LOWERRE, FREDERICK, PERALES,
ALLMON & ROCKWELL
ATTORNEYS AT LAW
707 Rio Grande, Suite 200
Austin, Texas 78701
(512) 469-6000 • (512) 482-9346 (facsimile)
Mail@LF-LawFirm.com

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CHIEF CLERKS OFFICE

October 9, 2008

Ms. LaDonna Castañuela
TCEQ
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

Re: Application of Regional Land Management Services, Ltd., for a Type 1 Municipal Solid Waste Permit (No. MSW-2286); SOAH Docket No. 582-04-0975; TCEQ Docket No. 2003-0729-MSW

Dear Ms. Castañuela:

Please find attached, an original and eleven copies of Highway 359 Landowners Coalition and Guillermo Cavazos's Replies to Exceptions to the Proposal for Decision.

Thank you for your consideration of this matter. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Marisa Perales

Marisa Perales

CC: Service List
SOAH ALJs

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CHIEF CLERKS OFFICE

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

APPLICATION OF REGIONAL LAND MANAGEMENT SERVICES, LTD, FOR A TYPE 1 MUNICIPAL SOLID WASTE PERMIT (NO. MSW-2286)	§ § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

HIGHWAY 359 LANDOWNERS COALITION' REPLY TO EXCEPTIONS

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

Protestant Highway 359 Landowners Coalition ("Protestant" or the "Coalition") submits this Reply to the Exceptions filed by Applicant Regional Land Management Services, Ltd. ("Applicant" or "Regional") and the Exceptions filed by Protestant Webb County. For support, the Coalition respectfully shows the following:

I. INTRODUCTION

Webb County already has a landfill, operated by the City of Laredo, by an experienced operator. Now, Regional, which has no landfill operating experience and does not even own the proposed landfill site, seeks to obtain a permit to operate a new landfill. Rather than conducting a thorough investigation of the area and submitting a complete application that complies with TCEQ's rules, however, Regional has chosen to allow the Protestants participating in this case to investigate the area, while Regional simply attempts to create a "living" application that it can mold and modify according to the latest information provided by Protestants. Even with its numerous and substantial delays in this hearing and substantial modifications to its application, however, Regional still cannot satisfy its burden of proving that it has complied with all of TCEQ's rules.

II. BACKGROUND

In its Exceptions, Applicant Regional complains that up until June 2007, none of the Protestants raised the issue of whether the deeper Laredo Formations is indeed the uppermost aquifer at the landfill site, rather than the shallow Yegua Formation. Indeed, comments were raised, and the TCEQ Commissioners referred to SOAH the issues of whether the proposed groundwater monitoring was adequate and whether the geology information included in the application was adequate. Protestants were under no duty to present their direct case or provide any technical analysis during the comment and hearing request phase of the administrative procedure.

As for the assertion that the uppermost aquifer issue was not raised until June 2007, the tortured procedural history of Regional's landfill permit application will help place this statement in the proper context. Regional first submitted its application for a Type I municipal solid waste landfill permit on July 3, 2000—more than eight years ago. It was declared technically complete on July 2, 2002—more than six years ago—and a draft permit was issued. On September 25, 2003, TCEQ Commissioners granted the hearing requests of the Coalition and others and referred sixteen issues to the State Office of Administrative Hearings. A preliminary hearing was held at SOAH on January 21, 2004, and a hearing on the merits was schedule for July 2004—more than four years ago.

Anticipating the adoption of new Site Operating Plan rules, the parties agreed to an abatement of the hearing, which the then-presiding Administrative Law Judge granted by Order dated May 3, 2004. The abatement was intended to allow Applicant time to

evaluate the new rules and determine whether it would amend its application to comply with those rules.

As anticipated, the Commission adopted new SOP rules on November 10, 2004, and Applicant elected to amend the SOP in its application to comply with the new rules. It first submitted its new, revised SOP on July 7, 2005 and then submitted a second revised SOP on October 27, 2005.

Finally, on February 8, 2006, the abatement was lifted, and a new hearing schedule was adopted. Under this new hearing schedule, the hearing on the merits was to occur in mid-August 2006. In preparation for this hearing, the parties commenced discovery and depositions.

