SOAH DOCKET NO. 582-06-3321
TCEQ DOCKET NO. 2005-0337-MSW

APPLICATION OF WILLIAMSON COUNTY FOR A PERMIT AMENDMENT TO EXPAND A TYPE I MUNICIPAL SOLID WASTE LANDFILL FACILITY (PERMIT NO. MSW-1405B)	§ § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

PROTESTANT TJFA, L.P.'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGES' PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW TJFA, L.P. (incorrectly named as Texas Justice For All, L.P. by the Administrative Law Judges ("ALJs") of the State Office of Administrative Hearings ("SOAH") on page 1 of their Proposal for Decision), hereinafter referred to as TJFA, one of thirteen Protestants in the above referenced matter, and hereby files its exceptions to the ALJs' Proposal for Decision (PFD) and corresponding proposed ORDER issued February 14, 2008. The ALJ's recommendation that the Texas Commission on Environmental Quality ("TCEQ" or "the Commission") grant this permit application is factually and legally flawed and should not be accepted. Because the Applicant failed to meet its burden of proof that the application complies with all legal requirements, the above-requested permit application should be **DENIED** by the Commission.

I. SUMMARY ARGUMENT

A. OVERVIEW

In this filing, TJFA identifies and excepts to certain factual statements and legal conclusions as discussed by the ALJs in their PFD as set forth below. TJFA believes the ALJs' PFD is fatally flawed under the TCEQ rules due to the following: 1.) lack of SOAH jurisdiction,

2.) the failure of Williamson County to meet its burden of proof as to its ownership interest in the property due to its quitclaim deed, 3.) the failure of Williamson County to present evidence in its case in chief of land use compatibility regarding future growth trends of Hutto, 4.) the failure of Williamson County to properly characterize the geology and related groundwater associated with the uppermost aquifer, 5.) the failure of Williamson County to develop an adequate groundwater monitoring system, 6.) the failure of Williamson County to present adequate evidence of slope stability, and 7.) the inability to properly locate a pipeline easement through the landfill property.

In addition, there are two other issues of particular concern that TJFA wants to bring to the attention of the Commission as fatal flaws potentially producing reversible error if adopted by the Commission and are discussed more fully below:

(1) the ALJs' incorrect legal conclusion that since WMTX is a "contract operator", it must therefore be the "Operator" who submits permit amendments and modifications under 30 TEX. ADMIN. CODE § 305.43(b) and whose name must be on the permit; and

(2) the ALJs incorrect legal conclusion that a 250% increase in 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 design engineer of the landfill) is not a significant alteration of natural drainage patterns, regardless of the adverse impacts on downstream properties.

Following this Summary Argument, the specific sections of the PFD are addressed with TJFA exceptions as appropriate.

B. ALJs INCORRECTLY CONCLUDE A CONTRACT OPERATOR IS AN "OPERATOR" WHO MUST APPLY FOR A PERMIT AND BE NAMED ON THE PERMIT

1. OPERATOR – APPLICANT - PERMITTEE

One of the primary issues raised by all of the Protestants during this contested case proceeding involved who has which rights and responsibilities under the current and proposed permit and the question of who is/will be the "Operator" of this landfill, and thus, who was

responsible for submitting the permit amendment application (i.e. the "Applicant" and eventual "Permittee" if this requested permit amendment is issued). The ALJs incorrectly conclude that WMTX is the "Operator" of this landfill and thus must apply for and be named on the permit as such. This statement is true even though WMTX was found to be simply a "contract operator" on behalf of Williamson County, whom the ALJs found to be the "Owner" and "Site Operator" of the landfill.

The problem with the ALJs findings and conclusions is that they believe that because Williamson County entered into a contract with WMTX to operate the facility on behalf of the County, this somehow makes WMTX the "Operator" of this facility, as that term is used in the Texas Health and Safety Code and the TCEQ rules. In fact, in the agreement between the County and WMTX, it is not referred to as the "Operator". This erroneous finding led the ALJs to therefore conclude in their PFD that WMTX (as a "contract operator") must be on the permit in accordance with the Texas Health and Safety Code, must "submit" the permit application according to 30 TEX. ADMIN. CODE § 305.43(b), but is not an applicant since Williamson County is the "sole applicant".

2. "CONTRACT OPERATOR" IS NOT THE "OPERATOR"

The ALJs have incorrectly equated "contract operator" with "Operator" in their interpretation of the various rules and statutes that are applicable in this case that use the term "Operator". For example, the ALJs state that they find the Texas Health and Safety Code requires that the "contract operator" be named in the permit. The Texas Health and Safety Code does not use the term "contractor" or "contract operator". Rather, it refers to the "operator or person in charge of the facility" (TEX HEALTH & SAFETY CODE § 361.087(1)). This is because the entity that is issued the permit from the TCEQ for a municipal solid waste disposal facility

(landfill) is the one who is being authorized to operate the landfill, i.e. the "Operator". A "contract operator" indicates that the entity responsible for the operation of the facility, i.e. the "Operator", has chosen to hire a contractor to conduct certain functions at the facility on behalf of the "Operator", which is not uncommon. Often there is more than one contractor hired to fulfill the various needs of the "Operator." Yet it is the "Operator" who is the Permittee, not a "contract operator". Likewise, 30 TEX. ADMIN. CODE §305.43(b) regarding who applies for a MSW permit states that it is the Operator (if different from the landowner) who must submit the application to obtain the permit. This is consistent with the federal regulation regarding who applies for RCRA permits. The "Operator" is defined as the person with overall responsibility for the operation of the landfill. Such a person is the one who should be applying for the permit as the Applicant and would become the Permittee, if the requested permit is issued. This is not the "contract operator" as the ALJs have concluded in their PFD.

3. NEW PRECEDENT BEING SET CREATING MAJOR PROBLEMS STATEWIDE

What the ALJs have recommended in response to this issue **has never been done before.** No TCEQ permit could be found in which a "contract operator" had been named on a permit as the "Operator", as is being recommended here by the ALJs. If the Commission were to review the TCEQ 2006 and 2007 Annual Reports for MSW landfills and transfer stations in Texas, it would find that over 30 Site Operators have reported using "contract operators" to run their facilities, yet not one of these facilities have such a contractor named on its permit as the "Operator". If this permit amendment is approved by the Commission as recommended by the ALJs, such precedent creates a whole new frontier of problems for MSW permittees throughout the state.

For example, does every permittee have to now add any and all of their "contract operators" to their permit under this precedent? What rule supports these three different types of entities being listed on the permit: the land owner, the Site Operator and the contract operator identified as an Operator? Will contract operators have to submit permits, permit amendments and permit modifications, as 30 TEX. ADMIN. CODE § 305.43(b) operators, and be listed on any future amended permits? If there is more than one contract operator on a given facility, which contract operator would be the lead operator? Which contract operator submits the application on behalf of the owner and Site Operator? What happens if the contract operator refuses to submit an application on behalf of the owner or Site Operator? Which contract operator would receive a notice of violation? Which contract operator's compliance history would be used in the application process? Would the contract operator's rights and responsibilities under the permit as the 305.43(b) Operator require that this contractor would have to become a party in a contested case hearing?

The contract operator(s) would now control the permit because they get to choose what goes into the permit application that they submit on behalf of the Site Operator and owner of a landfill. The ALJs' approach allows the contract operator to be the entity to prepare and submit the permit application, but without having to become a party to any contested case hearing. It allows a party to receive rights and responsibilities under the permit without having to identify itself and be subjected to the contested case hearing process. The contract operator would be the gate keeper for access to the TCEQ, as the entity who must submit the application.

It appears that the ALJs in this case simply tried to justify the way that Williamson County and WMTX went about presenting this application as co-applicants after the ALJs had already decided that the County would be the sole applicant and the only party to this hearing

that would be defending the application. However, in so doing, not only did the ALJs not resolve this issue, they created a hornet's nest of new problems for all permittees throughout the state concerning liabilities under and control of permits. The Commission cannot allow this to occur.

C. THE ALJs INCORRECTLY CONCLUDE THAT A 250% INCREASE IN STORM WATER RUNOFF VOLUME AT THE PERMIT BOUNDARY IS NOT SIGNIFICANT

1. TCEQ RULES PROHIBIT SIGNIFICANT ALTERATION OF RUNOFF VOLUME AT PERMIT BOUNDARY

The ALJs mistakenly found that the Application met the requirements of the TCEQ regarding the drainage analysis required under the TCEQ rules, specifically 30 TEX. ADMIN. CODE § 330.56(f)(4)(A)(iv). This rule requires a discussion and analysis to demonstrate that natural drainage patterns will not be significantly altered as a result of the proposed landfill development. Such an analysis of natural drainage patterns must include an evaluation of storm water runoff volume increases before and after the proposed landfill development to determine if they are "significant". This is in accordance with the TCEQ rules as well as its Regulatory Guidance Document RG-417 entitled "Guidelines for Preparing a Surface Water Drainage Report for a Municipal Solid Waste Facility" ("RG-417"). This guidance document was developed after the Commission's decision in *Blue Flats* on the issue of storm water runoff volumes. *In the matter of the Application of Blue Flats Disposal, LLC for Proposed Permit No. MSW-2262,* SOAH Docket No. 582-98-1390, TNRCC Docket No. 98-0415-MSW, (Jan. 2, 2001). ("*Blue Flats*").

2. ALJs CONCLUSION INCONSISTENT WITH TCEQ PRECEDENT

In the *Blue Flats* case, the applicant had proposed a landfill design that would have increased the storm water runoff volume by about 300% at a given discharge point due primarily

to the diversion or redirection of drainage area, yet the Application only discussed the peak flow rates leaving the site. The Commission found that the required discussion and analysis of the natural drainage patterns had to include runoff volume, direction of flow and timing of flows, in addition to the peak flow rate. This peak flow rate at the permit boundary previously had been the only parameter used by applicants to determine if significant alteration of natural drainage patterns had occurred at the permit boundary.

In the present case, the increases in runoff volumes at the permit boundary have been calculated by the Applicant to be as much as 250%. Such major increases in runoff volumes were primarily due to the redirection and diversion of drainage areas. Furthermore, the timing of the runoff flows would also change after the proposed development of the landfill as compared to pre-landfill conditions. Yet, the ALJs found that no significant alteration of natural drainage patterns would occur at the permit boundary because the ALJs believed that since the peak flows would not increase at the permit boundary, then there would be no adverse impacts off-site from these increases in runoff volumes.

3. ALJs CONCLUSION INCONSISTENT WITH THE TCEQ GUIDANCE DOCUMENT

The ALJs simply ignored the portion of the TCEQ Regulatory Guidance Document (RG-417) in which there is a discussion of how an applicant is to go about evaluating such major increases in runoff volumes in order to determine if they would significantly and potentially affect downstream water bodies and/or nearby property owners.

This guidance document also shows the importance of evaluating and considering the timing and rate of flows leaving the landfill site and how those flows might interact with off-site flows. Yet this was not done in this case because both of the ALJs erroneously conclude that the TCEQ does not require such an analysis.

