

SOAH DOCKET NO. 582-04-0975  
TCEQ DOCKET NO. 2003-0729-MSW

IN THE MATTER OF THE  
APPLICATION OF REGIONAL  
LAND MANAGEMENT SERVICES,  
LTD. FOR TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY  
PERMIT NO. MSW-2286

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BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

2008 OCT -9 PM 4: 57  
CHIEF CLERKS OFFICE

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

REPLIES TO EXCEPTIONS TO THE PROPOSAL FOR DECISION  
OF APPLICANT, REGIONAL LAND MANAGEMENT SERVICES, LTD.

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Regional Land Management Services, Ltd. (RLMS), applicant in the above-captioned proceeding files these Replies to the Exceptions to the Proposal for Decision (PFD) and Proposed Order filed on behalf of Highway 359 Landowners Coalition, Guillermo Cavazos, and Webb County.

I. UPPERMOST AQUIFER

In their Exceptions, Webb County, Highway 359 Landowners Coalition and Guillermo Cavazos repeat their arguments, previously made to and rejected by the Judges, in support of their position (also soundly rejected by the Judges) that the uppermost aquifer at the proposed landfill site (the Site) is the shallow Yegua formation, rather than the deeper Laredo formation (the top of which is located 400 to 500 feet below the ground surface. However, the Judges concluded, based on the large amount of data obtained from RLMS's field investigations of geology and groundwater hydrology at the proposed landfill site and the thorough and proper evaluations of that data conducted by RLMS's hydrogeologist, Mr. Vincent Barlock, P.G.<sup>1</sup>, that the Laredo formation is the

<sup>1</sup>Mr. Barlock is the Senior Program Manger, Principal Geologist/Hydrogeologist, and Director of Remediation and Hydrogeologic Services for Pelorus Environmental and Biotechnology Corporation. He has over 21 years of professional experience in the environmental and geological consulting fields. His experience includes the management and technical oversight of hydrogeologic and projects throughout the United States and overseas. Mr. Barlock provides peer review and technical oversight in support of the design and hydrogeologic assessment for the permitting and CQA at solid waste facilities in several states. He has served as Project Manager, Senior Geologist, and/or Senior Hydrogeologist on geologic and hydrogeologic investigations for solid waste facilities in Texas and California. He holds bachelor's and master's degrees in geology and is a Licensed Professional Geologist in

uppermost aquifer. Based on their evaluation of all of the evidence in the record and their assessment of the witnesses who testified on this issue, the Judges properly found Mr. Barlock's testimony of "to be quite credible", both in terms of his conclusion that the Laredo formation is the uppermost aquifer and his explanations of the information and analyses that support it and in terms of his "persuasive" and "conclusive" demonstrations that the methods used by protestants' witness George Rice in support of his assertion that the Yegua is the uppermost aquifer were "inappropriate" and "incorrectly performed". *PFD at pp. 24-28*. RLMS respectfully suggests that the Judges conclusion and recommendation that the Laredo formation is uppermost aquifer is fully supported by the evidence and that the protestants' exceptions regarding the uppermost aquifer should be overruled.

It is clear from the testimony of each of the three expert witnesses who testified about groundwater in this case that TCEQ rules regarding the uppermost aquifer apply to the "formation nearest the natural ground surface" at the site of a proposed landfill facility that is "capable of yielding significant quantities of water from wells or springs." 30 TAC §§330.2(6) and (158) (TCEQ rule definitions of "aquifer" and "uppermost aquifer"); *Barlock Testimony, Ex. A-28 p.10/26-34* (TCEQ rules address the uppermost aquifer beneath the facility...); *McCoy Testimony, Ex. A-229 p.12/2-23* (TCEQ rules relate to aquifers that exist beneath the property proposed for use as a facility.) and *Ex A-230; Rice Testimony, Ex. P-2 and Webb Ex. 5* (discussions throughout prefiled testimony about the Yegua formation "beneath the Site"). However, the protestants apparently now realize that the evidence in the record conclusively establishes that the Yegua Formation is not an aquifer beneath the Site, so they are advancing an argument (unsupported by any evidence in the record) that all they need to do in order to show that the Yegua Formation should be considered the "uppermost aquifer" in connection with the Ponderosa Regional Landfill is to identify evidence that the formation is present beneath the Site and evidence that the formation is an aquifer somewhere, even if not at the Site. In their exceptions, the protestants discuss various evidence showing that the Yegua-Jackson Formation is present beneath the Site and that it is an aquifer somewhere (both of

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California, Nebraska, and Texas. Mr. Barlock supervises and trains other leading environmental consultants, staff geologists, and engineers in hydraulic fracturing and mud, air, reverse circulation, and hollow-stem auger drilling operations in various geologic conditions for groundwater characterization studies and agency requirements. He supervises the design and implementation of various hydraulic tests, including constant-discharge, step, and falling/rising-head tests, and isolated packer tests. *Ex. A-28, p.1/11-15; Ex. A-29; Barlock Testimony, Transcript vol. 3, p.297/9-19.*

which are facts with which RLMS agrees). They refer to Texas Water Development Board and USGS publications (*Exs. P-2F and P-2E, also introduced into evidence by RLMS*) that refer to the Yegua-Jackson Formation as a minor aquifer<sup>2</sup> and to the fact that there are producing wells in the Yegua-Jackson Formation in various parts of the state. But, when considered in the context of the real issue here (whether the Yegua Formation is an aquifer beneath the Site), this evidence only serves to support what RLMS has proven by way of its site-specific investigations: the Yegua Formation is not an aquifer at the Site.

The spotty nature of the Yegua Formation's ability to produce water is confirmed by information regarding it in the Texas Water Development Board and USGS publications. The Texas Water Development Board recognizes that there are locations where the Yegua-Jackson Formation is present, but where little or no water can be obtained from it. "Although the occurrence, quality and quantity of water from this aquifer are erratic, domestic and livestock supplies are available from shallow wells over most of its extent." *Ex. A-86 sec. 5.3.1.1 at p.38*. When the USGS did its 2004 study on Hydrogeology of Webb County, Texas, the USGS was unable to locate even a single well completed in the Yegua Formation for which specific capacity (pumping rate) data was available. *Ex. P-2E p.8*. Even though the Yegua Formation is present at or very near the surface of approximately 700 square miles in Webb County, there are no more than 15 wells completed in the Yegua Formation in the entire county.<sup>3</sup> *Ex. P-2E p.7; Ex. A-89*. According to the protestants' own witness, George Rice, the nearest well to the Site that was completed in the Yegua Formation is approximately seven miles away. *Rice Testimony, Transcript vol.5 p.772/7-11*. Although no

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<sup>2</sup>It is interesting to note that the Texas Water Development Board did not consider the Yegua-Jackson Formation to be even a minor Texas aquifer until 2002, even though there are hundreds of wells, some drilled many decades ago, completed in various locations on the formation as it arcs across Texas from the Louisiana border, through Central Texas, and down to the Mexican border in far South Texas. *Barlock Testimony Ex. A-28 p.11/28-45; Ex. A-86; Rice Testimony Transcript vol.5 p.771/18 - p.773/12; Ex. A-86 p.38*.

