

**SOAH DOCKET NO. 582-15-2082
TCEQ DOCKET NO. 2015-0069-MSW**

**APPLICATION OF 130 § BEFORE THE STATE OFFICE
ENVIRONMENTAL PARK, LLC § OF
FOR PROPOSED PERMIT NO. 2383 § ADMINISTRATIVE HEARINGS**

**TJFA, LP'S & ENVIRONMENTAL PROTECTION IN THE INTEREST OF
CALDWELL COUNTY'S (and ALIGNED INDIVIDUAL PROTESTANTS')
REPLY TO EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONERABLE ADMINISTRATIVE LAW JUDGES KERRIE JO
QUALTHROUGH AND CASEY BELL:

Protestants TJFA, L.P. ("TJFA") and Environmental Protection in the Interest of Caldwell County ("EPICC") and aligned individual Protestants (collectively, "Protestants") hereby submit their Reply to Exceptions to the Proposal for Decision. Protestants urge the Commission to deny the application for a landfill permit submitted by Applicant 130 Environmental Park, LLC (Applicant). In the alternative, Protestants urge the Commission to remand the application to allow the Applicant to submit a complete and accurate application in accordance with TCEQ's regulatory procedures. For support, Protestants respectfully offer the following:

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I. INTRODUCTION

In its exceptions, Applicant 130 Environmental Park LLC points out that the Administrative Law Judges (ALJs) noted 3 deficiencies, but nevertheless recommended approval of the draft permit. Applicant excepts to these 3 noted deficiencies.

Protestants note that a closer reading of the PFD reveals that the ALJs found more than the 3 noted deficiencies, but accepted Applicant's excuses and rationalizations for the deficiencies, as described in Protestants' exceptions. For instance, the ALJs found that: (1) Applicant breached its duty when its expert consultants discarded field logs and soil samples, without reasonable excuse; (2) the geology report over-estimated and exaggerated the amount of fat clay in Stratum II;¹ (3) at least one soil classification, in the boring logs, was not consistent with the laboratory results for the soil sample analyzed; (4) fractures are presumed to have existed in the subsurface material at the site in 2013, but the Geology Report notes no fractures in the boring logs; (5) the piezometer logs merely reproduced the lithologic descriptions from the boring logs (from the borings drilled earlier at different locations) rather than reflecting the soil characteristics encountered from the piezometer borings; (6) Applicant's land use expert should have considered the County's siting ordinance in his analysis but did not; and (7) the proposed facility's potential impacts on Site 21 should have been considered in the land-use compatibility analysis.² In its recommendation, the PFD avoids giving the consequences of law to many of these noted deficiencies, however.

In at least one instance—land use compatibility—the PFD notes that the ALJs continue to have concerns. The ALJs recommend that the commissioners determine “whether situating an MSW Landfill in very near proximity to the 100-year floodplain, immediately upstream of a flood control structure needed to protect human life, is a

¹ PFD, p. 61. The PFD actually states that the Geology Report exaggerates the amount of “silty fat clay, or CL,” in Stratum II, but this is likely a typographical error. All of the boring logs included only one soil classification: CH or fat clay, not “CL.”

² PFD, p. 173. In this discussion regarding land use compatibility, the ALJs determined that impacts to Site 21 were considered in the context of other rules, namely surface water drainage and floodplains. But the PFD fails to note that Mr. Traw, Applicant's hydrologist, did not consider the significance of the dam's re-classification as “high hazard,” or the repercussions of that classification.

compatible land use.”³ Indeed, the commissioners should carefully consider this issue. Applicant, however, has provided no evidence to assist the commissioners with this exercise. Plum Creek Conservation District and Protestants’ experts (e.g., Dr. Lauren Ross) provided the only credible evidence regarding the significance of the classification of the Site 21 dam as “high hazard” and the potential impacts of siting a landfill “in very near proximity to” and “immediately upstream of” this flood control structure. And this evidence demonstrates that siting a landfill near Site 21 is not a compatible land use.

Elsewhere in the PFD, the ALJs propose revising the permit boundary to incorporate the entire length of the proposed access road from the entrance on US 183 to the entrance into the facility permit boundary, as a remedy for Applicant’s failure to include the access road within the permit boundary in its application. As discussed in Protestants’ exceptions, the PFD is correct in recognizing that the access road must be included within the permit boundary. But the process for accomplishing this revision to the draft permit is to remand the application and allow the ED’s staff to conduct a technical review of the revised permit boundary, access road, surface water drainage issues, and draft permit. This would also allow the Applicant to address another deficiency noted by the ALJs: Applicant’s failure to obtain a floodplain development authorization from the County, despite repeated requests from TCEQ staff to do so.

As explained in Protestants’ Exceptions to the PFD, Applicant’s permit application was replete with deficiencies. Taken together, it is apparent that Applicant did not satisfy the regulatory requirements, and its belated attempts to rationalize its failure to satisfy the rules cannot cure the defects in the application. If Applicant desires to correct the deficiencies in its application or revise the representations in the application so that they accurately reflect the conditions at the site, it must seek a remand to accomplish this. Absent a remand, the application must be denied for failing to comply with TCEQ’s rules.

Protestants agree with and incorporate by reference the exceptions submitted by OPIC and Caldwell County.

³ PFD, p. 2.

II. ARGUMENT

A. The Items Identified as Deficiencies in the Application Do Not Satisfy the Applicable Requirements

Applicant excepts to the 3 deficiencies identified by the ALJs, arguing that they are not deficiencies. The Executive Director does not dispute the ALJs' characterization of the noted deficiencies, but agrees with the ALJs in arguing that the noted deficiencies do not warrant denial of the application.

Protestants agree with the ALJs' characterization of the 3 noted deficiencies (but dispute that these were the only 3 deficiencies in the application, as explained in their Exceptions). Further, as explained below, the deficiencies warrant denial of the application or at least a remand.

1. Plum Creek Conservation District must be identified as a potentially impacted owner of a property right.

It is undisputed that the proposed landfill property is subject to an easement owned by Plum Creek Conservation District for use of Site 21.⁴ The PFD also acknowledges that Site 21 should have been included in the land use compatibility analysis. And the ALJs expressed concern about siting a landfill in close proximity to and upstream of Site 21. In other words, the District's property right—its easement—is impacted by any decision to permit a landfill on the proposed site. Yet, the District was not named as an easement holder in the landfill permit application, and the District was therefore not provided with the required notice that is afforded to adjacent and potentially affected property interest owners.⁵

Applicant's attempt to excuse its failure to identify the District as an easement holder should be rejected. Applicant argues that it was not required to identify the District as an easement holder because Applicant's own application states that the District was not

⁴ PFD, p. 7.

⁵ It is worth noting that the ED had already alerted Applicant, in one of his NODs, that Applicant needed to provide additional information, on the landowners list, regarding the easement holder, in order to comply with TCEQ rules. Ex. P-22, pp. 4-5. But Applicant dismissively responded that its landowners list was sufficient to comply with TCEQ's requirements. Ex. P-22, p. 5.

listed in the County's appraisal district records.⁶ But the undisputed evidence demonstrates that Applicant knew that the District owned an easement for Site 21. And yet, despite this knowledge, Applicant failed to include this essential piece of information in its application, resulting in a failure to provide notice to an affected property right owner.

