the creek of interest. If FEMA never studied or analyzed the floodplain of a particular stream or creek, FEMA will not show an indication of a 100-year floodplain along such a creek on its floodplain map. Use of such a FEMA map, that does not present any information about the floodplain of a creek, to conclude that this creek does not have a floodplain simply because the FEMA map does not show one, would be arbitrary and capricious, especially when it is known that this creek does in fact have a floodplain. The TCEQ rules provide for means by which to determine if a site is in the 100-year floodplain other than the FEMA map if it's not useable (30 TAC 330.56(f)(4)(B)(i)). Use of such an inappropriate FEMA map has previously been found to be inadequate and unreliable by the Commission in previous cases. Yet the ALJ recommended that the Commission allow this very thing to happen in this case, and the Commission agreed with

the ALJ, contrary to Commission precedent and common sense, without any discussion by the TCEQ of its rationale, even though it is contrary to its own rules.

2. A Doubling of Stormwater Runoff from Landfill Violates TCEQ Rules and State Law

Plaintiffs complain as legal error the TCEQ's findings and conclusion that sufficient analyses and discussion were provided showing natural drainage patterns will not be significantly altered by the development of the proposed landfill, as required by TCEQ rules, despite the fact that the amount of stormwater running off the landfill (runoff volume) will almost be doubled as compared to natural conditions at the permit boundary associated with Discharge Point E and no analysis was provided showing what impact if any this additional water would have on potential flooding of downstream properties.

The TCEQ rules require that a permit application contain sufficient analyses and discussion to demonstrate natural drainage patterns will not be significantly altered by the development of the proposed landfill (30 TAC § 330.56(f)(4)(A)(iv)).

In addition, the following TCEQ rule is also of importance in establishing the requirement that the Applicant must evaluate potential off-site flooding impacts due to the proposed landfill:

- 30 TAC 301.34(3) - (referenced in 30 TAC 330.53(b)(12)(A) & 330.55(b)(7)) - Criteria for approval of preliminary plans for drainage improvements by the Commission shall include the requirement that the design "... will not increase flooding or divert waters in such a way that any person's life or property will be endangered or subjected to significantly increased flooding. The Commission shall not approve plans for levees or other improvements which will significantly increase flood rises on any person's land..."

TCEQ's Guidance Document, RG-417, presents a discussion of the various parameters associated with "natural drainage patterns" that are not to be significantly altered by the development of the landfill, as proposed in the permit application. One of those parameters is

the runoff volume, the total amount of water that runs off of the property after a storm event. The Applicant identified the runoff volume leaving the landfill site at five discharge points (A, B, C, D and E). The Applicant tabulated this information and showed that the runoff volume at Discharge Point E would almost double as a result of the landfill as compared to conditions before the landfill. Yet, there is no discussion in the application regarding this issue, as required by the TCEQ rules, and how or why the almost doubling of the area draining to, and the resulting runoff volume leaving Discharge Point E, may or may not impact properties downstream. This issue was simply ignored by the Applicant. Anyone reading the application likely would not become aware of this issue.

In fact, not only did the Applicant attempt to hide this issue, the Applicant attempted to misrepresent what is really happening here. Within the application, the Applicant actually states that the drainage areas and runoff volumes are "similar" for natural conditions, pre-development conditions and post-development conditions, and thereby concluded that "... this information demonstrates that natural and currently permitted drainage patterns will not be significantly altered or adversely affected by the proposed expansion."

No one with any common sense would believe that an almost doubling of the drainage area and runoff volume between pre- and post- development of the landfill would be considered "similar" values. The Applicant was simply hoping that no one would notice the tabulated data, and instead, would simply read and rely on the narrative discussion to accurately portray the information and results of the technical analyses contained within the application. This is why the TCEQ rules require a "discussion" and analyses. It is incumbent on the Applicant to explain exactly how a doubling of the runoff volume being discharged off-site will not impact properties downstream. Only by doing so can the Applicant meet the TCEQ requirement of demonstrating

no significant alteration of natural drainage patterns due to the landfill development. The very lack of such a discussion regarding a significant increase in runoff volume is what led the Commission to deny a previous permit application in the *Blue Flats* Case.

However, the Applicant did no analysis off-site in order to determine if this doubling of runoff volume would cause any increased flooding downstream, claiming such is not required by TCEQ rules. However, 30 TAC 301.33 specifically requires the Commission to consider the potential for increased flooding of off-site properties in evaluating drainage improvements for a landfill.