<sup>3</sup>The information source that identified the highest number of Yegua Formation wells in Webb County (15) is a Texas Water Development Board database. *Rice Testimony Ex. P-2; Ex. P-2G*. However, protestants' witness George Rice found errors and inconsistencies in the Yegua well information reported by the Texas Water Development Board, so it is unclear how many wells identified as Yegua wells are actually completed in the Yegua Formation. *Rice Testimony, Transcript vol.5 p.891/8 - p.895/7; Ex. A-273*. The 2004 USGS report shows only 12 Yegua wells in all of Webb County (*Ex. A-89*), and a 2003 Texas Water Development Board report shows only one Yegua well in Webb County (*Ex. A-245 at p.138*).

information is available regarding production rates for any Yegua well in Webb County<sup>4</sup>, Mr. Rice himself testified that the productivity of a geologic formation like the Yegua can vary significantly over distances of 5 to 10 miles. *Rice Testimony, Transcript vol.5 p.774/4-8 and p.754/17-21*. Finally, while it may not show every well completed in the Yegua Formation in Texas, the Texas Water Development Board's 2003 report entitled "Brackish Groundwater Manual for Texas Regional Water Planning Groups" shows large numbers of Yegua wells in East Texas and Central Texas, and significant numbers in far South Texas. However, it shows very few Yegua wells in either Webb County or in La Salle, McMullen, and Atascosa Counties (the counties just north and east of Webb) or in the northern half of Zapata County (the county just south of Webb). *Ex. A-245, p.138*. Obviously, Webb County is on the low end of the "erratic occurrence and quantity of water" from the Yegua Formation and the area around the proposed Ponderosa Regional Landfill is completely devoid of any water wells producing water from the formation--certainly not indicative of the presence of an aquifer there.

As pointed out by the Judges in the PFD, two aspects of Mr. Rice's testimony were identified by the protestants in support of their contention that the Yegua Formation is the uppermost aquifer: his calculation of hydraulic conductivity values for the formation using slug test data from the 20% to 30% normalized head range (mid or early stage data) and his Cooper-Jacob Method calculations which formed the basis for his opinions regarding the quantity of water that could be produced from a well completed in the Yegua Formation on the Site. However, the evidence in the record shows that neither of these methods should be used in evaluating the Yegua Formation.

Mr. Rice's testimony and report show that he used the 20% to 30% normalized head range data because he had seen the method described in a book by Mr. James J. Butler titled "The Design, Performance and Analysis of Slug Tests". *Rice Testimony, Ex. P-2 p.11/30-p.12/33; Ex. P-2B secs. 4.0-4.3 at pp.3-6 and References at p.12; Exs. A-284 and P-6*. Mr. Barlock testified that it was not appropriate for Mr. Rice to use 20% to 30% normalized head range data to determine hydraulic conductivity for all slug test data generated in RLMS's investigation of the Yegua Formation at the Ponderosa Regional Landfill site. Mr Barlock stated the consistent use of 20% to 30% normalized

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<sup>4</sup> This could be due to the age of the wells. The only two Webb County Yegua wells for which drilling date information is available were reportedly drilled in 1916 and 1937, respectively, even though drilling date information should be easier to find for newer wells than for older ones (*Rice Testimony, Transcript vol.5 p.771/18-p.774/2*).

head range data would be appropriate for sites that are typically more homogeneous in nature, that don't have such a drastic heterogeneity, and that have much more consistent flow regimes than the Ponderosa Regional Landfill site. *Barlock Testimony, Transcript vol.7 p.1275/7 - p1276-2*. Mr. Barlock's opinion was confirmed in a conversation he had with Mr. Butler, the author of the book relied on by Mr. Rice. *Barlock Testimony, Transcript vol.7 pp.1277/18 - p.1281/14*. Mr. Barlock described the methodology that he, the field hydrologist who conducted the slug tests, and another chief hydrogeologist used as they went through the data for each slug test that was run and determined which data from each test should be used in calculating hydraulic conductivity values. He also explained how his background and experience with formations similar to the Yegua directly affected decisions about use of the slug test data. *Barlock Testimony, Transcript vol.7 pp.1260/10 - p.1267/3*. Mr. Rice erred in his use of the 20% to 30% normalized head range data. That data provided the basis for all of the hydraulic conductivity values and groundwater flow rates determined by Mr. Rice. *Rice Testimony, Ex. P-2 p.12/35-13/19; Ex. P-2B sec. 6 pp.7-8; Barlock Testimony, Transcript vol.7 p.1275/7-18; Ex. P-2B Table 4.2 at p.5*. Mr. Rice determined his hydraulic conductivity and groundwater flow rates in a flawed effort to discredit the values developed by RLMS through its investigation of the Site. Because Mr. Rice used inappropriate methods to determine his values, they are not credible and do not serve to discredit the values about which Mr. Barlock testified.

In his testimony and report, Mr. Rice offered opinions regarding the quantity of water that could be produced from a well completed in the Yegua Formation at the Site. Mr. Rice's prefiled testimony includes a heading stating "The Yegua Formation Beneath the Site Can Produce More Than 1000 Gallons Per Day of Groundwater" and his testimony includes the statement that he would "expect a well at the proposed site completed into the Yegua Formation to be capable of producing 1000 gallons per day of groundwater". *Ex. P-2 p.13/21-16/2*. In his report, in Section 7.0 titled "Aquifer Yield Analysis" Mr. Rice provides calculations purporting to show that the Yegua Formation at the Site is capable of yielding 1,000 gallons per day to a pumped well. *Ex. P-3 sec. 7.0 at p.8*. And, on cross-examination by OPIC, Mr. Rice first testified to his opinion that the formation "may be able to produce" 15 gallons per minute from a well at the Site, then to his opinion that "it's more likely than not" that the formation could produce 15 gallons per minute from a well at the Site. *Rice Testimony, Transcript vol.5 pp.750/14 - p.751/25*. It is also clear from his testimony and

report, as cited above, that each of these opinions is based on calculations performed by Mr. Rice using the Cooper-Jacob Method. However, Mr. Barlock testified that Mr. Rice incorrectly used the Cooper-Jacob Method and that the pumping rate is actually an input parameter into the equation that Mr. Rice used rather than the result of using the equation. The Cooper-Jacob equation will not calculate the amount of water that can be produced by pumping a geologic formation. *Barlock Testimony, Transcript vol. 7 pp. 1296/18 – p. 1298/11*. Mr. Barlock testified that the pumping rate of 1,000 gallons per day that Mr. Rice claims to have “calculated” using the Cooper-Jacob equation is nothing but an assumption—one that cannot be made for the Site because “You don’t have water to pump, so you can’t derive a Q [pumping rate]... We proved during packer tests and other tests there’s no water there to pump, and if we did pump, it would go dry”. *Barlock Testimony, Transcript vol. 8 pp. 1342/7-22 and 1345/2-4*. Pumping rate data has to come from a pump test and, in particular, a constant rate pump test, [but] there has been no pump test performed at the Site. *Barlock Testimony, Transcript vol. 8 p. 1297/9-12*. Mr. Barlock testified that a pump test would have been performed on the Yegua Formation at the Site, but “there wasn’t enough water to do a pump test.” *Barlock Testimony, Transcript vol. 8 p. 1397/19-1348/1*. Mr. Rice’s “calculations” and his opinions of groundwater production rates for a hypothetical Yegua well at the Site are the basis for the protesting parties’ assertions that the Yegua Formation is the uppermost aquifer at the Site. Because those calculations and opinions have now been shown to be incorrect and unsupported, there is no credible evidence in the record that the Yegua Formation at the Site is an aquifer.