Ignoring significant increases in runoff volumes at the permit boundary, especially those resulting from redirection or diversion of natural drainage areas due to the inappropriate design of the landfill, without evaluating whether such increases will result in adverse impacts downstream, is not being protective of the public and its property. An evaluation of the peak flow rate at the permit boundary as being the sole factor in determining the potential impacts on receiving water bodies off-site or on nearby property owners, is contrary to TCEQ policy and precedent. Stakeholders, including those from the landfill industry, worked with the TCEQ staff to develop the Regulatory Guidance Document regarding this very issue in order to outline the appropriate analyses to be conducted to protect nearby property owners from having increased flooding and/or erosion problems due to a landfill development. It is now well recognized following the *Blue Flats* case that simply relying on peak flow rate comparisons at the permit boundary does not protect the public from increased flooding from a landfill development, much like any other kind of land development project. The ALJs findings and conclusions reached in this case on this issue are in error and not in compliance with state law. Section 11.086 of the Texas Water Code prohibits the diversion of the natural flow of surface water in a manner that will damage the property of another. The Applicant has failed to demonstrate the 250% increase in runoff volume due to the diversion of the natural flow of surface water will not impact downstream properties.

TJFA recommends that the Commission reject the findings of the ALJs regarding this issue and find that a 250% increase in runoff volume at the permit boundary constitutes a significant alteration of natural drainage patterns at the permit boundary due to the proposed development of the landfill, in violation of TCEQ rule 30 TEX. ADMIN. CODE § 330.56(f)(4)(A)(iv).

II. INTRODUCTION, OVERVIEW AND PROCEDURAL HISTORY

A. INTRODUCTION AND OVERVIEW

The ALJs identified Williamson County as the Applicant in this matter (PFD p. 1). This seemingly simple task nevertheless is a hotly contested issue in this case, as discussed herein. The ALJs also designated other parties to this proceeding, including thirteen protestants, yet failed to list in their PFD all of the protestants that were granted party status as "affected persons" at the beginning of this contested case proceeding. The ALJs refer to "... the eight individuals represented by HCG and MHAC ..." without naming these individuals and without identifying that they were not necessarily members of these two organizations, whose membership is much greater than eight individuals.

TJFA would ask the Commission that all eight of these individuals who are parties to this proceeding be specifically named so as to be recognized for their willingness to participate in this very important process that is to ensure that the health, safety and welfare of the public and the environment are being protected when considering the issuance of this permit.

B. PROCEDURAL HISTORY

TJFA takes exception to some of the statements made by the ALJs regarding TJFA motives for becoming a party in this section of the PFD. Some background of the procedural history of this matter is first presented below.

1. Background

The Permit Amendment Application for the Williamson County Landfill (PAA) was filed with the TCEQ with the representation that the proposed expansion of the existing landfill has been designed in accordance with the rules and regulations of the TCEQ and was therefore

protective of the health, safety and welfare of the public and the environment. The ED, after reviewing the PAA for administrative and technical completeness, agreed with the Applicant and issued a Draft Permit MSW-1405B. However, various landowners, including TJFA, expressed concerns that such representations made in the PAA were not true and that there was considerable confusion over who was the "Applicant" for this permit and who would become the permittee and who would control future permit amendment and modification submittals (and the controlling party of the permit) if it were issued as reflected in the ED's Draft Permit.

As a result, various landowners, including TJFA, became parties in this contested case hearing to protest the issuance of the requested permit amendment MSW-1405B as not being in accordance with the TCEQ rules, not providing adequate notice as to who was and would be in control of the permit, and not being protective of the health, safety and welfare of the public and the environment. Throughout the course of this contested case hearing, it became clear that Protestants' concerns, including those of TJFA, were legitimate. Even the ALJs had to admit that the issues raised by the Protestants, including TJFA, were "reasonable and well presented" (PFD p. 87).

2. TJFA's Motives are Irrelevant

The ALJs admitted TJFA as a party to this proceeding, over the objections of the Applicant's attorneys (two of whom were also WMTX attorneys), because the ALJs found that TJFA was an "affected person" that possessed the same property rights as any other landowner near a landfill (Order 4, p. 3-4). However, the ALJs for some unknown and inexplicable reason felt compelled to include in their PFD statements that "TJFA's motives were competitive" (PFD p. 3 and FN42). Besides being totally unnecessary to these proceedings, the evidence in the

record is contrary to the ALJs' statement, as shown below. In addition, no one else's motives were discussed in the PFD, just those of TJFA.

3. TJFA's Motives are Mischaracterized

Not only did the ALJs inappropriately discuss TJFA's motives, they mischaracterized TJFA's motives as "competitive". TJFA, L.P. is a real estate investment company that owns numerous tracts of land throughout central Texas (Exhibit to Applicant's Motion to Deny TJFA, L.P. Party Status ("Gregory Depo"), Gregory Depo., p. 32, line 19-20; p. 68, line 25 - p.69, line 6). Within Williamson County, TJFA owns two tracts of land, each used as rental property and each located within one mile of the proposed landfill site (Gregory Depo., p. 32. line 22 – p. 33, line 3). TJFA has a business plan to invest in properties in the proximity to existing landfills (Gregory Depo., p. 68, line 25 – p. 69, line 12). TJFA's goal is to see appreciation in the value of the properties when the nearby landfills are operated properly and in compliance with state regulations and in compatibility with the surrounding land uses (Gregory Depo, p. 36, line 21 – p. 37, line 8; p. 41, line 6 – 15).

Yet despite this evidence, without any to the contrary, the ALJs stated in a footnote that "... The evidence established that TJFA purchases properties near landfills operated by WMTX and then seeks party status in landfill expansion proceedings. The ALJs agreed with WMTX that TJFA seeks party status for competitive purposes." (PFD, p. 3, FN 4). There are numerous errors and mischaracterizations in these statements made by the ALJs that are not supported by the evidence and therefore are prejudicial to TJFA that need to be discussed.

4. No Evidence TJFA Targets WMTX

TJFA does not purchase properties only "near landfills operated by WMTX". The ALJs' statement of such makes it sound like TJFA is targeting WMTX operated landfills. This is not

true and there is no evidence of such. In fact, the only evidence presented during this proceeding is to the contrary. TJFA has purchased 10 properties in the vicinity of landfills, some of which are operated by someone other than WMTX (such as the Sunset Farms Landfill in Travis County, operated by BFI (referred to in testimony as the "Allied" landfill); the City of Austin Landfill, operated by the City; the IESI Travis County Landfill, operated by IESI; and the TDSL landfill (Gregory Depo., p. 32, line 19 – p. 36, line 14). In fact, this landfill is operated by Williamson County and managed under contract by WMTX. Therefore, TJFA does not understand why the ALJs would make such a statement as they did when the only evidence in the administrative record is to the contrary.

5. No Evidence TJFA's Intent is to Seek Party Status

The purchase of such properties by TJFA is not solely to seek party status in landfill expansion proceedings. While it is true that property ownership does provide TJFA with the same property rights as any landowner in the vicinity of a landfill who might be qualified as an "affected person" to request and seek party status in a contested case hearing, TJFA does not purchase its properties for that purpose (Gregory Depo., p.41, line 6-p.42, line 12). If what the ALJs said were true, then TJFA would seek party status in and/or request a contested case hearing for every landfill expansion application that occurred in the vicinity of its property holdings. However, the evidence presented during the contested case hearing clearly shows that TJFA has in fact not done so, even with regards to WMTX-operated landfills.

For example, with regards to the recent WMTX landfill permit expansion application filed for the Covel Gardens Landfill in San Antonio, Texas, TJFA chose not to request a contested case hearing in that case, even though TJFA owned land directly across the road and within one mile of that facility and had the right to request such status (Gregory Depo., p. 48,

line 15 – p. 49, line 9). TJFA observed that the Waste Management Covel Gardens landfill permit application met state regulations and at the time was being operated well, and therefore no opposition to a permit expansion was pursued (Gregory Depo. P. 62, line 4-11). Again, TJFA does not understand why the ALJs would make such a statement when the only evidence in the record is to the contrary.

6. TJFA is NOT a Competitor of WMTX

TJFA disagrees with the ALJs' statement that "... TJFA seeks party status for competitive purposes." TJFA is not a competitor with WMTX, Williamson County or any other landfill owner and/or operator. TJFA is a real estate investment company and does not do business as an owner or operator of solid waste management facilities. (Gregory Depo., p. 55, lines 12-16). It is true that Mr. Bobby Gregory, who is affiliated with TJFA and its limited partner, is president and principal owner of other businesses (such as TDS, TDSL, and TLM) that are involved in solid waste management activities in central Texas (Gregory Depo., p. 28, line 15 - p. 29, line 15). However, such affiliation by Mr. Gregory does not make the real estate investment company, TJFA, L.P., a competitor of WMTX or Williamson County. In fact, TJFA's response to the Covel Gardens landfill expansion permit application submitted by WMTX is evidence that TJFA is not in the business of seeking party status for competitive purposes (Gregory Depo. P. 48, line 15-p. 49, line 9).

7. TJFA's Motives for Raising Issues Irrelevant

TJFA takes exception to the ALJs' statements in footnote 42 of their PFD regarding TJFA's motives in discussing TJFA's pursuit of the issue regarding who is the "Operator" of this landfill (see PFD p. 13). The implication of these ALJs' statements is that TJFA argued this issue solely due to its motives "as a competitor to WMTX". As discussed above, this is not true. But if

the ALJs thought that a party's motive was relevant to the arguments made on this issue, then why didn't the ALJs discuss the motives of all of the parties (and their attorneys) who presented an argument on this issue?

The ALJs discussed only TJFA's motives in their PFD and not those of WMTX. This is prejudicial to TJFA and suggests favoritism towards WMTX and Williamson County. For example, the ALJs failed to mention that WMTX's attorneys, Mr. John Riley and Mr. Bryan Moore (both of whom are with the law firm of Vinson & Elkins) were also the attorneys representing the Applicant, Williamson County, throughout this proceeding, along with Mr. Mark Dietz (Prelim. Hrg., p. 7, line 19- p. 8, line 2, and Gregory Depo., p. 9, line 22 – p. 10, line 4). Any arguments made by TJFA's attorney during the hearing for not identifying WMTX as the "Operator" and for removing WMTX from the Draft Permit were responded to by WMTX's attorneys, through Mr. Mark Dietz and his client Williamson County, requesting that WMTX be named the "Operator" and remain on the Draft Permit. If the ALJs somehow thought that TJFA's motives were relevant when it was making these arguments, then why weren't WMTX's motives also considered relevant and therefore discussed when its lawyers argued on this issue as well? In addition, such arguments made by these WMTX lawyers were contrary not only to TJFA's arguments but also to the direct testimony of the County's witnesses, who consistently testified that the County, not WMTX, was the entity responsible for the overall operation of the landfill (i.e. the "Operator" and the "30 TEX. ADMIN. CODE § 305.43(b) operator").

After all of the evidence was presented and heard by the ALJs, they ultimately found that the issues raised by the Protestants, including those of TJFA, were "reasonable and well presented" (PFD, p. 87). So, regardless of TJFA's motives for seeking party status in this case,

the ALJs found the issues raised by TJFA were worthwhile and reasonable, not frivolous or irrelevant, and presented in a way that was not unduly repetitive or a waste of time. This is the purpose of a contested case hearing on a permit application, to have relevant and reasonable issues presented and discussed in an appropriate manner by affected persons, including landowners such as TJFA. As such, the motives of TJFA or any other affected person who is a party protestant are **totally irrelevant** and the ALJs should have treated them as such. Otherwise, the ALJs should have discussed the motives of all of the participants in this proceeding, including the WMTX attorneys, which the ALJs failed to do.

