

**LOWERRE, FREDERICK, PERALES,
ALLMON & ROCKWELL**

707 Rio Grande
Austin, TX 78701
(512) 469-6000 Phone
(512) 482-9346 FAX

June 1, 2009

Via Hand-Delivery

Ms. La Donna Castañuela
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

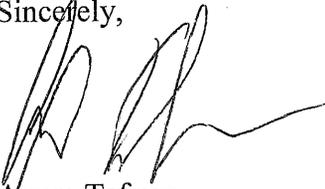
Re: SOAH Docket No. 582-08-1804; TCEQ Docket No. 2007-1302-MSW;
Application by IESI TX Landfill, L.P. For MSW Permit No. 2332

Dear Ms. Castañuela:

Two Bush Community Action Group ("Two Bush") files the enclosed original and seven copies of its **Exceptions to the Proposal for Decision**. Please contact us if you have any questions.

Thank you for your assistance in this matter.

Sincerely,



Axum Teferra
Legal Assistant

CC: Certificate of Service

CHIEF CLERKS OFFICE

2009 JUN - 1 PM 4: 57

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

SOAH Docket No. 582-08-1804
TCEQ DOCKET NO. 2007-1302-MSW

2009 JUN -1 PM 4: 57

APPLICATION BY
IESI TX LANDFILL LP
FOR MSW PERMIT NO. 2332

§
§
§

BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY
CHIEF CLERKS OFFICE

TWO BUSH COMMUNITY ACTION GROUP'S EXCEPTIONS TO THE PFD

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

Protestant Two Bush Community Action Group ("Two Bush" or "Protestant") submits these exceptions to the Honorable Administrative Law Judge Sarah Ramos' Proposal for Decision and Proposed Order. Although Two Bush agrees with much of that decision and with her ultimate conclusion to deny the Application of IESI TX Landfill LP ("IESI" or "Applicant") for MSW Permit No. 2332, Two Bush offers these exceptions to address only a few issues.

I. Introduction

IESI has proposed to construct a municipal solid waste landfill in the recharge zone of an important aquifer that supplies a significant portion of the Jack County population with ground water: the Twin Mountains or Trinity aquifer. The Trinity aquifer is present in only a small section of Jack County, so IESI could have avoided this aquifer by selecting just about any other site in Jack County. The evidence also suggests that the landfill is located over the Pennsylvanian aquifer, which is an important groundwater source in Jack County. IESI has chosen a site where the protection of groundwater is of paramount importance.

Moreover, the proposed landfill site is surrounded by residents who rely on ground water. There is no other water supply available to these residents currently. Importantly, the ground water that the landowners rely upon is found in both the Trinity aquifer and in the Pennsylvanian aquifer. And yet, the application characterizes the Pennsylvanian as the opposite, an aquiclude.

The geology and hydrogeology underlying the proposed landfill site has been described as complex and varied. Despite this fact, the application does not reflect the complex nature of the underlying geology and hydrogeology at the site. Indeed, the Applicant in this case does not seem to recognize the significance of the presence of at least two ground water sources underlying the proposed site. One cannot confidently rely upon the information included in the application to ensure that ground water resources will be adequately protected.

In sum, IESI failed to conduct the type of analysis and investigation that the TCEQ rules require and that this sensitive location warrants. For instance, the water well assessment was cursory; the boring logs were sparse and lacked vital information; and the surface water analysis included contradictory information. The Applicant has simply failed to satisfy its burden of proof on a number of issues, and its application should therefore be denied.

II. Standard 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.

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.¹ 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.”² 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.³

III. Groundwater Wells and Springs

The ALJ has properly found that IESI’s search for wells and springs was inadequate, leading to the omission of valuable information regarding area aquifers. The identification of area wells is not simply relevant to land use, but is also a crucial component of the geology report for a proposed facility.⁴ IESI’s woefully inadequate characterization of wells and springs in the area contributed to its failure to recognize the existence of the Trinity aquifer and the Pennsylvanian aquifer, and their importance.

¹ *Hunter Industrial Facilities, Inc. v. Texas Natural Resource Conservation Commission, et al.*, 910 S.W.2d 96, 102 (Tex. App. – Austin, 1995, writ denied).

² *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).

³ *Hunter* at 102.