Finally, the TCEQ's Regulatory Guidance Document RG-417 specifically states that the "volume of storm water ... should not change significantly when compared with predevelopment conditions..." (Section 7.1).

3. Other Relevant Issues Not Discussed in TCEQ Order

There are some other issues regarding the Drainage Plan that were presented in the hearing and in Plaintiff's briefing that were not specifically mentioned in the TCEQ Order, as follows:

1. Failure to Show Floodplain Areas on Attachments 3 and 7

The TCEQ rules require that the areas subject to flooding by the 100-year flood be shown on Attachments 3 and 7 of Part III of the PAA (see 30 TAC § 330.56(c) and (g), respectively). The purpose of this is to demonstrate that the landfill design will not adversely impact the 100-year floodplain of any adjacent or nearby creek or stream, or that the landfill itself will not be adversely impacted by flood waters up to and including the 100-year event.

In reviewing the application, it is clear that these attachments do not show any areas subject to flooding by the 100-year flood along Mesquite Creek or its tributary. Yet all expert

witnesses agreed and testified that in fact there is a floodplain associated with Mesquite Creek for the 100-year event.

Therefore, even though there are areas along this creek that would be inundated during a 100-year flood, such areas were not identified and located on these two attachments, as required by the TCEQ rules. As such, no one, including the TCEQ, the public or the Applicant, can conclude if any of the landfill features would be located within the 100-year floodplain, as required by the TCEQ rules.

2. Required Information Missing regarding Existing Ponds A and B

The TCEQ rules require complete information be provided in a permit application regarding the design of the landfill, including the Drainage Plan (see 30 TAC § 330.55(b)(5)(C), 30 TAC § 330.56(f) and 30 TAC § 330.56(f)(4)(A)(iii) and (v)). For example, included in Attachment 6 of Part III of the Application must be a maintenance plan to ensure the continued operation of drainage and/or storage facilities (see 30 TAC § 330.56(f)(4)(A)(vi).

Part of the Drainage Plan presented in this application for providing and handling the drainage of storm water off the landfill includes the existing Ponds A and B, located between Unit 1 and Mesquite Creek. These ponds were not included in the previous permit amendment MSW-66A, but were constructed after that permit amendment was issued and before this current Application was filed. The purpose of these ponds being constructed was apparently to help control the release of sediment from the existing landfill due to some erosion problems. There is no evidence that TCEQ has ever reviewed or approved the design and/or construction on these ponds.

The Applicant's engineer testified that these two ponds help reduce flow rates at Discharge Point B to less than natural conditions. Yet, he stated that he failed to show any plan view of Pond A, as he had done for the other ponds, since this pond was already constructed. He doesn't know if a prior design of these two ponds was ever done. In fact, he didn't have any information about Pond B, in order to determine how high water can get in that pond before it would overflow. For Pond A, he admitted that the Application does not identify the outlet for this pond; therefore, he doesn't know where the emergency spillway is located or if one even exists.

C. APPLICANT'S LACK OF COMPLIANCE WITH REQUIREMENTS PERTAINING TO GEOLOGY AND HYDROGEOLOGY

1. Applicant Failed to Conduct Testing of Groundwater Flow for Stratum IV Into Which Excavations will Extend

Plaintiffs complain as legal error the TCEQ's incorrect finding and legal conclusion that the Applicant adequately analyzed data regarding the site's hydrogeology. The TCEQ was incorrect in finding that the permit application complies with TCEQ rules, specifically 30 TAC 330.56(d)(5)(B)(i) and (ii) requiring permeability testing of the soil layer or stratum along the side of and below proposed excavations, because the facts and evidence in the Application and presented at the hearing do not support, and in fact are contrary to, such a finding and conclusion.

