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 TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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

COMES NOW TJFA, L.P., hereinafter referred to as TJFA, one of the landowner Protestants in the above referenced matter, and hereby files its Motion for Rehearing of the Texas Commission on Environmental Quality ("TCEQ" or "the Commission") Order granting the referenced permit application to Williamson County issued on February 17, 2009. This Motion for Rehearing is being requested pursuant to 30 TAC §80.272. Because the Applicant failed to meet its burden of proof that the application complies with all legal requirements, this motion should be granted and the above-requested permit application should be **DENIED** by the Commission. In support of this motion, TJFA respectfully shows as follows:

I. BACKGROUND

A preliminary hearing was conducted that established jurisdiction and named parties including TJFA. The hearing on the merits was held August 20, 2007 through August 30, 2007 and the Proposal for Decision ("PFD") was issued by Administrative Law Judges Travis Vickery

and Henry Card on February 14, 2008. At its agenda meeting on February 11, 2009, the Commission granted Williamson County its permit after having revised the Administrative Law Judge's Findings of Fact and Conclusions of Law. The Commission's Order was mailed on March 18, 2009 and Protestants are presumed to have been notified on the third day after the date that the Order was mailed, making the date for filing this Motion for Rehearing no later than April 10, 2009, per the TCEQ website.

II. COMMISSION ERRORS

A. SUMMARY ARGUMENT

In this filing, TJFA identifies and excepts to certain Findings of Fact and Conclusions of Law discussed in the TCEQ Order as set forth below. TJFA believes the TCEQ Order is therefore fatally flawed under the TCEQ rules, due in part to the following errors: (1) lack of SOAH jurisdiction due to flawed public notices and the failure to have all applicants, including the "Site Operator" as identified on Permit 1405A, be named as parties to the contested case hearing, (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, (7) the failure of the County to provide the requisite demonstration that natural drainage patterns will not be significantly altered as a result of the

development of the landfill, (8) the inability to properly locate a pipeline easement through the landfill property, (9) the improper designation of operating hours that are inconsistent with the evidence presented and incompatible with surrounding land use, and (10) the improper allocation of transcript costs to the Protestants without proper consideration of the factors required under the TCEQ rules.

In particular, there are three issues of particular concern that TJFA wants to bring to the attention of the Commission as fatal flaws if not modified by the Commission and are discussed more fully below:

(1) the TCEQ's Order contains an incorrect legal conclusion that since Waste Management of Texas, Inc. ("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;

(2) the TCEQ's Order fails to recognize that WMTX was named as the "Site Operator" on Permit 1405A, that was being amended in this permit amendment application, and remained so throughout this proceeding but was not included as a party to the contested case hearing; and

(3) the TCEQ's Order contains an incorrect legal conclusion that a substantial 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 TCEQ Order are addressed with TJFA objections as appropriate.

B. THE TCEQ ERRS IN CONCLUDING THAT A CONTRACT OPERATOR IS AN "OPERATOR" WHO MUST APPLY FOR A PERMIT AND BE NAMED ON THE PERMIT WITHOUT BEING AN APPLICANT OR PERMITTEE

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 TCEQ incorrectly concludes 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 TCEQ found to be the "Owner" and "Site Operator" of the landfill.

The problem with the TCEQ's findings and conclusions as contained in its Order is that because Williamson County entered into a contract with WMTX to operate the facility on behalf of the County, in the eyes of the TCEQ 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, WMTX is not referred to as the "Operator". This erroneous finding led the TCEQ to therefore conclude that WMTX (as a "contract operator") must be on the permit in accordance with the Texas Health and Safety Code; that WMTX must "submit" the permit application according to 30 TEX. ADMIN. CODE § 305.43(b) even though the TCEQ also found that Williamson County filed the Application; and that

WMTX is not an applicant since "The Applicant is Williamson County" and "Williamson County is the sole Applicant", even though the Application shows otherwise.

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

The TCEQ has 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 TCEQ's Order states that it finds that 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 TCEQ has concluded and it is error to conclude that the Applicant has met the requirements of §305.43(b) by saying that WMTX submitted the Application "on behalf of" Williamson County. The Application itself clearly shows that WMTX submitted the Application on its own behalf as an Applicant, directly contrary to and in conflict with the findings and conclusions by the TCEQ. Since WMTX represented itself as the Applicant and was named on Permit 1405A as the "Site Operator" (defined as the holder of or applicant for an MSW permit), it should have also been named as a party to the contested case hearing, which did not happen.