⁴ 30 TAC § 330.56(d)(4)(J) (This permit is being processed under rules in effect immediately prior to March 27, 2006, and all references to rules in this brief are to that prior version of the MSW rules).

Following the ALJ's recommendation on this issue will not result in the imposition of overly burdensome requirements.

First, the ALJ has not imposed unreasonable expectations upon IESI. IESI could easily have discovered from the City of Jacksonville or TCEQ records that there is no public water supply in the area, and made the reasonable inference that the 25 residences within one mile of the site drew their water from groundwater wells. Certainly, IESI had no basis to conclude that none of these residences used groundwater as its application represents. Likewise, IESI's own experts conceded that windmills tend to indicate the presence of a groundwater well, yet IESI excluded these obvious sites from its well inventory. With respect to area springs, the Proposal for Decision merely expects IESI to honestly characterize the information set forth in the public literature. TCEQ rules require the identification of all groundwater wells within one mile of the property boundaries of a facility, along with the aquifer that each well draws water from.⁵ An applicant cannot meet the requirement of this rule when it consciously ignores facts that contradict the information it provides to TCEQ.

Secondly, IESI is essentially asking the Commission to ignore information merely because it has been provided by the protestants in a matter. IESI does not dispute the existence of the numerous additional groundwater wells that were not identified in its application. The absence of any realistic assessment of area wells and springs is not just a procedural technicality. The information regarding local wells and springs presented during the hearing has shed light on substantive flaws in IESI's application. For example, many of the wells near the landfill site identified during the hearing draw their water from the Pennsylvanian. This calls into question IESI's characterization of the Pennsylvanian as an aquiclude, and the adequacy of its monitoring system that is premised on this assumption. Also, many of the nearby wells appear to be

⁵ 30 TAC § 330.56(d)(4)(J)

completed into the Stratum IA sands, which IESI does not propose to monitor. Furthermore, many of the wells in the Pennsylvanian are located West of the site, with groundwater flowing to the west towards those wells. Yet, IESI proposes only one monitoring well on the western side of the site, intended to determine background levels in the Trinity. Persons affected by the application have played a valuable role in the process by bringing this information to the Commission, and neither the ALJ nor the Commission can simply ignore the information just because IESI wishes it did not exist.

IV. Water Recharge

Protestants support the findings and conclusions of the ALJ with regarding the failure of IESI to address the impact of dewatering operations at the landfill on underlying aquifers.

V. Geologic and Hydrogeologic Information

A. Geology Report

Protestants support the ALJ's conclusion that IESI did not adequately describe the regional aquifers within the landfill's vicinity based on published and open file sources.

B. Subsurface Investigation Report

The PFD acknowledges that "the Application is so difficult to decipher that not even a qualified expert can determine which borings were made with Shelby tubes and which were made with wash borings." Yet, the PFD concludes that the rebuttal evidence was sufficient for Applicant to meet its burden of proof. It is, by now, indisputable that Applicant could not have met its burden if its subsurface investigation relied upon mostly wash borings. The evidence reveals, however, that this is precisely what Applicant did. And its rebuttal evidence did not prove otherwise.

The Rules

Under TCEQ's rules, the subsurface investigation report must describe all borings drilled on-site to test soils and characterize groundwater.⁶ In preparing this report, a sufficient number of borings must be performed to establish subsurface stratigraphy and to determine geotechnical properties of the soils and rocks beneath the proposed facility.⁷ The TCEQ rule cautions that locations with stratigraphic complexities will require a significantly greater degree of subsurface investigation than areas with simple geologic frameworks.⁸

Additional requirements specify that borings must be sufficiently deep to allow identification of the uppermost aquifer and underlying hydraulically interconnected aquifers.⁹ And, significantly, all borings must be conducted in accordance with established field exploration methods.¹⁰

The Evidence

As a preliminary matter, the fact that "not even a qualified expert can determine which borings were made with Shelby tubes and which were made with wash borings" should render Applicant's evidence regarding this issue inadmissible, or at the very least, unreliable. Below is a brief account of the evidence provided by Applicant regarding its subsurface investigation.

Dr. Kreitler, testifying on behalf of the Applicant, stated during the Applicant's direct case, that the Applicant "predominantly" used wash cuttings (wash borings) versus coring.¹¹ His conclusion that the Applicant relied predominantly on wash cuttings was based on both his review of the boring logs and on his conversations with Mr. Snyder.¹² In this regard, Dr. Kreitler contradicted both Mr. Snyder and Mr. Adams.