To accept Applicant's excuse for this failure would mean that an applicant may (1) ignore a conspicuous property interest owner—one who owns a property interest on the very tract of land for which the landfill is proposed, (2) withhold this information from TCEQ staff, and (3) avoid providing notice to an impacted property interest owner. In fact, Applicant's interpretation of TCEQ's requirements would *mandate* that an applicant ignore an obvious, impacted property interest owner, such as the District, if that property interest owner is not listed in the appraisal records. This is an absurd interpretation of TCEQ's rules and cannot be what was intended. *Texas Mutual Ins. Co. v. Vista Community Medical Center, LLP*, 275 S.W.3d 538, 549 (Tex. App.—Austin 2008, pet. denied) (holding that an agency's interpretation of a rule should not “lead to an absurd or unreasonable result”); *see also Harlingen Family Dentistry, PC v. Texas Health & Human Services Comm'n*, 452 S.W.3d 479, 482 (Tex. App.—Austin 2014, pet. dismiss'd).⁷

While TCEQ's rules allow an Applicant to rely on property appraisal records to search for and identify adjacent and potentially impacted property interest owners, the rules do not state that an Applicant must rely on such appraisal records *exclusively*. The rule was not intended to be used to limit or deny notice to potentially impacted property interest owners, particularly if the applicant has knowledge of property interest owners who may not be listed in the appraisal records.⁸

⁶ Protestants dispute that a representation in the application is sufficient to prove the contents of the County's appraisal records. This is not legally sufficient evidence. There was no testimony regarding who searched the records or whether the statement was based on personal knowledge.

⁷ Failure to identify the District as a property interest owner also violates the statutory requirement that rules be construed to effectuate “a just and reasonable result” and to favor the public interest over any private interest. Tex. Code Construction Act § 311.023(1) & (5).

⁸ It is not uncommon for easement holders to be omitted from appraisal records. Yet, TCEQ's rules clearly require identification of easement holders. 30 Tex. Admin. Code § 281.5. In a case such as this, where the existence of an easement is obvious and conspicuous to the average observer, and where the

Indeed, in a case such as this one, Applicant had a duty to provide this information to TCEQ and a duty to provide notice to the District, because its surface water drainage analysis relies on the presence of the reservoir (although Protestants maintain that it was inappropriate and a violation of TCEQ's rules to do so). Accordingly, TCEQ staff advised Applicant that it needed to acquire a drainage easement because of its reliance on the reservoir for its surface water drainage analysis.⁹ Applicant refused to acquire such an easement, and failed to provide notice to the District. This refusal to acknowledge the District's property interest and its refusal to acknowledge its reliance on the reservoir—even though it has no property right to do so—reflects a disregard for TCEQ and local authorities.

As discussed elsewhere, Applicant also failed to apply for a County floodplain development authorization, as required by TCEQ's rules, and failed to inform TCEQ staff that it had not applied for such an authorization. Applicant has shown a pattern of disregarding local regulatory authorities and of providing TCEQ staff with inaccurate information regarding these local authorities, in an apparent attempt to avoid having to address these local entities or comply with their rules. The commission should not countenance Applicant's attempts to excuse its misrepresentations to TCEQ staff and its failure to comply with TCEQ rules; the application must be denied for failing to comply with TCEQ rules.

Finally, if the requested permit were to be issued, and if Applicant were to request a modification or amendment of the permit at a later time, it is imperative that the District be provided notice of such a request. As explained above, the District possesses a property interest that will be impacted by the proposed landfill if it is permitted and that could potentially be further impacted by any future revisions to the permit. The District must, therefore, be recognized as an owner of a property interest—one that is entitled to notice. For this reason, the permit, if granted, should include a special provision that

Applicant was clearly aware of the existence of an easement, the Applicant must comply with the rule requiring disclosure of easement holders.

⁹ Ex. ED-SO-4, p. 4.

specifically requires the Applicant to provide the District notice of any requests for modifications or amendments to the permit.

2. TCEQ's rules require approval of a soil boring plan before borings are drilled, and Applicant failed to comply with this requirement.

TCEQ Rule 330.63(e)(4) unequivocally states that before an application can be prepared and submitted, an applicant must first submit a soil boring plan to TCEQ for approval. The "soil boring plan, including locations and depths of all proposed borings, shall be approved by the executive director prior to initiation of work." 30 Tex. Admin. Code § 330.63(e)(4). The rule further provides detailed guidance regarding the objectives of the soil boring plan and how the soil borings are to be conducted. Even modifications to the soil boring plan must be approved by the Executive Director. 30 Tex. Admin. Code § 330.63(e)(4)(E). And the rules make clear that the borings must be conducted in accordance with established field exploration methods and that they include recommendations for preferred boring methods. 30 Tex. Admin. Code § 330.63(e)(4)(C).

It is undisputed that Applicant failed to obtain approval of the soil boring plan before commencing the soil boring work. In fact, Applicant had already completed its soil borings before its plan was approved. The evidence also demonstrates that Applicant did not comply with the representations made in the soil boring plan even after it was approved. And the evidence demonstrates that the Applicant never sought to modify the soil boring plan.

Regarding the 2016 "supplemental" Geology Report, Applicant never even attempted to obtain approval of a soil boring plan before drilling the additional borings that provided some of the information included in the "supplemental" Geology Report.¹⁰ This is but one reason that the "supplemental" Geology Report should not have been admitted or considered as additional evidence in support of Applicant's permit application.

¹⁰ Tr. V. 9, p. 1997, ll. 4-9 (testimony by Mr. Avakian, confirming that he did not approve a soil boring plan for Applicant's 2016 borings); & p. 2003, ll. 7-25 (testimony by Mr. Avakian, confirming that he did not conduct a technical review of the "supplemental" Geology Report and no longer had jurisdiction to do so).

Based on the regulatory language cited above and on the undisputed evidence presented at the hearing, the only logical conclusion to be drawn is that Applicant failed to comply with Rule 330.63(e)(4); it failed to obtain approval before commencing its soil boring work. The evidence supports no other finding or conclusion.

Applicant attempts to excuse its disregard of TCEQ's rule by pointing to unreliable hearsay information—information excluded from evidence by the ALJs (Exhibit 130EP-23). Consistent with its pattern of disregarding any decision that is inconvenient or inconsistent with its objectives, Applicant simply chooses to disregard the ALJs' evidentiary ruling and continues to rely on this hearsay. All references to Exhibit 130EP-23 in Applicant's exceptions should be stricken and this exhibit not given any consideration because this exhibit was excluded from evidence. Similarly, all argument that relies on this exhibit (at pages 4 and 5 of Applicant's exceptions) should be stricken and not be given any consideration. In any event, this hearsay exhibit does not change the undisputed facts in this case: Applicant finished its boring work before its boring plan was approved.