While TJFA commends the ALJs for conducting the hearing in an efficient and expeditious manner, if the ALJs' proposed findings and conclusions (and sense of fairness) were influenced by their mistaken perception of TJFA's motives, then TJFA, and the other parties who challenged WMTX's participation and recognition as the "Operator" on the permit, with the rights and responsibilities that come with it, were prejudiced. Therefore, the findings and conclusions made by these ALJs are called into question.

III. JURISDICTION, BURDEN OF PROOF AND COMPLIANCE HISTORY

A. JURISDICTION

TJFA filed its Plea to the Jurisdiction with the ALJs early in the contested case proceeding, which was denied by the ALJs (PFD p. 8). TJFA now reasserts its jurisdictional challenge on the basis that the PAA failed to comply with the TCEQ and federal requirements that the "Operator" apply for a permit, especially in light of the ALJs finding that WMTX is the "Operator" of this landfill and the entity who had to submit the permit amendment application, per 305.43(b). If that is the case, then WMTX is the Applicant and should have been a party to this proceeding and was not. If the Commission finds that WMTX is not the "Operator" but

rather Williamson County is the "Operator" and the proper entity to be the "Applicant" for this permit amendment, then the PAA is full of contradictory statements and references to WMTX as the "Applicant" which would need to be corrected before becoming part of the permit if it were to be issued. Otherwise, both the PAA and the PFD are sufficiently flawed to be denied and rejected.

B. APPLICANT'S BURDEN

TJFA does agree with the ALJs' finding and discussion that the Applicant bears the burden of proof in this contested case hearing. TJFA strongly disagrees, however, with the ALJ's determination that the preponderance of the evidence in the record shows that this burden has been met. In fact, the Applicant has failed to meet the burden of proof on a **number** of issues, as presented herein. It is important to remember that none of the Protestants, including TJFA, have any burden of proof in this proceeding. The Applicant's attempt to obscure the issues with red herrings does not change the fact that the Applicant is required to meet its burden or the Application is deficient and the permit amendment application must be **denied.** This simple truth cannot be evaded.

C. COMPLIANCE HISTORY

TJFA takes exception to the ALJs' PFD on this issue to the extent that the ALJs relied on the compliance history of WMTX, the contract operator, to make their determination that WMTX is the "Operator" and that this PAA is therefore in compliance with TCEQ rules

IV. PRELIMINARY ISSUES

A. IDENTITY OF OWNER, OPERATOR, AND APPLICANT AND RELATED ISSUES

TJFA takes great exception to the ALJs' PFD regarding this issue, particularly with regards to their legal conclusion that WMTX as a "contract operator" is also the "Operator" of

this facility who must apply for this permit and whose name must therefore be on the permit. The ALJs' findings and conclusions contained in their PFD on this issue are fundamentally wrong and in conflict with TCEQ rules, federal regulations and state law. The Commission must deny this permit amendment application because of this fundamental and reversible error.

Until now, the determination of who applies for a permit to operate a MSW landfill was straightforward. In accordance with TCEQ rules, whoever is required to obtain a permit or requests an amendment to an existing permit must submit an application to the ED (30 TEX. ADMIN. CODE § 305.42(a)). For solid waste permit applications, it is the duty of the operator (if different than the owner) to submit the application (30 TEX. ADMIN. CODE § 305.43(b)). The corresponding federal regulation dealing with who applies for a permit makes it clear that if the facility is owned by one person but operated by another, "... it is the operator's duty to obtain a permit, except that the owner must also sign the permit application." 40 C.F.R.§ 270.10(b). Thus, common sense tells us that whoever submits the application for a permit becomes the "Applicant" and automatically becomes a party to any contested case proceeding. If approved, the applicant who submitted the application would then be issued the permit and become the permittee.

Furthermore, the Texas Health and Safety Code mandates that an MSW permit must include the name of "…. the person who is or will be the operator or person in charge of the facility…". TEXAS HEALTH & SAFETY CODE § 361.087(1). It does not require a Site Operator and a separate contract operator to both be named on the permit, or to agree on the contents of a permit amendment or modification before it is submitted. If that was the case, then all other permitted municipal solid waste facilities managed by one or more contract operators currently have permits that fail to meet that interpretation. The Williamson County Landfill permit is the

only permit in the state that we are aware of which would identify an operator separate from the permittee. It would raise the question as to whether there are two permit holders, since there are two types of operators with rights and responsibilities listed on the permit. It also raises the question as to whether the cities and counties that rely upon contract operators to manage solid waste processing and disposal facilities want those contract operators to have rights under the permit, potential veto power in blocking them from removing the contract operator from the permit, and control over what the permit holder chooses to do with and through their permit. Finally, it raises the question whether contract operators around the state want to be listed as the "Operator" on permits, which could subject them to liability and enforcement exposure previously reserved for the Site Operator/permit holder.

The problem with the ALJs findings and conclusions is that they believe that because Williamson County entered into a contract with WMTX to operate the facility on behalf of the County, this somehow makes WMTX the "Operator" of this facility, as that term is used in the Texas Health and Safety Code and the TCEQ rules (PFD p. 13). This erroneous conclusion led the ALJs to therefore conclude in their PFD that WMTX (as a "contract operator") must be on the permit in accordance with the Texas Health and Safety Code (PFD p. 15), must "submit" the permit application according to 30 TEX. ADMIN. CODE § 305.43(b) (PFD p. 9), but is not an applicant since Williamson County is the "sole applicant" (PFD p. 18).

The ALJs have incorrectly equated "contract operator" with "Operator" in their interpretation of the various rules and statutes that are applicable in this case that use the term "Operator". For example, the ALJs state that they find the Texas Health and Safety Code requires that the "contract operator" be disclosed in the permit (PFD p. 15). The Texas Health and Safety Code does not use the term "contractor" or "contract operator". Rather, it refers to the

"operator or person in charge of the facility" (see TEX HEALTH & SAFETY CODE § 361.087(1)). This is because the entity that is issued the permit from the TCEQ for a municipal solid waste disposal facility (landfill) is the one who is being authorized to operate the landfill, i.e. the "Operator". No permit is issued to, or for that matter needed by, the person who simply owns the land upon which the facility is located, i.e. the "Owner". The permit is issued to and is needed by the person "in charge of the facility" in order for that person to be authorized to construct and/or operate a landfill, i.e. the "Operator".

This understanding of the "Operator" being the entity that needs to obtain the permit is also consistent with the federal regulation discussed above regarding "who applies" for a permit. A "contract operator" indicates that the entity responsible for the operation of the facility, i.e. the "Operator", has chosen to hire a contractor to conduct certain functions at the facility on behalf of the "Operator", which is not uncommon. Often there is more than one contractor hired to fulfill the various needs of the "Operator." Yet it is the "Operator" who is the Permittee and the one required to apply for it (i.e. submit an application for a permit) from the TCEQ.

There can be several contract operators on a single landfill (i.e., for landfill gas management, composting, facilities construction, rodent and other vector control, as well as solid waste receipt and compaction), yet there can be only one Site Operator. While there can also be numerous landowners who should be identified on the permit, there again can only be one Site Operator. The definition of Site Operator under 30 TEX. ADMIN. CODE § 330.3(142) effectively describes the same entity as the Operator that is defined under 30 TEX. ADMIN. CODE § 305.2(24). To identify WMTX as the "Operator", being the party who has the overall responsibility for the operation of the landfill and to require them to be the applicant (under 30 TEX. ADMIN. CODE § 305.43(b)) who must submit any application for a permit modification or

amendment, yet not allow or require the applicant to be a party in a contested case hearing, demonstrates some of the confusion that flows from considering one or more contract operators as the "Operator" with rights and responsibilities under the permit.

The TCEQ's 330 rules provide the definition of a "Site Operator" as the holder of or applicant for a permit for a municipal solid waste site (30 TEX. ADMIN. CODE § 330.2(132)). Common sense tells us that this is the same as the "Operator" as that term is used in the Texas Health and Safety Code as the "person in charge of a facility". This is the person whose name and address must be on the permit. This is also the person who is ultimately responsible for the overall operation of the landfill (i.e. the 30 TEX. ADMIN. CODE § 30.543(b) Operator). This is the person who should be applying for a permit (i.e. the applicant). This is the person who would be the permittee if a permit is issued. This is the person who the state and affected parties look to for enforcement and long-term care of the facility. This is the person who may choose to hire contractors to carry out their duties under the contract. This is Williamson County, based on all of the evidence presented during this proceeding. This person is not a contract operator like WMTX.

The ALJs agree that Williamson County would be the permittee if this permit amendment were to be issued. The ALJs agree that Williamson County is the Applicant and the only applicant for this permit amendment. The ALJs agree that Williamson County is the entity that is/will be ultimately responsible for the operation of this landfill. The ALJs agree that Williamson County is the Site Operator, as that term is used in the 330 rules. Yet, the ALJs failed to reach the logical conclusion that Williamson County is also the "Operator" of this landfill, and that WMTX is nothing more than a "contractor" or a "contract operator". This position taken by the ALJs has no precedence in the MSW permits program (as no permits

identify an "Operator"). It dramatically changes the interpretation of the rules relating to who must apply for permits and the rights and responsibilities of a contract operator in a permit amendment, modification or enforcement process. It dramatically changes the permits that have been processed over the past thirty years, and is a fundamental legal error in the ALJs' PFD. To find otherwise would mean that this permit amendment application process is fatally flawed because WMTX, if it is an applicant and 30 TEX. ADMIN CODE § 305.43(b) operator, was not a party to this contested case proceeding and did not seek party status to obtain the permit amendment as the "Operator", applicant and a party with the rights and responsibilities of an operator under 305.43(b).

WMTX attorneys argue there is no problem with designating a contract operator as the "Operator". This argument is clearly demonstrated to be untrue by the sheer number of people who have commented on a proposed Chapter 305.43(b) rule-making who believe there is a problem and provided specifics of the problems in their comments to the TCEQ. As of February 22, 2008, the TCEQ had received at least six (6) comment letters that represented the opinions and positions of at least seventeen (17) legal entities that believe there is a problem with this section of the rules that needs to be addressed in a timely manner. The only two commentors who allege there is no significant problem with this section of the rules represent two large commercial municipal solid waste operators, including WMTX. The seventeen entities which believe there are very serious issues that should be addressed in this rule-making represent the opinions of municipalities, commercial operators, citizens, and public interest groups. All of these entities have presented details of the specific issues they believe exist in the rules that should be addressed by the Commission.

The ALJs had to find that the testimony (that the County is the "Operator" of the landfill) of both County witnesses, County Judge Gattis and Mr. Murray, is erroneous in order to conclude that WMTX is the "Operator". This decision by the ALJs actually seeks to change the testimony of Judge Gattis and Mr. Murray. It seeks to undermine the testimony of Judge Gattis, the highest authority to speak for the County. As such, there now has to be three entities named on the permit: the Land Owner, the Site Operator, and the Contract Operator, changing 30 years of how TCEQ permits have been issued.

If the Commissioners adopt the ALJ's position designating WMTX as the "Operator", it will also cause the following adverse and unintended consequences:

1. Entities who manage facilities as contractors and who have signed and submitted applications, as arguably would now be required by this new interpretation of 30 TEX. ADMIN. CODE § 305.43(b), will not be a party to a contested case hearing, even though they are the "Operator".