Then, by letter dated April 19, 2006, Applicant informed the ALJs and all parties to this proceeding that it had "decided to revise its permit application in this case, including making changes to the surface water management plan." No further description of the anticipated application revisions was provided. Applicant did, however, promise to provide additional information about the application revisions "within two weeks" from the date of the letter. Two weeks later, no further information regarding the anticipated application revisions was provided. Thus, uncertain of the extent of the revisions and the date they would be provided to the parties, the Coalition moved for an abatement of the hearing. Applicant agreed to the request for an abatement, adding that an abatement was appropriate "until after [it] *completes* . . . revisions to its permit application." (Emphasis added.) The abatement was granted by Order dated May 15, 2006.

In October 2006—six months after Applicant first informed the ALJs and the parties that it would revise its application—Applicant finally submitted its revisions to the application. The revisions affected at least six portions of the application, including the site operating plan again, the Groundwater/Surface Water Protection/Drainage Plan, and the endangered and threatened species assessment. Applicant did not, however, use this 6-month opportunity to develop and introduce a groundwater sampling and analysis plan.

The Coalition filed a response to the Applicant's proposed application revisions, explaining that the time to correct deficiencies in the application is during the technical review period, not during the hearing process and especially not in response to discovery or motions for summary disposition that reveals the application deficiencies. The Coalition requested reimbursement of its expenses to discourage Regional from revising its application at will whenever Protestants identify another deficiency in the application. That request was denied.

The abatement was ultimately lifted on January 30, 2007. In March 2007, Rosetta Resources moved to intervene as a party in this proceeding. Its request was granted by Order No. 10, and a new hearing schedule was adopted. The parties again engaged in discovery, and Applicant deposed the Coalition's (and Webb County's) groundwater expert, Mr. George Rice, on two separate occasions. Yet, it was not until August 1, 2007, the second to the last day of the hearing on the merits, that the Applicant sought to again revise its application, adding a groundwater monitoring plan to monitor the Yegua Aquifer underlying the landfill site. The plan was not prepared by Applicant, but was

instead a plan developed by another geologist (not a witness or party in this proceeding) for a completely different landfill expansion application in Williamson County.

Ultimately, Rosetta Resources and Regional reached an accommodation agreement, but not before the record was re-opened and a hearing re-convened to address Rosetta Resources' anticipated drilling schedule and the changes that Regional would have to make to its landfill design and surface water management plan to accommodate that drilling schedule. All of this could have been avoided had Regional provided Rosetta Resources with proper notice of its application, obtained the mineral rights for the property, or negotiated an agreement with Rosetta before submitting its application (or at least before proceeding to an administrative hearing).

The Agreement reached between Rosetta and Regional further evidences Regional's strategy choice of doing too little too late. As with the application amendment that Regional submitted to address the deficiencies in its groundwater monitoring plan during its rebuttal phase of the first hearing on the merits, the effect of this eleventh-hour submittal of a Surface Use Agreement is unclear. The parties did not had an opportunity to conduct discovery regarding the effect of this Agreement. The experts did not have an opportunity to evaluate how the Agreement may affect other aspects of Regional's application. And, unlike with late submittal of a new groundwater monitoring plan, the parties have not even had the benefit of examining witnesses to further explore the substance and significance of this Agreement.

The Agreement is important for more than merely showing the likelihood that Rosetta will drill additional wells on the landfill property, however. The Agreement

evidences that had Regional used the abatement—an abatement that was occasioned by its own choice to further revise its application—to investigate the ongoing and prolific drilling occurring in the area and to ascertain whether the lessee of the mineral interests on its property (which it did not own) had plans to exploit the minerals there, the Protestants and the TCEQ and the ALJs might not have had to attempt to address the adequacy of a living application that is constantly in flux, and certainly no longer reflects the actual conditions that exist on the landfill site. Significantly, Regional did not even notify Rosetta of its plans to seek a landfill permit. The Coalition notified Rosetta, and Rosetta intervened in this proceeding. And finally, at the very last minute possible, Regional negotiated a Surface Use Agreement with Rosetta.