Next, Applicant relies on Snyder's testimony, wherein he states that drilling soil borings before receiving approval of a boring plan from the ED is a common scenario that he has encountered many times. What Applicant and Snyder fail to mention, however, is that in this case, the ED's staff was unaware that Snyder had finished drilling his borings before the boring plan was approved.¹¹ In other words, the ED's staff was not familiar with Snyder's "common scenario."

Finally, in its exceptions, Applicant listed a number of older landfill permit applications and attached to its exceptions excerpts from those applications (and some soil boring plan approval letters) to demonstrate that it is not uncommon for borings to be commenced before the soil boring plan is approved.¹² But all of the listed applications and attached application excerpts were prepared by the same consulting firm that

¹¹ ED Ex. SO-9, p. 45.

¹² These application excerpts and references to them in Applicant's exceptions should be stricken. This information was not introduced as evidence during the contested case hearing, and should not be relied on now by the Applicant to attempt to meet its burden of proving compliance with TCEQ's rule.

prepared the application in this case—*i.e.*, Biggs and Matthews Environmental—or its predecessor consulting firm—*i.e.*, Emcon. The only thing these older application excerpts demonstrate is that Applicant’s consulting firm has a history of disregarding TCEQ’s rules; indeed, violation of TCEQ’s rules appears to be a “common scenario” for Applicant’s consulting firm. This disregard for TCEQ’s regulatory requirements must be deterred.

In any event, these application excerpts do not change the fact that the undisputed evidence in this case demonstrates that Applicant failed to comply with TCEQ’s rule requiring approval of a soil boring plan before boring work commences. If Applicant is dissatisfied with this regulatory requirement, it should seek a rule change. But it should not be allowed to simply disregard the regulatory requirements that it finds inconvenient.

Because Applicant (1) failed to obtain approval of its soil boring plan before drilling its borings; (2) failed to comply with the representations included in its soil boring plan; (3) failed to seek modification of its soil boring plan; (4) discarded all field logs and soil samples from its soil boring program before the ED’s technical review was complete; and (5) failed to obtain approval of a soil boring plan before commencing its 2016 soil boring work, the permit application should be denied, or alternatively, remanded to TCEQ to allow Applicant to conduct its subsurface investigation in accordance with TCEQ’s rules.

3. Applicant failed to comply with TCEQ’s rule requiring a floodplain development permit; this deficiency warrants denial.

The Texas Supreme Court has made clear that for an agency to adopt regulatory exemptions through the adjudication process undermines the Administrative Procedures Act, and that an agency action is arbitrary and capricious if it runs contrary to agency rules.¹³ With regard to several requirements of the TCEQ rules, the Executive Director asks that TCEQ illegally create exemptions from the plain language of the TCEQ rules.

For example, the Executive Director asks that the Commission disregard the plain language of the TCEQ rules with regard to the requirement that an applicant submit a floodplain development permit *within the application*. TCEQ Rule 330.63 is entitled

¹³ *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254-55 (Tex. 1999).

“Contents of Part III of the Application.” At paragraph 330.63(c), this rule explicitly requires that Part III of the Application, which is the Site Development Plan, “must include the items listed in this section[,]” and goes on at 330.63(c)(2)(D)(ii) to state that within the Site Development Plan, “The owner or operator shall . . . for construction within the floodplain, submit. . . a floodplain development permit from the city, county or other agency with jurisdiction over the proposed improvements.”¹⁴ This rule is not ambiguous. The plain language of the rule leaves no room for argument that Part III of the application is not required to contain a floodplain development permit for construction within the floodplain.¹⁵ This language is explicit both as to the information that must be submitted, *and* as to the timing of that submittal.

The ALJs properly found that the Application did not provide the required floodplain development permit as required by 330.63(c)(2)(D)(ii). The evidence compels this conclusion. The Executive Director does not dispute this finding. Yet, as if out of thin air, the Executive Director and the ALJs conjure up a distinction between regulatory provisions requiring “strict” compliance versus other provisions where the Commission did not *really* mean what it plainly said in the TCEQ rules, and, thus, compliance with such rules can be found optional on an *ad hoc* basis.¹⁶

TCEQ rules explicitly provide that certain information must be provided within the application, while the rules identify other information that must be provided prior to construction. For example, TCEQ rules at 330.61(I)(1) provide that for certain facility water wells, the owner or operator must provide the executive director with written certification that the wells have been capped, plugged, and closed in accordance with applicable rules and regulations.¹⁷ In this way, where the Commission intends that

¹⁴ 30 TAC 330.63(c)(2)(D)(ii).

¹⁵ The Commission is required to follow its own rules and procedures. *Tex. Water Code Ann. § 5.103(c); accord City of Waco v. Texas Natural Res. Conservation Comm’n*, 83 S.W.3d 169, 179 (Tex. App.—Austin 2002, pet. denied) (“The commission shall follow its rules as adopted until it changes them in accordance with the Act.”). An agency’s failure to follow the clear and unambiguous language of its own rules is arbitrary and capricious. *Rodriguez*, 997 S.W.2d at 254-55.

¹⁶ PFD at p. 180, Executive Director’s Exceptions at p. 2.

¹⁷ 30 Tex. Admin. Code § 330.63(I)(1).

information be submitted prior to construction, rather than within the application, the Commission has made clear that it will establish such a separate deadline by rule.

Of course, a decision of the Executive Director to ignore the explicit regulatory requirements of the rules as a “common practice” would not excuse such a decision. Protestants dispute that exemption from the requirements of 330.63(c)(2)(D)(ii) is common practice; the evidence does not support this proposition. Mr. Odil testified generally that he had included special provisions to address agency coordination in prior permits, but he did not testify that floodplain issues had been handled in this manner. In fact, he specifically testified that he was not aware of a specific example where an applicant’s failure to obtain a floodplain development permit had been excused by including a special provision in the draft permit.¹⁸ Even if this approach were consistent with agency practice, neither the staff nor the Commissioners possess the authority to utilize agency practice as a means of amending the regulations.¹⁹

Accordingly, Applicant’s failure to comply with the following requirements warrants denial of the application: (1) 30 Tex. Admin. Code § 330.63(c)(2)(D)(ii) related to the submission of a floodplain development permit; (2) 30 Tex. Admin. Code §§ 330.281.5(6) and 330.59, related to the identification of easements, and (3) 30 Tex. Admin. Code § 330.63(e)(4), related to the obtaining of approval for the soil boring plan.

With regard to the regulatory requirement that an applicant submit a floodplain development permit, 130 EP argues in its exceptions that an applicant is only required to submit a floodplain development permit when the waste management unit itself will be located within the floodplain.²⁰ This argument is unavailing. Rule 330.63, which contains

¹⁸ Tr. V. 9, p. 1986, ll. 4-7.