The ALJ specifically noted that the evidence presented during the hearing showed that excavations will extend into Stratum IV. The ALJ also correctly notes that the "*Applicant tested neither Stratum IV's groundwater flow direction and rate nor its horizontal hydraulic conductivity...*" and that "*... Ms. Meaux admitted that previous field tests conducted by others in*

Stratum IV under Unit 1 were unreliable for use in this application..." Thus, the Application does not meet the MSW rules associated with the requirements for the Geotechnical Report, clearly stated at 30 TAC 330.56(d)(5)(B)(i) and 330.56(d)(5)(B)(ii):

"*(i) A laboratory report of soil characteristics shall be determined from at least one sample from each soil layer or stratum that will form the bottom and side of the proposed excavation and from those that are less than 30 feet below the lowest elevation of the lowest excavation...*"

"*(ii) ... Those undisturbed samples that represent the sidewall of any proposed trench, pit, or excavation shall be tested for the coefficient of permeability on the sample's in-situ horizontal axis ...*"

As can be seen, this rule requires the horizontal permeability of the stratum that will form the sidewall of any excavation to be tested. The TCEQ knows that excavations will extend into Stratum IV and that no reliable testing of the horizontal permeability of this stratum was conducted by the Applicant or provided in the Application. Yet the TCEQ somehow finds that this complies with these rules. This is contrary to the evidence presented at the hearing.

For example, the evidence at the hearing revealed that the Applicant did not conduct any permeability testing within the upper portions of this Stratum IV, and this was even stipulated to by the Applicant's attorney; therefore, neither the Applicant, the ALJ nor the TCEQ can know if and/or how groundwater moves through the fractures in the weathered portions of this soil layer. The only evidence presented at the hearing regarding groundwater movement in Stratum IV is associated with permeability tests previously conducted by others under Unit 1 only. However, the three permeability tests that were run previously by others on the upper portions of Stratum IV under Unit 1 were found by the Applicant's geologist, Ms. Meaux, at the hearing to be "unreliable".

Therefore, Plaintiffs contend that the evidence presented at the hearing shows that the Applicant clearly failed to comply with this TCEQ rule regarding the determination of soil characteristics along the side of and beneath the landfill excavation in Stratum IV. This determination is necessary to provide the appropriate depth of screening for groundwater monitoring wells that need to extend below the landfill, as discussed below.

2. Uppermost Water-Bearing Zone Incorrectly Identified as Only Stratum III and Should Have Included the Fractured Portions of Stratum IV

Plaintiffs complain that the TCEQ committed legal error by finding that the Applicant correctly identified, in accordance with 30 TAC 330.56(d)(5)(A)(ii), only Stratum III as the uppermost water-bearing zone or aquifer and that there are no hydraulically interconnected aquifers beneath Stratum III, such as the fractured portions of Stratum IV. The basis of the TCEQ's incorrect conclusion is the ALJ's belief that the borings and permeability tests in the Application sufficiently characterized Stratum III as the uppermost water-bearing zone and that there was so little water in the borings that penetrated Stratum IV that the ALJ believes it was reasonable to conclude that water does not move within the fractures identified in Stratum IV.

There is no evidence or insufficient evidence in the Application or presented at the hearing to support the ALJ's or the TCEQ's finding and conclusion on this issue. The Applicant did not install any piezometers in Stratum IV in order to determine how water moves within the fractures that had been identified in that stratum. Thus, the ALJ had no evidence of how groundwater moves through or within the fractures of Stratum IV. The ALJ simply concluded that water does not move within the fractures in Stratum IV because there was so little water noted in the borings in Stratum IV, according to the Applicant. However, this is not conclusive that water does not move within the fractures of Stratum IV and contrary to the evidence

presented at the hearing. Also, there were at least two borings in the Application in which it was noted that water was "lost" somewhere in the fractures in Stratum IV. Yet, without any further investigation by the Applicant of this water "loss" in Stratum IV, the ALJ somehow concludes water does not move within this stratum. This is contrary to the evidence presented in the Application and at the hearing.

Plaintiffs agree with the ALJ's conclusion that Stratum IV is a confining unit at its base and at least the lower portion is the aquiclude underneath the site. However, there are fractures and weathering in the upper portion of Stratum IV that the Applicant failed to investigate as to whether this portion of the Stratum transmits groundwater. The upper portion of Stratum IV is essentially a hydraulically connected underlying aquifer. Even the TCEQ's geologist, Mr. Williamson, testified about this and noted that this upper portion of Stratum IV exhibits the same kind of hydraulic conductivity (ability to transmit water) as Stratum III. This evidence is contrary to the TCEQ findings and conclusions regarding all of Stratum IV being an aquitard.

