

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

DEC 18 2006

CHIEF CLERK'S OFFICE

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December 18, 2006

The Honorable Carol Wood, ALJ  
State Office of Administrative Hearings  
P.O. Box 13025  
Austin, Texas 78711-3025

Via hand-delivery

Ms. LaDonna Castañuela  
Chief Clerk  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711

Via hand-delivery

Re: *In the matter of the application of Far Hills Utility District for Permit No. WQ0014555001 before the State Office of Administrative Hearings, TCEQ Docket No. 2005-1899-MWD and SOAH Docket No. 582-06-0568.*

Dear Ms. Castañuela and Honorable Judge Wood,

Enclosed please find Protestant Capps Concerned Citizens' Exceptions to the Proposal for Decision in the above-titled matter. Please call if you have any questions.

Sincerely,



Eric Allmon  
LOWERRE & FREDERICK  
Attorneys for Capps Concerned Citizens

Enclosure  
cc: Service List



TCEQ DOCKET NO. 2005-1899-MWD  
SOAH DOCKET NO. 582-06-0568

2005 DEC 18 PM 4:36

CHIEF CLERK'S OFFICE

IN THE MATTER OF THE § BEFORE THE TEXAS  
APPLICATION OF FAR HILLS § COMMISSION ON  
UTILITY DISTRICT FOR PERMIT § ENVIRONMENTAL QUALITY  
NO. WQ0014555001 §

**CAPPS CONCERNED CITIZENS' EXCEPTIONS TO THE PROPOSAL FOR  
DECISION**

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

In the case of the Application of Far Hills Utility District for Permit No.  
WQ0014555001, Protestant Capps Concerned Citizens (Capps) comes now, and files  
this, its Exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision.

**I. SUMMARY**

Far Hills Utility District (Applicant, or Far Hills) has applied to TCEQ for a new  
wastewater treatment plant to discharge 0.5 million gallons per day (MGD) into a shallow  
cove of Lake Conroe.<sup>1</sup> Instead of using land within the extensive area already  
encompassed by the district as a location for the plant, Far Hills has selected property  
owned by Roy Zboyan, a member of Capps, that is located outside of the District  
boundaries as the site for this plant, and is pursuing condemnation proceedings for this  
purpose.<sup>2</sup> In response to takings, such as this, by public entities for private gain, the  
Texas Legislature has since passed legislation to forbid precisely this type of  
condemnation; however, Applicant's action to take Roy Zboyan's land was instituted

<sup>1</sup> Ex. A-1, A00309, Ex. P-3, p. 38, l. 38 - p. 39, l. 7.

<sup>2</sup> Ex. A-4, Ex. 3 thereto (A00570); Ex. A-5, A00625, Ex. A-4, A00560 - 00561. Ex. A-4, A00588-A00604;  
Protestant sought to conduct discovery regarding other sites available for the plant within Far Hills' own  
boundaries but which Far Hills has opted not to use due to the private economic interest of the developers  
that are the source of the wastewater to be treated. The ALJ prohibited discovery and evidence on the  
issue. ALJ's Order Nos. 3 & 4.

prior to the effective date of the legislation.<sup>3</sup> The proposed site is immediately adjacent to a tributary of Lake Conroe, and entirely located within 1000 feet of Lake Conroe itself.<sup>4</sup> In newsletters, Applicant itself has described the proposed site as “low and swampy.”<sup>5</sup>

Capps agrees with the ALJ’s findings that Applicant has failed to meet its burden of proof to demonstrate that issuance of the permit is consistent with the state policy of regionalization, and agrees with the ALJ’s findings that Applicant has proposed to locate wastewater treatment plant units in wetlands. Capps disagrees with the ALJ that other issues raised during the hearing, with regard to which significant evidence and argument were provided, are properly considered “minor.”

## II. STANDARDS OF REVIEW

The Commission’s review of the Proposal for Decision in this case is governed by TEX. HEALTH & SAFETY CODE § 361.0832. That section provides that in considering an ALJ’s proposal for decision:

(c) The commission may overturn an underlying finding of fact that serves as the basis for a decision in a contested case only if the commission finds that the finding was not supported by the great weight of the evidence.

(d) The commission may overturn a conclusion of law in a contested case only on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules.

(e) If a decision in a contested case involves an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgment of the commission by law, the commission may reject a proposal for decision as to the ultimate finding for reasons of policy only.

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<sup>3</sup> House Bill 1208, 79<sup>th</sup> Texas Regular Legislative Session, promulgating TEX. WATER CODE § 54.209.

<sup>4</sup> Ex. A-7, A00946.

<sup>5</sup> See, e.g., Ex. P-14, p. 2.

The Austin Court of Appeals, in *Hunter Industrial Facilities, Inc. v. Texas Natural Resource Conservation Commission, et al.*, 910 S.W.2d 96, 102 (Tex. App. – Austin, 1995) examined this statute. The court found that through subsection (c) the Legislature intended to restrict TCEQ’s discretion to reject an ALJ’s underlying findings of fact, so that it can not do so simply because it would have reached a different conclusion.<sup>6</sup> Furthermore, a conclusion of law is “clearly erroneous,” for purposes of subsection (d), “when the reviewing body is left with the definite and firm conviction that a mistake has been committed.”<sup>7</sup> With regard to the ultimate findings of an ALJ, the Austin Court of Appeals in the same case found that subsection (e) is to be read in combination with subsections (c) and (d), so that the Commission may only reverse an ALJ’s finding on an ultimate finding of compliance if that finding: (1) is not supported by the underlying facts, (2) is clearly erroneous, or (3) contravenes the Commission’s policies.<sup>8</sup>

### III. REGIONALIZATION

#### A. Applicant Failed to Demonstrate a Need for the Facility.

The ALJ’s finding that no need exists for the facility is the only reasonable conclusion that can be reached considering the evidence in the record. A nearby service provider, Montgomery County Utility District No. 2 (MCUD2) is already providing wastewater treatment for the same area that would be served by the proposed plant. In response to TCEQ’s standard questionnaire sent to MCUD2 by Applicant, MCUD2

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<sup>6</sup> *Hunter Industrial Facilities, Inc. v. Texas Natural Resource Conservation Commission, et al.*, 910 S.W.2d 96, 102 (Tex. App. – Austin, 1995, writ denied).

<sup>7</sup> *Hunter Industrial Facilities, Inc. v. Texas Natural Resource Conservation Commission, et al.*, 910 S.W.2d 96, 102 (Tex. App. – Austin, 1995, writ denied). (citation and internal quotations omitted). See also *Southwest Public Service Company et al. v. Public Utility Commission of Texas, et al.*, 962 S.W.2d 207, 213-214 (Tex. App. – Austin, 1998, pet. denied).

<sup>8</sup> *Hunter* at 102.

indicated its willingness to continue to accept and treat this wastewater.<sup>9</sup> The Executive Director (ED) was denied the ability to evaluate this response to the TCEQ questionnaire, since Applicant never shared this response with ED staff.<sup>10</sup>

After submitting its application to TCEQ, Applicant negotiated an agreement that would allow it to eventually withdraw from the existing plant, but the President of the Board of MCUD2 testified that he did not see that such a change was needed.<sup>11</sup> The existing agreement between Applicant and MCUD2 extends service to 2012, and MCUD2 has never indicated that it will refuse service beyond that date.<sup>12</sup> Considering this availability of an alternate service provider, there is no need for the facility.

B. The ALJ's Regionalization Decision is Consistent With TCEQ Policy and Precedent.

Applicant has repeatedly, and erroneously, alleged that TCEQ cannot consider regionalization when deciding whether to issue a water quality permit. A legislatively mandated preference for regionalization is embodied in TEX. WATER CODE § 26.003, and TEX. WATER CODE § 26.082 explicitly confirms TCEQ's authority to implement this legislative imperative:

In considering the issuance, amendment, or renewal of a permit to discharge waste, **the commission may deny** or alter the terms and conditions of **the proposed permit**, amendment, or renewal **based on consideration of need**, including the expected volume and quality of the influent and the availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order pursuant to provisions of this subchapter. This section is expressly directed to the control and treatment of conventional pollutants normally found in domestic wastewater.

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<sup>9</sup> Ex. P-5, Exhibit 1 thereto.

<sup>10</sup> Ex. A-1, A00055, l. 7 – p. A00056, l. 10; the blank form that was provided to the ED by Applicant, instead of the actual response from MCUD2, may be found at Ex. A-5, p. A00771.

<sup>11</sup> Ex. P-5, p. 21, l. 3.

<sup>12</sup> Ex. P-5, p. 7, l. 18-20.

Applicant's assertion that TCEQ may not deny a permit based on a finding that no need exists for the facility is wholly inconsistent with both the governing law and prior consideration of the issue by TCEQ.

TCEQ precedent confirms this authority. In the Matter of the Consideration of an Application by Lake Travis II Investments LP for Permit No. 14257-001, TCEQ Docket No. 2002-1378-MWD, TCEQ denied a permit application based on similar considerations of the failure of an applicant to show a need for a wastewater treatment facility.<sup>13</sup> Lake Travis II Investments, LP, had submitted an application to TCEQ for a surface irrigation permit in Travis County.<sup>14</sup> Evidence in the record revealed that the planned development was within an area where Travis County Water Control and Improvement District No. 17 planned to extend service.<sup>15</sup> Considering this availability of an alternate service provider, TCEQ determined that no need for the proposed facility existed, and denied the permit application.<sup>16</sup> A significant difference between *Lake Travis II* and this case is that in *Lake Travis II*, no existing infrastructure was in place for the alternate utility to provide the service involved, while in this case that infrastructure has existed for 30 years. Thus, the basis for TCEQ to find a lack of need is even stronger in this case than it was in *Lake Travis II*.