¹⁹ The ED’s suggested approach of adding a special condition to the draft permit (as opposed to requiring Applicant to demonstrate compliance with the rule requiring a floodplain development permit) effectively creates new policy or procedure and thus, falls within the APA’s definition of a new “rule.” Tex. Gov’t Code § 2001.003(6). This new proposed “policy” or “rule” is inconsistent with existing TCEQ rules. And yet, this new proposed “policy” or “rule” was not properly promulgated in accordance with the APA rulemaking procedures. Thus, the ED’s suggested new “policy” of excusing an applicant’s failure to obtain necessary floodplain development permits by adding a special condition to the draft permit is invalid. *Texas State Bd. of Pharmacy v. Witcher*, 447 S.W.3d 520, 534-35 (Tex. App.—Austin 2014, pet. dismissed).

²⁰ 130 EP Exceptions at p. 6.

this requirement, relates to the development of the landfill *site*, which encompasses the entire facility.²¹ With regard to flood control, this rule requires that an owner or operator in the application identify whether the *site* is located within a 100-year floodplain,²² that the application contain a map of all 100-year floodplain areas within the boundaries of the landfill *facility*,²³ and that information detailing flood events be provided if the *site* is located within 100-year floodplain.²⁴ If the Landfill is constructed as proposed, the on-site access road within the site will cross the 100-year floodplain at two separate locations within the permit boundary as proposed by the Executive Director.²⁵ For this reason, in the Executive Director's notices of deficiency, the Executive Director's staff noted that the absence of the floodplain development permit was a deficiency in the application during technical review of the application.²⁶ If the permit boundary is expanded to reach US Highway 183, as it must be, then the access road will cross the 100-year floodplain in three separate locations. Considering this on-site construction of landfill appurtenances within the 100-year floodplain, 130 EP is required to submit a floodplain development permit within its application for construction within this floodplain.

B. The ALJs' Recommended Changes to the Draft Permit

1. The Limited Permit Boundary Warrants Denial of the Application

Both 130 EP and the Executive Director argue that the permit should be granted with the permit boundary remaining as proposed in the Executive Director's draft permit. These arguments should be rejected.

The Executive Director asserts that no rule requires that the access road be contained within the permit boundary. But, particularly under the circumstances presented in this case, the entirety of the access road must be included within the permit boundary in order to ensure compliance with the TCEQ regulations. The Executive Director relies on 30

²¹ 30 Tex. Admin. Code §§ 330.63(a), 330.3(139) (defining "site" as "Same as facility")

²² 30 Tex. Admin. Code § 330.63(c)(2)(A).

²³ 30 Tex. Admin. Code § 330.63(c)(2)(B).

²⁴ 30 Tex. Admin. Code § 330.63(c)(2)(C).

²⁵ Ex. 130 EP Adams-4, p. 2.

²⁶ Ex. ED SO-5, p. 2 (August 1, 2014 NOD).

TAC Section 330.153(c) as justification for the location of the entrance road outside of the permit boundary. In part, this rule provides that “All on-site and other access roadways must be maintained in a clean and safe manner.” Importantly, this provision is found within the rules governing the site operating plan, and addresses the operation of the facility, including actions by personnel employed at the facility to conduct activities such as litter collection on area off-site roadways.

The fact that the rules impose *operational* requirements related to roadways both inside and outside the permit boundary does not mean that roadways comprising *integral design components* of a facility can be located outside of the permit boundary. In this case, compliance with the TCEQ regulations, and compliance with the representations contained within the permit application go well beyond the activities of facility personnel on the roadway. Instead, Applicant’s demonstration of compliance requires that the entrance roadway be aligned to connect to US Highway 183, be sufficiently designed to withstand flooding events, be sufficiently designed to prevent the adverse alteration of drainage patterns, and be structurally maintained. Such design issues must be addressed as part of the site development plan, which according the TCEQ rules, “must include criteria that in the selection and design of a facility will provide for the safeguarding of the health, welfare, and physical property of the people and the environment through consideration of . . . adequacy of access roads.”²⁷ If the private entrance road is not included within the boundaries of the facility where the TCEQ has authority to regulate roadway *design*, then there is no assurance that the design, construction and maintenance of the roadway will be as represented in the Application.

The Executive Director further claims that there is “no evidence in the record that the agency cannot enforce the requirement that be maintained in a clean and safe condition.” As an initial matter, it is the applicant’s burden to demonstrate that TCEQ has enforcement authority over the represented design and alignment of the private entrance road. No such demonstration has been made. As discussed in Protestants’ Exceptions, the TCEQ has previously disavowed extensive jurisdiction over roadways outside of the

²⁷ 30 TAC 330.63(a).

permit boundary. Notably, unlike the regulation of off-site *operations* as set forth in 330.153(c), the regulation of roadway design and alignment in this case outside the permit boundary would require that the Commission regulate private property rights that may be held by a person wholly unrelated to the landfill. In asserting such authority over private property rights, the Commission would incur liability for a regulatory taking of that person's property. No evidence suggests that the Commission is willing to take on that type of liability that enforcement would require.

The Applicant unpersuasively claims that prior cases provide precedent that landfill berms and roadways may be located outside of the permit boundary. As one instance, the Applicant refers to the NTMWD 121 Regional Disposal Facility located in Collin County (121 RDF). According to 130 EP, a 2009 modification of the permit removed screening berms previously located outside the permit boundary.²⁸ But, none of the information presented indicates that the prior berms were outside the permit boundary.²⁹ And, none of the berms authorized by the modification were located outside the permit boundary.³⁰ Even if the action did allow screening berms outside the permit boundary, this does not justify the location of a facility component as integral as the entrance road outside of the permit boundary. So, this example provides no support for 130 EP's position that the entrance road can be located outside of the permit boundary.

130 EP also relies on the permitting of the IESI Jacksboro Landfill in claiming that the access road and screening berm need not be located within the permit boundary. Based on the available information, a portion of the entrance road at that facility is located outside of the permit boundary. But, this does not provide precedent for issuance of 130 EP's permit as requested. Importantly, the IESI Jacksboro application represented that the Applicant possessed an easement for the roadway that significantly limited the location of the roadway.³¹ This defined easement provides much more certainty in the location of the roadway, and provides assurances of access that 130 EP's application

²⁸ 130 EP Exceptions at p. 9.

²⁹ NTMWD 121 "Attachment 2 Fill Cross Section Location Plan"

³⁰ NTMWD 121 "Attachment 2 Fill Cross Section Location Plan"

³¹ IESI TX Landfill LP, Entrance Road Plan, Attachment 1K

simply lacks. Furthermore, the location of the roadway outside of the permit boundary was simply not an issue presented to the Commission when it made the decision to issue the permit.³² Thus, the IESI matter does not provide precedent for the off-site entrance road that 130 EP relies upon.

This is not the first time that 130 EP has attempted and failed to provide precedent for the location of the entrance road outside of the permit boundary. At the hearing, Kenneth Welch, 130 EP's engineer, claimed that Waste Management of Texas, Inc.'s New Boston Landfill utilized an entrance road that was located outside of the permit boundary.³³ But, later testimony by Steve Odil, the TCEQ Permit Engineer, demonstrated that this was simply incorrect, and that the entrance road for the New Boston facility was, in fact, located entirely within the permit boundary.³⁴

Finally, both the Executive Director and 130 EP complain that the permit boundary should not be expanded to include the entrance road and the screening berm because this would require new notice of the application.³⁵ Protestants agree that the expansion of the permit boundary would require additional notice of the Application, and further opportunities for public participation. But, this circumstance is wholly attributable to the Applicant's decision to exclude key elements from within the permit boundary. Further, the procedure required to make this alteration is irrelevant to the question of whether the change is necessary in order to develop a permit that complies with the TCEQ regulations.