On the other hand, the site-specific data developed during RLMS’s extensive geologic, geotechnical, and hydrogeologic investigations of the Ponderosa Regional Landfill site and the materials in the Yegua Formation there clearly show that the Yegua Formation is not an aquifer at the Site. In his rebuttal testimony, Mr. Barlock testified that the Yegua Formation is not the uppermost aquifer at the Ponderosa Regional Landfill site (*Barlock Testimony Transcript vol. 7 pp. 1230/5-11*) and he referred to various data developed during the investigations of the Site that support and form the bases for his opinion:

- Six of the original seven borings drilled in the Yegua Formation at the Site by Trinity in 1997 were dry when drilled. *Barlock Testimony, Transcript vol. 7 pp. 1230/16-1231/3*.
- 30 of 39 borings installed in the Yegua Formation at the Site in 1999 by SECOR were dry. *Barlock Testimony, Transcript vol. 7 pp. 1231/4-11*.
- Geotechnical laboratory testing performed on core material taken from the borings into the Yegua Formation at the Site were performed. The analytical results from this testing were unequivocal in

their results of hydraulic conductivity values being extremely low, along with the moisture content value in the rock being very low. This test data showed that there is a very low, "insignificant" potential for the Yegua Formation beneath the Site to produce water. *Barlock Testimony, Transcript vol.7 pp.1231/19-1234/7.*

-Efforts were made to conduct pump tests in borings into the Yegua Formation at the Site, but the formation did not yield enough water to perform the tests. *Barlock Testimony, Transcript vol.7 pp.1234/8-1238/21.*

-Packer tests were conducted in 24 zones at different depths and boring locations across the site, including in fractured zones. In 23 of the tested zones (the test equipment failed during one test), water could not be forced under pressure into the tested zones. Again, this shows that the permeability (hydraulic conductivity) of the formation at the Site is very low, confirming that there is an insignificant potential for the Yegua Formation beneath the Site to produce water. *Barlock Testimony, Transcript vol.7 pp.1234/2-1238/6; 1247/21-1248/7; 1248/17-1249/2; 1251/3-13.*

-As the 24 piezometers were installed across the Site and developed, it was observed that the recharge rates to the piezometers were very slow. *Barlock Testimony, Transcript vol.7 pp.1253/16-22.*

-Ten slug tests were run at various locations across the Site to determine in-situ permeabilities for the Yegua Formation. Slug tests are very useful in "tight" formations like the Yegua where it may not be practical to perform pumping tests. It is a strongly recommended industry standard to use slug tests in tight formations. Results of the slug tests were consistent with the geotechnical laboratory analyses and confirmed that hydraulic conductivity values for the formation were very low. Again, this shows that there is an insignificant potential for the Yegua Formation beneath the Site to produce water. *Barlock Testimony, Transcript vol.7 pp.1234/2-7; 1251/13-1264/0 and 1265/7-1267/3; Exs. A-75, A-76, and A-284 (excerpt from James J. Butler book titled "The Design, Performance and Analysis of Slug Tests").*

Mr. Barlock also testified that all of the information regarding the low hydraulic conductivity values for the Yegua Formation at the Site, which shows that there is an insignificant potential for the Yegua Formation beneath the Site to produce water, has been consistent, including visual observations of core materials from the borings, information gathered from the borings in 1997 and from the large investigation performed in 1999. *Barlock Testimony, Transcript vol.7 pp.1234/2-7; 1267/10-1268/3.* In Mr. Barlock's opinion, the productivity of the Yegua Formation at the Site is "a very low number...[there is an] almost negligible flow into these wells." *Barlock Testimony, Transcript vol.7 p.1364/13-21.* Based on all the data generated from the extensive investigations of the Yegua Formation at the Site, Mr. Barlock concluded that the Yegua Formation is not the uppermost aquifer at the Ponderosa Regional Landfill site (*Barlock Testimony Transcript vol.7 pp.1230/5-11*). Following the technical review of the Application, the TCEQ Executive Director concluded that the information in the geology report, Ex. A-30, satisfies the requirements in TCEQ's rules for what must be included in such a report and concurred that the uppermost aquifer beneath

the site proposed for the Ponderosa Regional Landfill is the Laredo Formation. *Ex. A-229; McCoy Testimony, Ex. A-229, p.8/3-p.10/2, p.20/13-16, and p.41/5-42/15; 30 TAC §330.56(e).*

The Judges properly concluded that the Laredo formation is the uppermost aquifer at the Site, and RLMS respectfully requests that the Commission accept their recommendation regarding this issue.

## II. GROUNDWATER MONITORING

### A. The Judges Properly Concluded that Groundwater Monitoring is Not Required at the Proposed Landfill.

In their exceptions related to the Judges' conclusion that the Commission's rules do not require groundwater monitoring at the proposed facility, Highway 359 Landowners Coalition and Guillermo Cavazos repeatedly confuse the protection of groundwater and the monitoring of groundwater. Throughout the discussion at pages 5 through 14 of their Exceptions, the protestants suggest that a decision by the Executive Director (recommended by the Judges for inclusion in the Commission's final order) to suspend groundwater monitoring requirements at the proposed Ponderosa Regional Landfill amounts to a decision by TCEQ that groundwater that may be present in the Yegua formation is not deserving of protection. That suggestion is simply not true. The Commission's requirements for municipal solid waste facilities' protection of groundwater of set out in Subchapter H of the Commission's Chapter 330 rules<sup>5</sup>, entitled "Groundwater Protection Design and Operation".

This subchapter (the requirements of which remain essentially the same today) requires that a new landfill protect groundwater (all groundwater, not just groundwater in the uppermost aquifer) by including in its design and construction either a "Subtitle D" composite liner (flexible membrane synthetic liner plus two feet of compacted clay) and a leachate collection system (to limit the accumulation of leachate in the bottom of the landfill to less than one foot at any location) or an alternate design that ensures that listed concentrations of contaminants will not be exceeded. *30 TAC §330.200(a).*

RLMS is not proposing any sort of alternate design for the liner system of its landfill. The entire excavated area of the landfill cells (bottom and sideslopes) will use the complete, composite

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<sup>5</sup> Unless otherwise noted, all references to rules in Chapter 330 will be to the version of the rules applicable to the permit application under consideration in this matter; the rules in effect prior to the amendments that took effect in March 2006.

liner system as described in the rules.