⁶ 30 TAC § 330.56(d)(5).

⁷ 30 TAC § 330.56(d)(5)(A)(i).

⁸ *Id.*

⁹ 30 TAC § 330.56(d)(5)(A)(ii).

¹⁰ 30 TAC § 330.56(d)(5)(A)(iii).

¹¹ Tr. V. 2, p. 179, ll. 22-23.

¹² Tr. V. 2, p. 180, ll. 1-2, ll. 9-12.

Both Mr. Adams and Mr. Snyder testified that they relied on wash cuttings for only a small percentage of the borings. But neither actually performed the borings or even observed all of the borings as they were performed. It was Mr. Stamoulis who performed the borings, who did not testify during the hearing. (Mr. Snyder testified that he was out there on 3 or 4 occasions while “they” were drilling.)¹³

Nor did Mr. Adams and Mr. Snyder actually draft the field notes or field logs. Those were provided by Mr. Stamoulis.

Mr. Snyder testified that Mr. Stamoulis would have noted in his field notes the areas where coring was performed and the areas where wash borings were performed.¹⁴ But that information was not transferred from the driller’s notes to the boring logs. And the driller’s notes have since been destroyed; the core samples were likewise discarded.

It is worth noting here that the law recognizes a presumption when, as here, a party knows or reasonably should have known that there is a substantial chance that a legal claim will be filed and that evidence in its possession will be material and relevant to that claim, and that party deliberately destroys relevant evidence. That destruction of evidence (like, the destruction of field notes in this case) gives rise to a presumption: The destroyed piece of evidence is presumed to have been *unfavorable* to the party who destroyed it.¹⁵

Mr. Snyder has over 25 years of experience in municipal solid waste permitting projects. He has been employed by TCEQ’s predecessor agencies. He has testified in other landfill permitting matters. And he knows the issues that arise in these types of landfill permitting cases. Thus, Mr. Snyder should have known that any landfill permitting matter is subject to opposition and a contested case hearing. And he should have known that evidence relating to borings, a

¹³ Tr. V. 2, p. 74, ll. 19-22.

¹⁴ Tr. V. 2, p. 76, ll. 20-24.

¹⁵ *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W. 3d 718, 721 (Tex. 2003).

significant part of the application, would be relevant and material. Because he destroyed this evidence, this evidence should be presumed to have been unfavorable to IESI; it should be presumed to show that the Applicant indeed relied significantly on wash cuttings in performing its subsurface investigation, instead of coring samples.

Moreover, the fact that not even a qualified expert could determine which borings were made with Shelby tubes and which were made with wash borings, based on Applicant's evidence, contravenes another basic legal principle, the principle espoused by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), requiring only *reliable* expert testimony.

Daubert established a checklist of factors for decision-makers to apply in assessing the reliability of an expert's testimony:

- (1) whether the expert's theory can be and has been tested;
- (2) whether the theory has been subjected to peer review and publication;
- (3) the known or potential rate of error of the particular scientific technique; and
- (4) whether the technique is generally accepted in the scientific community.

Daubert, 509 U.S. at 593-94. Application of these factors is germane to evaluating whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his peers. *Id.*

In this case, Mr. Snyder admitted that there is no "way to determine for sure which sections here are based on wash borings and which sections are based on [coring]." ¹⁶ Even Dr. Kreitler, IESI's own witness, could not determine which parts of the boring logs were based on wash cuttings. In sum, all of the reliable and available evidence in the record supports the conclusion that Applicant in fact relied on wash borings in conducting its subsurface

¹⁶ Tr. V. 2, p. 77, ll. 17-20.

investigation. At best, and in the alternative, the evidence is inconclusive regarding how Applicant conducted its subsurface investigation.

The Rebuttal Evidence

Applicant's rebuttal evidence did nothing to rectify its failure to meet its burden of proof. In short, Applicant's rebuttal evidence relied primarily on Dr. Kreitler's testimony. More specifically, Applicant relied on Dr. Kreitler's contradicting his previous testimony.

As a preliminary matter, it is worth noting that in this case "the Rule" had been invoked. That is, all testifying witnesses were instructed not to confer with one another regarding the substance of their testimony.¹⁷ This is to ensure that the witnesses are not improperly influenced by the testimony of others. As described below, this is precisely what occurred here; violation of the Rule resulted in inappropriate influence of the witnesses' testimony.