2. Applicant has a burden to justify requested operating hours, but has failed to do so.

³² Attachment A, Application of IESI TX Landfill, L.P. for MSW Permit No. 2332, SOAH Docket No. 2007-1302-MSW, March 5, 2009 Proposal For Decision (Table of Contents).

³³ Tr. V. 6, 1253.

³⁴ Tr. V. 8, 1919-1920, Ex. P-45.

³⁵ 130 EP Exceptions at p. 8, ED Exceptions at p. 3. 130 EP alleges that Protestants seek to convince the Commission to expand the permit boundary in an attempt to persuade the Commission to issue a decision beyond the Commission's authority. Of course, Protestants ask that the Commission deny the permit in light of the constrained permit boundary requested by the Applicant. Such a denial is clearly within the Commission's power. Furthermore, Protestants have at no point suggested that the permit boundary should be expanded without complying with all applicable notice requirements.

Both 130 EP and the Executive Director argue that 130 EP had no burden to justify the 24-hour per day, 7-days per week operating hours it has requested.³⁶ These arguments are premised largely on a contention that 130 EP had no burden to justify the operating hours requested.

The arguments set forth by 130 EP and the Executive Director must be rejected. The contention that 330.135 somehow relieves the Applicant of any burden to justify its operation is incorrect, but also ultimately irrelevant to the nature of Applicant's burden under the TCEQ rules. With regard to operating hours, the ALJs have properly found that Applicant has failed to meet its burden under the TCEQ rules. The facts of this case justify the imposition of the operating hours proposed by the ALJs. The operating hours relied upon by 130 EP at other facilities are not analogous to the immediate facility.

a) 130 EP Has the Legal Burden to Justify Its Requested Operating Hours.

TCEQ rules impose an overall requirement that the Applicant bears the burden of proof in a permit proceeding.³⁷ The Office of Public Interest Counsel correctly recognizes that this requirement applies to an applicant's requested operating hours. In part, this burden derives from an applicant's burden to establish that a proposed facility is a compatible land use.³⁸ A facility operating 7 am to 7 pm on Monday through Friday may be compatible with surrounding land uses, while a facility operating 24 hours per day, seven days per week would cause a greater interference with the surrounding land uses, and thus an applicant carries the burden to justify expanded land uses.

Within this context, the question of whether 330.335 standing on its own imposes a burden on the Applicant to justify the requested operating hours is irrelevant. Even so, this argument by 130 EP and the Executive Director renders the language of 30 TAC 330.135(a) that sets forth specific operating hours meaningless. According to the arguments of 130 EP and the Executive Director, this language in the rules might as well

³⁶ ED Exceptions at p. 3-4; 130 EP Exceptions at p. 10-21. The Site Operating Plan proposes site operations 24 hours per day, seven days per week, with acceptance of waste from public and private haulers authorized from 3:00 a.m. to 5:00 p.m. on Monday through Friday and from 5:00 a.m. to 12:00 p.m. on Saturday. App. Ex. 130EP-5, p. 138-139.

³⁷ 30 TAC 80.17(a).

³⁸ 30 TAC 330.61(h).

be deleted, since they claim that an applicant has the inalienable right to request any operating hours the applicant wants, with no requirement to justify such a request. Rules are to be interpreted under the same principles as statutes,³⁹ and the Texas Supreme court has noted that, “courts must give effect to all words in a statute without treating any statutory language as mere surplusage.”⁴⁰ Accordingly, the interpretation of 30 TAC 330.335 set forth by the Executive Director and 130 EP, which renders the specific hours set forth in the rules as superfluous, must be rejected. The ALJs and OPIC emphasize a superior interpretation of the rule, which allows for the hours established by rule to be considered default hours, while imposing a burden on the applicant to justify operating hours exceeding this default. As noted by the ALJs, the imposition of this burden is consistent with the Commission’s consideration of operating hours in a prior landfill case.⁴¹

b) 130 EP has not met its burden to justify 24-hour a day, seven day a week operating hours.

Contrary to the arguments of 130 EP and the Executive Director, the facts of this case justify a rejection of 130 EP’s request for 24 hour per day 7 days per week operating hours. Protestants do not dispute that the operating hours at a particular facility must be determined based on a case-specific consideration of the circumstances at the facility in question. In this case, 130 EP has failed to meet its burden of proof in consideration of 130 EP’s own admission that expanded operating hours are more likely to disturb people in residential areas, the undisputed very short distances between portions of the facility and existing residences, and the potential for the facility to create noise all justify the limitations on operating hours proposed by the ALJs. 130 EP asserts that its characterization of early morning waste acceptance traffic is the only evidence in the record regarding the reasonableness of waste acceptance between 3:00 a.m. and 7:00 a.m. This is untrue. The testimony of the applicant’s own witness regarding the potential

³⁹ *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011).

⁴⁰ *In re Lee*, 411 S.W.3d 445, 453 (Tex. 2013).

⁴¹ PFD at p. 188, citing An Order Granting the Application of Waste Management of Texas, Inc. for Type I MSW Permit No. 249D, TCEQ Docket No. 2006-0612-MSW, Order at FoF 210 (Mar. 15, 2010).

incompatibility of overnight operations is contrary to any implication that of reasonableness that may be drawn from Applicant's traffic projections.

Furthermore, Mr. Hobby, upon whom 130 EP now relies to justify the requested early morning waste acceptance hours, did not even identify the Site Operating Plan containing the waste acceptance hours as an item he reviewed, or claimed any expertise in.⁴² He had limited his review to the highway map in the application, the estimated site traffic in the application, and the site life.⁴³ Mr. Hobby did not indicate any effort to review factors such as the proximity of nearby residences that must be considered in evaluating the proper operating hours for a facility.

c) A comparison to other facilities does not justify 130 EP's requested operating hours.

In its Exceptions, 130 EP identifies operating hours at several other facilities throughout the state in an attempt to justify its own operating hours. As an initial matter, Protestants object to the consideration of these instances, since they are not contained in the record. Furthermore, Applicant's reliance on facilities elsewhere in the state is directly contrary to Applicant's own contention that the determination of operating hours is a case-specific question. The operating hours at these facilities elsewhere in the state do not alter the case-specific circumstances at the 130 EP facility, and are thus irrelevant.

Moreover, every instance identified by 130 EP involved the establishment of operating hours as the result of an amendment or modification. In such a case, the landfill exists prior to the permitting action, and thus the mere existence of the landfill will not alter the current character of the area. This is critically different from 130 EP's application for a greenfield facility, which will create a new industrial land use with noise, odor and traffic that simply do not exist under current conditions. Notably, of the seven examples identified by 130 EP, only two allow for the 24 hours per day, 7 days per week hours being sought by 130 EP. Thus, even 130 EP's own examples indicate that it

⁴² App. Ex. Hobby-1, p. 5.