This evidence further establishes that the Applicant failed to fully characterize the soil characteristics of Stratum IV, the upper portions of which contain fractures and should have been included as part of the upper-most water bearing zone or aquifer, in accordance with 30 TAC 330.56(d)(5)(A)(ii). Because the Applicant failed to include the upper portions of Stratum IV into the uppermost aquifer, the application also cannot meet the groundwater monitoring requirements of 30 TAC 330.231(a).

3. Other Relevant Issues Not Specifically Addressed by TCEQ

The TCEQ failed to address other defects in the Application that were raised by the Plaintiffs during the hearing and discussed in their briefing on Closing Arguments, one of which is as follows:

GEOLOGY REPORT FAILS TO COMPLY WITH TCEQ RULES

TJFA raised an issue during the hearing and in its Closing Argument that the Geology Report failed to comply with TCEQ rules. Specifically, Attachment 4 of Part III of the PAA contains the Geology Report, which is required to include certain information as listed in 30 TAC § 330.56(d). However, this Geology Report does not contain all of the required information.

For example, any limitations associated with the facility due to unfavorable topography, such as floodplains, must be discussed in this report (see 30 TAC § 330.56(d)(1)). As discussed above regarding the FEMA floodplain map, no such floodplain information is provided in this report, even though this site is located within the floodplain associated with Mesquite Creek.

Therefore, this Geology Report fails to provide the requisite information to satisfy the legal requirements of the TCEQ regarding a permit application for a municipal solid waste facility. This is contrary to the TCEQ Finding of Fact No. 26.c.

D. INADEQUATE GROUNDWATER MONITORING SYSTEM

Plaintiffs complain as legal error the TCEQ's findings and conclusion that the proposed groundwater monitoring system complies with the TCEQ rules. The failure of the Applicant's geologist, Ms. Meaux, to adequately characterize the geology and hydrogeology of the site as discussed above results in an inadequate groundwater monitoring system. Furthermore, Ms. Meaux is not even identified in the PFD as a "qualified groundwater scientist" as that term is

defined and required in the MSW regulations. The application's groundwater monitoring system won't meet 30 TAC 330.231(e). Specific inadequacies are discussed below.

1. Wells Should Be Screened Below Excavation into Stratum IV

Plaintiffs complain as legal error the TCEQ findings and conclusion that the proposed groundwater monitoring wells that will be screened only into Stratum III and not into the fractured portions of Stratum IV (where some excavation and landfilling will extend) meet TCEQ's regulatory requirements. According to the ED's geologist, Mr. Williamson, portions of the landfill will be excavated into Stratum IV and the pollutant pathway could be in this stratum. As such, failing to screen any monitoring wells below this excavation and into the fractured portions of Stratum IV fails to comply with TCEQ rules, e.g. 30 TAC 330.231(e)(1).

2. Wells Should Be Located Along Kohlenberg Lane Adjacent to Unit 1

Plaintiffs complain as legal error the TCEQ's findings and conclusion that it is not necessary to place a monitoring well along Kohlenberg Lane adjacent to Unit 1. The ALJ based her conclusion on the testimony of Mr. Williamson, the ED's geologist, who said that groundwater does not move towards Kohlenberg Lane, based on the potentiometric maps contained in the Application.

There is clearly the need for monitoring wells along Kohlenberg Lane adjacent to Unit 1. This landfill is one of the oldest landfills (MSW-66) still in operation in the state. Unit 1 includes the original landfill disposal cells from the 1970s at a time when no requirements existed for the construction or testing of liners or leachate collection systems. There is no

evidence that approved landfill liners were installed in these old cells that were filled adjacent to Kohlenberg Lane.

Currently, there is only one monitoring well along this roadway, MW-2. However, the Applicant proposes to remove this well, as being at best a side-gradient well, leaving no wells along this roadway adjacent to Unit 1. The groundwater contour map (Drawing 4-13A on page 1105 of APP-202) contained in the Application shows that groundwater does flow downgradient towards and potentially under this roadway before reaching Mesquite Creek, according to Dr. Clark, Plaintiff's expert geologist. It is interesting to note that in recent draft guidance for evaluating permit modifications related to the placement of monitoring wells as required by the March 2006 rule revisions, the TCEQ staff stated that side-gradient wells should be considered downgradient and included in the Point of Compliance. Therefore, it is important that there be monitoring wells along this flow path, in order to be in compliance with the TCEQ rules (30 TAC § 330.231(a)(2)). Having too many monitoring wells versus too few is in keeping with the intent of the TCEQ rules as being protective of human health and the environment.