Groundwater monitoring is addressed in a different part of the Chapter 330 rules, Subchapter I, entitled "Groundwater Monitoring and Corrective Action". Those rules provide that a landfill must have a system of monitoring wells that extend into the uppermost aquifer that can be used to take samples of groundwater in the aquifer to be analyzed and evaluated to determine if contaminants from the landfill have reached the "point of compliance" (generally a vertical plane extending down to the uppermost aquifer near the downgradient permit boundary), unless the Executive Director has approved an alternate design for a groundwater monitoring system or has suspended groundwater monitoring requirements for the landfill based on a demonstration that contaminants from the landfill will not migrate down to the uppermost aquifer during the active life and post-closure care period of the landfill, referred to as a "no-migration demonstration". 30 TAC §§330.200(a) and (b), and 330.231.

With regard to RLMS's proposed landfill, the permit application includes a no-migration demonstration prepared by a highly qualified hydrogeologist, Mr. Vincent Barlock, P.G.<sup>6</sup>, based on site-specific data generated during months of field investigations of geology and groundwater hydrology (including dozens of soil borings and groundwater piezometers installed on the site). *Geology Report, Ex. A-30; Groundwater Characterization Report, Ex. A-78*. That demonstration was thoroughly reviewed on behalf of the Executive Director by Thomas Wesley McCoy, a Senior Geologist in the Waste Permits Division.<sup>7</sup> Mr. McCoy reviewed the Geology Report and the Groundwater Characterization Report in RLMS's permit application prior to the time the TCEQ executive director issued his opinion that RLMS's permit application meets the applicable requirements of TCEQ's rules, and concluded that the information included satisfies the applicable rule requirements. *McCoy Testimony, Ex. A-229, p.8/3-p.10/2 and p.41/5-42/15; 30 TAC §330.56(e)*. Mr. McCoy concurred with Mr. Barlock's conclusions that the uppermost aquifer beneath the site proposed for the Ponderosa Regional Landfill is the Laredo formation. *McCoy Testimony, Ex. A-229, p.20/13-16*. Mr. McCoy also testified that, "I believe that this site fulfills the requirements of a

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<sup>7</sup>Mr. McCoy holds a bachelor of science degree in geological sciences from the University of Texas at Austin. He is licensed in the state of Texas as a geoscientist in the discipline of geology, registered in the state of Mississippi as a geologist, and certified as a professional geologist through the American Institute of Professional Geologists. He has participated in the review of more than 175 municipal solid waste permit applications. *McCoy Testimony, Ex. A-229, p.4/19-24, p.6/5-8, p.7/3-p.8/2*.

no-migration demonstration and is, therefore, exempt from groundwater monitoring activities.”  
*McCoy Testimony, Ex. A-229, p.76/13-16. See also, Ex. A-229, p.20/17-p.22/1.*

Now, based on their review of all of the evidence in the record regarding groundwater issues, the Judges have concluded in the PFD that the Laredo formation is the uppermost aquifer beneath the landfill site and that RLMS

is not required to have a groundwater monitoring system because no potential exists for migration of hazardous contaminants from [the proposed] landfill unit to the uppermost aquifer during the active life and post-closure care period of the unit.

*PFD at p. 28.*

The evidence in the record supports the “no-migration demonstration” in RLMS’s permit application, the Executive Director’s decision to suspend groundwater monitoring at the proposed Ponderosa Regional Landfill, and the Judge’s conclusion and recommendation in the PFD that groundwater monitoring is not required by the Commission’s rules.

#### B. Permit Special Provision Regarding Groundwater Monitoring

The protestants’ exceptions and objections regarding groundwater and groundwater monitoring are especially perplexing when considered in light of the fact that RLMS has offered to monitor Yegua formation groundwater at the landfill site, even though it has been clearly shown that such monitoring is not required by the Commission’s rules.<sup>8</sup> RLMS made its offer because of concerns expressed by the protestants and their witness on groundwater and groundwater monitoring, George Rice, during discovery and at the hearing.<sup>9</sup> Groundwater that may occur in the Yegua is

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<sup>8</sup> Monitoring of groundwater that may occur in the Yegua formation is not the only part of RLMS’s proposed facility that goes beyond the requirements of the Commission’s rules. For example, in 1998 when it began work on its permit application, RLMS instructed its engineers to include minimum buffer zones between waste disposal areas and adjacent properties of 125 feet, far exceeding the required 50 feet. (Buffer zones on the north and south sides of the proposed facility actually range from 300 feet to more than 2,200 feet.) This was done years before the Commission amended its rules to provide for wider buffer zones (of 125 feet). RLMS has also proposed a species management plan for threatened species that may occur on the landfill site, even though consideration of such species is not required by the Commission’s rules (see discussion in Section V, below). In addition, RLMS has proposed a bird control plan for the landfill, even though it is located approximately 12 miles from the nearest airport, well beyond the distance within which such a plan would normally be included. Also, when the Commission amended its rules regarding municipal solid waste landfill site operating plans, RLMS chose to amend its application to comply with the stricter provisions in those amended rules, even though the Commission provided the option for pending applications to continue to be considered under the former rules.

<sup>9</sup> As described by the Judges in the PFD (at pp. 28-29):

Because of the other parties’ concerns about the lack of groundwater monitoring at the facility

supposedly the groundwater the protestants want to be monitored and yet, since the time RLMS directed its hydrogeologist to prepare a program to do just that, (even following Mr. Rice's recommendations for such a program) the protestants have repeatedly and strenuously objected to the proposed groundwater monitoring program. The protestants have objected to RLMS's proposal to monitor the Yegua formation even though the evidence presented at the hearing clearly established that it is not the uppermost aquifer and the Commission's rules do not require monitoring of it. Now, in their Exceptions, the protestants continue to object to RLMS's proposal even though the Judges have considered and evaluated all of the evidence in the record and concluded that it has been "persuasively" and "conclusively" demonstrated that the methods used by protestants' witness George Rice in support of his assertion that the Yegua is the uppermost aquifer were "inappropriate" and "incorrectly performed". When the protestants vigorously object to an offer to undertake groundwater monitoring that goes beyond the Commission's requirements, it suggests that monitoring of the Yegua formation is not really what the protestants want or even important to them. Based on their prior objections, continued and further explained in their Exceptions, it is now apparent that what protestants want is not monitoring of groundwater that may occur in the Yegua formation; that has been offered to and rejected by them. What they want is a basis to allege evidentiary and/or procedural error in a future challenge to an order the Commission might issue approving RLMS's permit application, and they are prepared to assert that RLMS's proposed monitoring program and offer to implement it provide that basis. RLMS initially proposed the unrequired groundwater monitoring program as a way to address concerns (however poorly founded) expressed by the protestants. RLMS is now concerned that the protestants intend to use that offer as a weapon with which to challenge any order approving RLMS's permit application. RLMS would respectfully request that, if the Commission should be inclined to issue an order approving RLMS's permit application, that the Commission take into consideration RLMS's motives in offering, and the protestants reactions to, the proposed monitoring program and decide whether it might be most appropriate for the order to not address groundwater monitoring in the Yegua formation, but to leave

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and because Applicant "is committed to building and operating a facility that meets or exceeds all applicable requirements and expectations for environmental protection," Applicant asked its consulting hydrogeologist, Mr. Barlock, to design a groundwater monitoring system and to prepare a groundwater sampling and analysis plan to monitor groundwater in the water-bearing zones in the Yegua Formation found near the surface at the proposed site.

it to the parties and the Executive Director to consider such monitoring in the context of a possible future modification or amendment to any permit that may be issued in this proceeding.