⁴³ App. Ex. Hobby-1, p. 5.

is unusual for the Commission to approve the extent of operating hours being requested by 130 EP.

d) FF173, FF174, and CL43 do not justify the rejection of the operating hours proposed by the PFD.

Operation of the landfill for 24-hours-a-day constitutes a nuisance to the neighbors and community. 130EP cites to and relies upon the ALJs' proposed findings of fact FF174 and FF173 and conclusion of law CL43 for the proposition that the landfill will not create a nuisance, and therefore 24-hour-a-day operation is permissible. Reliance on these findings and conclusions is misplaced for each of the reasons set forth below.

i. PFD Nuisance determination is contingent on reduced operating hours

Any finding of "no nuisance" must be interpreted in conjunction with the ALJs recommendation that the landfill's operating hours be significantly restricted. Thus the PFD takes the position that the landfill will not constitute a nuisance if the operating hours are restricted to what is recommended in the PFD.

ii. FF174 is irrelevant to any determination of whether active operations constitute a nuisance.

The finding regarding nuisance in FF174 is expressly limited to passive "wastes storage units" and not the active operating of the landfill. Thus it has no relevancy to the operating hours issue, which relates to acceptance of waste and the processing of waste on a 24-hour basis.

iii. FF173, FF174, and CL43 are not supported by the law or evidence.

These findings and conclusions regarding nuisance cited by 130EP are without legal or factual basis and are not based on competent evidence.

Proposed FF173 says that the Application "states that solid waste capable of creating ... nuisances will be stored indoors, transferred, or processed promptly, and not allowed to cause nuisances" The conclusory statement by the Applicant in the Application is not evidence of nuisance or a lack thereof at all. At best it is a statement of the Applicant's aspiration. If the Applicant can prove a landfill will not create a nuisance simply by putting in the Applicant a statement saying it will "not be allowed to cause

nuisances,” this makes a complete mockery of all the regulations promulgated by the Legislature, TCEQ, and the courts for the prevention of a nuisance. This proposed fact-finding should be rejected as both irrelevant and without probative value.

Proposed FF174 states: “the Application provides design features for the waste storage units that will prevent the creation of nuisances and public health hazards due to odors, fly breeding, or harborage of other vectors.” (emphasis added) As shown in Protestants’ Exceptions to the Odor Control section of the PFD, the objections to the testimony of Martha O’Brien,⁴⁴ and in Protestants’ Closing Arguments and the parties’ cross-examination of Ms. O’Brien, this finding is without any evidentiary support. No expert explained the precise logical connection between specific “design features” and nuisance. An expert “cannot simply say, ‘Take my word for it . . .’ Credentials qualify a person to offer opinions, but they do not supply the basis for those opinions. The opinions must have a reasoned basis . . .” *Burrow v. Arce*, 997 S.W.2d 229, 236 (Tex. 1999). Ms. O’Brien’s testimony about odors and nuisance is incompetent and unreliable because her analysis is conclusory and fails to explain the logic and factual basis from which her opinion was derived. The Proposed FF174 is not the product of the required “rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand.” *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 579 (Tex. 2006).

Proposed CL43 concludes that the methods specified in the Site Operating Plan comply with the rules “to prevent the creation of any nuisance, as defined by 30 TAC § 330.3(95).” In fact, there was no testimony offered that made any detailed connection between the Site Operating Plan and the definition of nuisance found in 30 TAC § 330.3(95).

The Applicant’s odor expert, Martha O’Brien, did not cite to or rely on or refer to this specific regulation in forming her opinion.⁴⁵ Section 330.3(95) defines nuisance to

⁴⁴ Joint Caldwell County, TJFA, EPICC, Objections To, and Motion to Strike Prefiled Testimony 58-59 (July 26, 2016).

⁴⁵ Tr. V. 4, p. 974, ll. 3-13.

include odors adverse to human welfare and “any other applicable regulation or statute.” Other such regulations or statutes include: 30 TAC § 101.4 (defining nuisance to encompass contaminants which may tend to adversely affect human welfare or property or interfere with the normal use and enjoyment of property); 30 TAC 330.245(a) (prohibiting landfills from emitting air pollution as defined by the Texas Clean Air Act) and Texas Clean Air Act §§ 382.003(3) & (2) (defining pollution to encompass the presence of odors or fumes that interfere with the normal use and enjoyment of property or adversely affect property). None of these regulations and statutes were specifically cited or relied upon by Ms. O’Brien when formulating her opinion as to whether the landfill would create nuisance odors.⁴⁶

O’Brien’s expert testimony was an opinion about nuisance. Yet her definitions of nuisance varied and did not show consistent compliance with the legal meaning of that word under Texas law.⁴⁷ She did not claim any expertise in Texas nuisance law⁴⁸ and did not even identify the most relevant regulations and statutes that define nuisance under Texas law in the opinions she gave regarding nuisance. Instead, her true expertise and what she was basing her opinions on was an ASTM formula that does not address the factors of nuisance under Texas law.⁴⁹ There appear to be no Texas cases citing to and using Ms. O’Brien’s ASTM formula in deciding whether or not an odor has odors or fumes that interfere with the normal use and enjoyment of property or adversely affect property. Ms. O’Brien’s expertise was beside the point, and not probative.

Ms. O’Brien admitted that if an objectionable odor from a landfill was strong enough to cause a neighbor to wake up in the middle of the night, the question as to whether that would constitute an interference with the normal use of the property is a personal judgment.⁵⁰

⁴⁶ Tr. V. 4, 974:3-13.

⁴⁷ Tr. V. 4, 971:1-6.

⁴⁸ Tr. V. 4, 970:6-25.

⁴⁹ Tr. V. 4, 965: 15-18; 967: 1-18; 972: 21-25; 973: 1-12.

⁵⁰ Tr. V. 4, 972: 10-20.

Ms. O'Brien's opinion was given despite a lack of familiarity and knowledge of key components of the Applicant's odor management plan. Her opinion about the odors affecting nearby property, including the value of property just 185 feet away from the site, and her refusal to find that the landfill would not interfere with the normal use and enjoyment of nearby homes, one of which is located less than 185 feet downwind from the landfill boundary,⁵¹ was based on erroneous factual assumptions. It was based on the assumption that a berm surrounding the landfill would deflect prevailing winds carrying odors.⁵² But she did not know the height of the proposed landfill.⁵³ Nor did she know the height of the berm.⁵⁴ Nor did she know that the landfill would be at least ten stories taller than the berm.⁵⁵ Ms. O'Brien admitted that it would be hard to quantify the impact of the berm as protection from odor to adjacent residents.⁵⁶ Moreover, she admitted that the height of the landfill can render the earthen berm ineffective.⁵⁷ Moreover, as pointed out in the Exceptions by the Office of Public Interest Counsel the draft permit does not require construction of the berm before acceptance of waste and the berm is located, in part, outside of the permitted facility boundary, making enforcement of any promises or plans regarding the berm problematic. Ms. O'Brien's opinion regarding the impact of odors on property and the normal use and enjoyment of property does not have a legitimate factual basis. "When expert testimony is involved, courts are to rigorously examine the validity of the facts and assumptions on which the testimony is based." *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637 (Tex. 2009). Ms. O'Brien's testimony about nuisance is incompetent, irrelevant, and constitutes no evidence at all.