Therefore, Plaintiffs contend that MW-2 must remain as a down-gradient well along Kohlenberg Lane and not be removed as proposed by the Applicant and as recommended in the PFD and the TCEQ Order to comply with TCEQ rules and in being protective of human health and the environment.

3. Wells Adjacent to Unit 1 Will Be Influenced by Water in Ponds A and B

Plaintiffs complain as legal error the TCEQ findings and conclusions consistent with or based on the conclusion that water in Ponds A and B will not influence wells adjacent to Unit 1, as being contrary to the evidence presented at the hearing or not supported by any evidence. The

ALJ based her conclusion on the mistaken belief that these ponds are designed for "detaining" water rather than "retaining" water. This is in spite of the testimony of the Applicant's own geologist who testified that there was a possibility that the stored water in Pond A could influence MW-2A. And she doesn't know if MW-4 would be influenced by Pond B, since she doesn't know the elevation of Pond B.

The lack of information in the Application or presented at the hearing regarding these two storm water ponds is disturbing. These two ponds were not part of the previous permit amendment application for MSW-66A, and yet were constructed some time after that permit amendment was granted by the TCEQ and before this current permit amendment application was filed. There was no evidence presented during the hearing that the TCEQ ever approved the design or construction of these two ponds.

This lack of information in the permit application regarding these two ponds and their potential for influencing groundwater flow in the area is a failure to comply with the TCEQ rules.

E. INADEQUACY OF FACILITY ENTRANCE DESIGN IN SOP

1. Site Entrance as Designed Fails to Meet Safety Standards

Plaintiffs complain as legal error the TCEQ finding and concluding that the Applicant can fix the unsafe design of its proposed new landfill entrance as presented in the application by submitting to the TCEQ staff prior to construction a different location and design for its new entrance that complies with safety design standards. The ALJ acknowledged that the application had to include sufficient data to show the design will not pose adverse effects on nearby persons or property owners, but the evidence presented at the hearing showed that the current design does

not meet AASHTO standards regarding safe line-of-sight distances. The Applicant provided an alternative location and design for its new entrance at the hearing, but did not offer to amend its Application to incorporate this new design. Therefore, the application is deficient and fails to comply with TCEQ rules regarding a safe landfill design.

IX. CONCLUSION

In conclusion, Plaintiffs believe it is reversible error for the Commission to have made the findings and conclusions contained in its Order, especially regarding:

1. the Applicant's failure to demonstrate that the site is not located in the 100-year floodplain of Mesquite Creek, in violation of TCEQ rules (e.g. 30 TAC 330.56(f)(4)(B) and 330.303);

2. the Applicant's failure to provide the requisite discussion and analyses to demonstrate that natural drainage patterns will not be significantly altered as a result of the development of the landfill expansion, particularly as a result of the dramatic doubling in runoff volume shown for Discharge Point E, in violation of TCEQ rules (e.g. 30 TAC 330.56(f)(4)(A)(iv) and 301.33), Regulatory Guidance and the Texas Water Code Section 11.086;

3. the Applicant failure to provide the requisite geological and hydrogeological characterizations and testing in order to be able to develop a groundwater monitoring system that would ensure the protection of human health and the environment and be in compliance with the TCEQ rules (e.g. 30 TEX. ADMIN. CODE § 330.56 (d)(5)(B) and 330.231); and

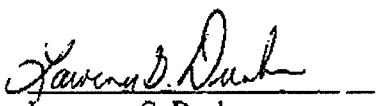
4. the Applicant's failure to demonstrate that the Site Operating Plan is protective of human health and the environment, especially as it relates to the failure to include a site entrance design that complies with AASHTO safe design standards.

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

1. Reversing the decision of the Commission and remanding the matter to the Commission for further proceedings; and
2. Awarding Plaintiffs costs incurred together with all other relief to which Plaintiff may be entitled.

Respectfully submitted,

DUNBAR HARDER PLLC

by: 
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ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on the following via hand delivery, express mail, electronic mail, facsimile, and/or U.S. First Class Mail, on this the 15th day of December, 2008.

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Executive Director
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Austin, Texas 78753

Judge Sarah Ramos
State Office of Administrative Hearings
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