3. NEW PRECEDENT BEING SET CREATING MAJOR PROBLEMS STATEWIDE

What the TCEQ has ordered 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 done here by the TCEQ's Order. 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". With this permit amendment being approved by the Commission as outlined in its Order, the Commission has misinterpreted the Health & Safety Code and the meaning of "Operator" as that term is used in state and federal statutes.

It appears that the TCEQ in this case simply tried to justify the way that Williamson County and WMTX, the "Site Operator" on Permit 1405A, went about presenting this application as co-applicants after the ALJs had already decided that the County would be the sole

District on the issue of storm water runoff and drainage patterns. *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*"); and *In re Application of North Texas Municipal Water District for Municipal Solid Waste Permit No. MSW-2294* TCEQ Docket No. 2002-0745-MSW (October 20, 2003), ("*North Texas*"). This Guidance Document specifies how an applicant is to address any increase in runoff volume so as to be in accordance with TCEQ rules.

2. THE TCEQ'S ORDER IS 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 and found by the TCEQ to be as much as almost triple. Such major increases in runoff volumes were primarily due to the redirection and diversion of drainage areas. Furthermore, the Applicant also determined that the timing of the runoff flows would also change after the proposed development of the landfill as compared to pre-landfill conditions. In

fact, the TCEQ found that the proposed landfill design "... generally creates a longer, more complicated flow path for stormwater than existed before the site was developed." Yet, the TCEQ has committed error in finding and concluding that no significant alteration of natural drainage patterns would occur at the permit boundary simply because the TCEQ believes that since the peak flows would not increase at the permit boundary, then there would be no adverse impacts off-site, without analyzing any points downstream of the proposed facility to determine the potential impact from the substantial increase in runoff volumes leaving the landfill site. This is contrary to its Guidance Document and common sense.

3. THE TCEQ'S ORDER IS INCONSISTENT WITH THE TCEQ GUIDANCE DOCUMENT

The TCEQ's Order simply ignores 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. Professional engineers as well as others who assisted the TCEQ staff in putting together this Guidance Document clearly understood that downstream analyses are necessary in order to determine the potential impacts from increased runoff volumes leaving a landfill site. Yet the Commission has ignored this and decided such was not necessary to reach such a conclusion of no adverse impact, regardless of the increase in runoff volumes and their potential impacts downstream.

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 the TCEQ's Order erroneously concludes that the TCEQ rules 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, as well as common sense. 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 TCEQ's Order contains findings and conclusions reached in this case on this issue that 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 almost tripling in runoff volume due to the diversion of the natural flow of surface water will not impact downstream properties.

TJFA requests that the Commission reconsider the findings in its Order regarding this issue and find that such increases 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 30 TEX. ADMIN. CODE § 330.56(f)(4)(A)(iv), without an analysis off-site to demonstrate otherwise.

III. INTRODUCTION, OVERVIEW AND PROCEDURAL HISTORY

A. INTRODUCTION AND OVERVIEW

The TCEQ's Order identifies Williamson County as the Applicant in this matter (p. 1). This seemingly simple task nevertheless is a hotly contested issue in this case, as discussed herein. The TCEQ's Order also designates other parties to this proceeding, including five protestants, yet fails to list in the Order all of the protestants that were granted party status as "affected persons" at the beginning of this contested case proceeding. The ALJs' PFD refers 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 supposed 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. 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 the contested case hearing, it became clear that Protestants' concerns, including those of TJFA, were legitimate. Both the ALJs and the

Commission found that the issues raised by the Protestants, including TJFA, were "reasonable and well presented."

2. TJFA's Motives are Irrelevant

The ALJs admitted TJFA as a party to the contested case 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. 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 PFD 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 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' PFD states 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' PFD would contain such a statement as they did when the only evidence in the administrative record is to the contrary.

