

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

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

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BEFORE THE  
STATE OFFICE OF  
ADMINISTRATIVE HEARINGS

TWO BUSH COMMUNITY ACTION GROUP'S EXCEPTIONS TO THE  
AMENDED 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' Amended Proposal for Decision and Proposed Order, dated September 4, 2009. In sum, Two Bush agrees with many of Judge Ramos' Findings of Fact, but disagrees with many of the Conclusions of Law. In fact, the proposed Findings of Fact do not support the proposed Conclusions. Many of the Findings actually contradict the Conclusions. Thus, as explained more fully below, Two Bush excepts to Judge Ramos' ultimate conclusion that the Application of IESI TX Landfill LP ("IESI" or "Applicant") for MSW Permit No. 2332 should be approved.

**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 population with ground water: the Twin Mountains or Trinity aquifer. It is worth noting that the Trinity aquifer is present in only a small section of Jack County. In other words, had IESI

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chosen just about any other part of Jack County to site its landfill, it could have avoided the Trinity aquifer.

Moreover, the proposed landfill site is surrounded by residents who rely on ground water.<sup>1</sup> 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 another important ground water source in this area of Jack County: the Pennsylvanian aquifer. And yet, the application characterizes the Pennsylvanian as an aquiclude.

The geology and hydrogeology underlying the proposed landfill site has been described as complex and varied. Yet, 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.

Unfortunately, throughout this proceeding, as Two Bush has pointed out one inaccuracy after another associated with the application, IESI has attempted to address these inaccuracies with "quick fixes," without going through a formal application amendment process. Moreover, IESI has never acknowledged the actual conditions that exist at this site, even after presented with overwhelming evidence regarding actual site conditions. Rather, IESI has continuously attempted to rely upon a hyper-technical

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<sup>1</sup> These residents make up the core of the Two Bush Community Action Group.

reading of the rules to justify its inaccuracies, and when that has not worked, IESI simply misinterprets the rules.

For instance, even though it is immediately apparent that no public water supply exists to provide the residents surrounding the proposed landfill site with water, IESI's technical team concluded that none of these surrounding residents has a water well. When confronted with this information (which was provided even before the evidentiary hearing commenced), IESI did not seek to amend the information in the application, or provide TCEQ staff with more accurate data. Rather, it resorted to an interpretation of the TCEQ rules, allowing an applicant to ignore actual conditions.

Similarly, when it became apparent that springs were present within a mile of the landfill site, IESI did not attempt to correct the information in the application. To be clear, its land use expert observed the presence of these springs first-hand, when he accessed the property on which the springs were located. But IESI's geologist never followed up with a visit to investigate those springs. And when confronted with information about the springs, IESI's geologist simply attempted to re-phrase the assertions he had included in the application.

When it was apparent that IESI had mischaracterized the Canyon/Pennsylvanian formation, IESI attempted to amend its application, during the prehearing conference just before the hearing and again during the hearing itself. Of course, IESI had not collected additional information regarding the subsurface investigation; so, its proposed changes were not the result of new data. It was simply another attempt to provide a "quick fix." That attempt ultimately failed. But it again reflects IESI's last-minute attempts to change

inaccuracies in the application, only after those inaccuracies were pointed out by the Protestant.

And now, after the hearing has concluded and the evidentiary record has closed, IESI has attempted to once again provide another "quick fix," without any regard for the actual conditions at the site. Moreover, by providing this latest application amendment after the record has closed, IESI has ensured that no one, not TCEQ staff nor any other party, has an opportunity to examine this latest submittal to ensure that it is actually protective of groundwater. In any event, the evidence already presented during the hearing and reflected in Judge Ramos' Findings of Fact clearly demonstrates that even with this last-minute proposal, IESI cannot satisfy its burden of proving that the landfill design is protective of groundwater, human health, and the environment.

In sum, the Applicant has presented a shoddy application with inadequate information. The Applicant failed to conduct the type of analysis and investigation that the TCEQ rules require and that this sensitive location warrants. Its 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 Texas Health and Safety Code section 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*, 910 S.W.2d 96, 102 (Tex. App.—Austin 1995, writ denied), 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>2</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>3</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

<sup>2</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>3</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).

compliance if that finding: (1) is not supported by the underlying facts, (2) is clearly erroneous, or (3) contravenes the Commission's policies.<sup>4</sup>

### III. Exceptions to Findings and Conclusions Regarding Surface Water Protection

Because Judge Ramos' discussion regarding surface water protection in the amended PFD is essentially the same as the discussion in the initial PFD, Two Bush adopts the same exceptions it submitted in response to that initial PFD. For the convenience of the Commissioners, the text of those exceptions are re-produced below.

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.

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<sup>4</sup> Hunter at 102.