2. Permits will be issued to contractor entities as "Operators" that are not considered an "Applicant" in contested case hearings, even though they submitted and signed the application in their own name and sought to be identified as the "Operator" and an "Applicant" in the application and public notices.

3. Enforcement will be complicated by confusion of the role and responsibility of the operator, site operator, and land owner due to inconsistent definitions between chapter 305 and 330 of the TCEQ rules.

4. Ownership of, liability under, and control of permits could be transferred to contractors who manage facilities under short-term or long-term contracts.

5. More than one applicant, operator, or site operator could be listed on the permit causing confusion in future permitting, enforcement, and financial assurance matters.

What the ALJs have recommended in response to this issue has never been done before. No TCEQ permit could be found in which a "contract operator" had been named on a permit as the "Operator", as is being recommended here by the ALJs. If the Commission were to review the TCEQ 2006 and 2007 Annual Reports for MSW landfills and transfer stations in Texas, it

would find that over 30 Site Operators have reported using "contract operators" to run their facilities, yet we are not aware of any of these facilities having such a contractor named on its permit as "Operator".

If this permit amendment is approved by the Commission as recommended by the ALJs, such precedent creates a whole new frontier of problems for MSW permittees throughout the state. For example, does every permittee have to now add any and all of their "contract operators" to their permit under this precedent? Will contract operators have to submit permits, permit amendments and permit modifications, as 30 TEX. ADMIN. CODE § 305.43(b) operators, and be listed on any future amended permits? If there is more than one contract operator, which contract operator would be the lead operator who must submit the application? Which contract operator would receive a notice of violation and to what extent would they be liable for an environmental discharge? Which contract operator's compliance history would be used in the application process? Which contract operator submits the application on behalf of the owner and Site Operator? What happens if the contract operator refuses to submit an application on behalf of the owner or Site Operator? What rule supports these three different types of entities being listed on the permit: the land owner, Site Operator, and the contract operator identified as the Operator?

The contract operator(s) would now control the permit because they get to choose what goes into the permit application that they submit on behalf of the Site Operator and owner of a MSW landfill or transfer station. The ALJs' approach allows the contract operator to be the entity to prepare and submit the permit application, without having to become a party to any contested case hearing. It allows a party to receive rights and responsibilities under the permit, without having to identify itself and be subject to the contested case hearing process. It allows

the contract operator to object and block a Site Operator or owner that wishes to remove or replace the contract operator(s) named on the permit.

It appears that the ALJs in this case simply tried to justify the way that Williamson County and WMTX went about presenting this application as co-applicants after the ALJs decided that the County would be the sole applicant and the only party to this hearing that would be defending the application. However, in so doing, not only did the ALJs not resolve this issue, they created a hornet's nest of new problems for all permittees throughout the state.

These two findings by the ALJs are clearly erroneous and would constitute reversible error if they were adopted by this Commission. The evidence presented at the hearing and in the record clearly establishes that Williamson County, not WMTX, is both the 305.43(b) operator (who must submit an application for this permit) and the person in charge of the operation of this landfill (under the provision of the Health and Safety Code).

For example, Williamson County has testified as being the "owner" of the existing Williamson County landfill (see Exhibit APP-100, County Judge Gattis pre-file testimony, p. 4, lines 29-30). Williamson County has also claimed to be the "Operator" of the Williamson County Landfill, having ultimate responsibility for the overall operations (TR, County Judge Gattis testimony, p. 36, line 24 – p. 37 line 2). Furthermore, Williamson County has insisted that it is the Applicant and the only Applicant for this pending permit amendment MSW-1405B (TR, County Judge Gattis testimony, p. 40, lines 20-24) and the 305.43(b) Operator). This is with the 30 TEX. ADMIN. CODE § 305.43(b) and the corresponding federal regulation 40 C.F.R. § 270.10(b) regarding who is to apply for a MSW permit or permit amendment. The ALJs agreed with all of this yet concluded that WMTX, as a contractor, still is to be considered an "Operator" under 30.543(b) and the Health and Safety Code provision.

Since there is no precedent or requirement that a contract operator be listed on the permit as the "Operator", it only makes sense that such an entity not be shown on the permit. Other than the owner of the land upon which the facility is located (to be in compliance with state and federal law), only the name of the "Site Operator" who, by definition, is the permit holder and applicant, should be shown on the face of a MSW permit in order to avoid any confusion as to who is the permittee. Over the years, the terms "Site Operator", "permittee" and "permit holder" have been considered equal to the "Operator". To the extent that the TCEQ wants to know the name of any "contract operator" that might exist, the TCEQ's Annual Reports inquire about such a situation and provide the opportunity for the name of such a contract operator to be identified.

Not only should any permit that might be issued in this case be clear as to who is the permittee, but any such permit will also include Parts I-IV of the PAA as part of the permit, according to TCEQ rules (30 TEX. ADMIN. CODE § 330.51(a)). The ED's witness Mr. Prompuntagorn testified that he understands that Parts I-IV of the PAA would become part of Permit 1405B if it were issued, and that such parts of the PAA currently makes reference to both Williamson County and WMTX as the Applicant, and thus could cause confusion as to who is the "permittee" (TR, Prompuntagorn testimony, p. 1530 line 24 – p. 1531 line 25). As such, any and all references in the PAA that WMTX is an "Operator", "Site Operator" or an "Applicant" would need to be eliminated so that if the permit amendment were issued, it would not contain any contradictions or inconsistencies between the permit and its attachments.

Applicant argued that it wants "...the permit to be abundantly clear..." that Williamson County is the sole Applicant for permit MSW 1405-B (see p. 3 of Appl. Closing Argument). Furthermore, the entire Commissioner's Court of Williamson County wanted the record to be clear that WMTX is simply "... a contractor to the county" (Order #11, HCG Exhibit 6). TJFA,

as well as the other Protestants, would like to see the same clarity, if this permit amendment ultimately gets issued by the TCEQ. The only way for that to happen is for the permit to contain only the name of Williamson County, as the Permittee, being the "Owner" and "Operator" of the Williamson County Landfill. This could be easily accomplished on the face of the permit itself by leaving off the name of anyone other than Williamson County. However, any issued permit must include the Application as a part of the permit. Unfortunately, the Applicant submitted a permit amendment application (PAA) that is anything but clear as to who is the "applicant" for this permit MSW-1405B.

For example, this PAA was submitted as having both Williamson County and Waste Management of Texas, Inc. (WMTX) identified as "Applicants" for this permit amendment. This led to the initial draft permit by the ED that reflected what was in the PAA – both Williamson County and WMTX being shown as the permittee - holder of permit MSW-1405B (TJFA Exhibit 24). This problem cannot be corrected simply by removing the name of WMTX from the face of any issued permit amendment, given the remainder of the application containing references to WMTX as being the applicant and/or operator. The face of the permit is important since it identifies who is the Permittee – the holder of the permit; however, so is the remainder of the permit application, as it becomes a part of the permit and the application must support the permit granted (TR, Prompuntagorn testimony, p. 1530 line 24 – p. 1531 line 25).

The Applicant has attempted to make it clear during the hearing that Williamson County is the Operator, Site Operator, 305.43(b) Operator, and the sole Applicant for MSW 1405-B and that WMTX is just its contractor. Yet, its PAA that it submitted to the TCEQ says otherwise and its closing arguments state that WMTX should be the "Operator". 30 TEX. ADMIN. CODE §330.51(b)(2) makes it clear that

"... submission of false information shall constitute grounds for denial of the permit." Given the remainder of the problems with this PAA, TJFA would recommend this permit application be **DENIED**.

B. LAND OWNERSHIP

TJFA takes exception to the ALJs' PFD on this issue in that the County had only acquired a quitclaim deed with some type of reversionary clause from WMTX to some of the property rather than a warranty deed. As such, there is a question as to what rights WMTX had in this property at the time WMTX quit-claimed all of its rights to the County. County Judge Gattis acknowledged that no one had confirmed in writing on behalf of the County what rights WMTX had in the property at the time of the conveyance (TR Gattis testimony, p. 98, lines 6-16.). Therefore, there is an outstanding question as to the ownership of the land upon which this landfill is located that is the subject of this permit request. Therefore, the Application must be **denied.**

C. NECESSITY OF CAPCOG REVIEW

TJFA takes no exception to the ALJs' PFD on this issue.

V. LAND USE COMPATIBILITY

TJFA excepts to the ALJs finding that the Applicant provided sufficient information in the PAA regarding future growth trends in the nearest community, Hutto, so that the ED could determine that the proposed landfill expansion will be compatible with the surrounding land use, both currently and in the foreseeable future. This is especially true in light of the statement in the PFD that ".... the hard reality is that the Facility's current location will impact the northerly growth of Hutto." (PFD p. 37).

The Protestants, including TJFA, objected to the testimony of Mr. Worrell on rebuttal for the Applicant as an apparent attempt on the part of Williamson County to provide the necessary information that was missing from its direct case and from the PAA in order to meet its burden of proof on this issue regarding future growth trends. Mr. Worrell was unaware that a major highway will pass by the landfill on the southwest and therefore did not evaluate and future land use impacts on future development.

The failure on the part of the PAA to provide the necessary information in Parts I/II of the PAA that is required under the TCEQ rules necessitates that this PAA be **denied**.

VI. TRANSPORTATION

TJFA takes no exception to the ALJs' PFD on this issue.

VII. GEOLOGY, HYDROGEOLOGY AND DRAINAGE

A. GEOLOGY AND GROUNDWATER PROTECTION

One of the most important concerns regarding the design and operation of a MSW landfill is the potential for the contamination of groundwater and surface water due to contaminants leaking through a break or tear in the protective liner of the landfill. The TCEQ has developed and adopted numerous requirements throughout its 330 rules in an attempt to ensure that the health, safety and welfare of the public and the environment will be protected from such a leakage if the TCEQ approves a permit for the development of a MSW landfill in Texas.

The rules require an applicant to thoroughly characterize the geology and hydrogeology of the soils underneath a landfill site using site-specific information in order to establish an appropriate groundwater (GW) monitoring system (see 30 TEX. ADMIN. CODE § 330.231(e)(1)).

An appropriate GW monitoring system is one that is established at appropriate locations and depths to ensure that any contamination that might escape from the landfill into the GW in the area will be detected before such contamination can leave the landfill site and potentially contaminate area GW or surface water sources (see 30 TEX. ADMIN. CODE § 330.231).

This thorough characterization of the geology and hydrogeology is one of the critical components of a landfill permit application and is necessary before an acceptable GW monitoring system can be established. Yet it became evident during this contested case hearing that the Applicant failed to provide such information, as discussed below.

Borings are taken that contain samples of the soils underneath the site so that tests can be run to characterize the geology of the site. The borings that are contained in the PAA establish that the site is underlain with three major soil layers: a surficial clay, a claystone and a limestone. (see Exhibit APP-404; TJFA Exhibit 15). The surficial clay contains some gravel and sand lenses. The claystone contained fractures throughout the extent of this soil layer. The limestone also contained fractures, some as deep as the borings themselves (see TR, McCoy testimony, p. 1652, line 17 – p. 1653, line 1). There are also transition zones of varying thicknesses between each major soil layer. Therefore, it was not known nor could it be established where the fractured portions of the limestone end and the unfractured portions of the limestone begin. This is critical because it was well-established both in the PAA and during the hearing that the movement of GW beneath the landfill site is primarily along the fractures in the claystone and limestone (e.g. see Exhibit APP-400, Gallup pre-file testimony, p. 32, lines 12-14).