Dr. Kreitler testified in the presentation of IESI's direct case that he believed IESI had relied on wash borings. Later, on rebuttal, he changed his mind, testifying that in fact, Applicant relied on Shelby tubes. When asked why he changed his mind, Dr. Kreitler explained that he took another look at the boring data *and that he spoke with Mr. Snyder and "the engineer."*¹⁸ This was in clear violation of the Rule that was invoked, and this testimony should be given little, if any, weight. But Dr. Kreitler's admission also reveals that in order to draw any conclusions from the information provided in the application, Dr. Kreitler was forced to resort to relying on what he was told by Mr. Snyder and the engineer. This may be sufficient for Dr. Kreitler, but it is not sufficient for IESI to satisfy its burden of proof.

Conclusion

¹⁷Tex. R. Evid. 614.

¹⁸ Tr. V. 8, p. 231.

In short, the issue to be addressed by the subsurface investigation is whether the Applicant gathered sufficient data to develop an accurate depiction of the geology and hydrogeology in the area. And Applicant clearly failed in this regard. The coaching of a witness to change his testimony is not sufficient to make up for the alarming lack of information provided in the Application. Applicant failed to meet its burden of proof on this issue too.

VI. Groundwater Protection

IESI has failed to demonstrate adequate protection of groundwater. The relevant TCEQ rules state that:

The design of a monitoring system shall be based on site-specific technical information that **must include a *thorough* characterization of:** aquifer thickness; ground-water flow rate; groundwater flow direction including seasonal and temporal fluctuations in flow; effect of site construction and operations on groundwater flow direction and rates; and thickness, stratigraphy, lithology, and hydraulic characteristics of saturated and unsaturated geologic units and fill materials overlying the uppermost aquifer, materials of the uppermost aquifer, and materials of the lower confining unit of the uppermost aquifer. A geologic unit is any distinct or definable native rock or soil stratum.¹⁹

The facts of this case simply do not support the standard applied by the ALJ to determine what constitutes a *thorough* geologic characterization.

IESI's groundwater monitoring system is designed on the flawed assumption that the Pennsylvanian formation is an aquiclude. As the ALJ has acknowledged, and is clearly the case, the Pennsylvanian formation is in fact an aquifer. Since the Pennsylvanian extends to areas beneath the site, this creates the potential for contaminants leaving the landfill to move to the west in groundwater flowing within the Pennsylvanian aquifer. It cannot be shown that IESI's design is based on a thorough evaluation of aquifer thickness, and the hydraulic characteristics of

¹⁹ 30 TAC § 330.231(e)(1).

saturated geologic units beneath the site, when IESI's investigation forming the basis of its design has fundamentally mischaracterized the Pennsylvanian.

Additionally, the potential for contamination to escape through the Stratum IA sands, which the ALJ notes does exist, must be addressed during the permitting process. IESI has failed to do so. The ALJ claims that if the permit is granted, monitoring wells could be added later screened into the Stratum IA sands. Recognizing the existence of a potential problem, without requiring an applicant to demonstrate how that problem will be addressed, defeats the entire purpose of the hearing process. This approach also raises finality issues with respect to the TCEQ's permit, since the means of addressing this contamination pathway is left undetermined.

Furthermore, IESI was required to consider the effect of site construction and operations on groundwater flow direction and rates.²⁰ The ALJ has noted IESI's failure to fully evaluate the impacts of its dewatering operations on the groundwater in the area. IESI's assumptions regarding the groundwater flow direction and rates that form the basis of its groundwater monitoring system ignores the impact of dewatering operations on groundwater flow and rates.

The primary concern of a groundwater monitoring system is to protect nearby neighbors who rely upon groundwater, and IESI's groundwater monitoring design was not informed by an accurate picture of surrounding groundwater wells and springs. Since IESI failed to identify most of these wells, it failed to consider the information they provided regarding groundwater flow rates and direction. IESI's groundwater investigation forming the basis of its groundwater monitoring system design can hardly be considered *thorough*, as TCEQ rules require, while at the same time ignoring this information.