The immediate application by Far Hills Utility District exemplifies the reasons the Texas Legislature has established a preference for regionalized wastewater service. Lake Conroe already accepts effluent from over 35 different permitted facilities, reflecting the

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<sup>13</sup> AN ORDER re: Application of Lake Travis II Investments, Ltd. for a Water Quality Land Application Permit; TCEQ Docket No. 2002-1378-MWD; SOAH Docket No. 582-03-2828, signed February 28, 2005. (Attachment A to this brief)

<sup>14</sup> Id. at Finding of Fact No. 7.

<sup>15</sup> Id. at Finding of Fact No. 14.

<sup>16</sup> Id.

potential for the proliferation of discharges into the lake.<sup>17</sup> To the extent wastewater flows can be combined, the regulatory burden on TCEQ is lessened. Additionally, larger plants are more likely to be better managed and maintained.<sup>18</sup> Furthermore, regionalization minimizes the intrusion on private property rights such as the condemnation being pursued in this case to facilitate construction of the proposed plant.

#### IV. WETLANDS

##### A. Applicant Failed to Demonstrate the Facility Would Not be Located In Wetlands.

The ALJ's conclusion that Applicant has proposed to locate wastewater treatment units within wetlands is the only conclusion consistent with the evidence in the record. For purposes of this case, the three-pronged analysis used by the Corps of Engineers to determine the status of a location provides a useful framework for evaluating the extent of wetlands on the site. This analysis involves determining whether hydrophytic vegetation, wetlands soils and wetlands hydrology exist at a location.

Both Applicant and Capps engaged an expert to evaluate the property for the existence of wetlands. Capps presented an analysis performed by Dr. John Jacob. Dr. Jacob has a Bachelors degree and a Masters degree, both in soil science, from Texas Tech University, with a Ph.D. in Pedology (the study of soils) from Texas A&M University.<sup>19</sup> He is a licensed Texas Geoscientist, and has *taught* the Wetland Delineation Certification Course for the Texas Engineering Extension Service on eight separate occasions.<sup>20</sup> After the disclosure of Dr. Jacob's wetlands evaluation report to Applicant, Applicant's expert Nick Laskowski performed a wetlands evaluation at the site.

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<sup>17</sup> Ex. P-7.

<sup>18</sup> Ex. P-3, p. 10, l. 7 – p. 11, l. 2.

<sup>19</sup> Attachment B.

<sup>20</sup> Attachment B.

Dr. Jacob visited the proposed site, and mapped the areas that are wetlands in consideration of the three-pronged analysis used by the Corps of Engineers. Agreeing with Dr. Jacob, the ALJ found that some of proposed treatment units will be located in wetlands.<sup>21</sup> Capps will also note that Applicant has not identified the proposed location of all the proposed treatment units, such as the chlorine contact chambers. Considering that all parties now agree that some portions of the site are wetlands, it is impossible for Applicant to meet its burden of proof on this issue without having disclosed each location on the site where it intends to locate a treatment plant unit.

B. The ALJ's Wetlands Decision is Consistent With TCEQ Policy and Precedent.

Applicant has repeatedly asserted that the Commission only considers wetlands that the Corps of Engineers considers to be "jurisdictional." Applicant's position is inconsistent with TCEQ precedent.

For instance, In the Matter of the Application of Tan Terra Environmental Services, Inc., L.L.C. for a Permit to Operate a Type I Municipal Solid Waste Facility (Permit No. MSW-2305); TCEQ Docket No. 2004-0743-MSW; SOAH Docket No. 582-05-0868 (*Tan Terra*), TCEQ referred a question to SOAH regarding whether wetlands existed within the proposed landfill footprint. A man-made drain owned by an irrigation district crossed the site, with waste disposal areas on each side of the drain. The ALJ noted that Applicant's expert testified that the Galveston Corps of Engineers' District Office had already classified the drain as *not* subject to USACE jurisdiction.<sup>22</sup> The ALJ recognized, however, that protestants' experts in that case testified that the drain

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<sup>21</sup> Ex. P-2-D; PFD at 16.

<sup>22</sup> See Proposal For Decision regarding Application of Tan Terra Environmental Services, Inc., for MSW Permit No. 2305, dated January 17, 2006, at p. 9. (The decision was made based on a prior version of Chapter 330, so some requirements have since moved to regulatory sections other than those cited by the ALJ).

contained hydric soils, wetlands hydrology, and hydrophytic vegetation.<sup>23</sup> Despite evidence that the Corps had already declared the area non-jurisdictional for the Corps' purposes, the ALJ found that the wetlands in the drain were still relevant for TCEQ permitting purposes, as they were subject to TCEQ oversight.<sup>24</sup>

When considering the ALJ's proposal for decision in *Tan Terra*, the Commission determined that the drain containing wetlands was outside the "footprint" of the landfill. For this reason, the Commission found that the ALJ's consideration of the wetlands in the drain was beyond the extent of the issues referred to SOAH. TCEQ consequently removed several of the ALJ's findings of fact with regard to wetlands in the drain.

TCEQ, however, did not disagree with the ALJ's conclusion that wetlands beyond federal jurisdiction are relevant for TCEQ permitting purposes. This conclusion remained relevant to TCEQ's ultimate determination that no wetlands existed within what it considered the landfill footprint. Thus, the order formally adopted by the Commission included a finding that, "Neither the Commission's nor the federal definition of wetlands limits their classification to only those waters designated as jurisdictional waters of the United States."<sup>25</sup> Applicant's approach to non-jurisdictional wetlands is directly contrary to this position recently adopted by the Commission.

## V. OTHER ISSUES

In addition to Applicant's failure to meet its burden of proof on issues of regionalization and wetlands, Applicant failed to meet its burden on several other issues.

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<sup>23</sup> Id. at pp. 9-10.

<sup>24</sup> Id. at p. 13.

<sup>25</sup> AN ORDER Regarding the Application by Tan Terra Environmental Services, Inc., L.L.C. for a Permit to Operate a Type I Municipal Solid Waste Facility (Permit No. MSW-2305); TCEQ Docket No. 2004-0743-MSW; SOAH Docket No. 582-05-0868. April 20, 2006. Finding of Fact No. 29 at p.5 (Attachment C)

Considering the extensive testimony, evidence and argument devoted to these issues, Capps disagrees with the ALJ's characterization of these issues as "minor."

#### A. Failure to Meet Water Quality Standards

Applicant failed to show that the discharge will not violate State Water Quality Standards. Chapter 307 of the TCEQ Rules establishes a water quality standard in Lake Conroe of 5.0 mg/L as a 24-hour mean value for dissolved oxygen. 30 TAC § 307.10(1), Appendix A. TCEQ Rules at 30 TAC § 307.4(h)(1) provide that dissolved oxygen concentrations must be maintained to support existing, designated and attainable aquatic life uses. Applicant presented no modeling to show this standard was met. The only evidence relied upon to meet the Applicant's burden of proof was modeling performed by the ED.

The ED performed modeling that showed the discharge would result in a dissolved oxygen level of 4.8 mg/l.<sup>26</sup> Capps expert Bruce Wiland used the same model, but applied what Applicant's expert agreed was a better means of evaluating the depth in the receiving waters, and adjusted the modeled cell-size to account for the geography of the receiving cove.<sup>27</sup> These corrections resulted in a corrected result of 3.46 mg/l, well below the standard of 5.0 mg/l.

In this way, the evidence demonstrates that (1) Applicant failed to present evidence to meet its burden with respect to the applicable water quality standard for dissolved oxygen; (2) the modeling performed by the ED does not support issuance of the permit; and (3) an accurate modeling of the impacts of the discharge yields results well in violation of the applicable water quality standard for dissolved oxygen.

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<sup>26</sup> Ex. A-2, p. A00411.

<sup>27</sup> Ex. P-4, at p. 6, l. 25 – p. 7, l. 41; Tr. V. 2, p. 394, l. 22 – p. 395, l. 24; Tr. p. 586, l. 10-17.

## B. Anti-Degradation

State law, and TCEQ rules, prohibit the significant degradation of water quality, and interference with the uses of receiving waters. TCEQ Anti-Degradation requirements are set forth at 30 TAC Section 307.5. At 30 TAC § 307.5(b)(1), the requirements of a “Tier 1 Review” are set forth. This provides that existing uses and water quality sufficient to protect those existing uses must be maintained. At 30 TAC § 307.5(b)(2), the requirements of a “Tier 2 Review” are set forth. This analysis prohibits the lowering of water quality by more than a “de minimus” amount, even if existing uses are preserved.

Applicant did not provide TCEQ with adequate information for the ED to perform an anti-degradation review. The evidentiary record in this case is void of evidence to establish any of the following: (1) the existing dissolved oxygen levels in the relevant portions of Lake Conroe; (2) the resulting level of dissolved oxygen in the relevant portions of Lake Conroe; (3) the change in dissolved oxygen that would result from the proposed discharge; or (4) what degree of change in dissolved oxygen would be considered “de minimus.” Considering that *none* of this information is known, TCEQ lacks the necessary evidence on which to base a finding that issuance of the permit will not result in degradation of the receiving waters.

## C. Odor Buffers

Generally, a 150 foot buffer zone to the nearest property line is required to surround all treatment plant units to address odor concerns. 30 TAC § 309.13(e)(1). The rules provide that under some situations, a permittee may meet the buffer zone by submitting sufficient evidence of legal restrictions prohibiting

residential structures within the part of the buffer zone not owned by the applicant. 30 TAC § 309.13(e)(3).