A thorough understanding of this GW movement along the fractures in the claystone and limestone is necessary in establishing where the bottom of the uppermost aquifer (UMA) is located, in that below the fractured portions of the limestone would be where the UMA ends and

the top of the aquiclude begins. It was agreed that the base of the UMA is somewhere in the limestone (Austin Chalk), but where that base is cannot be determined with the information provided in the PAA (see TJFA Exhibit 15; TR, Gallup testimony, p. 570, line 25 – p. 571, line 17; TR, Clark testimony, p. 1394, line 5 – p. 1395, line 10, referring to TJFA Exhibit 22; TR, McCoy testimony p. 1651, line 19 – p. 1652, line 16).

Another pathway for the movement of GW is along inactive faults (see TR, McCoy testimony, p. 1645, line 25 – p. 1646, line 3). The PAA and the pre-file testimony of the Applicant's geologist indicated that there were no inactive faults within the landfill site (see Exhibit APP-202, PAA, Attachment 4; Exhibit APP-400, Gallup pre-file, p. 16, line 24 – p. 17, line 17). However, during the hearing, the Applicant's geologist, Ms. Gallup, submitted a map showing the potential for two inactive faults that could be crossing the site (see APP- 403). The Applicant obviously does not know if or where these inactive faults are located underneath the site, nor has the Applicant made any provisions for looking for these faults and what will be done if they are found. The ED's geologist (Wes McCoy) stated that there were various indications of the existence of inactive faults underneath this site from the information he had reviewed as well as his own field experience in this area, however, he also has not been able to reach a conclusion whether or not any inactive faults do, in fact, exist underneath this site (see TR, McCoy testimony, p. 1642, line 7 – p. 1645, line 18).

These examples of the failure of the PAA to adequately characterize the geology of the site is contrary to the requirements of 30 TEX. ADMIN. CODE § 330.56(d)(5)(A)(i) requiring a sufficient number of borings shall be performed in order to establish geotechnical properties of the soils and rocks underneath the facility; and the requirements of 30 TEX. ADMIN. CODE

§ 330.56(d)(5)(A)(ii) requiring that borings be sufficiently deep to allow identification of the UMA and that borings penetrate the UMA and be deep enough to identify the aquiclude.

These failures in the characterization of the geology of this site also create problems in being able to comply with the rules regarding the characterization of the hydrogeology of the site, and the development of an adequate GW monitoring system that is in compliance with the rules of the TCEQ.

The TCEQ rules also require that an Applicant thoroughly characterize the hydrogeology of a proposed landfill site, and present that information in Attachment 5 of Part III of the application (30 TEX. ADMIN. CODE § 330.56(e)). Laboratory and field tests are typically performed on the soil layers underneath the site in order to characterize the hydrogeology of the site. The PAA and the Applicant's geologist indicated that such tests were performed and that there was GW moving within and along the sand and gravel lenses in the surficial clay, the fractures of the claystone, and some of the fractures in the limestone (see Exhibit APP-404; Exhibit APP-400, Gallup pre-file testimony, p. 32, line 10-14). However, there are a lot of unknowns regarding the movement of GW underneath the proposed landfill site, as follows:

> (1) the Applicant doesn't know how quickly or where GW moves through the fractures in the claystone - (since the permeability of the claystone is on the order of 10E-9 cm/sec as shown on Exhibit APP-404 and TJFA Exhibit 15 and is based on lab tests of unfractured claystone samples (see TR, McCoy testimony, 1647 line 20 – p. 1649 line 9) and the ED geologist doesn't know what is the permeability of the claystone containing fractures (see TR, McCoy testimony, p. 1649 line 20-22));
>
> (2) the Applicant doesn't know how quickly or where GW moves through the fractures in the limestone – (since the permeability of the limestone is on the order of 10E-9 cm/sec as shown on Exhibit APP-404 and TJFA Exhibit 15 and is based on lab tests of unfractured limestone samples (see TR, McCoy testimony, 1650 line 1-23) and the ED geologist doesn't know but the permeability of the limestone containing fractures could be on the order of 10-4 or greater (see TR, McCoy testimony, p. 1656 line 19-22));
>
> (3) the Applicant doesn't know where the bottom of the UMA ends and the top of the underlying aquiclude begins, as shown on TJFA Exhibit 15 – (the ED geologist

agreed that Ms. Gallup was unable to establish the bottom of the upper-most aquifer (see TR, McCoy testimony, p. 1651 line 3-24)); and

(4) the Applicant does not know what effect the proposed landfill will have on the GW movement in the area – (the ED geologist testified that the Applicant had not identified how GW flow direction and rate would be affected by the construction of the proposed landfill as required in 330.231(e)(1) (see TR, McCoy testimony, p. 1673 line 21 – p. 1674 line 17)).

Given all of these unknowns regarding the movement of GW underneath the proposed landfill site, it is evident that the Applicant failed to thoroughly characterize the hydrogeology of the site. This is in violation of 30 TEX. ADMIN. CODE § 330.56(e)(2) requiring the groundwater characterization report to contain identification of the uppermost aquifer, including GW flow direction and rate, and the basis thereof. In addition, it is impossible to establish an adequate GW monitoring system that can be in compliance with the TCEQ rules without the requisite GW characterization.

The TCEQ further requires that a GW monitoring system must be installed that will consist of a sufficient number of monitoring wells, installed at appropriate locations and depths, to yield representative GW samples from the UMA (30 TEX. ADMIN. CODE § 330.231(a)). According to the 30 TEX. ADMIN. CODE § 330.231(e)(1), the design of the GW monitoring system shall be based on site-specific technical information that must include a thorough characterization of various aspects of the geology/hydrogeology of the site, including: aquifer thickness, GW flow rate, GW flow direction, effect of site construction and operations on GW flow direction and rates, and the materials of the UMA.

Given the failure of the Applicant to thoroughly characterize the geology and hydrogeology as discussed above, the Applicant cannot design a GW monitoring system that can comply with the above rules. In addition, according to 30 TEX. ADMIN. CODE § 330.231(a)(2),

the downgradient GW monitoring system must be installed to ensure detection of GW contamination in the UMA.

The Applicant's geologist, Ms. Gallup, had a hard time establishing what direction was down-gradient versus up-gradient. She redrew the Point of Compliance line along the western side of the landfill during her cross-examination which is intended to establish where the down-gradient movement of GW occurs around the landfill site (see Exhibit APP-202, PAA, p. 414; TR, Gallup testimony, p. 637, line 4-14). On rebuttal, she attempted to correct herself and re-establish the down-gradient direction of GW flow and re-establish the Point of Compliance. However, if the Applicant's own geologist was confused over which direction was down-gradient versus up-gradient, that is a good indication that the hydrogeologic characteristics of the site have not been adequately established.

It is frightening to think that this landfill site has absolutely no down-gradient GW monitoring wells proposed along the entire western side of the landfill for use in detecting potential GW contamination, especially since this is where the old landfill is located, portion of which do not have post Subtitle D liners. The only GW monitoring wells anywhere along the western boundary of the site proposed for the landfill expansion are two wells (MW-11 and MW-12) designated in the PAA as "up-gradient" wells that are in line with one another. This is not in compliance with the TCEQ rules and not a GW monitoring system that is protective of human health and the environment.

In fact, the ED geologist testified that there was evidence presented by the Applicant's geologist that both MW-11 and MW-12 may be down-gradient, as well as the western portion of the site, and if so, these wells should be included as part of the Point of Compliance (see TR, McCoy testimony, p. 1680, line 24 – p. 1682, line 9). Yet, Mr. McCoy cautioned that it was

premature to say that these areas have been established to be actually down-gradient or up-gradient because Ms. Gallup was going to re-evaluate the data (see TR, McCoy testimony, p. 1682, line 14-18).

This is why this PAA must be **denied.** We were at the end of the contested case hearing on a supposedly administratively and technically complete PAA, reviewed and approved by the ED and his staff, and we were having the Applicant's geologist re-evaluating data to determine what direction the GW is flowing, and the ED's geologist was not sure either. This is what happens when an applicant does not fully characterize the geology and hydrogeology of the site in the permit application, as required by the TCEQ rules.

The ALJs addressed the issue of a lack of monitoring wells along the western boundary and concluded none were required because Ms. Gallup said so on behalf of the Applicant (PFD p. 53). However, Ms. Gallup was unclear about this on cross-examination as was the ED's geologist. While the ALJs noted that Ms. Gallup believed no such monitoring wells were needed along the western boundary, even she stated that she would not object to the inclusion of monitoring wells along that western boundary if the TCEQ so ordered (PFD p. 58).

Even the ALJs must have felt a little uneasy about not having any monitoring wells along the western boundary to serve as downgradient wells given the testimony and evidence that at least during certain times the piezometer readings showed groundwater movement towards the west. Thus the ALJs also have no objections if the Commission wanted to require some downgradient wells along the western boundary (PFD p. 44). TJFA would strongly recommend that the Commission, if it determines that this permit amendment be issued, require that some monitoring wells be established along the western boundary in protection of the health, safety and welfare of the public and the environment. This portion of the western boundary of the

landfill is critical as it is immediately adjacent to the original landfill cells, some of which are unlined and over which additional waste will be landfilled, if this permit amendment is granted.

The Applicant also argued that the TCEQ rules do not require a detailed analysis of inactive faulting (see p. 15 of Appl. Closing Argument). While the TCEQ rules do not specifically address "inactive" faults, the rules do require a thorough characterization of the geology and hydrogeology of the proposed landfill site (see e.g. 30 TEX. ADMIN. CODE §§ 330.56(d) and (e) and 330.231(e)(1)). Included in such a characterization is the presence of any inactive faults.

Such faults can be pathways for groundwater flow and therefore a preferential pollutant pathway (see TR, McCoy testimony, p. 1645, line 25 – p. 1646, line 3). Dr. Clark stated as much in his prefiled testimony (TJFA Exhibit 3, p.11, lines 33-37). The simple truth is that this Applicant failed to initially investigate the existence of inactive faults, and only after the issue of inactive faults was raised by the TJFA did Ms. Gallup present a map showing potential inactive faults crossing the site, but even then still failed to deal with their potential to carry groundwater flow. Her testimony throughout the hearing left a lot of questions about her capabilities and credibility to give reliable "expert" opinions. The PAA that she prepared and sealed as a Professional Geologist fails to satisfy the fundamental requirements of the TCEQ rules.

The ALJs make reference to Ms. Gallup's testimony regarding the preferential pathways for groundwater flow (and potential pollutants) as being along the contact zones between the three geologic units (PFD p. 66). As such, the ALJs note that Ms. Gallup proposes to only monitor at these contact zones, and notes that historically, groundwater has only been monitored at these locations (Id). The only thing that this historic monitoring tells us is that there is groundwater in those particular wells. Unfortunately, if there are no monitoring wells at other

locations within the underlying geologic layers other than at the contact zones, then no one can know if there is groundwater movement that is more preferential than at the contact zones.