### III. LAND USE

In the portion of its Exceptions related to land use compatibility, Webb County does not specifically except or object to any aspect of the Judges' analysis of land use compatibility as set out in the PFD or to any of the proposed findings of fact and conclusions of law regarding this issue in the proposed order. In fact, the County does not refer to or even acknowledge the Judges' analysis. Instead, the County repeats an incorrect assertion about the record that it has made before: that RLMS "limited its discussion concerning growth along State Highway 359 to the area along a new water line under construction, which ends approximately 2.5 miles east of the proposed landfill site".

The County then states, "[t]herefore, the applicant failed to demonstrate that the proposed landfill site is compatible with area land uses." In their Exceptions, Highway 359 Landowners Coalition and Guillermo Cavazos complain about the PFD and its conclusion that the landfill will be a compatible land use by making statements that are completely unsupported by, and inconsistent with the evidence in the record, including their vague and unsupported reference to "evidence demonstrating the growth of colonias—or illegal residential development—in the direction of the proposed landfill.", the untrue statement that "there is little evidence to suggest that the illegal development will not continue to occur along the Highway 359 corridor", and the completely unfounded conclusion that "the proposed landfill will likely result in a condition that is adverse to the health and safety of the colonias' inhabitants". *Highway 359 and Cavazos Exceptions pp. 4 and 5*. Because these assertions are not true, it is not surprising that they are not accompanied by citations to evidence in the record.

In the PFD, the Judges specifically addressed these unsupported assertions and concluded that

...the evidence does not demonstrate that the landfill site is in the path of significant growth. Rather, the evidence strongly suggests that there is limited projected development in the immediate vicinity of the site...[T]he Judges do not believe that projected growth trends render the proposed landfill an incompatible use.

*PFD at pp. 14, 15.*

Evidence in the record (referenced in the PFD) regarding growth trends includes testimony and other evidence that residential growth is occurring in all sectors of Laredo. *Land Use Report,*

*Ex. A-4, p. 4.* However, John Worrall, a land planner and land use expert, testified that the proposed landfill site is located in an area with very little development and population density currently present and with a low probability of additional development occurring in the foreseeable future. Mr. Worrall testified that there is a low probability of significant additional development occurring in the general vicinity of the proposed Ponderosa Regional Landfill site, whether or not the landfill is developed. *Worrall Testimony, Ex. A-1, p. 4/8-20.* No witness presented any testimony and no party offered any exhibit suggesting that any develop is occurring or could be expected to occur any closer to the proposed site than 2.5 miles west of the site. The fact that the evidence shows that no growth can be expected beyond the area that is 2.5 miles from the landfill site certainly does not mean that RLMS did not consider land use and development closer to the landfill. The County's statement that Mr. Worrall's testimony was limited to the area along the new water line east of Laredo (that ends approximately 2.5 miles west of the landfill site) is simply untrue. In fact, Mr. Worrall's testimony and exhibits address land use, development, and growth trends in and around the City of Laredo, including the entire area along Highway 359 from the urbanized areas of Laredo to past the proposed landfill site, including a narrated video (taken from a helicopter) showing and describing development in the entire area along Highway 359 from Laredo out to more than a mile beyond the proposed landfill site (including residential development in and near Laredo and, in the area near the proposed landfill site, the lack of development), as well as a detailed land use report that focuses on the area within a one-mile radius in all directions from the site. *Exs. A-6, A-7, A-4, and Worrall Testimony, Ex. A-1 (p.1/31-2/9 and p.2/20-3/4).*

Within one mile of the proposed landfill site, the land is overwhelmingly (99%) open and undeveloped. There are only six residences within one mile of the site, three of which are used only on an occasional basis. There are no business establishments within one mile of the permit boundary. The only commercial uses within one mile are the large, steel antenna tower approximately 1,000 feet west of the permit boundary and the waste storage and injection well operation located approximately 3,625 feet to the east on the property of protestant Guillermo Cavazos. Within one mile of the site there are no schools, no day care centers, no churches, no cemeteries, no historic sites, no archaeologically significant sites, and no sites of exceptional aesthetic quality. *Land Use Report and Worrall Testimony, Ex. A-4, at p. 5.* From a land use standpoint, the proposed landfill site is a very good one. *Worrall Testimony, Ex. A-1, p.4/17-20.*

A new water main extends eastward from Laredo along State Highway 359, but ends approximately 2.5 miles west of the Site. This water line was sized large enough to meet existing needs in colonias along State Highway 359 and to provide excess capacity for future growth, equivalent to 2252 homes, in the area along the line. *Land Use Report, Ex. A-4, p.4.* All of the excess capacity in the new water line has been reserved for tracts adjacent to the part of Highway 359 where the new water line runs. The easternmost tract for which water service will be provided from the new water line is on the north side of State Highway 359, 2.5 miles west of the proposed landfill site. The new water line will not provide service to the Regional Land Management Services, Ltd. tract or any of the properties around it. Because there are no plans for water service east of the end of this new water line, the future urban/suburban growth east of Laredo along State Highway 359 will be limited to the area served by the new water line for the foreseeable future, likely several decades. *Land Use Report and Worrall Testimony, Ex. A-4, p.4.*

The only other expert to testify on land use issues was Webb County's witness Rhonda Tiffen, who is the Webb County Planning Director. Ms. Tiffen did not offer any testimony disagreeing with or inconsistent with Mr. Worrall's testimony or exhibits. She testified that there are two types of residential developments occurring along the Highway 359 corridor east of Laredo: new subdivisions and substantial growth in existing, former rural residential areas known as colonias. She testified that significant growth trends have also been noted in the existing colonias located along this corridor, and that the growth within these colonia areas has been exacerbated by the multiple dwellings constructed upon the larger tract sizes typical of the county's colonias (emphasis added). *Tiffen Testimony, Ex. Webb 14, p.4/16-32.* Ms. Tiffen also testified that key functions of the Webb County Planning Department (which she supervises) include review and enforcement of real property development issues and state colonia legislation and planning for public infrastructure improvements, that particular emphasis has been placed on the department's duties imposed by the state's colonia legislation, and that she is responsible for all activities related to the County's enforcement of the model subdivision rules for residential development in Webb County. *Tiffen Testimony, Ex. Webb 14, p.2/34-3/10.* Ms. Tiffen further testified that the City of Laredo prohibits the extension of water service outside the city limits for residential use and that, because the City of Laredo is the water and sewer service provider for the areas immediately east of Laredo on Hwy 359, up to and including the colonia known as Pueblo Nuevo, residential development within that corridor

must contract for those services with the City of Laredo under its rules and regulations. *Tiffen Testimony, Ex. Webb 14, p.5/41-42 and p.4/38-42.*

The exceptions regarding land use filed on behalf of Webb County, Highway 359 Landowners Coalition and Guillermo Cavazos have no evidentiary support in the record and are completely without merit and RLMS respectfully requests that the Commission overrule them.