As noted by the ALJ, treatment plant units will consist of various apparatus including a lift station, a manual bar screen, and chlorine contact chambers. Applicant apparently ignored the need for a buffer distance around the on-site lift station. Applicant also has not disclosed the proposed location of the chlorine contact chambers. Without knowing the location of these units, TCEQ cannot find that an adequate buffer will surround them. Furthermore, Applicant relies on certain right-of-way as buffer zones, but it is not clear that residential construction is forbidden in these areas, and evidence in the record reflects that the rights-of-way may not even be owned by Montgomery County, as Applicant has asserted.

D. Failure to Demonstrate That the Effluent Will Not Cause Odor Interfering With Recreational Use of the Receiving Waters, As Required by Tex. Water Code § 26.030(a)

Where a wastewater discharge will occur into a recreational area, odors from not just the plant, but also the odors from the effluent once it is in the water, must be considered. Designated uses for Lake Conroe include Contact Recreation. 30 TAC § 307.10(1), Appendix A. At Texas Water Code § 26.030(a), the applicable statute provides:

In considering the issuance of a permit to discharge effluent into any body of water having an established recreational standard, *the commission shall consider any unpleasant odor quality of the effluent* and the possible adverse effect that it might have on the receiving body of water, and the commission may consider the odor as one of the elements of the water quality of the effluent.

The Commission has established water quality standards for Lake Conroe in consideration of its recreational use in combination with other uses. Thus, the requirement of Tex. Water Code § 26.030 that any unpleasant odor of the effluent be considered prior to issuance of a permit applies.

Yet, no analysis of the odor caused by the effluent in the receiving water was provided by Applicant, and none has been performed. The evidence shows that the effluent will be discharged at a depth as shallow as five feet for significant periods of time<sup>28</sup> into a receiving area with little mixing action, where water is likely to stagnate.<sup>29</sup> Applicant has not shown that the odor of this effluent discharge under such conditions will not have an adverse effect on the use of the receiving water in the area of the discharge for recreational purposes.

E. Applicant Has Not Demonstrated Compliance with Applicable Facility Design Requirements

Applicant's facility does not meet all design requirements of 30 TAC Chapter 317. Dissolved Oxygen concentrations of the influent have not been properly considered as required by 30 TAC § 317.4(a). Furthermore, the capacity of the aeration basins are not adequate to handle peak flow as required by 30 TAC § 317.4(g)(2), as confirmed by Applicant's witness Timothy Hardin:

Q: (Dickman) How about if one aerator in the final phase had to be taken out of service?

A Well, you might -- you want aeration basin --

Q -- aeration basin --

A You wouldn't be able to accommodate peak flow, but you'd get close.<sup>30</sup>

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<sup>28</sup> Ex. P-1, p. 4, l. 37-44.

<sup>29</sup> Ex. P-3, p8, l. 45-46, p.9, l. 1-9.

<sup>30</sup> Tr. p. 152, l. 5-10.

Upon further questioning, Mr. Hardin again confirmed the plant's lack of capacity:

Q: (Allmon) So let's go through that. What's the peak flow number that the permit allows?

A In Phase 1.

Q In Phase 2?

A In Phase 2?

Q Yeah.

A 1,042 gallons per minute for two hours.

Q And in your analysis what's the maximum flow quantity that an aeration basin -- one aeration basin can handle in Phase 2?

A It's not designed in that manner. I mean, it -- the closest I could -- the best I could tell you is that we would be -- we would be slightly overloaded in that condition with an aeration basin out of -- yes, out of service, yes.<sup>31</sup>

Similarly, the facility lacks adequate clarifier capacity, as required by 30 TAC § 317.4(a)(4). These design deficiencies were confirmed by Daryl Knowles, expert witness for Capps.<sup>32</sup> Moreover, Applicant's repeated assertions that it can accommodate half of the *design flow* with half of the units out of service<sup>33</sup> hardly demonstrates the ability to handle *peak flow* under emergency maintenance conditions as required by 30 TAC § 317.1(b)(6).

## V. CONCLUSION AND PRAYER

For these reasons, Protestant Capps Concerned Citizens respectfully prays that the Commission adopt the Proposal for Decision submitted by the ALJ, and deny the application by Far Hills Utility District for Permit No. WQ001455001.

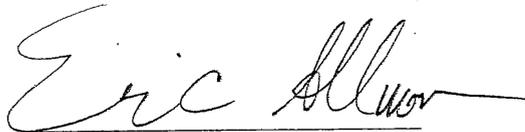
Respectfully submitted,

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<sup>31</sup> Tr. p. 155, l. 14 – p. 156, l. 3.

<sup>32</sup> Ex. P-3.

<sup>33</sup> Far Hills Utility District's Post-Hearing Reply Brief, p. 26.

A handwritten signature in cursive script that reads "Eric Allmon". The signature is written in black ink and is positioned above a thin horizontal line.

Eric Allmon  
State Bar No. 24031819  
Lowerre & Frederick  
44 East Ave, Suite 101  
Austin, TX 78701  
(512) 482-9345; (512) 482-9346 fax

Certificate of Service

I, Eric Allmon, hereby state that a true and correct copy of the foregoing **Protestant Capps Concerned Citizens' Exceptions to the Proposal for Decision** has been sent on this day, the 18<sup>th</sup> day of December, 2006, by U.S. first-class mail and/or facsimile transmission to those listed below.



Eric Allmon

For the Applicant:

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For SOAH:

The Honorable Carol Wood, ALJ  
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For the TCEQ Chief Clerk:

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Courtesy Copy For the Executive Director:

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CHIEF CLERK'S OFFICE

DEC 19 10 41 AM '06

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



THE STATE OF TEXAS  
COUNTY OF TRAVIS

I hereby certify that this is a true and correct copy of a  
Texas Commission on Environmental Quality document,  
which is filed in the permanent records of the Commission.  
Given under my hand and the seal of office on

*LaDonna Castanuela* DEC 18 2006

LaDonna Castanuela, Chief Clerk  
Texas Commission on Environmental Quality

**AN ORDER** Application of Lake Travis II Investments, Ltd. for a  
Water Quality Land Application Permit; TCEQ  
Docket No. 2002-1378-MWD; SOAH Docket No.  
582-03-2828

On January 26, 2005, the Texas Commission on Environmental Quality ("Commission or TCEQ") considered the Application for a Texas Land Application Permit by Lake Travis II Investments, Ltd., ("Applicant"). The Application was presented to the Commission with a Proposal for Decision ("PFD") by an Administrative Law Judge ("ALJ") with the State Office of Administrative Hearings ("SOAH").

After considering the ALJ's PFD and the evidence and arguments presented, the Commission determined to overturn the ALJ's decision and deny the Application for a Texas Land Application Permit by Lake Travis II Investments, Ltd. The Commission determined that denial of the application is appropriate, because issuance of the proposed permit would not be in furtherance of the Texas Water Code's annunciation of the State policy for promoting regionalization found at TEX. WATER CODE ANN. § 26.0282. After considering the ALJ's PFD and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

**Attachment A**

## FINDINGS OF FACT

### Procedural History and Parties

1. Applicant, a limited partnership, filed the Application on January 22, 2001, and the Executive Director ("E. D.") declared it administratively complete on March 6, 2001.
2. By order issued February 26, 2003, the Commission referred this case to SOAH for a contested case hearing.
3. The preliminary hearing was conducted on June 30, 2003, at SOAH offices, 300 West Fifteenth, Austin, Texas.
4. The hearing for the case was held October 29, 30, and 31, and November 3, 4, 5, and 10, 2003. The record closed on December 12, 2003, after responsive briefs were filed.
5. The following participated as parties in the contested case hearing, represented by the persons listed:  
  
Applicant – John J. Carlton and Casey L. Ware, attorneys;  
Travis County Water Control and Improvement District No. 17 ("WCID") – Lauren Kalisek, attorney;  
Highland Club Village Neighborhood Association and certain individual members – Bruce and Gina Cook;  
Windmill Bluff Estates Homeowners Association and certain individual members – Janet Stockard, attorney;  
The Lauderdale Family – Jerry and Mary Lauderdale; and  
The Office of Public Interest Counsel ("OPIC") – Eric Allmon, attorney.
6. Prior to the hearing, the E. D. prepared a draft permit for this Application.
7. The wastewater treatment facilities and disposal site were proposed to be located approximately 0.8 miles west of Mansfield Dam and 0.5 miles south of Ranch Road 620 in Travis County, Texas.

### **Notice Requirements**

8. On September 10, 2001, the Chief Clerk sent a combined notice of application and preliminary decision and notice of public meeting to all persons on the mailing list submitted with the Application.
9. On April 18, 2003, the Chief Clerk mailed notice of the hearing to, among others, all persons on the mailing list submitted with the Application.
10. Applicant published the notice of receipt of application and intent to obtain a water quality permit (March 13, 2001), the combined notice of application and preliminary decision and notice of public meeting (September 13, 2001), and the notice of hearing (May 9, 2003).
11. At least from September 19, 2001, until the application was referred to SOAH, a copy of the Application was made publicly available at the Lake Travis Community Library in Travis County, Texas.
12. On or before March 13, 2001, the Application was made publicly available at the TCEQ offices in Travis County, Texas.

### **Regionalization**

13. Approximately 396 units in the proposed development will generate 96,000 gallons per day of domestic sewage that must be treated and disposed.
14. There is a regional entity, WCID, that holds a CCN to serve the area, and regional service is proposed for this area.