The Applicant failed to collect any such groundwater flow data in order to conduct such an analysis to fully and thoroughly characterize the hydrogeology at the site as required by the TCEQ rules. This failure is inexcusable given the acknowledgement by the Applicant's "expert" that the underlying claystone and limestone are full of fractures and that it is via these fractures that groundwater is most likely to move through these geologic formations. Yet the ED's geologist conceded that he did not know what the permeability was of the claystone and limestone containing fractures, because the permeability tests had been conducted by the Applicant only on **unfractured** samples (PFD p. 61).

The ALJs determined that Ms. Gallup defined the UMA and placed her monitoring well screens at appropriate depths at the base of the UMA (PFD p. 65). This conclusion by the ALJs ignores the reality of Ms. Gallup's testimony during the hearing where she could not identify the extent of the UMA when creating TJFA Exhibit 15.

All of the geologists who testified at the hearing agreed that the UMA included the claystone and a portion of the limestone that was weathered/fractured, but also could not determine how far down that extended into the limestone due to a lack of information on the hydraulic conductivity/permeability of the fractured portion of the limestone. There were guesses, such as about 5-10 feet below the interface with the claystone, but with no basis other than general knowledge of the Austin Chalk. Such is clearly not enough to satisfy the TCEQ rules, which require site-specific information with a thorough characterization of the geology/hydrogeology of the site, including the thickness of the UMA, per 30 TEX. ADMIN. CODE § 330.231(e)(1).

The Applicant only plans to screen the contact zones of the three geologic units for its groundwater monitoring system. Again, the ALJs agreed with this screening because Ms. Gallup said it was adequate and believed it was not necessary to screen across the entire depth of the UMA, even though it was possible that some groundwater contamination could miss the screening at the interface (PFD p. 66-68). Identifying these contact zones can be done by examining the boring logs, but there is no provision for determining the extent of the fracturing in the limestone to establish the bottom of the UMA so that the screening will extend to that depth. Also, there is no screening proposed across the full depth of the claystone, which is fractured throughout.

Again, the lack of information in the PAA leads to questions, confusion, disagreements and uncertainties as to the proper location and depths of monitoring wells in order to protect human health and the environment, as required by the TCEQ rules (30 TEX. ADMIN. CODE § 330.231(a)). TJFA would strongly recommend that the Commission require that the full extent of the UMA be screened due to the fractured nature of the UMA and the uncertainty in knowing where the fractures are located throughout the UMA.

Ms. Gallup's confusion over where downgradient is at this site is evidence in and of itself that she has failed to thoroughly characterize the hydrogeology of this site. She could not argue with the contour maps of GW levels that she compiled and put into the PAA, which clearly showed GW movement to the western boundary of the site, that initially convinced her that downgradient included the western portion of the landfill site, prompting her to extend the point of compliance along that side of the permit boundary.

On rebuttal, Ms. Gallup attempted to change her mind again, based on "more recent information". However, that information did not change the information that showed the western

portion of the permit boundary as being downgradient. All it did was establish that the Applicant had not thoroughly characterized the hydrogeology at the site if there is conflicting information as to where downgradient is at this site. This is the underlying theme of this entire PAA as to the geology and hydrogeology, which is not in accordance with the rules, because such failure leads to guesses, confusion, and conflicting information, just like we have here with this PAA.

The TCEQ requires that a GW monitoring system must be installed that will consist of a sufficient number of monitoring wells, installed at appropriate locations and depths, to yield representative GW samples from the UMA (30 TEX. ADMIN. CODE § 330.231(a)). According to the 30 TEX. ADMIN. CODE § 330.231(e)(1), the design of the GW monitoring system shall be based on site-specific technical information that must include a thorough characterization of various aspects of the geology/hydrogeology of the site, including: aquifer thickness, GW flow rate, GW flow direction, effect of site construction and operations on GW flow direction and rates, and the materials of the UMA.

Given the failure of the Applicant to thoroughly characterize the geology and hydrogeology as discussed above, the Applicant cannot design a GW monitoring system that can comply with the above rules.

In addition, according to 30 TEX. ADMIN. CODE § 330.231(a)(2), the downgradient GW monitoring system must be installed to ensure detection of GW contamination in the UMA.

This PAA is not in compliance with the TCEQ rules and does not contain a GW monitoring system that is protective of human health and the environment. Therefore, this PAA should be **denied** on this basis.

B. DRAINAGE PATTERNS

TJFA excepts to the ALJs conclusion that natural drainage patterns will not be significantly altered as a result of the development of this landfill, despite that the storm water runoff volume will increase 250% at the permit boundary.

Attachment 6 of the Site Development Plan of a proposed landfill application is required to include a drainage plan for managing the storm water runoff from the landfill site. This drainage plan must meet the rules of the TCEQ. The primary rule that governs the adequacy of such a drainage plan states that an applicant must provide the discussion and analyses to demonstrate that natural drainage patterns will not be significantly altered as a result of the proposed development of the landfill (30 TEX. ADMIN. CODE § 330.56(f)(4)(A)(iv)). The purpose of this rule is to protect adjacent and nearby properties from having flooding or erosion problems caused by the development of the landfill. This PAA fails to provide such a discussion and analyses to make this required demonstration, particularly with regards to Discharge Points A and B and their associated runoff volumes increases due to the proposed drainage plan presented in the PAA.

The TCEQ has issued technical guidance to assist in preparing a drainage plan that would be in compliance with the rules (RG-417). This Technical Guidance was created in response to the Commission's rulings in the *Blue Flats* case that dealt with the information that had to be provided in an application in order to make this determination of no significant alteration. The PAA engineer testified that he was familiar with this technical guidance and that he followed it (TR, Murray testimony, p. 293 line 5 – p. 294 line 5). However, on further examination, it was shown that he had not followed these guidelines, which was confirmed on cross-examination of the ED witness, Mr. Prompuntagorn. The primary failure of the PAA to follow these guidelines and also be in compliance with the TCEQ rules regarding maintaining natural drainage patterns

deals with the issue of the dramatic increase in runoff volume at Discharge Points A and B, and the potential impacts downstream associated with such an increase.

In this PAA, the proposed landfill expansion drainage plan presents a design of the storm water drainage system that causes a considerable amount of drainage area to be diverted from its natural drainage path. For example, Discharge Point B (DP-B) is at the FM 1660 roadside ditch and drains towards the unnamed tributary north of the landfill site (see Exhibit APP-202, PAA p. 1853, Figure III – 6.1). Specifically, under Natural Conditions, only 75 acres drain north into this FM 1660 roadside ditch and towards the unnamed tributary; however, under Proposed Conditions, the design would result in 164 acres draining into this roadside ditch and towards the unnamed tributary, over 200% increase in the area that naturally drains to this point along the permit boundary (TR, Murray testimony, p. 320, line 5-13).

This diversion of natural drainage area was the primary reason for the approximately 250% increase in the runoff volume in acre-feet (AF) computed by the PAA for Discharge Point B (see Exhibit APP-202, PAA p. 1146; see also TJFA Exhibit 10). Yet the PAA does not contain any discussion or analysis of this significant increase in runoff volume that would be discharged at DP-B, as required by the TCEQ rules. The Applicant's permit engineer, Mr. Murray, agreed that there is no discussion in the PAA on the comparison between existing and proposed runoff volumes (see TR, Murray testimony, p. 328 line 6-25).

Similarly, the PAA shows a large increase in runoff volume at DP-A to be discharged into the FM 1660 roadside ditch towards the south and into Mustang Creek (see Exhibit APP-202, PAA p. 1146; see also TJFA Exhibit 10). Again, the PAA does not contain any discussion or analysis of this major increase in runoff volume that would be discharged at DP-A, as required by the TCEQ rules.

The PAA engineer stated that he complied 100% with the TCEQ's Regulatory Guidance (RG-417) dated June 2004 entitled "Guidelines for Preparing a Surface Water Drainage Plan for a Municipal Solid Waste Facility" that was applicable at the time he prepared the PAA (TR, Murray testimony, p. 293 line 5 – p. 294 line 5). However, after a review of the information contained in the PAA, it became evident that this statement by the PAA engineer was not true. In fact, upon questioning the ED's witness (Mr. Prompuntagorn), who had reviewed the drainage aspects of the PAA, he confirmed that the Applicant's engineer had not complied with various aspects of the technical guidelines, especially as it pertained to the major increase in runoff volume discussed above.

Specifically, Mr. Prompuntagorn testified that the Applicant failed to comply with the technical guidelines dated June 2004 as follows:

> (1) Under section 2.1, the PAA failed to evaluate the significance of changes to drainage patterns based on the impacts of changes on receiving streams or channels, and on the downstream flooding potential, specifically the unnamed tributary to the north of the landfill and Mustang Creek to the south of the landfill (see TR, Prompuntagorn testimony, p. 1566 line 1-24);
>
> (2) Under section 2.1.1, the PAA failed to consider the timing of peak discharges and their contribution to the peak discharge in the receiving streams/channels (see TR, Prompuntagorn testimony, p. 1567 line 25 – p. 1568 line 3);
>
> (3) Under section 2.1.2, the PAA failed to consider alterations to drainage patterns caused by increased volumes of water and the potential impacts on the downstream receiving streams and channels (see TR, Prompuntagorn testimony, p. 1568 line 4 – 18);
>
> (4) Under section 2.1.2, the PAA failed to demonstrate that the additional volume will be released at a rate that will not significantly affect the downstream receiving water body at Discharge Points A and B (see TR, Prompuntagorn testimony, p. 1569 line 24 – p. 1570 line 8); and
>
> (5) Under section 5.3, the PAA failed to include a discussion of how the proposed development of the landfill affects the shape of the hydrographs for each condition at the permit boundary, as well as any relevant downstream analysis point, such

as downstream creeks (see TR, Prompuntagorn testimony, p. 1576 line 20 – p. 1577 line 15).

Mr. Prompuntagorn testified that the watersheds that would potentially be impacted by the development of the proposed landfill expansion were those portions of the unnamed tributary to the north and those portions of Mustang Creek to the south that were shown in the PAA on page 1853, Figure III – 6.1 (see TR, Prompuntagorn testimony, p. 1562, line 24 – p. 1563, line 9). Yet, the PAA engineer failed to conduct any analysis of these watersheds to determine if these major increases in runoff volumes at DP-A and DP-B would result in any increase in flooding or erosion along these creeks (see TR, Prompuntagorn testimony, p. 1564, line 16 – p. 1565 line 18).

The above discussion shows that the PAA failed to provide the necessary information, discussions and analyses that are needed in order to evaluate the potential impacts from the proposed drainage plan for the landfill expansion project. Without the requisite discussion and analyses, the Applicant cannot make the requisite demonstration that natural drainage patterns will not be significantly altered as a result of the development of the proposed landfill expansion, as required by the TCEQ rules (30 TEX. ADMIN. CODE § 330.56(f)(4)(A)(iv)).

The increase in volumes as shown in this PAA is a result of the Applicant's engineer designing the landfill final cover and drainage system in such a way so as to divert the drainage from areas that naturally do not drain towards Discharge Points A and B and have that drainage redirected and sent to these discharge points, causing a significant increase in the volume and the flow rates at certain times during the storm event over that which would occur under pre-development conditions.