Additionally, IESI's groundwater monitoring system was considered under rules in effect prior to March 27, 2006. In some respects, this exempted IESI from demonstrating during the

²⁰ 30 TAC § 330.231(e)(1).

hearing process that it met the more stringent requirements of the new rules. IESI, however, failed to perform the site-specific analysis required under the pre-2006 rules to determine monitoring well spacing. Instead, IESI simply applied the 600 foot maximum spacing allowed under the newer rules. It is inappropriate to accept IESI's cherry-picking of the requirements of the old MSW rules and the new MSW rules to determine the requirements of each that IESI would prefer. No site-specific evaluation has been presented that justifies the coincidental spacing employed by IESI.

VII. Surface Water Protection

The PFD and the Proposed Order state that the Applicant properly used the HEC-HMS models to define pre- and post-development drainage patterns. In fact, the Applicant used *both* the Rational Method *and* the HEC-HMS models to define pre-development drainage patterns, and reached different conclusions. This is because the Applicant's peak flow rates that it calculated under the Rational Method were much lower than those reached via the HEC-HMS model for pre-development conditions, while the two methods produced similar results for post-development conditions. The Applicant, however, all but ignored this difference in results for pre-development conditions and was never able to articulate an explanation for this difference in these computed peak flow rates. Instead, the Applicant compared the results from these two methods for pre-development conditions and somehow found them to be "compatible", and then proceeded to use the higher HEC-HMS results for pre-development conditions to compare to the post-development conditions.

Applicant, however, continued to refer to the Rational Method peak flow rates throughout its application, and it did so, according to the Application, to comply with the TCEQ rules. In fact, in several places throughout Attachment 6, the application states that Rational Method

calculations for peak flow rates for pre-developed conditions were included in order to comply with TCEQ Rule 330.56:

In order to demonstrate compliance with 330.55(b)(5)(A), which requires the use of the rational method for drainage areas less than 200 acres, a demonstration of compatibility of the two methods is presented in Appendix 6A-B. This comparison demonstrates that the peak flows produced by HEC-HMS, that were used to design the perimeter drainage structures, provide for a more conservative design when compared to the peak flows produced by the Rational Method.²¹

Rather than investigate the difference in peak flow rates for pre-developed conditions derived by the Applicant using the two different methods, the Applicant prepared and included in its Application a chart, in which the Applicant proclaims that the two sets of peak flow rates are “compatible.” The chart purports to compare the peak flow rates derived from the Rational Method with those derived from the HEC-HMS computer model to show that they are “compatible.”²² Had these two sets of peak flow rates actually been compatible, there would be no problem in using either set. A review of that chart, however, readily reveals that the two versions of peak flow rates are not actually compatible. And ultimately, even Mr. Welch, the Applicant’s permit engineer, conceded that the two sets of peak flow rates were not actually compatible.²³ Therefore, using one set of results instead of the other without first determining which set is the correct one is arbitrary and inappropriate.

The PFD even acknowledges that there is evidence that the HEC-HMS method overstated pre-development flow, but then somehow concludes that the overstatement should be consistent across both pre- and post-development calculations, thus allowing a reasonable comparison of the two. But there is no evidence in the record that supports such a conclusion.

²¹ Ex. App.-100, p. 6A-4.

²² Ex. App.-100, 6A-B-77a.

²³ Tr. V. 1, p. 78, ll. 6-16.

In fact, Applicant did not provide its calculated peak flow rates using the Rational Method for post-developed conditions in order to compare them to the results using the HEC-HMS method. So, one cannot determine, based on Applicant's evidence, that the overestimation of peak flow rates is consistent for pre-developed and post-developed conditions.

Mr. Dunbar, on the other hand, explained and demonstrated that the opposite is true. He showed that the overestimation does not occur across both the pre-developed and post-developed conditions.²⁴ He provided the analyses using both methods for post-developed conditions and demonstrated that in fact, the peak flow rates for post-developed conditions under the Rational Method are pretty comparable to those derived from HEC-HMS.²⁵ In other words, the overestimation of peak flow rates only occurs for pre-developed conditions, not post-developed conditions. Thus, actual, pre-development peak flow rates are much lower than those used by the Applicant for its drainage analysis, resulting in a significant increase when compared to post-developed peak flow conditions. And this is the *only* evidence in the record regarding whether the overestimation of peak flow rates occurs consistently across both pre- and post-developed conditions.