### **Transcription Costs**

15. Both WCID and Applicant have financial resources to pay for the transcript of the hearing in this case.

16. Protestants other than WCID do not have financial resources with which to pay for the transcript.
17. Applicant requested the transcript.
18. Only the Applicant, WCID, and OPIC had access to the transcript when preparing closing briefs.

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case, pursuant to TEX. WATER CODE ANN. ch. 26.
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. The Application for a Land Application Permit was processed and the proceeding described in this Order was conducted in accordance with applicable law and regulations of the Commission, including: 30 TAC § 80.1 *et seq.*, 1 TAC § 155.1 *et seq.*, and TEX. WATER CODE ANN. ch. 26.
4. Issuance of the proposed permit would not be in furtherance of the Texas Water Code's annunciation of the State policy for promoting regionalization found at TEX. WATER CODE ANN. § 26.0282.

### EXPLANATION OF CHANGES

The following findings of fact (FOF) and conclusions of law (COL) were omitted, because they were unnecessary to the Commission's determination that denial of the Application is

appropriate based on the issue of regionalization: FOF Nos. 13-39 relating to Surface Water Impacts; FOF Nos. 40-42 relating to Groundwater Impacts; FOF Nos. 43-49 relating to Siting Requirements; FOF Nos. 50-53 relating to Sludge Management; FOF Nos. 54-56 relating to Emergency Provisions; FOF Nos. 58-60 relating to Regionalization; FOF Nos. 61-63 relating to Nuisance Odors; FOF No. 64 relating to Compliance History; FOF Nos. 65-70 relating to the Bond; FOF Nos. 75 and 76 relating to Miscellaneous Changes to the Draft Permit; and COL No. 5(A)-(G). The Order was then re-numbered accordingly.

FOF No. 7 was amended to clarify that the facility was proposed to be located in the location described.

New FOF No. 14 was added to reflect the fact that WCID, a regional provider, holds a CCN for the service area proposed in the Application.

COL No. 4 and Ordering Provision No. 1 were amended to reflect that the ALJ's ultimate recommendation of "grant" was changed to "deny," based on the issue of regionalization.

COL No. 5(H) was re-numbered to Ordering Provision No. 6.

Ordering Provision No. 3 was amended to remove references to the "attached permit," since the Application was denied.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS ON LAW, THAT:

1. The Application of Lake Travis II Investments, Ltd. is hereby DENIED.

2. All other motions, requests for entry of specific findings of fact or conclusions of law submitted by any party and any other request for general or specific relief not expressly granted or adopted herein are denied for want of merit.
3. The Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to all parties.
4. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of such shall not affect the validity of the remaining portions of the Order.
5. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOVT. CODE ANN. § 2001.144.
6. Applicant will pay 85% of the transcript costs, and WCID will pay the remainder.

ISSUED: FEB 28 2005

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

  
Kathleen Hartnett White, Chairman

**JOHN S. JACOB**  
Director, Texas Coastal Watershed Program  
Associate Professor, Department of Recreation, Park and Tourism Sciences  
Texas Sea Grant Coastal Community Development Specialist  
Extension Environmental Quality Specialist  
Texas Cooperative Extension and Texas Sea Grant  
The Texas A&M University System  
(281) 218-0565 (W)  
(281) 461-6099 (H)  
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jjacob@tamu.edu

#### PROFESSIONAL INTERESTS

Watershed Management, Sustainable Urban Development, Wetlands, Runoff Pollution,  
Natural Resource Mapping and Assessment, Soil Science

#### EMPLOYMENT AND CONSULTING RECORD

- 1997-  
prsnt **Extension Environmental Quality Specialist and Coastal Community Development Specialist, Texas A&M Sea Grant and Texas Cooperative Extension (Dept. of Recreation, Parks, and Tourism Sciences).** Coastal Specialist for water quality, environmental issues, and coastal community development. Direct the Texas Coastal Watershed Program to provide education on the impacts of land use on water quality for local governments. Over \$3 million in grant funds. Direct Watersmart landscaping program for Texas Gulf Coast. Coordinate watershed partnerships. Application of geospatial technology for natural resource management and community development. Provide leadership statewide on soil and site evaluation issues for the on-site sewage industry. Direct a staff of 5-7 working on issues of urban sustainability.
- 1996 **Senior Environmental Scientist, Fugro International, Inc. Houston, Texas.** Environmental impact assessments, oil and gas operations in South America. Performed base line assessments of tropical rainforest environments, including soils and land use, biological inventories, and water quality assessments. Impact evaluation and ranking, environmental management and mitigation plans. Major field work in Bolivia and Ecuador in Upper Amazon basin. Wetland Delineation and Permitting on Texas Gulf Coast and East Texas. Design of wetland mitigation projects.
- 1995 **Research Fellow, Environmental Institute of Houston, University of Houston-Clear Lake.** Taught graduate course in Wetland Geoecology. Environmental short courses in Wetlands and Environmental Site Assessment.
- 1994-  
1995 **Assistant Training Specialist, Texas Engineering Extension Service.** Responsible for environmental short courses. Developed courses on wetland delineation and soil and groundwater remediation. Developed geology and soil modules for environmental site

assessment courses. Taught chemistry and toxicology portions of hazardous materials courses. Development of environmental contacts in Mexico. Established working relationship with Instituto Tecnológico y de Estudios Superiores Monterrey ("Monterrey Tech").

- 1987-1994 **Research Associate**, Texas A&M University. Supervisor, Soil Characterization Laboratory. Responsible for analyses in support of Texas soil survey and pedology research group. Supervision of graduate-student lab internships. Director, Cobweb Swamp Project (funded by National Geographic Society). Coordination of a multidisciplinary pedo-ecological reconstruction of a Maya wetland. **Teaching:** Introductory soil science laboratory.
- 1990-prsnt **Independent Consultant**. Gulf Coast wetlands and habitats. Extensive use of geographic information systems and remotely sensed data. Preparation of soil maps and reports. Subcontracted to several consulting firms in the Houston area, working on at least 100 wetland projects, from a few acres to over 5,000 acres each.
- 1991-1993 **Staff Geoarchaeologist**. New Rio Hondo Archaeology Project, northern Belize. Reconstruction of past environments (Holocene) and investigation of ancient Maya wetland agriculture.
- 1993-Prsnt **Staff Geoarchaeologist**. Regional Archaeological Investigation of the Northern Peten, Guatemala (RAINPEG) Project. Investigation of past and present environments (Quaternary) in the central Maya lowlands. Investigation of Maya adaptations to wetland environments.
- 1992 **Independent Consultant**. Contracted by the International Union for the Conservation of Nature to evaluate soils and hydrology for a rehabilitation of indigenous agrotechnology (ancient raised fields in wetlands) in Peten, Guatemala.
- 1991 **Forensic Pedologist**. Evaluated soil samples on murder victim for District Attorney, San Diego, California. Identification of provenience of soil contributed to confession of accused.
- 1989 **Independent Consultant**. Soil resource investigation of Yalbac Ranch, Belize. Evaluation of soils and landscapes. Interpretations for citrus and vegetables.
- 1987-1992 **Independent Consultant**. Soil archaeological investigations in conjunction with the Archeological Research Laboratory, Texas A&M University. Evaluation of site formation parameters and reconstruction of site evolution. Research of paleoclimatic signatures in soil organic matter and carbonates. Research of soil chemical signatures (e.g., phosphorous accumulations) of human influence.
- 1983- **Soil Scientist**, USDA-Soil Conservation Service. Soil survey in Victoria and

- 1987 Brazos counties, Texas. Competent in all phases of mapping, classification, and correlation. Identification of geomorphic surfaces and geologic framework. Identification of major vegetative communities. Quantification of map unit composition: transects and statistical analysis. Establishment of several new soil series.
- 1979-1983 **Student Worker and Graduate Research Assistant.** Texas Tech University, Lubbock, Texas. Advanced chemical and mineralogical analyses of soils. Research towards completion of Masters degree. Research of mineral stability in volcanic soils of the Texas Trans-Pecos.
- 1973-1979 **Staff Sergeant,** United States Air Force, Reese AFB, Lubbock, Texas. Managerial and supply experience in dental clinic. Coordination of preventive dentistry programs for public. Supervised up to 5 subordinates.
- 1971-1973 **Field Promoter,** Alma de Centroamerica, Guatemala City, Guatemala. Principal field promoter in highland strawberry project. Provided technical assistance on cultivation and irrigation. Formation of producer cooperatives. Development of market strategies.

#### EDUCATION

- 1992 **Ph.D.** Pedology, Texas A&M University. Dissertation: "The Agroecological Evolution of Cobweb Swamp, Belize."
- 1984 **M.S.** Soil Science (Pedology and Mineralogy), Texas Tech University. Thesis: "Persistence of a Zeolite in Tuffaceous Soils of the Texas Trans-Pecos."
- 1981 **B.S.** Soil Science, Texas Tech University.

#### FORMAL TEACHING EXPERIENCE

- Wetlands: Process and Function.* Lecture for Texas Master Naturalists.
- Urban Growth: Environmental and Quality of Life Issues.* Lecture for Texas Master Naturalists and local citizens and local officials.
- Web-Based Soil and Site Evaluation Basic Introduction.* 8-hr CEU credit course for the Texas On-site Sewage Facility program (TCEQ).
- Soil and Site Evaluation:* One-day course, taught at least 10 times, TAEX, 1997-2001.
- The Geoecology of Wetlands:* 3-hour graduate course, taught 3 semesters (University of Houston - Clear Lake, 1995 to present).
- Introductory Soil Science:* 1-hour laboratory undergraduate course, taught 1 semester (Texas A&M University).
- Wetland Delineation Certification Course:* 40-hour short course, taught 8 times (Texas Engineering Extension Service and University of Houston - Clear Lake).
- Environmental Site Assessment, Phase I (Investigation):* 30-hour short course, taught 3 times (Texas Engineering Extension Service) 1993-1995.
- Environmental Site Assessment, Phase II (Sampling):* 30-hour short course, taught 5 times (Texas Engineering Extension Service) 1993-1995.