6. TJFA is NOT a Competitor of WMTX

TJFA disagrees with the ALJs' PFD that contains a 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' PFD that contains 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 the 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 and not those of WMTX. This is prejudicial to TJFA and suggests favoritism towards WMTX and Williamson County. For example, the ALJs' PFD 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 "Site Operator" and "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 "Site Operator" and/or "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). The TCEQ Order found this also to be true. So, regardless of TJFA's motives for seeking party status in this case, the TCEQ's Order 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, which the ALJs failed to do, especially the WMTX attorneys (since WMTX was identified on Permit 1405A and the original draft permit as "Site Operator" and remained so throughout the contested case hearing up to the issuance of the TCEQ Final Order in 2009).

While TJFA commends the ALJs for conducting the hearing in an efficient and expeditious manner, if the ALJs' 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 "Site Operator" and "Operator" on the permit, with the rights and responsibilities that come with it, were prejudiced. Therefore, the findings and conclusions made by the ALJs and subsequently adopted by the TCEQ in its Order are called into question.

In fact, the Commission took the unusual step to change the allocation of transcript costs that had been recommended by the ALJs and to assess a substantial amount of such costs to TJFA, despite not having any evidence or finding of fact regarding TJFA's financial ability to pay any of the reporting and transcription costs. Such action suggests the Commission has a bias

against TJFA, which was further evidenced by the Commission refusing to allow the attorney representing TJFA to speak at the TCEQ Agenda meeting during which this permit application was being considered for approval. This attorney had been originally recognized and identified as wanting to make a presentation to the Commission before it made its decision on this permit request. TJFA requests that the Commission reconsider its granting of this permit amendment and deny this permit amendment.

IV. JURISDICTION AND BURDEN OF PROOF

A. JURISDICTION

TJFA filed its Plea to the Jurisdiction early in the contested case proceeding, which was denied by the ALJ's (PFD p. 8). TJFA now reasserts and incorporates herein by reference 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 TCEQ's finding that WMTX is the "Operator" of this landfill and the entity that had to apply for the permit amendment application, per §305.43(b). Thus, WMTX is the Applicant and should have been a party to this proceeding and was not.

Instead, the Commission has found that WMTX is not the "Applicant" but rather Williamson County is the "Applicant" for this permit amendment, contrary to the findings and evidence noted above. This finding is inconsistend with the PAA, which is full of contradictory statements and references to WMTX as the "Applicant" which have not been corrected before becoming part of this permit that has been issued. Thus, the TCEQ Order and the issued permit are sufficiently inconsistent with each other to be fatally flawed.

B. APPLICANT'S BURDEN

TJFA agrees with the TCEQ conclusion that the Applicant bears the burden of proof in demonstrating its compliance with the TCEQ rules and regulations regarding its permit application. TJFA strongly disagrees, however, with the TCEQ finding and conclusion that the Applicant has met its burden. 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 process. For example, it is the Applicant that bears the burden of demonstrating that natural drainage patterns will not be significantly altered as a result of the landfill development. The Protestants should not have to do off-site analyses to disprove an arbitrary determination by the TCEQ that natural drainage patterns would not be significantly altered.

V. PRELIMINARY ISSUES

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

TJFA takes great exception to the TCEQ 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 TCEQ's findings and conclusions on this issue are fundamentally wrong and in conflict with TCEQ rules, federal regulations and state law. The Commission must reconsider and 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 TCEQ's Order is that just 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. This erroneous conclusion led the TCEQ to therefore conclude 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 and does not have to be a party in any contested case hearing since Williamson County is the "sole applicant".

The TCEQ has incorrectly equated "contract operator" with "Operator" in its interpretation of the various rules and statutes that are applicable in this case that use the term "Operator". For example, the TCEQ states that it finds that the Texas Health and Safety Code requires that the "contract operator" be disclosed 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" (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) to 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 and inequities 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 § 305.43(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, even though WMTX was named the "Site Operator" on Permit 1405A and on the draft permit 1405B that was used throughout much of the contested case hearing. Williamson County did not meet its burden under § 305.43(b) by having WMTX submit the Application.