This increase in peak flow rates is significant for neighboring landowners already experiencing erosion that will only be exacerbated by the construction of the landfill.²⁶ Flooding is also an issue that will be exacerbated should this landfill be constructed. In short, this is not simply about which numbers are the most appropriate to use for the drainage analysis. This is about determining what the actual, pre-development drainage conditions are, so that an accurate comparison can be done with expected post-development conditions. Applicant failed to meet its burden of proof in doing this.

²⁴ Tr. V. 8, p. 73, l. 6- p. 74, l. 4.

²⁵ Tr. V. 8, p. 75, l. 14- p.76, l. 21.

²⁶ Ex. P-3, p. 4, l. 10 – 20 (Pre-filed testimony of Lanna Moxley) and Attachments A and B.

In sum, the Applicant provided two different, incompatible peak flow rates in its discussion of existing or natural drainage patterns. Even assuming, for the sake of argument, that Applicant was not required to rely on the Rational Method for determining peak flow rates,²⁷ the fact remains that Applicant calculated peak flow rates using two different methods and arrived at two different sets of results. Contrary to the statements in the application—statements to which Mr. Welch affixed his professional engineer’s seal and then subsequently retracted—these two sets of peak flow rates are *not* compatible, and both cannot be correct. Rather than attempt to determine which peak flow rate was the more accurate and reliable one or attempt to correlate the two peak flow rates, the Applicant simply relied upon the higher peak flow rate. This, in turn, affected the Applicant’s surface water controls and its drainage analysis by comparing post-developed drainage patterns to over-estimated pre-developed drainage patterns.

Consequently, Applicant failed to present a complete and accurate picture of the true natural drainage conditions at the proposed landfill site. And without accurate pre-development peak flow rates, Applicant cannot credibly demonstrate that natural drainage patterns will not be significantly altered. Applicant simply failed to satisfy its burden of proof in this regard.

VIII. Geotechnical Evaluation

Protestants disagree with the ALJ’s finding that the geotechnical evaluation was adequate. The slope stability analysis provided by Applicant does not demonstrate that the landfill will not be subject to slope failures because the analysis does not include an evaluation of intermediate slopes. The geotechnical report stated that, "the slope stability analyses represent end of construction conditions and may not represent temporary

²⁷ It is also worth noting that the Applicant relied on the Rational Method to design the final cover drainage system and erosion control features. *See* Ex. App.-100, 6A-3.

conditions during construction or interim waste slopes during filling operations."²⁸

Applicant's expert Gregory Adams confirmed that the potential for a block failure of intermediate slopes was not evaluated.²⁹ A "block" analysis considers the potential for a failure to occur along a plane with low interface strength, such as the geosynthetic liner of a landfill.³⁰ For intermediate conditions at a landfill, one of the scenarios examined with a block analysis is the situation where there is an "active" block tending to slide down the sidewall along the liner due to gravity, while there is a "central" block sitting atop the liner that would tend to resist movement due to the friction required to move this block.

IX. Vectors and Scavenging

There is a Legal Standard that Specifically Addresses Scavenging by Animals

While the PFD recognizes that feral hogs will be attracted to the landfill, damage the fencing at the proposed facility, and potentially damage the properties nearby, the conclusions in the analysis contradict the Commission's established policy on this issue. The ALJ's analysis is premised on an incorrect legal conclusion that scavenging does not include mammalian scavengers.

In fact, in the Commission has established that scavenging includes animal scavengers. It explicitly stated as much in its April 20, 2006 Final Order regarding the application by Tan Terra Environmental Services, Inc., LLC:

The term scavenging, defined in 30 TAC § 330.2(125), applies to animal scavengers as well as human scavengers.³¹

²⁸ Application Section III, Attachment 4, page 4-22.

²⁹ Tr. V. 1, p. 172, l. 11- 15.

³⁰ Ex. P-7, p. 25, l. 18 - 20. (Pre-filed testimony of Pierce Chandler).

³¹ See Attached, Conclusion of Law No. 7 in TCEQ Final Order regarding 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. The Order was upheld on Appeal in Tan Terra v. Texas Commission on Environmental Quality; in the District Court Travis County, Texas 345th Judicial District; Cause No. D-1-GN-06-002425.