### PERSONAL

Born April 14, 1953, Utah. Married. Bilingual (Spanish-English). High school in Guatemala (Liceo Javier).

### PROFESSIONAL LICENSES AND AFFILIATIONS

Professional Geoscientist, State of Texas License No. 1423; Professional Wetland Scientist, No. 176, Society of Wetland Scientists. Member: Society of Wetland Scientists, American Planning Association, American Water Resources Association, Congress for the New Urbanism, Urban Land Institute.

### GRANT HISTORY

- 1990 \$24,000. National Geographic Society #4274-90. **Agroecological Evolution of Cobweb Swamp, Belize.** (Principal Investigator).
- 1998 \$350,000. Environmental Protection Agency and Texas State Soil and Water Conservation Board. **Clean Water for Armand Bayou: Runoff Pollution Education and Abatement.**
- 1998 \$25,000. Texas General Land Office. Coastal Management Program. **Guidebook for Texas Coastal Wetlands.**
- 1999 \$15,000. Texas Natural Resource Conservation Commission. **A Synthetic Literature Review of Soil Water Tables as They relate to On-Site Sewage Systems.**
- 2000 \$83,000. Texas On-Site Wastewater Treatment Council. **Synoptic Maps of Shallow Groundwater in Montgomery County, TX.**
- 2000 \$34,000. Galveston Bay Estuary Program. **Neighborhood conservation landscaping.**
- 2000 \$44,000. Galveston Bay Estuary Program. **Wetland Conservation Map for Clear Creek Watershed.**
- 2001 \$120,000. Galveston Bay Estuary Program. **Urban Wetlands to Treat Stormwater Runoff.**
- 2002 \$80,000. Texas General Land Office. **"No La Riegues" water conservation campaign in Spanish.**
- 2002 \$60,000. Texas General Land Office. **Armand Bayou Watershed Working Group coordinator.**
- 2002 \$39,000. Galveston Bay Estuary Program. **Texas Coastal Wetlands Web Site.**
- 2002 \$118,000. Texas General Land Office. **Non-Point Education for Municipal Officials (NEMO) startup grant for Texas**
- 2002 \$75,000. National Oceanic and Atmospheric Administration (NOAA). **Texas Coastal Watershed Program startup grant (companion to NEMO).**
- 2002 \$150,000. Houston Endowment. **Watersmart Landscaping for Houston.**
- 2003 \$100,000. Galveston Bay Estuary Program. **Mapping of Wetland Loss in the Lower Galveston Bay Watershed.**
- 2004 \$50,000. Texas General Land Office, Coastal Management Program. **Watersmart Landscaping Demonstrations for the Upper Gulf Coast.**
- 2004 \$80,000. Texas General Land Office. **La Cuenca Cuenta: Hispanic watershed**

- outreach in the East End Barrio of Houston.
- 2004 \$200,000. Texas Commission on Environmental Quality. Arroyo Colorado Water Quality Restoration Plan
- 2005 \$125,000. Galveston Bay Estuary Program. Urban Watershed Education.
- 2006 \$180,000. Houston Endowment. Watersmart Landscaping for Houston: the Habitat Highway.

## PUBLICATIONS

### *Refereed Journal Articles*

- Hansen, R.D., S. Bozarth, J. Jacob, D. Wahl, T. Schreiner. 2002. Climatic and Environmental Variability in the Rise of Maya Civilization: A Preliminary Perspective from Northern Peten. *Ancient Mesoamerica*, 13:273-295.
- Nordt, L.C., T.W. Boutton, J.S. Jacob, R.D. Mandel. 2002. C<sub>4</sub> plant productivity and climate-CO<sub>2</sub> variations in South-Central Texas during the Late Quaternary. *Quaternary Research* 58:182-188.
- Jacob, J.S. and C.T. Hallmark. 1996. Holocene stratigraphy of Cobweb Swamp, a Maya Wetland in Northern Belize. *Geological Society of America Bulletin* 108: 883-891
- Jacob, J.S. 1995. Ancient wetland agricultural fields at Cobweb Swamp, Belize: Construction, chronology, and possible function. *Journal of Field Archaeology* 22:175-190
- Pohl, M.D., K.O. Pope, J.G. Jones, J.S. Jacob, D.R. Piperno, S.D. deFrance, D.L. Lentz, J.A. Gifford, M.E. Danforth, J.K. Josserand. 1996 **Early Agriculture in the Maya Lowlands**. *Latin American Antiquity*. 7:355-372.
- Alcala, J., J.S. Jacob, M. Machain-Castillo, and R. Neck. 1994. Holocene paleosalinity as inferred from the microfossil assemblage in a Maya wetland, Belize. *Quaternary Research* 41:121-130.
- Machain-Castillo, M.L. F.R. Gío-Argaez, J.A. Alcalá-Herrera, and J.S. Jacob. 1992. **Ostrácodos del Holoceno del norte de Belice y su interpretación paleoambiental**. *Revista de la Sociedad Mexicana de la Historia Natural*. 43:87-94.
- Jacob, J.S. and L.C Nordt. 1991. Soil and landscape evolution: A paradigm for pedology. *Soil Sci. Soc. Am. J.* 55:1194.
- Jacob, J.S. and B.L. Allen. 1990. Persistence of a zeolite in tuffaceous soils of the Texas Trans-Pecos. *Soil Sci. Soc. Am. J.* 54:549-554.

### *Books*

Moulton, D.S., and J.S. Jacob. 2000. **Texas Coastal Wetlands Guidebook**. Texas Sea Grant. 66p. TAMU-SG-00-605. College Station.

### *Refereed Book Chapters*

Jacob, J.S., R. Griffin, L.P. Wilding, W.L. Miller. 1997. **Aquerts and Aquertic soils: A querulous proposition**. In M. Vepraskas and S. Sprecher, eds., *Aquic Conditions and Hydric Soils: The Problem Soils*. Soil Science Society of America Special Publication No. 50. Madison, WI.

Pope, K.O., M.D. Pohl, and J.S. Jacob. 1996. **Formation of ancient Maya wetland fields: Natural and anthropogenic processes**. pp. 165-176 In: S. Fedick (ed.). *The Managed Mosaic: Ancient Maya Agriculture and Resource Use*. University of Utah Press, Salt Lake City.

Jacob, J.S. 1995. **Archaeological pedology in the Maya lowlands**. In M. Collins, ed., *Pedological perspectives in archeological research*. Soil Science Society of America. Soil Science Society of America Special Publication 44. Madison, WI.

Jacob, J.S. 1995. **Perspectivas edafológicas sobre la agricultura en las chinampas: observaciones iniciales**. In, T. Rojas Rabiela, ed., *Presente, pasado, y futuro de las chinampas*. Centro de Investigaciones y Estudios Superiores en Antropología Social, Mexico, D.F.

Nordt, L.C., L.P. Wilding, C.T. Hallmark, and J.S. Jacob. 1996. **Carbon isotope composition of soil carbonates and their use in studying pedogenesis**. In: S. Yamaski and T.L. Boutton (eds.), *Mass spectrometry of soils*. Marcel Dekker Inc.

Nordt, L.C., J.S. Jacob, and L.P. Wilding. 1991. **Map unit composition and quality assurance in soil survey**. In L.P. Wilding and M. Mossbauch (ed.). *Spatial variabilities of soils and landforms*. Soil Science Society of America Special Publication No. 28. Madison, WI.

### *Extension Bulletins and Pamphlets*

Jacob, J.S., and D. Crossley. 2005. **Choices for Growth: Quality of Life and the Natural Environment**. TAMU-SG-05-701.

Jacob, J.S. 2001. **WaterSmart Landscapes, Upper Gulf Coast**. Extension pamphlet. Texas Cooperative Extension.

Jacob, J.S. 2001. **Five Tips for Organic Lawn Care on the Upper Texas Gulf Coast**. Extension pamphlet. Texas Cooperative Extension.

Jacob, J.S. 2000. **Soil and site evaluation manual for on-site septic systems**. Manual for 8-hr short course. Texas Cooperative Extension.

Hollin, D, J. Massey, J. Jacob, and G. Treece. 1998. **Airing out the problem: Methods of**

reducing water quality impacts and fish kills in coastal marinas. Marine Advisory Bulletin. TAMU-SG-98-503, Texas Sea Grant College Program, Texas A&M University, College Station.

*Popular Articles*

- Jacob, J.S. 2004. **Transportation: Which Future is 2025 Plan For?** Houston Chronicle Op-Ed page, Wednesday, June 24. Article addressing transportation and land use issues.
- Jacob, J.S. 2004. **One suburbanite's view: Core of Houston must grow, prosper.** Houston Chronicle Op-Ed front page, Sunday, January 16. Article on the advantages of dense urban growth for environmental and urban quality of life issues.
- Jacob, J.S. 2001. **What we *can* control: Damage from the flooding.** Houston Chronicle Op-Ed page. Wednesday, June 20<sup>th</sup>. Article on the implications of Tropical Storm Allison for local patterns of development.
- Jacob, J.S. 1999. **Washington's answers won't do to save Houston's wetlands.** Houston Chronicle Outlook Section, front page. Sunday, August 22.