O'Brien testified as to the absolute necessity of daily cover and its importance in preventing nuisance odors. Applicant intends to rely upon on-site soils as the source of

⁵¹ Tr. V. 1, 39; 130EP-1, p. 150.

⁵² Tr. V. 4, 999: 9-25.

⁵³ Tr. V. 4, 1001: 11-25.

⁵⁴ Tr. V. 4, 1002: 17-18.

⁵⁵ Tr. V. 4, 1006: 22-25.

⁵⁶ Tr. V. 4, 1008: 6-10; 1009: 3-5.

⁵⁷ Tr. V. 4, 1010: 10-12.

soil for liners and daily cover.⁵⁸ Applicant has not demonstrated that the soils on-site are suitable for use in the landfill as it has claimed as required by TCEQ Rule 330.63(e)(5). As Dr. Lauren Ross observed, the boring logs characterize the subsurface as composed uniformly of high-plasticity clay.⁵⁹ But, in fact, laboratory tests for several samples indicate that some of the soil material beneath the site is low plasticity clay and silts.⁶⁰ Furthermore, as noted, the material at the site contains considerable quantities of sand, gravel and cobble material in Stratum I. Applicant has simply not accounted for the true character of the soils at the site when claiming that the soils at the site are suitable as a supply for the soil needs of the landfill. No soil balance has been provided to determine what portion of the soils on-site are, in fact, suitable for the daily cover, and whether this amount is sufficient to supply the quantity of soil needed for construction and operation of the landfill.⁶¹ Without the inclusion of a soil balance, Applicant's geotechnical evaluation fails to demonstrate that the on-site soils are suitable for use as source material for the daily cover needs at the facility.

Applicant asserted in exceptions that the findings and conclusions of no nuisance are supported by the "fact" that the buffer zone exceeds requirements. But this is not true. Applicant in its Exceptions is counting as a buffer zone property that is outside the facility boundary and thus, by definition, not part of the buffer zone. *See* 30 TAC § 330.3(19) ("Buffer zone--A zone free of municipal solid waste processing and disposal activities within and adjacent to the facility boundary on property owned or controlled by the owner or operator").

For each and all of these reasons, the proposed findings of fact and conclusions of law cannot provide a basis for approving the 24-hour operation of the landfill proposed by 130EP.

C. Additional Matters

⁵⁸ Tr. Vol. 4, 809. App. Ex. 130EP-3, p. 61. App. Ex. 130EP-3, pp. 62, 67, 68, & 69.

⁵⁹ Protestants Ex. 5, p. 25.

⁶⁰ Protestants Ex. 5, p. 25, referencing lab test results for BME-28 at 14 feet, BME-29 at 13 feet and BME-31 at 23 feet.

⁶¹ Tr. 730 & 809.

Applicant excepts to a number of other findings by the ALJs, including the ALJs' discussion of the proposed landfill's compatibility with the Site 21 Reservoir, destruction of field logs and samples, and the County's siting ordinance. These issues are addressed, in turn, below. Also, below, Protestants address some of the issues raised by other parties in this case.

1. *The proposed landfill is not compatible with the Site 21 Reservoir.*

Applicant takes exception to the ALJs' expression of concern regarding the compatibility of the proposed landfill with the Site 21 Reservoir and Dam. Applicant maintains that the evidence in the record demonstrates that the proposed landfill will be compatible with the Site 21 Reservoir and Dam. But Applicant presented no evidence demonstrating that its experts considered the fact that the Site 21 Dam and Reservoir has been classified as high hazard or that its experts considered the repercussions of siting a landfill near a high hazard dam.

As acknowledged by the PFD, the reservoir was created in 1962 with the construction of the Site 21 Dam. The dam was originally designed as a low-hazard dam needed to protect downstream agricultural areas from flooding.⁶² The PFD further acknowledges that development downstream of the proposed landfill site has increased, causing the Site 21 Dam to be reclassified as a high hazard dam necessary for the protection of human life.⁶³ Yet, the PFD fails to acknowledge that none of Applicant's experts considered the compatibility of siting a landfill in close proximity to a high hazard dam.

Mr. Worrall was the Applicant's designated land use expert, responsible for analyzing the compatibility of the proposed landfill with existing, surrounding land uses. Yet, he did not consider the presence of, or potential impacts to, a high hazard dam in his land use analysis.⁶⁴ In fact, in response to cross-examination regarding the high hazard dam, Worrall appeared to be unfamiliar with the classification of the dam as "high hazard."⁶⁵

⁶² PFD, p. 7.

⁶³ PFD, p. 7.

⁶⁴ Tr. V. 1, p. 77, ll. 3-16.

⁶⁵ Tr. V. 1, p. 77, ll. 3-4 (Worrall: "what did you call it? A high hazard dam? Is that what you said?").

Applicant's engineer of record, Mr. Maroney, also failed to consider potential impacts of siting a landfill in close proximity to a high hazard dam:

Q: Have you made any attempt to collect additional information regarding the Site 21 Dam and Reservoir near the proposed landfill footprint?

A: No, ma'am.

Q: Have you conducted any evaluation of Site 21?

A: No, ma'am.⁶⁶

Similarly, Mr. Snyder, Applicant's geologist who was involved in the site selection process, also failed to take into account the presence of the Site 21 Reservoir and Dam:

Q: You also testified that this particular site in Caldwell County, in your opinion, appears to be better than the proposed Pintail site. Did -- in making that evaluation, did you consider the presence of the High Hazard Dam that is near the proposed site?

A: I did not consider the High Hazard Dam as part of my evaluation.⁶⁷

The PFD states that Applicant addressed potential impacts of the proposed facility on the Site 21 Reservoir and Dam in the context of addressing rules regarding surface water drainage and floodplains. But the Applicant's expert hydrologist, responsible for the surface water drainage and floodplain analyses, also failed to consider the potential impacts of siting a landfill in close proximity and immediately upstream of a high hazard dam and reservoir:

Q: Did you do an evaluation to determine whether the changes resulting from this landfill would compromise the ability of this reservoir to handle the probable maximum flood?

A: No. The probable maximum flood was not incorporated into my analysis.⁶⁸

⁶⁶ Tr. V. 9, p. 2073, ll. 9-14.

⁶⁷ Tr. V. 2, p. 483, ll. 12-18.

⁶⁸ Tr. V. 3, p. 678, ll. 21-24.