#### IV. DRAINAGE

In its Exceptions, Webb County suggests that RLMS did not adequately address drainage issues related to the proposed landfill and that it did not demonstrate that the proposed stormwater controls are adequate. However, RLMS asserts that the ALJs thoroughly evaluated all of the evidence on this issue and appropriately concluded in the PFD that RLMS has adequately addressed drainage and stormwater controls and properly demonstrated that natural drainage patterns will not be significantly altered by the proposed landfill facility.

Various issues related to drainage raised by the County in its Exceptions are addressed below, however, RLMS would point out two specific failures that run throughout the County's discussion of drainage issues—failures that also plagued the testimony of the County's drainage witness, Larry Dunbar. First, the County continues its refusal (following Mr. Dunbar's lead) to acknowledge that the Commission's rules (as explained in the agency's Drainage Guidance Document) require the use of HEC-1 computer modeling for the drainage analyses associated with this proposed landfill. Second, the County continues to urge reliance on Mr. Dunbar's actions in re-running RLMS's computer models after he changed certain input parameters to values that the evidence clearly establishes are inappropriate. The ALJs addressed the issues in the PFD and concluded that Mr. Dunbar and the County are wrong with regard to both of them. RLMS respectfully suggests that the Commission overrule the County's exceptions regarding drainage and stormwater controls.

RLMS's consulting engineer and hydrologist, Mr. J. Roy Murray, performed computer modeling, in accordance with methods that are both appropriate and specified by TCEQ in its rules and drainage guidance document, to evaluate drainage on and from the Site considering various scenarios involving the Site in its natural condition, mineral well sites, and the landfill. *Exs. A-310 through A-322; Murray Testimony, Tr. Vol. 11 p.1920/9-1958/8, Tr. Vol. 12:2048/9-2055/3.* Based on the analyses he performed, Mr. Murray concluded and testified that the surface water management system that's proposed for the Ponderosa Regional Landfill will function adequately either with or

without the presence of wells at the possible future well locations, that the surface water management system that's proposed for the Ponderosa Regional Landfill will have adequate capacity either with or without the presence of wells at the possible future well locations, and that development of the landfill either with or without wells would not result in significant alteration of natural drainage patterns, considered on the basis of either on-site or off-site drainage. *Murray Testimony, Tr. Vol. 11 p.1956/8-1957/5; Ex. A-313 at p.8.*

On rebuttal, Webb County's witness Larry Dunbar attempted to discredit Mr. Murray's computer modeling, analyses, and conclusions. Considering his rebuttal testimony in the reopened hearing and his direct testimony in the original hearing, Mr. Dunbar attempted to discredit Mr. Murray's work in three ways. The County has continued these efforts in its Exceptions. Each of these three sub-issues is discussed below.

**A. Rational Method.** One of the primary arguments advanced by Webb County regarding RLMS's surface water analyses and demonstrations is that RLMS should have used the rational method, and not the HEC-1 computer model, to evaluate drainage related to the Site and the proposed landfill. However, no matter how many times Mr. Dunbar and Webb County may suggest otherwise, the computer modeling used by RLMS's consulting engineer and hydrologist, Mr. J. Roy Murray, is the method that is actually required by TCEQ for evaluating drainage at the Site. TCEQ's Guidelines for Preparing a Surface Water Drainage Plan for a Municipal Solid Waste Facility provides that

The rational method is needed for small drainage areas of less than 200 acres and (note that the 200-acre standard applies to the total area of the watershed or sheds above and including the proposed landfill permit boundary).

For areas larger than 200 acres, the guidance document and TCEQ's rules specify the use of the HEC computer models. *Exs. A-317 and A-317A.* The total area of the watersheds above and including the proposed Ponderosa Regional Landfill permit boundary is 1,293.4 acres. *Murray Testimony, Tr. Vol. 12 p.2048/9-2049/6.* As a result, the use of the rational method in drainage area hydrologic analyses for the proposed Ponderosa Regional Landfill would not be appropriate or consistent with TCEQ requirements.

**B. CN Values.** Webb County also supports the actions of Mr. Dunbar in changing input values (for the CN factor) in the HEC-1 computer analyses Mr. Murray performed and the resulting higher peak flow rates those changes to the modeling produces. However, the CN values Mr. Dunbar used are not appropriate for the Site and he offered no credible scientific basis for using them in computer

runs analyzing the site. *Murray Testimony, Tr. Vol. 12 p.2135/24-2158/14; Exs. A-313 and A-318 through A-322*. Mr. Dunbar did not perform his own drainage analyses for the Site and the landfill. He did, however, change one input parameter (the CN value) in the HEC-1 computer modeling done by Mr. Murray and re-run those analyses. *Dunbar Testimony, Tr. Vol. 12 p.2124/10-2125/10, 2132/16/-35, and 2068/24-2069/11; Exs. Webb 15-20*. But, the CN values Mr. Dunbar used are not appropriate for the Site and he offered no credible scientific basis for using them in computer runs analyzing the site. *Murray Testimony, Tr. Vol. 12 p.2135/24-2158/14; Exs. A-313 and A-318-A-322*. Not surprisingly, Mr. Dunbar did not even change the print outs of the computer runs he did to show that was the one who had done the work. The printouts of Mr. Dunbar's computer runs make it appear that the work was actually done by Mr. Murray and Peter Chang (who works for Mr. Murray), which is not the case. *Dunbar Testimony, Tr. Vol. 12 p.2126/2-6 and 10-19; Murray Testimony, Tr. Vol. 12 p.2161/10-21*. Mr. Dunbar's explanation for not putting his name into the computer run print outs was that he "didn't have time". *Dunbar Testimony, Tr. Vol. 12 p.2126/10-19*.