*Web-based Documents*

- Jacob, J.S., Lopez, R. 2004. **No La Riegues** Spanish language runoff pollution education site. ([www.Nolariegues.com](http://www.Nolariegues.com)).
- Vojta, M., Jacob, J.S., Lopez, R. 2004. **Armand Bayou Watershed Web Site** ([www.armandbayou.org](http://www.armandbayou.org)).
- Jacob, J.S., Lopez, R. 2003. **Texas Coastal Watershed Program Web Site** ([www.urban-nature.org](http://www.urban-nature.org))
- Jacob, J.S., Lopez, R. 2003. **Texas Coastal Wetlands Web Site** ([www.texaswetlands.org](http://www.texaswetlands.org))
- Jacob, J.S., LaChance, C. 2002. **Watersmart Web Site** ([www.watersmart.cc](http://www.watersmart.cc)).
- Jacob, J.S., Lopez, R., 2002. **Clear Creek Watershed Wetland Habitat Atlas.** Hard copy map and ARCIMS web site ([www.urban-nature.org](http://www.urban-nature.org)).

*Contract and Other Reports*

- Jacob, J.S. and Lopez, R. 2005. **Freshwater Wetland Loss in the Lower Galveston Bay Watershed.** Contract report to the Galveston Bay Estuary Program.
- Kim Crumpler, Ricardo Lopez, John Jacob, Rajavan Srinivasan. 2005. **Linking Land Use to Water Quality through Geospatial Technology: A Case Study for the Houston-Galveston Area.** Contract report to the Texas General Land Office.
- Mandel, R.D., Jacob, J.S., and Nordt, L.C. 2004. **Geoarchaeology of the Richard Beene Site.** *In:* Archaeological and Paleoecological Investigations at the Richard Beene Site 41BX831 -South Central Texas. A.V. Thoms and R.D. Mandel, eds. Reports of

Investigations No. 8. Center for Ecological Archaeology, Texas A&M University, College Station, Texas.

Jacob, J.S. 2002. **Analysis of Wetlands at the Bayport Site.** Two contract reports for the Galveston Bay Preservation and Conservation Association, Houston, Texas.

Jacob, J.S. 2002. **Pilot Study for Shallow Groundwater Maps for On-Site Evaluation.** Final Contract Report to the Texas On-Site Wastewater Treatment Research Council. Austin, TX.

Jacob, J.S. 2000. **Evaluation of shallow groundwater tables for on-site septic systems: A synthetic review of the literature.** Contract report to the Texas On-Site Wastewater Research Council.

Jacob, J.S. 1994. **Evidencia para cambio ambiental en Nakbé, Guatemala.** In VII Simposio de Investigaciones Arqueológicas en Guatemala. J.P Laporte and H.L. Escobedo, eds. pp 275-280. Ministerio de Cultura y Deportes, Instituto de Antropología e Historia. Asociación Tikal. Museo Nacional de Arqueología y Etnología, Guatemala.

Waters, M.W. and J.S. Jacob. 1991. **Geological and pedological investigations of Site 41HR273.** In H.B. Ensor and D. Carlson (eds.). Alabonson Road: Early ceramic period adaptation to the inland Coastal Prairie zone, Harris County, Southeast Texas. Report of Investigations No. 8. Archeological Research Laboratory. Texas A&M University, College Station, TX.

Jacob, J.S., and C.T. Hallmark. 1988. **Soil descriptions and analyses.** In Archaeological investigations at 41HR530 and 41HR608, Langham Creek, Addicks Reservoir, Harris Co. Texas. Report of Investigations No. 6. Archeological Research Laboratory, Texas A&M University, College Station, Texas.

### *Conferences Organized*

***Density by Design.*** May 2004. Co-Conveners: Houston-Galveston Area Council, Gulf Coast Institute of Houston. Sponsored by Main Street Coalition (Houston), Galveston Bay Estuary Program, and the Houston Chapter of the American Institute of Architects and the American Planning Association. Exploring the relationship between well-designed dense cities and environment and quality of life in Houston.

***A Watershed Event: Habitat, Flooding, and Development in Houston.*** November 2001. Cosponsored with Gulf Coast Institute, Galveston Bay Estuary Program. Exploring sustainable urban patterns for Houston's future.

## PROFESSIONAL PAPERS PRESENTED

*The New "Urban Grant": Imagining the Role of Extension in Developing Sustainable Cities.* Invited paper. New Partners for Smart Growth national conference. Miami, FL. January 2005.

*Smart Low Impact Development: Integrating Smart Growth and Low Impact Development.* Invited paper. Coastal Zone 05. New Orleans. July 2005

*Habitat and Runoff—the linkages.* Invited paper. State of the Bay Symposium. Houston. January 2005.

*The City by the Bay.* Invited paper. State of the Bay Symposium. Moody Gardens, Galveston, TX. January, 2003.

*The Nature of Coastal Cities: Patterns of Sustainable Development.* J.S. Jacob. Invited Paper. The Coastal Society. 18<sup>th</sup> International Conference, Galveston, Texas. May 2002.

*Reclaiming the Bayou City: Learning to Live in the Houston Gulf Coast Watersheds.* J.S. Jacob. A Watershed Event: Flooding, Development and Habitat on the Houston Gulf Coast. Houston, Texas, November, 2001.

*State of the Wetlands.* J.S. Jacob. Invited paper. State of the Bay Symposium. Moody Gardens, Galveston, TX. January, 2001

*Clean Water for Armand Bayou: A watershed partnership.* J.S. Jacob. State of the Bay Symposium (hosted annually by the Galveston Bay Estuary Program). Moody Gardens, Galveston, TX. January, 1999.

*Patterned grounds for dismissal: Hypothesis testing and ancient land use in Mesoamerica.* J.S. Jacob. Invited paper, Association of American Geographers annual meetings, Ft. Worth, Texas May, 1997.

*Evidencias para cambio ambiental en la cuenca Mirador, Petén, Guatemala.* J.S. Jacob. Invited paper, V Simposio de los Investigadores de la Cultura Maya. Universidad Autónoma de Campeche, Campeche, México. November 1995.

*Aquerts and aquertic soils: A querulous proposition.* J.S. Jacob, R. Griffin, W. Miller, and L. Wilding. Invited paper, special symposium on Problem Hydric Soils, Soil Science Society of America annual meetings, November 1994. Seattle, WA.

*$\delta^{13}C$  of paleosol organic carbon indicates vegetation and climate changes during the past 15,000 years in the Southern Great Plains.* Nordt, L.C., T.W., Boutton, J.S. Jacob, and R. Mandel. 1995 Annual Meeting, Ecological Society of America.

*Todorokite in manganese oxide nodules of a Guatemalan Vertisol.* J.B. Dixon, J.S. Jacob, and G.N. White. Soil Science Society of America annual meetings, November 1994. Seattle, WA.

*La evaluación de los impactos ambientales en operaciones petroleras.* J.S. Jacob. Universidad LaSalle Environmental Symposium for Pemex. Mexico City, November 1994.

*Archaeological pedology in the Maya lowlands.* J.S. Jacob. Invited paper, special

symposium on Pedological Perspectives in Archeological Research, Soil Science Society of America annual meetings, November 1993, Cincinnati, OH.

*Late Quaternary landscape evolution and paleoenvironments in the Medina River valley, South-Central Texas.* R.D. Mandel, L. Nordt, and J.S. Jacob. Association of American Geographers 91st Annual Meeting, Chicago IL, 1995.

*A Tropohemist in Belize: An 8000-yr record of paleosalinity in a Maya wetland.* J.S. Jacob and Javier Alcala. Soil Science Society of America annual meetings, November 1992. Minneapolis, MN.

*The Maya Clay: Late Classic sedimentation in wetlands of northern Belize.* J.S. Jacob. Society for American Archaeology, 1992 Annual Meetings, Pittsburgh, Pennsylvania.

*Agroecological evolution of Cobweb Swamp, Belize.* J.S. Jacob. International conference on ancient Maya agriculture and biological resource management. University of California at Riverside, August 1991.

*Holocene landscape evolution and the Maya at Colha, Belize.* J.S. Jacob. International Congress of Americanists, July 1991, New Orleans, LA.

*Cobweb Swamp: Stable isotope and microfossil reconstruction of a Holocene Maya Wetland.* J.S. Jacob and Javier Alcala. Geological Society of America annual meetings, San Diego, CA, 1991.

*Stable carbon isotope ratios of organic matter and carbonates from a paleosol in East-Central Texas.* J.S. Jacob, T.W. Boutton, and L.C. Nordt. Soil Science Society of America annual meetings, 1990, San Antonio, TX, and Ecological Society of America, 1991, San Antonio, Texas.

*Pedochemical cycling of sulfur in East-Central Texas.* J.S. Jacob. Soil Science Society of America annual meetings, 1989, Las Vegas, NV.

*Maya raised fields in the Cobweb Swamp Area, Belize: a pedoarchaeologic assessment.* J.S. Jacob. Poster presentation, SSSA meetings, 1987, Atlanta, GA; oral presentation, Society for American Archaeology, 1988, Phoenix, AZ, and Conference of Latin Americanist Geographers, 1989, Queretaro, Mexico.