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.<sup>5</sup>

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."<sup>6</sup> 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.<sup>7</sup> Therefore,

<sup>5</sup> Ex. App.-100, p. 6A-4.

<sup>6</sup> Ex. App.-100, 6A-B-77a.

<sup>7</sup> Tr. V. I, p. 78, ll. 6-16.

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.

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.<sup>8</sup> 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.<sup>9</sup> 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,

<sup>8</sup> Tr. V. 8, p. 73, l. 6- p. 74, l. 4.

<sup>9</sup> Tr. V. 8, p. 75, l. 14- p.76, l. 21.

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.<sup>10</sup> 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.

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,<sup>11</sup> 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

<sup>10</sup> Ex. P-3, p. 4, 1. 10 – 20 (Pre-filed testimony of Lanna Moxley).

<sup>11</sup> 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.

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.

#### IV. Exceptions to Findings and Conclusions Regarding Groundwater Protection

Generally, Two Bush agrees with Judge Ramos' Findings of Fact regarding Groundwater Protection.<sup>12 13</sup> But these Findings do not support the corresponding Conclusions of Law, such as Conclusions of Law 5, 9, 10, 25, 26, 44, 45, and 47, which generally state that IESI's eleventh-hour proposal to install 28 monitoring wells in Stratum I and IA supports issuance of the permit. To the contrary, the Findings support the conclusion that IESI has failed to demonstrate adequate protection of groundwater and its application should therefore be denied.

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**

<sup>12</sup> Two Bush disagrees with Finding of Fact 79. The evidence presented reflects that the landfill may actually be excavated to a depth of 100 feet below the surface in some locations. At this depth, the landfill will be perilously close to, if not actually in, the Trinity Aquifer, reinforcing the need for additional monitoring in Stratum II.

<sup>13</sup> Two Bush also agrees with and adopts the arguments presented by the Office of Public Interest Counsel, as those arguments relate to the issue of Groundwater Protection.

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.<sup>14</sup>

Judge Ramos correctly found that the landfill site overlies both the Cretaceous and Pennsylvanian formations, and that the Pennsylvanian formation flows generally to the west.<sup>15</sup> She also found that groundwater wells within one mile of the permit boundary are in the Pennsylvanian Canyon formation.<sup>16</sup> Further, it is true that "it is not clear what direction groundwater will flow" in Stratum II.<sup>17</sup> All of these findings are supported by overwhelming evidence.

Equally true is the finding that of the eleven groundwater monitoring wells proposed for Stratum II, only one is proposed for the western boundary.<sup>18</sup> This is because 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.

<sup>14</sup> 30 TAC § 330.231(e)(1).

<sup>15</sup> Proposed FOF 77.

<sup>16</sup> Proposed FOF 76.

<sup>17</sup> Proposed FOF 78.

<sup>18</sup> FOF 75.

The amended PFD suggests that IESI's proposal to install 28 additional monitoring wells in Stratum IA adequately addresses Two Bush's concerns regarding the potential for contaminants leaving the landfill to flow to the west within the Pennsylvanian aquifer. But this is simply not supported by the evidence. This is because the Pennsylvanian is encountered in Stratum II, and thus, groundwater in Stratum II flows not only to the east, but also to the west.<sup>19</sup> Of the 28 additional monitoring wells proposed by IESI, not one of those is proposed to monitor Stratum II; so, not one of those proposed monitoring wells addresses Two Bush's concerns regarding contaminants reaching the Pennsylvanian aquifer, flowing to the west, and ultimately reaching one or more of the surrounding water wells.

The evidence overwhelmingly supports Judge Ramos' findings that the site overlies both the Cretaceous and the Pennsylvanian formations and that groundwater flow in the Pennsylvanian formation is generally to the west. Because IESI never identified the Pennsylvanian as an aquifer underlying the site, IESI presented no evidence whatsoever regarding the groundwater flow of the Pennsylvanian.

But the evidence presented by Two Bush regarding the Pennsylvanian, and which was uncontroverted, describes the Pennsylvanian Canyon as the most important aquifer in Jack County. The Pennsylvanian has higher water quality in southeaster Jack County because it underlies the Cretaceous (Trinity aquifer) sediments from which the Pennsylvanian is recharged. In other words, the Cretaceous and the Pennsylvanian are hydraulically connected.

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<sup>19</sup> See Proposed FOF 77.

Moreover, water wells within a mile and west of the landfill site have been completed in the Pennsylvanian. The depths of these wells correspond to the Stratum II sands, not Stratum IA.