**C. Flood Levels in Lobo Creek.** Finally, Webb County asserts that increased volumes of run-off from the Site after the landfill is developed will increase flooding in Lobo Creek and that RLMS has provided no analysis of the impact that the increased volumes will have. However, RLMS presented the testimony and analyses Mr. Murray did of both the Northern Drainage (that drains to Lobo Creek near the Highway 359 bridge over the creek) and the Southern Drainage (overland and small tributary flow to the south and southeast of the Site). The Northern Area drainage analysis done by Mr. Murray shows that water surface elevations (flood levels) will not be significantly altered by development of the Ponderosa Regional Landfill. In fact, the change in water surface elevation in Lobo Creek resulting from development of the landfill will be so small that it cannot be measured. HEC-1 computer analyses of the water surface elevations in the natural and post-development conditions show that development of the landfill will increase water surface elevations in Lobo Creek for a 25 year, 24-hour rainfall event by only one-eighth of an inch. *Murray Testimony, Tr. Vol. 11 p.1943/10-1956/7; Exs. A-313 and A-315*. Mr. Murray also performed detailed analyses of the Southern Drainage, which show that the peak flow rates (the issue of concern for receiving channels) stay the same or decrease, and that development of the landfill will not result in a significant alteration of natural drainage patterns. *Murray Testimony, Tr. Vol. 11 p.1938/16-1944/9 and 1956/25-1957/5; Exs. A-313, A-315, and A-316*. Mr. Dunbar testified that water surface

elevations in Lobo Creek could increase significantly as a result of development of the Ponderosa Regional Landfill and increased runoff volumes from the northern portion of the Site but, again Mr. Dunbar did no analysis that could serve as the basis for his opinion. *Dunbar Testimony, Tr. Vol. 5 p.714/11-18 and 720/10-721/8*. The Northern Area drainage analysis done by Mr. Murray shows that water surface elevations (flood levels) will not be significantly altered by development of the Ponderosa Regional Landfill. *Murray Testimony, Tr. Vol. 11 p.1943/10-1956/7; Exs. A-313 and A-315*.

#### V. THREATENED SPECIES

In their Exceptions, Highway 359 Landowners Coalition and Guillermo Cavazos complain about two aspects of the discussion of threatened species in the PFD: they disagree with the ALJs' conclusion that Texas state-listed threatened species are not included within the scope of the Commission's municipal solid waste rule provisions related to protection of endangered and threatened species, and they allege that the ALJs improperly concluded that RLMS has adequately evaluated endangered and threatened species at the site because, they assert, RLMS's species management plan fails to include a detailed plan for the transport and removal of any Texas horned lizards found on the site and because "there is little information regarding the preserve" (the site to which any threatened species found on the landfill site would be relocated).<sup>10</sup> However, as the ALJs concluded, specific language in the Commission's rules excludes state-listed threatened species from the rules' applicability, and, even though it was not required by the rules to do so, RLMS has proposed to implement a detailed species management plan that will protect state-listed species by relocating them to a well-described preserve area.

#### A. State-listed Threatened Species are Not Within the Scope of TCEQ's Rules.

As set out on page 49 of the PFD, the ALJs concluded that the rule provision related to protection of endangered and threatened species (30 TAC §330.53(b)(13)(B))<sup>11</sup>

<sup>10</sup> The exceptions address only threatened species because the undisputed evidence in the record shows that no species listed as endangered pursuant to either federal or state law would be present on the landfill site. In addition, it is undisputed that no federally-listed threatened species would be present on the site, or that the only state-listed threatened species for which suitable habitat exists on the site are the Texas horned lizard, the reticulate collared lizard, the Texas tortoise, and the indigo snake. The evidence further shows that, of these, only one Texas tortoise has been found at the proposed landfill site during several thorough field investigations that have been conducted.

<sup>11</sup> 30 TAC §330.53(b)(13)(B) provides:

The impact of a solid waste disposal facility upon endangered or threatened species shall be

does not apply to Texas state-listed threatened species because, by definition, TCEQ's endangered and threatened species rules are applicable only to species listed either as endangered or threatened under the Federal Endangered Species Act or under the Texas Endangered Species Act.

The Commission's municipal solid waste rules define "endangered and threatened species" as "any species listed as such under Federal Endangered Species Act, §4, 16 United States Code, §1536, as amended or under the Texas Endangered Species Act." 30 TAC §330.2(41). The federal Endangered Species Act (at 16 USC §1533) provides that the Secretary of the Interior, through the US Fish and Wildlife Service ("USFWS"), "shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species..." Pursuant to the federal Endangered Species Act, USFWS is authorized to list both endangered and threatened species, and, as such, any animal or plant species listed by USFWS as either endangered or threatened comes within the scope of TCEQ's rules. However, the situation in Texas is different. Under the Texas endangered species act (Parks and Wildlife Code Chapter 68, "Endangered Species"), the Executive Director of the Texas Parks and Wildlife Department ("TPWD") is only authorized to list endangered species of animal wildlife. The only recognition of the concept of a "threatened species" in Texas statutory provisions is in Chapter 88 of the Parks and Wildlife Code and relates only to threatened plant species (Parks and Wildlife Code, secs. 88.001, 88.002, 88.003, 88.008 and 88.0081). In Texas, threatened animal species are not identified through the listing process described in Section 68.003 of the Texas endangered species act (Parks and Wildlife Code Chapter 68); they are specified through a rulemaking process authorized in a different chapter of the Parks and Wildlife Code, Chapter 67 "Nongame Species", at §67.004—a statutory provision that does not even use the term "threatened species." See also, TPWD rule designating threatened species (31 TAC §65.175) and TPWD rules regarding violations and penalties (31 TAC §65.176), which clearly distinguish between threatened species (specified through rulemaking as prescribed by Chapter 67) and species listed pursuant to Chapter 68 "Endangered Species".<sup>12</sup> The Texas endangered species act

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considered. The facility and the operation of the facility shall not result in the destruction or adverse modification of the critical habitat of endangered or threatened species, or cause or contribute to the taking of any endangered or threatened species.

<sup>12</sup> Lee Sherrod, the only expert witness who presented evidence in this matter regarding endangered and threatened species, testified that the definition of "endangered and threatened species" in TCEQ's rules does not include state-listed threatened species within its scope. *Sherrod Testimony, Ex. A-195, p.3/11-25.*

authorizes the listing of only endangered species, so TCEQ's municipal solid waste rules do not require a permit applicant to consider state-listed threatened species.

In their Exceptions, the protestants actually acknowledge that state-listed threatened species are not covered by the Commission's MSW rules, but then suggest (with little or no record support) that previous Commission decisions were based on the Texas horned lizard and the Commission has, therefore, set a precedent that should be continued, apparently without regard to the language and requirements of the rules:

State-listed threatened species may not be included in the Texas Endangered Species Act, but the Commission has shown its intent to protect the Texas horned lizard under the provisions in 30 TAC §330.53(b)(13)(B).

*Exceptions of Hwy 359 and Cavazos, at p.14.*

RLMS respectfully requests that, in this case, the Commission apply the applicable rules, including the definition of "endangered or threatened species".