*Gypsic horizons in soils of East-Central Texas.* J.S. Jacob. Soil Survey and Land Resource Workshop, 1987, TAMU, College Station, TX

*Pleistocene Colorado delta, Texas: Soils and geomorphology.* J.S. Jacob. Soil Science Society of America annual meetings, 1986, New Orleans, LA

*Probabilistic analysis of soil water tables.* J.S. Jacob and W. Miller. Professional Soil Scientist Association of Texas annual meeting, 1985, Beaumont, TX

*Persistence of a zeolite in tuffaceous soils, Trans-Pecos Texas.* J.S. Jacob and B.L. Allen. Soil Science Society of America annual meetings, 1983, Washington, D.C.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

THE STATE OF TEXAS  
COUNTY OF TRAVIS

I hereby certify that this is a true and correct copy of a Texas Commission on Environmental Quality document, which is filed in the permanent records of the Commission. Given under my hand and the seal of office on



*LaDonna Castanuela* JUL 12 2006  
LaDonna Castanuela, Chief Clerk  
Texas Commission on Environmental Quality

AN ORDER

Regarding the Application by Tan Terra Environmental Services, Inc., L.L.C., for a Permit to Operate a Type I Municipal Solid Waste Facility (Permit No. MSW-2305); TCEQ Docket No. 2004-0743-MSW; SOAH Docket No. 582-05-0868

On April 12, 2006, the Texas Commission on Environmental Quality ("Commission" or "TCEQ") considered the application of Tan Terra Environmental Services, Inc., ("Tan Terra or Applicant") for Permit No. MSW-2305 to authorize Applicant to operate a Type I Municipal Solid Waste Facility in Willacy County, Texas. Sarah G. Ramos, Administrative Law Judge ("ALJ") with the State Office of Administrative Hearings ("SOAH"), presented a Proposal for Decision on specified issues the Commission had referred to SOAH for consideration. After considering the application and the Proposal for Decision, the Commission adopts the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Procedural History

1. On January 14, 2003, Tan Terra Environmental Services, Inc. ("Tan Terra" or the "Applicant") applied to the Texas Commission on Environmental Quality ("TCEQ" or "Commission") for a Type I Municipal Solid Waste ("MSW") permit to construct and operate a new landfill facility in Willacy County, Texas, ("Facility" or "landfill") about seven miles west of Raymondville and one and a half miles northeast of Lasara, Texas.

Attachment C

2. On March 5, 2003, the Executive Director of the TCEQ ("ED") found the application to be administratively complete, and on March 12, 2003, Applicant had the Notice of Receipt of Application and Intent to Obtain Permit published in the *Raymondville Chronicle and Willacy County News*.
3. On April 29, 2003, the TCEQ conducted a public meeting on the permit in Raymondville.
4. On October 16, 2003, the ED completed technical review of the application and recommended issuance of the permit.
5. On November 26, 2003, the Notice of Application and Preliminary Decision was published in the *Raymondville Chronicle and Willacy County News*.
6. The comment period closed on December 29, 2003.
7. The ED's Response To Comment was filed on April 23, 2004, and mailed by the Office of the Chief Clerk on April 30, 2004.
8. The deadline to request a contested case hearing on this application was June 1, 2004.
9. The Commission received timely hearing requests on Tan Terra's application from Arnolde Cantu, Russell Burdette, and North Alamo Water Supply Corporation ("North Alamo"), but North Alamo subsequently withdrew its hearing request.
10. On August 11, 2004, the remaining hearing requests were considered by the Commission during its open meeting, and the Commission found that Arnolde Cantu and Russell Ray Burdette and family were affected persons.
11. The Commission referred designated issues to SOAH for a contested case hearing.

12. The following persons were admitted as parties: Applicant, Office of Public Interest Counsel ("OPIC"), Yolanda Cantu and Nora Garcia; Russell Ray and Monica Burdette ("Burdette"); Delta Lake Irrigation District ("the District"); Arnoldo and Angelita Cantu, *et. al.*; the Lasara Independent School District, including Juan M. Pena, father of a Lasara I.S.D. student; Garcia and Yturria family members and other mineral interest owners for the property on which the Applicant proposes to build the landfill ("Mineral Owners"); William J. Thomas; Mitchell H. Thomas; and Billie C. Pickard.
13. An evidentiary hearing on the application was held on July 25 through July 27, 2005, in Raymondville, Texas, and on October 13 and 14, 2005, in Austin, Texas.
14. The Facility would serve as a regional landfill for the Lower Rio Grande Valley area, including Willacy County and the surrounding counties.
15. The total acreage of the Facility would encompass 629.867 acres with a footprint of approximately 450 acres.
16. The landfill would have an above-grade aerial fill (height) of approximately 193 feet above ground level.
17. The landfill would have an estimated capacity of about 45 years and would accept waste at a rate of approximately 800 tons per day at opening with a potential increase to 2,300 tons per day.
18. The Facility would be authorized to accept municipal solid waste resulting from, or incidental to, municipal, community, residential, commercial, institutional, industrial and recreational activities (including garbage, putrescible wastes, rubbish, ashes, brush, street

cleanings, dead animals, abandoned automobiles, construction demolition debris, inert material, and special wastes that are properly identified).

19. The Facility property includes two separate disposal areas separated by the North Hargill Drain ("Drain"), an agricultural earthen drainage ditch.
20. The northern disposal area ("North Area") is a 396-acre municipal solid waste disposal area that would receive household, commercial, and non-hazardous industrial waste.
21. The North Area would be constructed sequentially in 10-acre cell blocks or sectors, each with a separate bottom liner and leachate collection system.
22. Once a Facility cell block, or sector, was filled to final grade, that sector would be covered with final cover and closed.
23. The southern disposal area ("South Area") consists of 48 acres and would receive only Type IV wastes which consists of construction and demolition wastes, yard waste, and other non-putrescible wastes.
24. The South Area would not have a leachate collection system or a liner other than that provided by the naturally-occurring clay soil.
25. The area surrounding the Facility is predominantly flat and used for agriculture, with some residential and commercial uses to the west, south, and east. There are ten residences and two businesses within a mile of the Facility.
26. A part of the Lower Rio Grande Valley National Wildlife Refuge ("the wildlife refuge"), the Teniente Tract, is located ½ mile northwest of the proposed Facility site.

### Wetlands May Exist Within the Proposed Waste Footprint

27. An MSW application permit must include sufficient information for the ED to make a reasonable determination regarding whether a proposed landfill footprint is located within wetlands. 30 TEX. ADMIN. CODE ("TAC") § 330.302(5).
28. Wetlands are those properties that have a predominance of hydric soils, and that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support (and under normal circumstances do support) the growth and regeneration of hydrophytic vegetation. 30 TAC § 330.128; 16 U.S.C. § 3801(a)(18).
29. Neither the Commission's nor the federal definition of wetlands limits their classification to only those waters designated as jurisdictional waters of the United States.
30. The term "wetland" does not include irrigated acreage used as farmland; a man-made wetland of less than one acre; or a man-made wetland for which construction or creation commenced on or after August 28, 1989, and which was not constructed with wetland creation as a stated objective, including, but not limited to, an impoundment made for the purpose of soil and water conservation which has been approved or requested by soil and water conservation districts. 30 TAC § 307.3(a)(69).
31. [Deleted.]
32. [Deleted.]
33. [Deleted.]
34. [Deleted.]

Applicant's Plan for Management of Surface Water Is Adequate

35. The Applicant was required to show natural drainage patterns would not be significantly altered by the landfill. 30 TAC §§ 330.55 and 330.56.
36. The Facility's surface water management plan ("SWMP") describes a system designed to keep contaminated surface water separated from uncontaminated stormwater run-off.
37. Contaminated water would be collected in the leachate collection system.
38. Leachate pumped from each cell would be transported to the leachate evaporation basin where it would be evaporated, solidified, and disposed of in the landfill or transported to a publicly-owned treatment plant for disposal.
39. Leachate would not be discharged directly to the surface water or groundwater.
40. The North Area would be covered daily with a six-inch layer of clean soil or an alternate daily cover material.
41. Once a sector was filled with waste to final grade, portions of that sector would be covered with final cover material and closed.
42. Applicant would conduct evaluations of various soil veneer thicknesses and vegetation types to ensure that an adequate vegetation cover is established.
43. A very small percentage of rainfall will come into contact with waste because only a small area, generally an acre or less, will be open to the atmosphere at any time.
44. Presently, there are four 24-inch culverts from the North Area into the Drain.

45. The Drain is lined with earthen berms.

46. To replace the existing culverts, Applicant plans to install seven 48-inch culverts running to the Drain – five from the North Area and two from the South Area.

47. Applicant also plans to construct three 60-inch culverts in the South Area.

48. The culverts would run through the Drain's berm below the natural grade. A concrete apron would be placed on the side of the berm inside the Drain where each pipe goes through.

49. On the South Area, water would flow down chutes to one of the perimeter channels and then into the Drain.

50. Through the new culverts, uncontaminated surface water from the North Area would move through a series of swales on the sideslopes and move in a horizontal direction to one of several down-chutes, and then to the perimeter detention reservoir.

51. The reservoir will have approximately 206 acre-feet normal storage capacity and 246 acre-feet peak storage capacity.

52. The Drain has an approximately 40-foot wide bottom, 2:1 side slopes, and a top width of about 90 feet. The estimated design flow capacity is 1,200 cfs when water is flowing near the top of its bank.