In addition, as recognized by Judge Ramos in her findings, the piezometer data fails to prove that groundwater flows only to the east. IESI successfully installed only six piezometers within Stratum II.<sup>20</sup> The highest potentiometric points were located at opposite ends, in the northwest corner and southeast corners. (These are reflected as Points A-5 and F-20 on Figure 4H.3 of the Application.) In fact, in figure 4H-4, some of the highest potentiometric readings are located at the southeastern corner of the site.<sup>21</sup>

Another of the piezometers, located in the south-central area, consistently showed the second *lowest* water level. (This piezometer is reflected as D-20 on Figure 4H.3 of the Application.) In other words, there is a trough between the two highest potentiometric points. And groundwater is likely to flow toward that lower point, D-20, from the higher points, such as F-20. Again, because F-20 is located in the southeast corner of the site, it would logically move west towards the lower D-20 point, eventually leaving the site to the west and heading toward the water wells located west of the site.

In short, Judge Ramos correctly found that the site overlies the Pennsylvanian, that groundwater in the Pennsylvanian formation flows to the west, that water wells drilled into the Pennsylvanian formation exist within a mile west of the landfill site, and that based on IESI's piezometer data, it is not clear what direction groundwater will flow in

<sup>20</sup> Although eight piezometers were screened in Stratum II, two of those were dry and so did not contribute to the determination of the potentiometric surface. One of those two, A-20, was located in the southwest quadrant of the site. Consequently, no knowledge exists from any piezometer in the southwest portion of the site.

<sup>21</sup> Tr. V. 6, p. 191, l. 2-5.

Stratum II. In light of these factual findings, it is clear that because IESI failed to take into consideration the presence of the Pennsylvanian aquifer in Stratum II, its proposed groundwater monitoring system is grossly inadequate and fails to protect the groundwater in the Pennsylvanian. IESI failed to meet its burden of proving that its design is based on a thorough evaluation of aquifer thickness and the hydraulic characteristics of saturated geologic units beneath the site, because IESI fundamentally mischaracterized the Pennsylvanian.

Additionally, the evidence does not support a finding or conclusion that the 28 new monitoring wells proposed for Stratum IA are adequately protective of groundwater and comply with TCEQ's rules. This is because there was *no evidence* regarding these proposed groundwater monitoring wells. This latest application amendment was not proposed during the hearing process, and was not offered as part of the evidentiary record. The additional monitoring wells were proposed in a reply to exceptions, after the record had closed.<sup>22</sup> Moreover, TCEQ staff has not had an opportunity to review the proposed new wells for compliance with the TCEQ rules (and it will not have an opportunity to review the proposed new wells, should the Commission grant the permit with the ALJ's proposed special provision).

Allowing this eleventh-hour change to the application goes against the due process rights of Two Bush; it goes against the procedural rules established by TCEQ and SOAH; it goes against the Administrative Procedure Act, adopted by the Legislature; and it goes against equitable principles. In short, TCEQ should reject IESI's attempt to amend its

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<sup>22</sup> For this reason, Two Bush also specifically excepts to Conclusion of Law 6, as well.

application at this late stage of the proceeding. Otherwise, TCEQ risks setting a very dangerous precedent, rendering the contested case hearing process an exercise in futility.

**V. Exceptions to Findings and Conclusions Regarding Regional Aquifers, Site Specific Geology and Subsurface Investigation**

Two Bush generally agrees with the proposed Findings under this Section of the PFD. Two Bush recommends adding, for the sake of accuracy, that the Pennsylvanian is also an important aquifer in this region of the State, and thus, it too may be characterized as a regional aquifer.

Additionally, Two Bush excepts to the findings regarding the subsurface investigation. For convenience, Two Bush has re-produced here the exceptions it submitted in response to the initial PFD.

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.<sup>23</sup> 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.<sup>24</sup> The TCEQ rule cautions that locations with stratigraphic complexities will require a significantly greater degree of subsurface investigation than areas with simple geologic frameworks.<sup>25</sup>

Additional requirements specify that borings must be sufficiently deep to allow identification of the uppermost aquifer and underlying hydraulically interconnected aquifers.<sup>26</sup> And, significantly, all borings must be conducted in accordance with established field exploration methods.<sup>27</sup>

#### 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

<sup>23</sup> 30 TAC § 330.56(d)(5).

<sup>24</sup> 30 TAC § 330.56(d)(5)(A)(i).

<sup>25</sup> *Id.*

<sup>26</sup> 30 TAC § 330.56(d)(5)(A)(ii).

<sup>27</sup> 30 TAC § 330.56(d)(5)(A)(iii).

coring.<sup>28</sup> 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.<sup>29</sup> In this regard, Dr. Kreitler contradicted both Mr. Snyder and Mr. Adams.

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.)<sup>30</sup>

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.<sup>31</sup> 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:

<sup>28</sup> Tr. V. 2, p. 179, ll. 22-23.