The TCEQ agrees that Williamson County would be the permittee if this permit amendment were to be issued. The TCEQ agrees that Williamson County is the Applicant and the only applicant for this permit amendment. The TCEQ agrees that Williamson County is the entity that is/will be ultimately responsible for the operation of this landfill. The TCEQ agrees

that Williamson County is the Site Operator, as that term is used in the 330 rules. Yet, the TCEQ 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 TCEQ has no precedence in the MSW permits program (as no permits identify a contractor as 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 TCEQ's Order. 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 Section 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 TCEQ 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 TCEQ 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.

Because the Commissioners adopted 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, thus transferring a valuable public asset (a permit) to a private entity without compensation to the public entity.

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 TCEQ has ordered 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 has been done here by the TCEQ. 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".

Approval of this permit amendment by the Commission 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 TCEQ's 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 TCEQ 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 does the TCEQ Order not resolve this issue, it has created a hornet's nest of new problems for all permittees throughout the state.

These two findings by the TCEQ's Order are clearly erroneous and would constitute reversible error if not reconsidered and reversed by the 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 consistent 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 TCEQ agreed with all of this yet concluded that WMTX, as a contractor, still is to be considered an "Operator" under §305.43(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 <u>not</u> 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 Parts I-IV of the PAA would become part of Permit 1405B if it were issued, and that such parts of the PAA currently make 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 the permit amendment would not contain any contradictions or inconsistencies between the permit and its attachments. The TCEQ's Order changed some but not all of the relevant pages. As such, the issued permit is fatally flawed and constitutes reversible error.

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. 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 permit amendment application (PAA) that was submitted 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, Site Operator 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 requests the Commission reconsider and find this permit application be **DENIED**.

B. LAND OWNERSHIP

TJFA takes exception to the TCEQ's Order 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 should have been **denied** and it is error to do otherwise.

C. BOUNDARY ISSUES

TJFA takes exception to the TCEQ's Order 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 30 TEX. ADMIN. CODE §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 the granting of this permit amendment be reconsidered by the Commission and found to be **denied.**

VI. LAND USE COMPATIBILITY

TJFA excepts to the TCEQ's Order which finds 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 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 the granting of this PAA should be reconsidered and be **denied**.

VII. GEOLOGY, HYDROGEOLOGY 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 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 rules further require 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, portions 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's 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 the granting of this PAA must be reconsidered and subsequently **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 TCEQ's Order addressed the issue of a lack of monitoring wells along the western boundary and found that there is no groundwater movement across the western boundary. If this were true, then how can the TCEQ also find that MW-11 and MW-12 are upgradient wells instead of downgradient wells. The Applicant's geologist, Ms. Gallup, was unclear about all of

this on cross-examination as was the ED's geologist. While the TCEQ 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.

Even the ALJs felt 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. The ALJs even stated that they have no objections if the Commission wanted to require some downgradient wells along the western boundary (PFD p. 44).

TJFA requests that the Commission reconsider the granting of this permit amendment and, at a minimum, require that some downgradient 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 is proposed to be landfilled.

The Commission noted that the TCEQ rules do not require a detailed analysis of inactive faulting. 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 TCEQ's Order makes 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. As such, the TCEQ notes that Ms. Gallup proposes to only monitor at these contact zones, and notes that historically, groundwater has only been monitored at these locations. 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.

The TCEQ determined that the Applicant had defined the UMA and placed its monitoring well screens at appropriate depths at the base of the UMA. This conclusion by the TCEQ 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 TCEQ 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. 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 requests that the Commission reconsider its decision to grant this permit amendment and, at a minimum, 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 the downgradient direction 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 (emphasis added).

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, the granting of this PAA should be reconsidered and subsequently **denied** on this basis.

VIII. DRAINAGE PATTERNS

TJFA excepts to the TCEQ's 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 almost triple 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 volume 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, more than a doubling of 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 almost tripling of 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). The TCEQ Order found that the runoff volume increased from 29 acre-feet to 81 acre-feet at Discharge Point B (DP-B) due to the proposed development of the landfill. 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). The TCEQ Order found that at Discharge Point A (DP-A) the runoff volume increased from 62 acre-feet to 90 acre-feet as a result of the landfill. 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 TCEQ's Order refers to the Regulatory Guidance Document, suggesting that any impacts from these large increases in runoff volumes may be mitigated by the use of the detention ponds to control the rate of discharge. 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 "mitigate" 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, 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 TCEQ's Order disagrees with this, citing the Commission's decisions in the *Blue Flats* case and the *North Texas* case in which the TCEQ concludes 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. This is inconsistent with the TCEQ Regulatory Guidance Document and common sense. Therefore, TJFA requests that the Commission reconsider the granting of this permit amendment and subsequently deny this permit amendment.