III. SUMMARY OF REPLY

The Coalition generally agrees with the Exceptions submitted by Webb County. The Coalition disagrees with the assertions in Applicant's Exceptions, and will address the most significant disagreements below.

IV. IS THE PROPOSED GROUNDWATER MONITORING ADEQUATE?

A. The Flaws in the PFD May Not be Addressed By Adopting Regional's Groundwater Plan Provision

Both the Administrative Law Judges, and Regional, seek to address the overwhelming evidence that the Yegua is the uppermost aquifer by proposing to require a groundwater monitoring system for that aquifer, without acknowledging that the Yegua is an aquifer. Neither special provision proposed is legally defensible.

As discussed by Regional, the special provision proposed by the Administrative Law Judges, broadly requiring a groundwater monitoring system, would prevent any decision of the Commission from being considered "final." This provision leaves the nature of such a plan open-ended. Groundwater monitoring systems, and groundwater sampling and analysis plans, are highly complex and would require review by the Executive Director prior to implementation.

What Regional fails to acknowledge are the inherent legal deficiencies in its own proposed special provision. In short, Applicant's approach fails because there are no findings of fact or conclusions of law to support inclusion of this plan in an ordering provision, and the record does not support any findings of fact or conclusions of law to justify the inclusion of this provision.

The proposed order contains no findings of fact or conclusions of law regarding Exhibit A-287. The Texas Administrative Procedures Act requires that an agency include findings of fact to inform the parties, and a reviewing court, of the basis of the Commission's decision.[1] If the order makes no findings of fact or conclusions of law whatsoever regarding this exhibit, how can a court look to the order to determine the Commission's reasons for requiring it to be implemented?

There is good reason for the ALJs' failure to incorporate Applicant's special provision specifically referencing Exhibit A-287. Any attempt to make findings of fact regarding this exhibit immediately reveals the tremendous lack of information in the

[1] Tex. Gov. Code § 2001.141, *Brantley v. Texas Alchoholic Beverage Comm'n*, 1 S.W.3d 343, 345-346 (Tex. App, Texarkana – 1999*), no pet.*

record to support the plan. As noted in Protestants' exceptions, Applicant has not provided information *required* by 30 TAC §§ 330.56(b)(1), 330.56(d)(6), 330.56(e)(5), 330.56(e)(5), 330.56(e)(6), 330.5(e)(7), 330.56(k) of the rules under which this application is being processed. If submitted as part of an application, Applicant's plan would not even be considered administratively complete, much less technically sufficient. It would be difficult for the Commission to defend independently developing its own findings of fact specifically regarding the plan when the administrative record includes no input on the issue from the Commission's own technical staff, and the Commission lacks substantial information required for such an evaluation in every other landfill permitting case. In sum, the Commission has no basis to require a specific groundwater monitoring plan when it has reached no conclusion regarding the effectiveness of that plan?

Furthermore, developing any conclusion of law that would designate Exhibit A-287 to be "Groundwater Sampling and Analysis Plan" is simply impossible. First, it is unclear which version of the Commission's rules apply to this Plan. To develop the Plan, Regional has arbitrarily substituted certain requirements from rules effective after March 27, 2006 for aspects of the plan that failed to meet the requirements effective prior to March 27, 2006; however, this Application (with the exception of the SOP) was processed under the rules in existence prior to March 27, 2006. In doing so, Regional has developed a plan that does not fully meet the requirements of either set of rules, and there is no basis for a conclusion of law that Exhibit A-287 is in fact a proper Groundwater Sampling and Analysis Plan.

In short, Applicant's approach fails because there are no findings of fact or conclusions of law to support inclusion of this plan in an ordering provision, and the record does not support any findings of fact or conclusions of law to justify the inclusion of this provision.

By attempting to include groundwater monitoring plans that have not undergone a true technical review, both Regional and the ALJs are attempting to create for the Commission an end-run around the question of whether the Yegua is in fact the uppermost aquifer. Both recommendations are legally flawed.