<sup>29</sup> Tr. V. 2, p. 180, ll. 1-2, ll. 9-12.

<sup>30</sup> Tr. V. 2, p. 74, ll. 19-22.

<sup>31</sup> Tr. V. 2, p. 76, ll. 20-24.

The destroyed piece of evidence is presumed to have been *unfavorable* to the party who destroyed it.<sup>32</sup>

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 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;

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<sup>32</sup> *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W. 3d 718, 721 (Tex. 2003).

- (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].”<sup>33</sup> 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 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.<sup>34</sup> This is to ensure that the witnesses are not

<sup>33</sup> Tr. V. 2, p. 77, ll. 17-20.

<sup>34</sup> Tex. R. Evid. 614.

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."*<sup>35</sup> 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

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. Exceptions to Findings and Conclusions Regarding Slope Stability**

<sup>35</sup> Tr. V. 8, p. 231.

For the convenience of the Commissioners, the exceptions to the slope stability analysis submitted in response to the initial PFD have been reproduced here.

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 conditions during construction or interim waste slopes during filling operations."<sup>36</sup>

Applicant's expert Gregory Adams confirmed that the potential for a block failure of intermediate slopes was not evaluated.<sup>37</sup> 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.<sup>38</sup> 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.

#### VI. Exceptions Regarding Land Use Issues

Two Bush recommends adding two additional findings. First, IESI failed to identify all springs in the vicinity. And second, the proposed facility is not compatible with land uses because it will result in groundwater completion.

<sup>36</sup> Application Section III, Attachment 4, pages 4-22.

<sup>37</sup> Tr. V. 1, p. 172, l. 11-15.

<sup>38</sup> Ex. P-7, p. 25, l. 18 - 20. (Pre-filed testimony of Pierce Chandler).

## VII. Exceptions Regarding 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.<sup>39</sup> 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.

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.<sup>40</sup> An

<sup>39</sup> 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).

<sup>40</sup> 30 TAC § 330.56(d)(4)(J)

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 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.

#### **VII. Exceptions Regarding Vectors and Scavenging**

Two Bush excepts to Findings of Fact 148 through 151, as well as the associated Conclusions of Law, in particular, 18, 19, 21,<sup>41</sup> and 37, related to the referred issues: whether the site operation plan provides adequate controls for vectors and scavenging and is adequate to guide day-to-day operations of the facility; and whether the proposed permit is adequately protective to prevent nuisance conditions.

In her original PFD, Judge Ramos correctly recounted what the evidence proved: that feral hogs would be attracted to the landfill, break the facility's planned barbed wire fencing, and possibly damage neighboring properties.<sup>42</sup> This is still the case. No new evidence has been presented regarding the presence of feral hogs in the area of the proposed landfill site and the damage that they are capable of doing.

Indeed, even IESI, the applicant, in its Reply to Exceptions did not deny that feral hogs would be a problem. Instead, IESI argued, first, that the term scavenging refers only to human scavengers, not animals.<sup>43</sup> Initially, Judge Ramos agreed with IESI, explaining that while the evidence showed that feral hogs were a problem in the area of the proposed landfill, the rules pertaining to scavenging did not contemplate animal scavenging, only human scavenging.

In her amended PFD, however, Judge Ramos concedes that the term scavenging indeed includes animal scavenging, but she now agrees with IESI's second argument: that its proposed measures for controlling disease vectors, as reflected in the Site

<sup>41</sup> These conclusions apparently refer to the latest version of the rules, whereas the body of the PFD refers to the 2006 version of the rules. See, e.g., PFD, p. 45 (citing 30 TAC § 330.128, as pertaining to salvaging and scavenging).

<sup>42</sup> May 2009 PFD, p. 42.

<sup>43</sup> In fact, IESI recognized that the Commission's decision in the *Tan Terra* case held otherwise, but argued that Judge Ramos and the Commission erred in that case and that Judge Ramos should try to correct that error in this case. See IESI's Reply to Exceptions to PFD, dated June 11, 2009, p. 18.

Operating Plan, are adequate. This goes against the great weight of the evidence, and it is contrary to established caselaw.