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 should not have been approved and should be **denied**.

IX. 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 TCEQ concluded that slope stability is not an issue at this site. 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, the granting of this PAA should be reconsidered and **denied**.

X. SOP - OPERATING HOURS

The Commission erred in changing the ALJ's PFD regarding the operating hours for the proposed MSW facility so as to be incompatible with surrounding land use. The ALJs had recommended that the operating hours be limited due to the potential for incompatibility with surrounding land uses. At its Agenda meeting the Commission decided to expand the operating hours beyond those recommended by the ALJs, and even beyond those recommended by the ED staff. The operating hours contained in the TCEQ's Order allow for heavy equipment to be operated and materials transported as early as 3:00 a.m. and as late as 10:00 p.m. Monday through Saturday. This would clearly affect nearby residents as found by the ALJs and agreed to by the County.

TJFA requests the Commission reconsider its Order and revise the operating hours to be compatible with surrounding land uses and consistent with the ALJ's recommendation.

XI. REPORTING AND TRANSCRIPTION COSTS

TJFA takes exception to the TCEQ's Order on this issue. The ALJs had recommended that the Applicant bear all of the reporting and transcription costs. Without discussion or explanation, the Commission changed this recommendation and assessed half of the costs to the

Protestants, even though they had been found to have reasonable issues that were well-presented. The Commission was in error to assess these costs to the Protestants, including TJFA, for failing to follow its own rules for assessing such costs, per 30 TAC §80.23(d). This rule requires the Commission to consider various factors, such as the parties' financial ability to pay these costs. It was found by the ALJs that there was no evidence regarding such financial ability, yet the Commission chose to arbitrarily assess half of these costs against the Protestants, with the most being assessed against TJFA. Assessment of costs against Protestants – whose arguments were specifically found to be reasonable – will have the clear and chilling effect of dissuading members of the public from exercising their right to participate in the landfill permitting process. Again, by doing so, the Commission is demonstrating bias against TJFA.

TJFA requests that the Commission reconsider its decision regarding this issue and not assess any of these costs against the Protestants, including TJFA.

XII. CONCLUSION

In conclusion, TJFA excepts to the TCEQ Order that issues the requested permit, with modifications. TJFA believes it is reversible error for the Commission to grant this permit 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 substantial increase in runoff volume leaving the site as not being a significant alteration of natural drainage patterns without an off-site analysis. TJFA excepts to all of the findings of fact and conclusions of law included in the TCEQ Order that are contrary to the position taken by

TJFA as discussed herein. As such, TJFA requests that this Order be reconsidered and that this permit be **DENIED**.

Furthermore, TJFA believes that the ALJ's references to TJFA's motives for becoming a party to the contested case proceeding were irrelevant and contrary to the evidence. As such, TJFA believes that the issues raised and argued by TJFA during that proceeding have not been fairly evaluated and considered, to the prejudice of TJFA and the other Protestants. The Commissions' prejudice towards TJFA is also evident by its actions during its Agenda meeting.

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 TCEQ's Order contains an incorrect legal conclusion that since Waste Management of Texas, Inc. ("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;

2. the TCEQ's Order fails to recognize that WMTX was named as the "Site Operator" on Permit 1405A, that was being amended in this permit amendment application, and remained so throughout this proceeding but was not included as a party to the contested case hearing; and

3. the TCEQ's Order contains an incorrect legal conclusion that a substantial 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.

4. the TCEQ erred in changing the ALJ's PFD regarding the operating hours for the proposed MSW facility so as to be incompatible with surrounding land use.

5. 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 "Site Operator" and an operator on the permit, as well as an Applicant, but is only a contract operator, in violation of TCEQ rules (30 TEX. ADMIN. CODE § 305.43(b)), as well as federal and state law;

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

7. 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;

8. 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);

9. 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));

10. 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

11. 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 request that the Commission grant this motion for rehearing and deny this application for permit amendment.

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 9th day of APRIL, 2009.

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