With regard to groundwater monitoring, this permit must stand or fall on a decision of whether the Yegua is the uppermost aquifer. As discussed in the Coalition's Exceptions, and confirmed by the Texas Water Development Board and United States Geological Survey, any reasonably examination of the evidence demonstrates that the Yegua is in fact the uppermost aquifer, and so the permit must be denied.

B. Adoption of Applicant's Belatedly Submitted Groundwater Monitoring Plan Violates Applicable Procedural Statutes, Rules and Policies

Under the Texas Administrative Procedure Act, parties are to be afforded a fair opportunity to respond to the evidence presented.[2] The application materials, and direct case, presented by Applicant raised the issue of whether Applicant qualified for an exemption to the groundwater monitoring requirements. Applicant had never presented evidence regarding what type of groundwater monitoring plan it would propose for the site if this exemption did not apply. Despite the total lack of any notice that Applicant

[2] Tex. Gov't Code 2001.051.

would propose a groundwater monitoring plan (and despite the fact that Applicant had ample opportunity to revise its application to include a groundwater monitoring plan before the commencement of the hearing on the merits), Applicant presented a proposed sampling plan and limited information on the proposed location for monitoring wells. Protestants were provided no opportunity to conduct discovery regarding this information, and were allowed no opportunity to present their own expert materials regarding the groundwater monitoring elements submitted by Applicant.

Both the APA and the principles of due process require that parties to an administrative proceeding be accorded a full and fair hearing on disputed fact issues. Tex. Gov't Code § 2001.051; *City of Corpus Christi v. Public Util. Comm'n*, 51 S.W.3d 231, 262 (Tex. 2001) (explaining that due process does not require the full procedural framework of a civil trial, but it does require the basics of an adversarial process). Consideration of Applicant's belatedly submitted application materials violates the APA and Protestants' due process rights. Considering the multiple opportunities Applicant has had to correct deficiencies in its application, Applicant should not now be allowed to add a significant and substantial provision to its permit—the provision that would allegedly protect groundwater—at this late date without an adequate opportunity to examine and contest the information that forms the basis for this provision.

Consideration of the groundwater monitoring system elements presented by Applicant also defeats the public notice process established by the Commission. The rules establish a process by which an Applicant provides a proposal, the public provides comments to the Executive Director on the proposal, and the ED evaluates the proposal

in consideration of the public comments. Applicant has sought to eliminate both the public and the ED from this process. Throughout the comment period, the public knew only of applicant's claim that it was not required to have a groundwater monitoring system. As discussed above, the inclusion of a groundwater monitoring system would have required the addition of substantial materials to the application, far beyond what Applicant has provided during the hearing. By proposing a groundwater monitoring plan at the last minute, Applicant is denying the public the opportunity to provide comments to the agency staff on the proposal, and is denying the State Office of Administrative Hearings the benefit of an evaluation of Applicant's proposal by TCEQ's technical staff.

V. PRAYER

Applicant has not met its burden of proof. Therefore, Protestant respectfully prays for recommendation of denial of the application filed by Regional Land Management Services, Ltd. for Permit No. MSW-2286.

Respectfully submitted,

Lowerre, Frederick, Perales,
Allmon & Rockwell
707 Rio Grande, Suite 200
Austin, Texas 78701
Phone: (512) 469-6000
Facsimile: (512) 482-9346

By: Marisa Perales

Marisa Perales

CERTIFICATE OF SERVICE

By my signature below, I certify that on the 9th day of October, 2008, an original and eleven copies of the forgoing document was served upon the Chief Clerk at the TCEQ and a true and correct copy was served upon each of the parties identified below by facsimile, first class mail, or hand-delivery.

Marisa Perales

Marisa Perales

Jim Allison
Eric Magee
Allison Bass & Associates, LLP
402 West 12th St.
Austin, Texas 78040
Fax: 512/480-0902

Brent Ryan
McElroy, Sullivan & Miller
1201 Spyglass Dr., Suite 200
Austin, Texas 78746
Fax: 512/327-6566

Garrett Arthur
Office of Public Interest Counsel
TCEQ – MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Fax: 512/239-6377

Helen Currie Foster
John B. McFarland
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Ave., Suite 2200
Austin, Texas 78701
Fax: 512/480-5881

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