IESI failed to include any measures for controlling feral hogs. In fact, IESI maintains that the scavenging restrictions do not apply to feral hogs; they apply only to human scavenging. Thus, IESI's proposal is to deal with the feral hogs *after* they become an issue. There is nothing in IESI's current application that proposes measures for dealing with feral hogs. Although IESI proposes to construct a perimeter fence, that fence will be "barbed wire, woven wire, wooden fencing, plastic fencing, pipe fencing, or other suitable material." The evidence presented demonstrated that this proposal is inadequate to prevent feral hogs from accessing the site,<sup>44</sup> and there was absolutely no evidence to the contrary. And yet, Judge Ramos, in her amended PFD, determined that this plan to create a plan was sufficient: "[I]t may become necessary for IESI to employ someone like Mr. Rife to remove the animals or it may become necessary for IESI to build an electric fence."<sup>45</sup>

In the case of *BFI Waste Systems v. Texas Natural Resource Conservation Commission*, 93 S.W.3d 570, 579 (Tex. App.—Austin 2002, pet. denied), the Austin Court of Appeals explained that an applicant must submit a "detailed site operating plan as a part of its landfill permit application. A detailed, enforceable site operating plan is crucial in light of the fact that permits are normally granted for the life of the landfill." The Court also recognized that the Commission's rules provide only general

<sup>44</sup> Ex. P-5, p. 5.

<sup>45</sup> PFD, p. 48.

requirements, allowing landfill operators to develop specific operating procedures tailored to their individual sites. *Id.* at 580. Therefore, each site operating plan must provide specific, enforceable procedures to govern the daily operation of a specific landfill. *Id.* Deviation from an approved site operating plan will be deemed a violation of the Commission's rules. *Id.*

Similarly, the Commission has represented, in judicial proceedings, that a "wait-and-see" approach to dealing with scavenging is insufficiently specific for purposes of a site operating plan. In the case of *Tan Terra v. TCEQ*,<sup>46</sup> the applicant Tan Terra argued to the district court that TCEQ erred in denying its permit application based on TCEQ's conclusion that Tan Terra failed to meet its burden of proving that its control measures will work to prevent animal scavenging.

As recounted by TCEQ in its written argument, Tan Terra's theory was that it should be "given a permit and allowed to see what happens. Under Tan Terra's theory, if its proposed measures fail, the TCEQ may insist after-the-fact that additional measures be employed to solve the problem."<sup>47</sup> In other words, Tan Terra took the exact same position that IESI takes here: when feral hogs become a problem, IESI will take additional, unspecified measures to control the scavengers.

But, as recognized by the TCEQ in its written arguments, this proposal is contrary to the TCEQ's rules, which require that an applicant's proposed site operating plan include measures to control and prevent scavenging. This is consistent with the Court of

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<sup>46</sup> Excerpts from TCEQ's written arguments to the district court have been included as an attachment to these Exceptions.

<sup>47</sup> Attachment, p. 40.

Appeals' holding in the *BFI* case as well. The site operating plan must include specific, enforceable operating procedures, tailored to the specific landfill site. Where, as here, the evidence proves that feral hogs are a problem, the site operating plan must include specific measures for preventing and controlling these animals, measures that may be enforced if violated.

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. Thus, a demonstration of an adequate fence or other means of access control for scavengers is required by both sections regarding scavenging and disease vectors. As in *Tan Terra's* case, IESI simply failed in this regard. IESI has proposed no measures for preventing or controlling feral hogs, even though the evidence shows that feral hogs are a known problem in this area (and which Judge Ramos acknowledged are a problem at this proposed site). IESI failed to meet its burden of proof on these issues.

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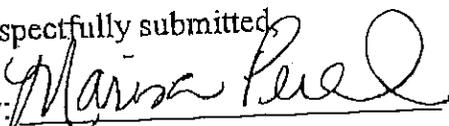
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#### Prayer

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

Respectfully submitted,

By:

  
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**CERTIFICATE OF SERVICE**

By my signature below, I certify that on this 24th day of September, 2009, a copy of **Two Bush Community Action Group's Exceptions to the Amended Proposal for Decision** was served upon the parties identified below via facsimile transmission, electronic mail, hand delivery and/or U.S. Postal Mail.



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# Attachment 1

**COPY**

NO. D-1-GN-06-002425

TAN TERRA ENVIRONMENTAL SERVICES, INC.

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IN THE DISTRICT COURT

V.

TRAVIS COUNTY, TEXAS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

345<sup>TH</sup> JUDICIAL DISTRICT

**BRIEF OF TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, DEFENDANT**

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**ATTORNEYS FOR TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, DEFENDANT**

Date: October 12, 2007

Relatedly, Tan Terra argues about the meaning of the term "critical habitat" as that term is used in conclusion of law 6:

Applicant failed to demonstrate that the proposed MSW facility and its operations 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 species.

The conclusion cited 30 Texas Administrative Code sections 330.53(b)(13)(B) and 330.129, from which the conclusion's language was drawn.