B. RLMS's Proposed Species Management Plan is Sufficient to Protect Threatened Species.

Even though the Commission's rules do not require it (see discussion above), RLMS has proposed a species management plan to protect state-listed threatened species that may occur on the landfill site by way of regular surveys conducted by appropriately-licensed wildlife biologists to find threatened species and relocate them to a designated conservation area with habitat similar to the landfill site. The Ponderosa Regional Landfill Potentially Affected Species Management Plan was developed by Lee Sherrod of Horizon Environmental Services, Inc.<sup>13</sup> The Plan has been accepted by

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<sup>13</sup> Lee Sherrod is a principal in and co-founder of Horizon Environmental Services, Inc. of Austin, Texas. His technical specialties are wetlands ecology, botany, forestry, endangered species, land reclamation, habitat creation and enhancement, and environmental permitting. Mr. Sherrod has a Bachelor of Science degree in Forestry, Wildlife Management, and Zoology from Stephen F. Austin University, and a Master of Arts degree in Botany and Wetlands Ecology from the University of Texas at Austin, where he has also completed post-graduate studies and research. Mr. Sherrod has over 25 years experience in applied ecological research and consulting. He has completed the US Fish & Wildlife Service course on habitat evaluation procedures and he is a member of the Texas Organization for Endangered Species and the Texas Academy of Science. *Ex. A-196, pp.1 and 11.* He has conducted numerous surveys and evaluations for rare, threatened, and endangered species in Texas and in other states. *Ex. A-196 at p. 1.* Mr. Sherrod is routinely invited to instruct, make presentations, or be an active participant in conferences, workshops, and seminars dealing with subjects including endangered species and environmental regulation. *Ex. A-196 at p. 2.* He has been a presenter at Endangered Species Act conferences in Austin, Denver, and Washington D.C., addressing subjects including plans to avoid takings, US Fish & Wildlife Service protocols and survey methods, permits, Science and the Endangered Species Act, and endangered species act permitting. He was a presenter at the centennial meeting of the Texas Academy of Science on the subject of land development and the Endangered Species Act. *Ex. A-196 at p. 3.* Mr. Sherrod has published over 150 scientific journal papers and technical reports on subjects including endangered and threatened species and wildlife

Texas Parks & Wildlife Department for state-listed species. The Plan includes provisions for the conduct of thorough field surveys for potentially affected species, including Texas horned lizards, both before and during operation of the landfill. If any individuals of a species of concern are found, they will be relocated to a conservation area to prevent potential landfill-related adverse effects. *Sherrod Testimony, Transcript vol. 1, p. 71/22 – p. 75/3*. The Plan includes measures for handling and transportation of affected animals that may occur on the landfill site, including a specific provision that no person at the Ponderosa Regional Landfill facility may

annoy, pursue, hunt, wound, trap, capture or collect any indigo snakes, reticulate collared lizard, Texas tortoise or Texas horned lizard that may be present at the facility except for capturing for purposes of relocation as authorized by this plan and a State Scientific Collection Permit.

The Plan makes clear that all handling and management of species protected under the Plan will be conducted in accordance with the Plan, which requires that survey and relocation activities will be done by a biologist with a State Scientific Collection Permit. The Plan specifically requires the involvement of a qualified professional in the survey and relocation activities, and prevents other persons from annoying, pursuing, hunting, wounding, trapping, capturing or collecting any protected species. *Ex. A-167, Section 6 at pp. 13-14*. Rather than specifying methods to be used by persons not licensed by the State to manage these animals, the RLMS Plan prohibits such activities all together. In addition, the Plan was submitted to the staff of the Texas Parks and Wildlife Department, and no changes to the Plan were suggested or recommended by that agency. The Plan has been accepted by Texas Parks & Wildlife for state-listed species, which all of the potentially affected species in this case are, and is substantially the same as a plan previously approved by TCEQ as a part of the permit for the operation of another municipal solid waste landfill. *Sherrod Testimony, Transcript vol. 1, p. 71/22 – p. 75/3 and p. 87/22 – p. 88/20*.

Protestants' claims, at pages 15-16 of their Exceptions, that "there is little information regarding the preserve" (to which species of concern would be relocated) and "the only information in the record indicates that [the preserve] may be at or near the same location of the colonias in the area" are not correct and ignore the ample evidence in the record regarding the preserve area. The evidence in the record shows that that when species of concern are found, they will be relocated to a

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management. *Ex. A-196 at pp. 3-9*. He has consulted on the development of permit applications for 20 to 30 landfill projects in Texas. *Sherrod Testimony, Transcript vol. 1, p. 69/14-17*.

conservation area to prevent potential adverse effects (*Sherrod Testimony, Transcript vol. 1, p.73/21-23*), that the conservation area to which all individuals of these species encountered and captured will be relocated is the P1 Ranch, located four to five miles west of the landfill site on State Highway 359 (*Ex. A-159, p.41; Ex A-197, p. 13; Sherrod Testimony, Transcript vol. 1, p.91/22-p.92/2*), that the conservation area is a large undeveloped area with no plans for any future development (*Sherrod Testimony, Transcript vol. 1, p.73/21-23*), that the applicant for the landfill owns the P1 Ranch (*Sherrod Testimony, Transcript vol. 1, p.89/20-21*), that the P1 Ranch is far enough removed from the landfill activity so that the species will not wander back into the landfill area where they could be harmed (*Sherrod Testimony, Transcript vol. 1, p.84/9-14*), that the closest residential development to the P1 Ranch is approximately two to three miles to the west (*Sherrod Testimony, Transcript vol. 1, p.91/18-21*), that the P1 Ranch is several hundred acres in size (*Sherrod Testimony, Transcript vol. 1, p.83/18-24*), that the P1 Ranch has suitable habitat for the species of concern, that there is a stream area or a wetland area on the P1 Ranch, and that the P1 Ranch is very similar property to the proposed landfill site (*Sherrod Testimony, Transcript vol. 1, p.86/1-9*).

Protestants' exceptions regarding threatened species are not supported by, and are in fact contrary to, both the language of the Commission's rules and the evidence in the record and those exceptions should be overruled.

#### VI, PRAYER

Wherefore, premises considered, RLMS respectfully requests that the Commission:

A. Overrule all Exceptions filed on behalf of Highway 359 Landowners Coalition, Guillermo Cavazos, and Webb County; and

B. Issue, as its final order in this matter, the Proposed Order attached to the Proposal for Decision, revised to include the findings of fact and conclusions of law requested by RLMS in its Exceptions and, if the order includes a requirement for groundwater monitoring at the Ponderosa Regional Landfill, that it do so by way of the permit special provision requested by RLMS in its Exceptions.

**Respectfully submitted,**

**McELROY, SULLIVAN & MILLER, L.L.P.**

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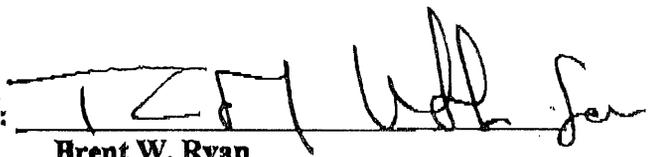
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MANAGEMENT SERVICES, LTD.**

By: 

**Brent W. Ryan**

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 9<sup>th</sup> day of October 2008, a true and correct copy of the foregoing Replies to Exceptions to the Proposal for Decision of Applicant, Regional Land Management Services, Ltd. was sent via fax to the Administrative Law Judges and by email or fax to attorneys for the parties as shown below:

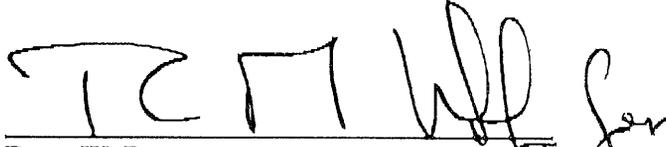
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Date: October 9, 2008

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**APPLICATION OF REGIONAL LAND MANAGEMENT SERVICES, LTD.**

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