The ALJs refer to the Applicant's engineer who stated that any impacts from these large increases in runoff volumes have been "negated" by the use of the detention ponds to be

constructed at this site (PFD p.76). Yet, even after the storm water runoff passes through the Applicant's proposed detention ponds, the runoff volumes as well as many of the flow rates at various times, are still significantly increased over predevelopment conditions, contrary to the Technical Guidance and in violation of the TCEQ rules regarding "no significant alteration of natural drainage patterns".

Section 2.1.2 of the Technical Guidance gives specific ways in which to demonstrate that any volume increases are not significant (a demonstration that is the responsibility of the Applicant). Yet the Applicant failed to follow any of these suggested demonstrations, instead relying on its detention ponds to "negate" the volume increases, which fail to produce volumes and flow rates that do not change significantly from predevelopment conditions, in violation of TCEQ rules and contrary to the Guidance issued by the TCEQ to assist applicants in complying with its rules.

The TCEQ rules specifically require "a discussion and analyses to demonstrate that natural drainage patterns will not be significantly altered as a result of the proposed landfill development (30 TEX. ADMIN. CODE §330.56(f)(4)(A)(iv)). Most of the time, this can be and is accomplished at the permit boundary without performing any downstream analyses. This is because there are no significant changes shown to be occurring at the permit boundary that would warrant any analysis downstream. However, in this case, there are substantial increases in runoff volumes at Discharge Points A and B at the permit boundary, up to 250%, as well as increases in flow rates at various times as compared to pre-development conditions. This by itself demonstrates a lack of compliance with this TCEQ rule.

However, an applicant should be allowed to perform an analysis downstream to show that even though there may be substantial increases at the permit boundary, such would not cause any

problems downstream. The Technical Guidelines allow for such an analysis and limit it in Section 2 to the "... watershed that will be affected by the proposed development." Mr. Prompuntagorn acknowledged that the affected watershed in this case was the portions of the unnamed tributary to the north and Mustang Creek to the south that were shown on the PAA Figure III-6.1. Yet, the ALJs disagree with this, citing the Commission's decisions in the *Blue Flats* case and the *North Texas* case in which the ALJs conclude that no downstream analysis can be performed by an applicant to show that a large increase in runoff volume and /or major timing change at the permit boundary would not cause any significant adverse impacts off-site (PFD p. 77-78).

Ultimately, had the PAA engineer not designed the proposed landfill in a way that will divert considerable drainage away from where it naturally drains and instead redirecting it towards Discharge Points A and B, no major increases would have occurred at these locations and no significant alteration of natural drainage patterns would occur. But the PAA engineer chose to design it in a way that will cause such a diversion, in clear violation of both the TCEQ rules and Section 11.086 of the Texas Water Code. Such a PAA cannot be approved and must be **denied**.

VIII. GEOTECHNICAL INVESTIGATIONS AND CONCLUSIONS: SLOPE STABILITY

It is important that during the construction and operation of a MSW landfill, the slopes of any excavation or filling are stable in order to protect the health, safety and welfare of the public and the environment. There have been reports of landfill failures in Texas and elsewhere. Unfortunately, the ED's witness on slope stability didn't know what caused the landfill failures in Texas (TR, McCoy testimony, p. 1639, line 21 – p. 1640, line 17). The Applicant's expert on slope stability couldn't recall if there were any landfill failures in Texas (TR, Cravens testimony

p. 1035, line 6 – p. 1037, line 12). Yet the Applicant's expert was absolutely sure that the proposed landfill expansion will be stable during the development of the landfill and the working face, and therefore did not need to run any slope stability analyses for that condition (TR, Cravens testimony, p. 1022, line 19-247).

Slope stability analyses are conducted for a proposed landfill design in order to determine if the various slopes created during the excavation and filling of a landfill will be stable, based on the assumptions and parameters used as input into the modeled analyses. If the result of these analyses produces a Factor of Safety less than 1.0, then the design would be expected to fail given the input into the model (TR, Cravens testimony, p. 1011, line 17-22). Likewise, if the resulting Factor of Safety is computed to be greater than 1.0, then the design would be expected to be stable according to the model input (TR, Cravens testimony, p. 1022 line 22 – p. 1023 line 5).

But since there is uncertainty in the accuracy of the input to the model, then the Factor of Safety that should be used for testing the stability of the proposed design should be greater than 1.0. Similarly, if there is a risk of potential harm to the public or the environment, then the Factor of Safety should be greater than 1.0.

The minimum Factor of Safety recommended by the EPA for municipal solid waste landfills that accept sludge ranged from 1.5 to 2.0 or greater, depending on the uncertainty of the input, assuming major environmental impact (TR, Cravens testimony, p. 1052, line 5 – p. 1054, line 11; p. 1758, line 10 – p. 1179, line 9). The Williamson County landfill has accepted large amounts of sludge, according to its annual reports (TJFA Exhibit 27).

The slope stability analyses conducted for the Final Buildout condition, as shown in Table 2 of the PAA (p. 1640), produced Factors of Safety as low as 1.8, associated with the

Liner. The critical parameter used in the analysis for the Liner is an "estimated" shear strength for the interface of the geonet/geomembrane, based on an 11 degree friction angle (p. 1060, line 4-70).

However, the Applicant's expert couldn't identify the source of the friction angle of 11 degrees, in order to determine the degree of uncertainty in that assumption, much less whether that estimate was even correct (TR, Cravens testimony, p. 1119, line 2 – p. 1123, line 8). Therefore, the Applicant cannot confirm that the slope stability analyses are using reasonable parameters, and thus no one, including the TCEQ, can rely on these analyses and their results to determine that the proposed landfill design will be stable.

In addition, the Protestants questioned whether the Final Buildout condition was really the "worse case" scenario, and whether some interim condition during the filling of the landfill with waste almost 170 feet in height pushing on top of a "smooth" synthetic liner wouldn't be worse, and yet was not analyzed in the PAA. The Applicant's expert didn't think such a condition was of concern, based on his personal inspection of working faces of landfill operations in the past (TR, Cravens testimony, p. 1098, line 2 – p. 1099, line 9).

On rebuttal, the Applicant's engineer decided to submit a new slope stability analysis of an intermediate buildout condition, the kind that he was so sure would be very stable and therefore not an issue, that produced a Factor of Safety of 1.49, less than the 1.5 value he had established as the minimum to be used for his "worse case" final buildout scenario, and less than the USEPA's criteria for minimum Factors of Safety for MSW landfills assuming major environmental impact (see Exhibit APP-503).

The Protestant TJFA continues to have serious concerns about the stability of the proposed landfill expansion design, given the low Factors of Safety computed by the Applicant's

expert and those contained in the PAA, and the uncertainty in the critical input parameters used in these analyses, given the EPA's recommended Factors of Safety for MSW landfills of 1.5 – 2.0 and greater. Past landfill failures in Texas indicates that this is a real concern that the TCEQ has little guidance on and obviously provides very little if any review. For example, a landslide of trash (a trash slide) can put tremendous pressure and stress on liners and leachate collection systems installed and covered with trash that is involved in or adjacent to the trash slide. It may not be possible to remove the trash and repair the liners and leachate collection system connected to the trash slide before waste enters the adjacent creeks.

The ALJs concluded that slope stability is not an issue at this site because Mr. Cravens says it's not an issue (PFD p. 81). This assumes Mr. Cravens' opinion is unquestionably reliable. A review of the evidence presented at the hearing shows otherwise.

For example, Mr. Cravens was of the opinion that "Final Buildout" was the "worst-case scenario" for a possible slope failure, until on cross-examination when it was revealed that an interim buildout condition may be of concern but was not even analyzed because Mr. Cravens was sure, based on his experience "by inspection", that such a condition was nothing to worry about. However, when he ran this interim condition and presented it on rebuttal, it was found to have a Factor of Safety of 1.49, less than any Factor of Safety associated with "Final Buildout" and less than the minimum recommended Factor of Safety by the USEPA associated with municipal solid waste landfills assuming a major environmental risk.

This analysis by Mr. Cravens establishes not only that there is reason to believe there is a potential for a slope failure during the filling of this landfill as proposed, but Mr. Cravens "unwavering" testimony about how "inherently stable" this proposed landfill design is raises

doubts about all of these slope stability analyses, given the questionable reliability of Mr. Cravens' opinions. As such, this PAA should be **denied**.

IX. SITE OPERATING PLAN, SOURCES OF WASTE AND BOUNDARY ISSUES

A. SITE OPERATING PLAN

TJFA takes no exception to the ALJs' PFD on this issue.

B. ACCEPTANCE OF WASTE OUTSIDE WILLIAMSON COUNTY

TJFA takes no exception to the ALJs' PFD on this issue.

C. BOUNDARY ISSUES

TJFA takes exception to the ALJs' PFD on this issue regarding an existing pipeline easement not being able to be located across the property. The PAA represented that an existing pipeline easement within the northern portion of the landfill site would not be affected by any waste operations, a requirement of the TCEQ rules and regulations (30 TEX. ADMIN. CODE § 330.121(a)). However, the PAA contained conflicting information on the width of this easement and no legal description of where this easement is located.

For example, a boundary survey was provided in the PAA that identifies this easement as 50-feet wide, but with no reference to any deed to establish the metes and bounds description of the location of this easement (Exhibit APP-202, PAA, p. 48). Instead, this survey notes that the legal description of this easement was provided by WMTX. When questioned, the PAA engineer was sure that the width of this easement is 50 feet, although he had written a letter to the pipeline company noting it was a 75-foot easement and couldn't explain why he referred to this easement as 75-feet wide (TR, Murray testimony, p. 202, line 9 – p. 205, line 2). Further, the exact location of this easement is unknown, since it is not recorded, according to the survey contained in the PAA (Exhibit APP-202, PAA, p. 48).

The PAA engineer was familiar with the importance of identifying easements, but agreed that he could not find any legal description of this easement in order to determine exactly where it is located and how wide it really is, so as to ensure compliance with TCEQ rule 330.121 (TR, Murray testimony, p. 207, line 11 – p. 209, line 13).

The failure on the part of the PAA to provide the necessary information in Parts I/II of the PAA that is required under the TCEQ rules necessitates that this PAA be **denied**.

X. REPORTING AND TRANSCRIPTION COSTS

TJFA takes no exception to the ALJ's PFD on this issue

XI. CONCLUSION

In conclusion, TJFA excepts to the PFD which recommends that the permit, with modifications, be granted. TJFA believes it will be reversible error if the Commission accepts this PFD as issued, particularly to the findings and conclusions regarding (1) WMTX being recognized as an "Operator" who must submit the permit application and be named in the permit, and (2) a 250% increase in runoff volume leaving the site as not being a significant alteration of natural drainage patterns. TJFA excepts to all of the findings of fact and conclusions of law included in the PFD that are contrary to the position taken by TJFA as discussed herein. As such, TJFA would recommend that its Findings of Fact and Conclusions of Law attached herein as Exhibit A be adopted by the Commission.

Furthermore, TJFA believes that the ALJ's references to TJFA's motives for becoming a party to this important proceeding were irrelevant and contrary to the evidence. As such, TJFA believes that the issues raised and argued by TJFA during this proceeding have not been fairly evaluated and considered, to the prejudice of TJFA and the other Protestants.