By dwelling on the phrase "critical habitat," Tan Terra raises a red herring and seems to have missed the point: Tan Terra did not do enough of an evaluation to meet its burden of proof. The TCEQ did not find that there was critical habitat on the site or in the Drain. It found, as a matter of law, that Tan Terra did not do what its rules required. The conclusion is underlain by, among others, findings of fact 85 and 86, which are supported by substantial evidence, as discussed in detail above. Conclusion of law 6 deserves deference, as a TCEQ interpretation of the meaning of its own regulations. And the conclusion has support in precedent — the *Blue Flats* case discussed by the ALJ in the narrative portion of her PFD.<sup>130</sup>

**V. Tan Terra did not demonstrate that its landfill would meet the agency's scavenging requirements. (Responsive to Tan Terra's Points of Error Group C.)**

**A. The findings concerning scavenging.**

On January 17, 2005, the SOAH administrative law judge sent the TCEQ a Proposal for Decision including a recommended draft Order. The draft order included a section with

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130. A.R. Vol. 6, Item 140, p. 60-61.

four findings of fact as follows:

**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.

In its April 2006 Order, the TCEQ adopted the entire section verbatim, including its heading. However, on April 10, two days before the TCEQ was set to consider the matter at an open meeting, the ALJ had sent the TCEQ what she called an "Amended Proposed Order."<sup>131</sup> Its transmittal letter said it was describing the ways in which the amended proposed order supposedly differed from "the first one submitted."<sup>132</sup> The letter made no mention of changes to the above-reproduced section, although a side-by-side comparison of the two reveals that the ALJ's Amended Proposed Order suggested seven findings on the scavenger issue: the four set out above (verbatim, although numbered differently) and three additional findings

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131. A.R. Vol. 8, Item 161, attached as Appendix Item. C.

132. *Id.*, see two page cover letter from Judge Sarah Ramos to Derek Seal, General Counsel of TCEQ.

— cumulatively, adverse to Tan Terra — on the scavenger issue.

Tan Terra attacks the TCEQ for “improperly and unlawfully” overturning the ALJ’s findings of facts 89 and 91, apparently meaning that the TCEQ should not have omitted from its Order the additional adverse findings<sup>133</sup> that were in the ALJ’s amended proposed order. Without citation to any other authority, Tan Terra relies for its argument on Health & Safety Code section 361.0832, subsections (c) and (f), a provision discussed above in § II.A. which concerns changes to ALJ recommended findings.<sup>134</sup>

Under both versions of the ALJ’s proposed order, the scavenger findings went against Tan Terra. Ironically, Tan Terra necessarily is arguing that the TCEQ should have entered the order with six (or seven) findings adverse to it, not four. It is hard to see how Tan Terra was harmed by the TCEQ’s adopting fewer findings adverse to Tan Terra. If the TCEQ erred, its error was *de minimus* and did not harm Tan Terra’s substantial rights. Cf. *Lauderdale v. Texas Department of Agriculture*, 923 S.W.2d 834 (Tex. App.—Austin 1996, no writ) (where Court invokes the doctrine of *non curat de minimus lex*, the law does not concern itself with trifling matters); see also Government Code section 2001.174, which requires a party to show prejudice to its substantial rights before the reviewing court may reverse an agency decision in a contested case matter.

Health and Safety Code section 361.0832 was enacted in 1991. It should be no

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133. Actually, Tan Terra seems to complain only about the omission of two of the three additional findings.

134. See relevant text, *supra*, at pg.9 and full text in Appendix Item N.

surprise that Tan Terra has cited no cases interpreting it, because the provision has been discussed in published opinions only three times<sup>135</sup> and none of the discussions was about the unusual situation in the present case. The Third Court of Appeals also discussed the provision in a "not designated for publication" opinion, *Pistocco v. Tex. Natural Res. Cons. Comm'n*, 2000 WL 190659 \*8 (Tex. App. —Austin 2000, no pet.). There, Justices Jones, Kidd and Patterson upheld a harmless, unexplained change to a finding of fact, saying:

The only change in a finding or conclusion that appellants challenge is the deletion of the italicized phrase from conclusion seven which provides as follows:

If constructed and operated in accordance with permit provision, the Solid Waste Disposal Act, and the 30 Tex. Admin. Code Chapter 330, a permit amendment authorizing *expansion of the West Fill Area and the implementation of Subtitle D upgrades, including the use of a final cover for the entire Facility, will not adversely affect the public health or the environment.*

Because the deletion actually decreases the scope of the conclusion by limiting it to Subtitle D upgrades and excluding the West Fill expansion, it actually favors appellants' opposition to the amendment of the permit. Even if the district court erred by affirming the Commission's edit, appellants were not harmed.

**B. The meaning of the term scavenging.**

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135. See *Hunter Indus. Facilities v. Tex. Natural Res. Cons. Comm'n*, 920 S.W.2d 96 (Tex. App.—Austin 1995, writ denied); *Southwest Pub. Serv. v. Pub. Util. Comm'n*, 962 S.W.2d 207 (Tex. App.—Austin 1998, pet. denied); and, *Heat Energy Advanced Technology v. West Dallas Coalition for Envtl. Justice*, 962 S.W.2d 288 (Tex. App.—Austin 1998, pet. denied).