Moreover, the Findings of Fact in Tan Terra left no room for doubt; the section regarding scavenging was entitled “Applicant Did Not Propose Adequate Control Measures For Avian and Mammalian Scavengers” and included a list of scavengers that would be attracted to the proposed facility. The list included feral hogs. See Attachment C. The conclusion provided in the PFD clearly conflicts with this policy.

Animal scavengers may act as disease vectors and expose the public to health and safety hazards if they are able to freely enter and exit the facility, a demonstration of an adequate fence or other means of access control for scavengers is required by both sections regarding scavenging and disease vectors.

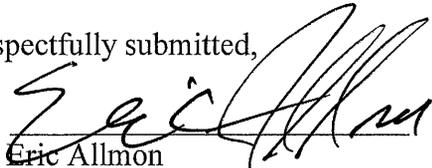
While the impacts from feral hogs is prohibited under the scavenging rule the TCEQ rule regarding vector control also applies to this issue. The rule regarding disease vectors does not explicitly state how a landfill operator shall control disease vectors, it does state that controls which allow landfill operators to develop and tailor plans to the specific condition at the site must be specified.³²

Prayer

WHEREFORE, PREMISES CONSIDERED, Protestant asks that this Commission adopt the proposal for Decision and to deny the permit.

Respectfully submitted,

By:


Eric Allmon

Texas Bar No. 24031819

³² See TCEQ rules at 30 TAC § 330.111 *et seq.* A good discussion of the role of operating plans is provided on pages 579-580 of *BFI Waste Systems of North America, Inc. v. Martinez Environmental Group*, 93 S.W.3d 570, 579 (Tex. App. – Austin 2002, pet. denied)

Marisa Perales
Texas Bar No. 24002750

**LOWERRE, FREDERICK, PERALES
ALLMON & ROCKWELL**

707 Rio Grande, Suite 200
Austin, TX 78701
Tel. (512) 469-6000
Fax (512)482-9346

CERTIFICATE OF SERVICE

By my signature below I certify that on the 1st day of June, 2009 a copy of **Two Bush Community Action Group's Exceptions to the Proposal for Decision** was served upon the parties identified below via facsimile transmission, electronic mail, hand delivery and/or U.S. Postal Mail.



Eric Allmon

FOR THE APPLICANT:

William Moltz
Janessa Glenn
Moltz Morton O'Toole, L.L.P.
The Littlefield Building
106 E. 6th Street, Suite 700
Austin, TX 78701
Tel. (512) 439-2170
Fax (512) 439-2165

FOR THE EXECUTIVE DIRECTOR:

Anthony Tatu, Staff Attorney
Ron Olson, Staff Attorney
Texas Commission on Environmental
Quality
MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel. (512) 239-0600
Fax (512) 239-0606

FOR PUBLIC INTEREST COUNSEL:

Scott Humphrey, Attorney
Texas Commission on Environmental
Quality
Public Interest Counsel, MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Tel. (512) 239-6363
Fax (512) 239-6377

FOR THE CITY OF JACKSBORO:

Kerry Russell
Russell & Rodriguez, LLP
1633 Williams Drive
Building 2, Suite 200
Georgetown, Texas 78628
Fax (866) 929-1641

FOR THE CHIEF CLERK:

Ms. LaDonna Castañuela
Texas Commission on Environmental
Quality
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel. (512) 239-3300
Fax (512) 239-3311

FOR HONORABLE SARAH G. RAMOS:

Judge Sarah G. Ramos
State Office of Administrative Hearings
300 West Fifteenth Street, Room 504
Austin, Texas 78701
Tel. (512) 475-4993
Fax (512) 475-4994

CHIEF CLERKS OFFICE

2009 JUN -1 PM 4:58

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

ATTACHMENT A



ATTACHMENT B



ATTACHMENT 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 Castañuela JUL 12 2006

LaDonna Castañuela, 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.

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 Arnaldo 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 Arnaldo 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:

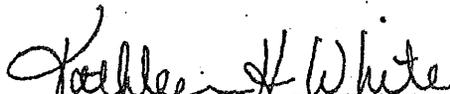
1. The application by Tan Terra Environmental Services, Inc., L.L.C., for a permit to operate a Type I Municipal Solid Waste Facility (Permit No. MSW-2305) in Willacy County, Texas, is denied.
2. Tan Terra shall pay the amount charged for expediting any transcript Tan Terra requested. After the amount 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 Harnett White, Chairman