TJFA again asserts that the Application of Williamson County (the "County") for Permit Amendment No. MSW-1405B ("PAA") should be **DENIED** for the following reasons:

1. the PAA fails to establish that the County, as owner and operator of both the existing and proposed landfill, is the sole Applicant for this permit amendment, as is the intent of the County, and instead contains documentation that identifies WMTX as an operator on the permit is also an Applicant as a contract operator, in violation of TCEQ rules (30 TEX. ADMIN. CODE § 305.43(b)), as well as federal and state law;

2. the PAA fails to establish that Williamson County has the requisite ownership interest in the site given its Quitclaim Deed from WMTX;

3. the PAA fails to provide the requisite information regarding growth trends of the nearest community to show that the proposed expansion of the Williamson County Landfill will be consistent with the current and/or foreseeable future surrounding land use;

4. the PAA fails to provide the requisite geological and hydrogeological characterizations 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 (30 TEX. ADMIN. CODE § 330.231);

5. the PAA fails 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 increases in runoff volumes shown for Discharge Points A and B, in violation of TCEQ rules (30 TEX. ADMIN. CODE § 330.56(f)(4)(A)(iv));

6. the PAA fails to demonstrate that the construction and operation of the landfill will be stable due to the lack of an acceptable minimum factor of safety as set by the U.S. Environmental Protection Agency; and

7. the PAA fails to provide reliable documentation regarding the location of a pipeline easement to ensure compliance with TCEQ rule 30 TEX. ADMIN. CODE § 330.121(a).

WHEREFORE, PREMISES CONSIDERED, TJFA respectfully requests that the Commission issue an order denying this permit request.

Respectfully submitted,

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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 7 day of March, 2008.

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ATTACHMENT A

SOAH DOCKET NO. 582-06-3321
TCEQ DOCKET NO. 2005-0337-MSW

IN RE THE APPLICATION OF	§	BEFORE THE
WILLIAMSON COUNTY FOR TCEQ	§	STATE OFFICE OF
PERMIT NO. MSW-1405B	§	ADMINISTRATIVE HEARINGS

PROTESTANT TJFA'S RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. OWNER/OPERATOR/APPLICANT

FINDINGS OF FACT

1. Williamson County is the current owner of the Williamson County Landfill permitted under MSW-1405A.

2. Williamson County would be the owner of the proposed expansion of the current Williamson County Landfill under the requested permit amendment MSW-1405B.

3. Williamson County is the current operator of the Williamson County Landfill permitted under MSW-1405A.

4. Williamson County would be the operator of the proposed expansion of the current Williamson County Landfill under the requested permit amendment MSW-1405B.

5. Williamson County's intent was to be the sole applicant for permit amendment MSW-1405B, as the owner and operator of that proposed landfill expansion.

6. The Permit Amendment Application contains conflicting information as to whether Williamson County alone is the applicant or whether both Williamson County (as the owner) and Waste Management of Texas, Inc. (WMTX) (as the operator) were applicants for the proposed expansion of the Williamson County Landfill.

7. WMTX is a contract operator handling the day-to-day activities associated with the operation of the current landfill on behalf of the County.

CONCLUSIONS OF LAW

1. Due to the conflicting information contained in the permit application for MSW-1405B as to who is the applicant, this application fails to comply with 30 TAC 305.43(b), requiring the owner of a municipal solid waste facility submit the permit application rather than both the owner and a contractor.

II. LAND USE COMPATIBILITY

FINDINGS OF FACT

1. The Permit Application failed to provide adequate information regarding the future growth trends for the nearest community to the landfill, i.e. the City of Hutto.

CONCLUSIONS OF LAW

1. Due to the failure of the permit application to contain sufficient information regarding the future growth trends in the nearest community to the landfill, the application fails to meet the requirements for a permit application, as required by TCEQ rule 330.53(a)(8)(C).

III. GEOLOGY/HYDROGEOLOGY

FINDINGS OF FACT

1. The proposed landfill site is underlain with three major soil layers: a surficial clay, a claystone and a limestone.

2. The claystone contains fractures throughout the extent of this soil layer.

3. The limestone contains fractures in the upper portion of this soil layer.

4. The movement of groundwater beneath the proposed landfill site is primarily along the fractures in the claystone and in the limestone.

5. A thorough understanding of the groundwater movement along the fractures in the claystone and in the limestone underneath this site is necessary in order to identify the uppermost aquifer, including its location as well as its thickness.

6. The top of the uppermost aquifer is located within the surficial clay above the sand/gravel lenses within that soil layer.

7. The applicant does not know how quickly or where groundwater moves through the fractures in the claystone.

8. The applicant does not know how quickly or where groundwater moves through the fractures in the limestone.

9. The permit application fails to provide sufficient information in order to have a thorough understanding of how groundwater moves along the fractures in the claystone and in the limestone.

10. The permit application fails to provide sufficient information in order to establish where the bottom of the uppermost aquifer is at this site.

11. The permit application fails to provide sufficient information in order to establish the thickness of the uppermost aquifer.

12. Another pathway for the movement of groundwater is along the openings associated with inactive faults.

13. There is the potential for two inactive faults that could be crossing the proposed landfill site.

14. The applicant does not know if groundwater moves through inactive faults at this site.

15. The permit application fails to provide sufficient information in order to establish the direction of groundwater flow at this site and what direction is downgradient.

16. There is evidence in the permit application that groundwater flows downgradient in a westerly direction across the western portion of this site.

17. There are no downgradient monitoring wells proposed along the western portion of the proposed permit boundary.

CONCLUSIONS OF LAW

1. Due to insufficient information in the permit application that prevents the establishment of the bottom of the uppermost aquifer at this site, the application fails to comply with 330.56(d)(5)(A) requiring that borings be sufficiently deep to allow identification of the uppermost aquifer and penetrate the uppermost aquifer.

2. Due to insufficient information in the permit application regarding groundwater characterization, the application fails to comply with 330.56(e)(2) requiring identification of the uppermost aquifer, including groundwater flow direction and rate, and the basis thereof.

3. Due to the insufficient information in the permit application regarding regarding groundwater characterization, the application fails to comply with 330.231(a) requiring that a groundwater monitoring system be installed with a sufficient number of monitoring wells at appropriate locations and depths to yield representative samples from the uppermost aquifer.

4. Due to the insufficient information in the permit application regarding the thorough characterization of various aspects of the geology/hydrogeology of this site, the application fails to comply with 330.231(e)(1) requiring the design of the groundwater monitoring system be based on site-specific technical information that must include a thorough characterization of the geology/hydrogeology of the site, including aquifer thickness, groundwater flow rates and

direction, effects of site construction and operation on groundwater flow direction and rates, and the materials of the uppermost aquifer.

5. Due to insufficient information in the permit application regarding the direction of downgradient groundwater flow, the application fails to comply with 330.231(a)(2) requiring that the downgradient groundwater monitoring system be installed to ensure detection of groundwater contamination in the uppermost aquifer.

IV. DRAINAGE

FINDINGS OF FACT

1. The permit application provides a proposed drainage plan that will result in an increase in the runoff volume leaving the site at Discharge Points A and B that far exceeds the amount of runoff leaving the site at those locations under pre-development conditions.

2. The runoff volume at Discharge Point A will increase from 62 acre-feet to 90 acre-feet of storm water for the 25-year storm event as a result of the proposed drainage plan contained in the application.

3. The runoff volume at Discharge Point B will increase from 29 acre-feet to 81 acre-feet of storm water for the 25-year storm event as a result of the proposed drainage plan contained in the application.

4. The proposed drainage plan will also result in excessive changes in the timing and magnitude of flows leaving the site at Discharge Points A and B at the proposed permit boundary as a result of the development of the proposed landfill expansion.

5. The excessive increases in runoff volume, as well as the changes in the timing and magnitude of flows, at Discharge Points A and B are primarily the result of redirecting the runoff from areas of the landfill that do not naturally drain to those locations at the permit boundary.

6. There is no discussion and/or analyses in the permit application as to the significance of these excessive increases in runoff volumes, in addition to the excessive changes in the timing and magnitude of flows, at Discharge Points A and B.

7. There is no discussion and/or analyses in the permit application as to the potential impact of these excessive increases in runoff volume, in addition to the excessive changes in the timing and magnitude of flows, at Discharge Points A and B on nearby downstream properties within the watershed that would be affected by the development of the proposed landfill.

8. The watersheds that would potentially be impacted by the development of the proposed landfill expansion include those portions of the unnamed tributary to the north of the site and Mustang Creek to the south of the site prior to these creeks flowing under FM 1660.

9. The permit application fails to evaluate the significance of changes to drainage patterns based on the impacts of changes on receiving streams or channels, and on the downstream flooding potential, specifically the unnamed tributary to the north of the landfill and Mustang Creek to the south of the proposed landfill site.

10. The permit application fails to consider the timing of peak discharges and their contribution to the peak discharge in the receiving streams or channels, specifically the unnamed tributary to the north of the landfill and Mustang Creek to the south of the proposed landfill site.

11. The permit application fails to consider alterations to drainage patterns caused by increased volumes of water and the potential impacts on the downstream receiving streams and channels,

specifically the unnamed tributary to the north of the landfill and Mustang Creek to the south of the proposed landfill site.

12. The permit application fails to demonstrate that the additional volume will be released at a rate that will not significantly affect the downstream receiving water body at Discharge Points A and B, specifically the unnamed tributary to the north of the landfill and Mustang Creek to the south of the proposed landfill site.

13. The permit application fails to include a discussion of how the proposed development of the landfill affects the shape of the hydrographs for each condition at the permit boundary, as well as any relevant downstream analysis point, such as downstream creeks, specifically the unnamed tributary to the north of the landfill and Mustang Creek to the south of the proposed landfill site.

CONCLUSIONS OF LAW

1. The application failed to provide the requisite discussion and analyses to demonstrate that the natural drainage patterns will not be significantly altered as a result of the proposed landfill development, per 330.56(f)(4)(A)(iv).

V. SLOPE STABILITY

FINDINGS OF FACT

1. The minimum factor of safety recommended by the USEPA for municipal solid waste landfills that accept sludge range from 1.5 to 2.0 or greater, depending on the uncertainty of the input, assuming major environmental impact.

2. The Williamson County Landfill has accepted large amounts of sludge in the past.

3. The permit application for the proposed expansion indicates that the landfill will continue to accept sludge after it is expanded.

4. A slope failure along the working face of the landfill could have a major environmental impact, given the close proximity of the landfill to nearby receiving streams and roadways.

5. A slope failure after final buildout could have a major environmental impact, given the close proximity of the landfill to nearby receiving streams and roadways.

6. There is considerable uncertainty in the input to the slope stability analyses, particularly with the liner and its interface.

7. The slope stability analyses conducted by the applicant for the Final Buildout condition produced factors of safety as low as 1.8 for the liner.

8. The slope stability analysis conducted by the applicant for an interim condition along the working face produced a factor of safety of 1.49.

CONCLUSIONS OF LAW

1. The permit application has failed to ensure that the construction of the landfill will be stable and therefore protective of the health, safety and welfare of the public and the environment.

VI. BOUNDARY ISSUES

FINDINGS OF FACT

1. A pipeline easement is located along the northern portion of the proposed permit boundary.

2. The permit amendment application fails to contain reliable information as to the width and location of this pipeline easement.

CONCLUSIONS OF LAW

1. Due to the failure of the permit application to contain reliable information regarding the location and width of a pipeline easement located within the proposed permit boundary, the application fails to ensure that no solid waste operations will occur within any easement, as required by TCEQ rule 330.121(a).