53. The lag time from a storm event until the peak of the rainfall run-off is between 24 and 80 hours.

54. Applicant calculated drainage capacity using a 24-hour lag time.

55. The onsite drainage system at the landfill site will route water off of the landfill area very quickly, and because the site is adjacent to the North Hargill Drain, run-off from the landfill site will reach the Drain within a few hours after the peak of the rainfall.
56. Four hours and 40 minutes after the peak of the rainfall event, storage capacity in the North Area perimeter detention reservoir will be sufficient to store all of the remaining run-off that will enter the reservoir.
57. The South Area will be almost completely drained in only one hour.
58. Under existing conditions, the peak discharge rate from the property is 1,410 cfs.
59. After development as planned by Applicant, the discharge rate would be approximately 1,175 cfs, resulting in a 17% reduction in the peak discharge rate from pre-development conditions.
60. The reduction is due to the large detention reservoir to be constructed.
61. Even though the Drain is not functioning at its design capacity, the proposed detention reservoir would minimize the potential adverse impacts for downstream properties.
62. Applicant owns no mineral rights to the property upon which it proposes to build the Facility.
63. The Mineral Owners and BlakEnergy have entered into a lease for exploration and development of the minerals in the property.
64. BlakEnergy has already completed two producing gas wells on the property.
65. Both wells are located in the North Area of the proposed landfill.

66. One well is located in a portion of the proposed reservoir for the North Area that would drain into the Drain.
67. A landfill reconfiguration to accommodate the drilling of the additional eight gas wells would require elimination of many landfill cells, incorporation of sloping sides into the design of the remaining landfill cells, the accommodation of service roads to the wells, the accommodation of the natural gas pipelines, the creation of new drainage chutes, and the creation of new drainage channels within the site.
68. [Deleted.]
69. [Deleted.]
70. [Deleted.]
71. [Deleted.]
- 71A. The changes needed to the SWMP to accommodate the gas wells substantially alter the draft permit conditions.
- 71B. The evidence presented by the Applicant regarding a FEMA map was a FEMA floodplain index rather than a map, and does not clearly delineate whether the Facility is or is not located in a floodplain. Other testimony in the record provides evidence that the site may flood.

The Applicant Did Not Identify and Adequately Consider Impacts on All Relevant

Endangered and Threatened Species

72. An MSW facility and its operation must not result in the destruction or adverse modification of critical habitat for endangered or threatened species or cause or contribute to the taking of any endangered or threatened species. 30 TAC §§ 330.53(b)(13)(B) and 330.129.
73. The Facility site is under cultivation for cotton, and surrounding properties to east, west, and south are also primarily farmland.
74. The Teniente Tract of the wildlife refuge includes highly valuable wildlife habitat for threatened and endangered species.
75. The wildlife refuge includes dense thickets of shrubs intermixed with open grassy areas; trees vary in size and structure.
76. The Texas Biological and Conservation Data System lists 38 threatened or endangered species for Willacy County.
77. The South Texas siren is listed as a Texas-threatened species and had been documented within a mile of the site.
78. A potential ocelot travel corridor is along a drain within ½ mile of the site.
79. Endangered wintering piping plovers and endangered nesting interior least terns have been documented at three nearby salt lakes.
80. There is a breeding colony of least terns at the wildlife refuge near the site.

81. In order to conclusively determine whether the least terns are indeed endangered interior least terns, it would be necessary to capture the birds and collect morphological and plumage coloration data.
82. An increased presence of laughing gulls at the proposed site would threaten endangered and threatened species, such as the piping plovers and interior least terns.
83. [Deleted.]
84. The Drain is a good riparian habitat for the Texas-threatened indigo snake, and the snakes, which are present near the property and in the Drain, would likely use the Drain as corridor from the neighboring U. S. Fish and Wildlife Service property.
85. Applicant did not make a detailed evaluation of the Drain on its property to determine whether endangered and threatened species use it for nesting, a food source, or a travel corridor.
86. Applicant's site operating plan ("SOP") does not specifically address how construction activities within the Drain will affect endangered and threatened species that may reside in the Drain.
87. [Deleted.]

Applicant Did Not Propose Adequate Control Measures  
For Avian and Mammalian Scavengers

88. A diversity of scavengers will be attracted to the proposed landfill by the food and other wastes.

89. Water sources such as the Drain and nearby salt lakes also would make the Facility's site attractive to scavengers.

90. Scavengers such as the following would be attracted to the landfill: coyotes, raccoons, opossums, feral hogs, domestic and feral cats and dogs, undesirable rodents, gulls, caracaras, and probably, turkey vultures.

91. Control of scavengers will be difficult, if not impossible, because of the refuge provided in nearby landscapes.

#### Apportionment of Transcription Costs

92. With the exception of a few land and mineral owners, Protestants are low-income residents of Willacy County or local governments with limited budgets.

93. The hearing was initiated when comments were filed upon the application; thus, all parties had a role in initiating the hearing.

94. Mr. Burdette and the Mineral Owners were particularly active in the hearing process, but all parties were represented in the hearing, and all the named representatives questioned witnesses.

95. Those parties who filed briefs (the Applicant, Protestants, and OPIC) benefitted from having a transcript.

96. OPIC was a statutory party against whom transcript costs cannot be assessed.

97. Among the parties, Applicant would benefit most if the permit were granted.

98. Any party that requested an expedited transcript should bear the additional cost for expediting.

#### CONCLUSIONS OF LAW

1. TCEQ has jurisdiction over the disposal of municipal solid waste and the authority to issue municipal solid waste permits. TEX. HEALTH & SAFETY CODE ANN. Ch. 361 (Vernon 2005).
2. SOAH ALJs have jurisdiction to conduct a hearing and prepare a Proposal for Decision in contested cases referred by the TCEQ. TEX. GOV'T CODE ANN. § 2003.47 (Vernon 2005).
3. Notice of the application was provided in accordance with TEX. HEALTH & SAFETY CODE ANN. § 361.0665, 30 TEX. ADMIN. CODE ("TAC") §§ 39.5 and 39.101, and TEX. GOV'T CODE ANN. §§ 2003.051 and 2003.052 (Vernon 2005).
4. [Deleted.]
5. The record is unclear and insufficiently detailed to determine if the landfill site is located within a floodplain as required by 30 TAC § 330.301. Applicant failed to demonstrate the SWMP will not significantly alter drainage patterns as required by 30 TAC Ch. 330.
6. Applicant failed to demonstrate that the proposed MSW facility and its operation will not result in the destruction or adverse modification of critical habitat for endangered or threatened species or cause or contribute to the taking of any endangered or threatened species. 30 TAC §§ 330.53(b)(13)(B) and 330.129.
7. The term scavenging, defined in 30 TAC § 330.2(125), applies to animal scavengers as well as human scavengers.

8. Applicant has not demonstrated that the proposed Facility's SOP would prevent scavenging, as required by 30 TAC § 330.128.
9. Any party that requested an expedited transcript must pay the cost difference between an expedited transcript and one produced on a regular time schedule.
10. After the amount is deducted for the cost of expediting, the remaining cost of the transcript should be assessed 80% to Applicant, 10% to Mr. Burdette, and 10% to the Mineral Interest Owners. 30 TAC § 80.23.

#### EXPLANATION OF CHANGES

1. The Commission determined that the ALJ improperly expanded the issue referred to hearing by the Commissioners at its August 11, 2004 Agenda concerning wetlands to include areas outside the waste footprint such as the Drain. The Commission determined that the Applicant met its burden of proof by showing that no wetlands exist within areas where the waste footprint is proposed (i.e. areas where waste is to be placed). Consistent with the Commission's decision, the Commission changed the word "site" to "footprint" in Finding of Fact No. 27 and deleted Finding of Fact Nos. 31 through 34 and Conclusion of Law No. 4.
2. The Commission determined that the ALJ improperly found that the Applicant's SWMP was adequate. The Commission based its decision on factors including the Applicant's failure to identify the floodplain, the Applicant's failure to adequately rebut credible drainage issues raised by the District, and the material effect on the due process rights of the parties to be able to adjudicate the appropriateness of the SWMP given the changed facts at the proposed site from the addition of gas wells. The Commission determined that the Applicant failed to meet its burden of proof on the delineation of the floodplain based on the following: (1) the Commission's previous decision in the *Juliff Gardens, L.L.C.* (Docket No. 2002-0117-MSW) matter; (2) the Applicant's failure to provide information in addition to the FEMA

map index given the index's failure to indicate whether the site was or was not in a 100-year floodplain and the contrary testimony in the record that the site had flooded in the past; and (2) the presence of lakes and the Drain on the FEMA index map and the fact that some floodplain values should have existed for those areas if FEMA had mapped the area. Accordingly, the Commission deleted Finding of Fact Nos. 68 through 71, added new Finding of Fact Nos. 71A and 71B, and amended Conclusion of Law No. 5 consistent with its decision.

3. The Commission deleted Finding of Fact Nos. 83 and 87 regarding endangered and threatened species. The Commission determined that those two findings related more to the implementation of federal law than the Commission's rules necessitate and are not necessary for the Commission to reach its decision on the endangered and threatened species issue.
4. The Commission adopted the ALJ's recommended grammatical changes that were suggested in her April 10, 2006 letter. These changes are nonsubstantive and concern formatting and grammatical structure only and do not include the ALJ's changes recommended regarding notice or the additional findings of fact proposed regarding scavenging.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. The application by Tan Terra Environmental Services, Inc., L.L.C., for a permit to operate a Type I Municipal Solid Waste Facility (Permit No. MSW-2305) in Willacy County, Texas, is denied.
2. Tan Terra shall pay the amount charged for expediting any transcript Tan Terra requested. After the amount is paid for expediting, Tan Terra shall pay 80% of the remaining cost of the transcripts, and Russell Ray Burdette and the Mineral Owners shall each pay 10% of the cost.

3. All other motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief not expressly granted herein, are hereby denied.
4. The Chief Clerk of the Commission shall forward a copy of this Order to all parties.
5. If any provision, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of such shall not affect the validity of the remaining portions of the Order.
6. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE § 2001.144.

ISSUED:

**APR 20 2006**

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

  
Kathleen Hartnett White, Chairman