While the TCEQ treated the term scavenging in 30 Texas Administrative Code section 330.128<sup>136</sup> as applying to both animal and human scavengers, Tan Terra contends the term applies only to human scavengers.<sup>137</sup> Based on that, Tan Terra attacks finding of fact 91<sup>138</sup> and conclusions of law 7 and 8. However, in a statement that seems to contradict its own position, Tan Terra says in its brief:

[Tan Terra witness Edward Myers] testified that none of the permit application materials in Exhibit 36 address scavengers other than humans and birds, with the possible exception of a general statement that scavenging will not be allowed at the facility, *which could be considered to refer to any scavenger.*<sup>139</sup>

Continuing with the same line of contradictory thought,<sup>140</sup> Tan Terra says its witness testified that Tan Terra's application proposed adequate control measures for avian and mammalian scavengers.<sup>141</sup> Thus the testimony of Tan Terra's own witness shows that scavenging, as used in the TCEQ's rules, can reasonably be interpreted to mean human *and animal*

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136. See also 30 Tex. Admin. Code § 330.2(125).

137. Tan Terra was well aware that one of the four issues referred by the TCEQ to SOAH was the adequacy of control measures for avian and mammalian scavengers. See pg. 2, *supra*. Even if Tan Terra disagreed with the TCEQ's interpretation, it was on notice well before the contested case hearing began that the TCEQ viewed scavengers as not just humans.

138. The finding says, "Control of scavengers will be difficult, if not impossible, because of the refuge provided in nearby landscapes." A.R. Vol. 8, Item 164, p.12, findings of fact 91.

139. Brief of Plaintiff Tan Terra Environmental Services, Inc., pg. 33, ln. 3-6 (emphasis added).

140. Tan Terra also contended in its Closing Brief of Applicant that it had "demonstrated that its permit application includes adequate control measures for avian and mammalian scavengers." Vol. 6, Item 131, p. 13, ln. 21-22.

141. *Id.*, ln. 14-15.

scavenging:

The dispute involves a question of rule construction. The TCEQ's interpretation is reasonable (even in the eyes of Tan Terra's witness), deserves deference,<sup>142</sup> and should be upheld.

**C. Tan Terra did not meet its burden.**

Tan Terra attempts to invert the permitting process and avoid its burden of proof when it contends, based on its witness's testimony, that, "[U]ntil it is shown that the standard control measures (compaction and cover) are not satisfactory and additional measures are needed, there is no basis upon which to impose additional requirements."<sup>143</sup> In other words, Tan Terra takes the position that it need not bear the burden of showing its control measures will work, but it should instead be given a permit and allowed to see what happens. Under Tan Terra's theory, if its proposed measures fail, the TCEQ may insist after-the-fact that additional measures be employed to solve the problem. Tan Terra's idea is contrary to the TCEQ's rules which, for example, require that an applicant's proposed site operating plan include measures to control and prevent disease vectors and prevent scavenging.<sup>144</sup> The rules also require the plan to include measures such as compaction, daily cover, etc., to prevent

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142. See discussion of deference to an agency's interpretation of a rule, in section II.B.

143. Brief of Plaintiff Tan Terra Environmental Services, Inc., pg. 33, ln. 21-23.

144. See 30 Tex. Admin. Code § 330.126 and .128. See also § 330.55(a)(3) which requires that an applicant's site development plan contain controls to protect the public from potential hazards (including fencing to control entry of livestock). Mammalian and avian scavengers can serve as disease vectors and expose the public to health hazards.

control of on-site disease vectors.<sup>145</sup> These rules and others<sup>146</sup> place the burden on Tan Terra.

Tan Terra planned to construct its landfill at a location that it should have known would be problematic. Dr. Kuvlesky testified that material deposited into the landfill would attract a variety of scavengers including gulls, coyotes, raccoons, opossums, feral hogs, feral dogs, feral cats, and skunks.<sup>147</sup> The site is "a short distance from a very large salt lake, which could become a roosting place for the gulls."<sup>148</sup> The gulls will carry materials from the landfill to areas outside it.<sup>149</sup> Despite this, Tan Terra never acknowledged or planned for the scavenger problem it was likely to encounter, or the hazards occasioned by such scavengers. For example its site development plan simply provides that an existing barbed wire fence will limit access to the site, but it does not show how the fence will protect health and safety.<sup>150</sup>

Tan Terra's plan to build next to a wildlife refuge figured into the outcome, as well: Tan Terra drew opponents who produced experts who testified convincingly about the

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145. See 30 Tex. Admin. Code § 330.126.

146. See also including 30 Tex. Admin. Code § 80.117(b) ("The applicant shall present evidence to meet its burden of proof on the application . . ."), 30 Tex. Admin. Code § 80.17 ("The burden of proof is on the moving party by a preponderance of the evidence . . ."), and 30 Tex. Admin. Code § 330.51(b), which describes certain requirements for an application.

147. A.R. Vol. 12, Item Burdette-11, p. 6, ln. 17-22; A.R. Vol. 12, Item Burdette-12, p. 10, ln. 13-17.

148. A.R. Vol. 12, Item Burdette-13, p. 5, ln. 38-39.

149. A.R. Vol. 12, Item Burdette-13, p. 3, 5.

150. A.R. Vol. 12, Item Burdette-15 (Tan Terra Site Development Plan Narrative, Part III), p. 4.

shortcomings in Tan Terra's plan.<sup>151</sup> Thus, the record justified any differential treatment of Tan Terra.

The TCEQ did not act contrary to the holding in *Starr County v. Starr Industrial Services*.<sup>152</sup> Rather, the TCEQ denied the requested permit because, among other independent and adequate reasons, Tan Terra did "not demonstrate[] that the proposed Facility's SOP would prevent scavenging, as required by 30 TAC § 330.128."<sup>153</sup> The decision was well within the bounds of reasonableness and, thus, was not arbitrary or capricious.<sup>154</sup>

**VI. The TCEQ's Order should not be Invalidated on the Basis of a few Contested Evidentiary Rulings. (Responsive to Tan Terra's Point of Error Group E.)**

Courts review evidentiary rulings under the abuse of discretion standard, and a reviewing court may not overturn a ruling merely because it disagrees with it.<sup>155</sup> An ALJ abuses her discretion by acting without reference to guiding principles.<sup>156</sup> Under the abuse of discretion standard, a party complaining about the exclusion of evidence by an ALJ must

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151. See e.g. the testimony of Linda Laack. Vol 12, Item Burdette-12, p. 10.

152. 584 S.W.2d 352 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.c.).

153. A.R. Vol. 8, Item 164, conclusion of law 8.

154. See, e.g., *Tarrant v. Clear Creek Indep. Sch. Dist.*, —S.W.3d—, 2007 WL 2005106, \*6 (Tex. App.—Houston [1 Dist.] 2007, no pet.) (holding agency decision within bounds of reasonableness was not arbitrary and capricious)

155. *City of Amarillo v. Railroad Comm'n*, 894 S.W.2d 491 (Tex. App.—Austin 1995, writ denied); *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991).

156. *Id.*

discharges that exceeded the capacity of the Main Drain, an issue that Mr. Poe had already testified to and that was not within the scope of the reconvened hearing.<sup>164</sup> Since Mr. Poe's testimony and Exhibit 66 did not relate to the subject of the reconvened hearing — whether any reconfiguration of the site resulting from the development of oil and gas on the property would affect discharges or the rate of discharges from the site — the ALJ excluded them.<sup>165</sup>

The ALJs' determination that portions of Dr. Poe's testimony, including Exhibit 66, should be excluded because they went beyond the scope of the reconvened hearing was not an abuse of discretion and should be upheld. Moreover, the excluded evidence was not controlling on a material issue, and there was substantial evidence to support the TCEQ's contrary finding.

#### CONCLUSION AND PRAYER

For the reasons set out above, the TCEQ asks the Court to affirm its decision.

Respectfully submitted,

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164. A.R. Vol. 15, Item 6, pp. 1159-1160.

165. *Id.*

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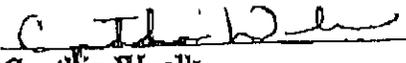
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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

ATTORNEYS FOR TEXAS COMMISSION  
ON ENVIRONMENTAL QUALITY,  
DEFENDANT

**CERTIFICATE OF SERVICE**

On October 12, 2007, I served the above and foregoing on each person on the list below, by the method shown.

  
Cynthia Woelk

**LIST OF PERSONS SERVED**

# LOWERRE, FREDERICK, PERALES, ALLMON & ROCKWELL

707 Rio Grande, Suite 200  
Austin, TX 78701  
(512) 469-6000 Phone  
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- To: LaDonna Castañuela (512) 239-3311
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- Scott Humphrey (512) 239-6377
- Anthony Tatu (512) 239-0606
- Ron Olson

From: Marisa Perales/Axum Teferra  
Date: September 24, 2009

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DOCUMENTS	NUMBER OF PAGES (not including cover pg.)
Protestant Two Bush's Exceptions to the Amended Proposal for Decision	

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