As discussed in Protestants' exceptions, Applicant's surface water drainage analysis relies on the existence of the Site 21 Reservoir. Yet, Applicant's hydrologist did not evaluate whether the proposed landfill would impact the ability of the Site 21 Reservoir to handle the proximate maximum flood. Nor could Mr. Traw identify another instance where a landfill was sited immediately upstream of a dam classified as high hazard.⁶⁹

Applicant's failure to consider potential impacts to the Site 21 Reservoir and Dam is inexcusable, considering that the dam is necessary for the protection of downstream property and human life (matters of public interest), as acknowledged by the PFD.⁷⁰ Plum Creek Conservation District's exhibits further emphasize the risks associated with this high hazard reservoir and dam and the uncertainty that it will be rehabilitated anytime soon:

Risk and Uncertainty . . .

Hydrology - The areas of risk and uncertainty associated with this project [proposed rehabilitation of Site 21] lie in the accuracy of estimating flood flows and flood elevations. The uncertainty of flood flows and water surface elevations has the potential for increased damages as new properties are converted from agricultural to residential and commercial use. It is possible that these uncertainties could lead to increased risk to human life in the event of a dam breach. Hydrologic methods and computer modeling used in this analysis are consistent with the standards of practice at this time. However, the tributary is not gauged, and no verification of storm flows is possible. The potential impacts for each alternative are estimated using techniques that relate potential damage to lost opportunity. However, these methods are in part based on professional judgment, and actual experience could be different.⁷¹

⁶⁹ Tr. V. 3, pp. 679-80.

⁷⁰ PFD, p. 173.

⁷¹ PCCD Exhibit 1.6 ("Excerpts from recent Final Report on Rehabilitation of Site 21"), p. 51.

In contrast to Applicant's experts, Protestants' expert, Dr. Lauren Ross, did consider potential impacts of the proposed landfill on the Site 21 Reservoir and Dam. In short, she concluded that:

The proposed landfill storm runoff management system is not designed to control runoff for the Probable Maximum Precipitation event, which is the design storm event for a high-hazard dam. Adequate design of Floodwater Retarding Structure No. 21 improvements to meet this standard must consider, therefore, the hydrologic impacts of the proposed landfill during these design conditions.

If the proposed improvements to Floodwater Retarding Structure No. 21 are not funded and completed, the proposed landfill will increase the risk of downstream flooding because [among other reasons]: The current Floodwater Retarding Structure No. 21 design has not been shown to mitigate increased runoff during the Probable Maximum Precipitation event.⁷²

The uncertainties and risks associated with siting a landfill near and upstream from the Site 21 Reservoir and Dam were simply never analyzed by Applicant's experts, even after evidence was presented by both the District and Protestants regarding the potential risks to Site 21. There is no basis for concluding that the proposed landfill is compatible with the Site 21 Reservoir and Dam. The only evidence that exists, in the record, regarding the compatibility of the proposed landfill with Site 21 is the evidence presented by the District and by Protestants, and this evidence establishes that siting a landfill near Site 21 will increase risks to downstream property and human life.

Protestants agree with and incorporate by reference, here, the arguments regarding land use compatibility submitted by OPIC and by Caldwell County.

2. The PFD correctly recognized that Applicant was responsible for the destruction of soil samples and field logs.

⁷² Ex. P-5, pp. 43-44.

In its exceptions, Applicant objects to references in the PFD and proposed order finding that Applicant 130EP destroyed field logs and soil samples. Applicant argues that it was Applicant's consultants, Biggs & Matthews Environmental (BME), who destroyed the field logs and soil samples, not Applicant, and thus, the PFD should not attribute the destruction of evidence to 130EP. For support, Applicant quotes extensively from an affidavit by Mr. Snyder, Applicant's geologist.

Applicant's argument fails for a number of reasons. First, Mr. Snyder's affidavit was never offered or admitted into evidence, and it is hearsay. The affidavit was included as an attachment to a response to Protestants' motion to compel access to property or in the alternative, motion for sanctions. Thus, references to and quotes from this affidavit should be stricken from Applicant's exceptions, and should not be considered or given any consideration.

Second, there is no question that Applicant was "in control" of the discarded field logs and soil samples. BME was collecting evidence and preparing an application for and on behalf of Applicant. Thus, Applicant had control and constructive possession of the evidence collected by BME. The relevant legal inquiry for purposes of determining whether a party improperly spoliated evidence is: whether a party knew or reasonably should have known that there is a substantial chance of litigation and that evidence in its possession or *control* will be material and relevant to that litigation. *Brookshire Bros., Ltd. v. Alridge*, 438 S.W.3d 9, 20 (Tex. 2014). In this case, it is Applicant who had "control" of the evidence material to this landfill permit proceeding, and so, it is Applicant who is ultimately responsible for the destruction of this evidence.

Third, there is no question that BME was the authorized agent acting on behalf of Applicant in preparing and submitting the landfill permit application. In Part I of the application, Mr. Kaufmann, on behalf of Applicant, signed and affirmed a "notice of appointment," designating BME as its duly appointed engineering firm for the purpose of submitting reports and materials for a landfill permit application to TCEQ.⁷³ So, Applicant designated BME as its agent, and as an agent, BME was acting on behalf of its

⁷³ Ex. 130EP-1, p. 78.

principal, 130EP. *Crooks v. M1 Real Estate Partners, Ltd.*, 238 S.W.3d 474, 483 (Tex. App.—Dallas 2007, pet. denied) (“An agent is a person who is authorized by another to transact business or manage some affair by that person’s authority and on account of it.”). Applicant was ultimately responsible for the information submitted to TCEQ, including any evidence collected and used to prepare the application materials. Applicant cannot now disavow the actions of its duly appointed agent, BME.

The PFD correctly acknowledges that Applicant breached its duty when its agent, BME, discarded relevant evidence. The PFD, however, fails to impose any sanction on Applicant for this spoliation of evidence. As explained in Protestants’ exceptions, because Applicant discarded its evidence, Applicant essentially had no legally sufficient evidence to support the representations in its application, and the draft permit should therefore be denied.

3. Caldwell County’s Landfill Siting Ordinance prohibits the issuance of a permit for a landfill at the proposed site.

Applicant objects to the PFD’s finding that Applicant should have considered the County’s landfill siting ordinance as part of its land use compatibility analysis. On this issue, Protestants agree with and incorporate by reference the arguments presented by Caldwell County in its Exceptions.

More specifically, Protestants agree that at the time the County passed its landfill siting ordinance, the only application pending at TCEQ was Applicant’s application for a land-use only determination. There was no application for a landfill permit pending at TCEQ. The application for a land use only determination did not exempt Applicant from compliance with the County’s landfill siting ordinance.

Applicant’s landfill permit application was not filed until after the County enacted a landfill siting ordinance. The ordinance was effective December 9, 2013. An administratively complete permit application was submitted to TCEQ February 2014; nearly 2 months after the County enacted its siting ordinance. For the reasons set out in Caldwell County’s exceptions, 130EP’s Application must be denied because issuance of the requested permit is prohibited by the County’s siting ordinance.

4. *The Application should be rejected because the Competency and Compliance disclosures required under statutes and rules have not been satisfied for the reasons given in the OPIC Exceptions.*

Protestants agree with the following statement on page 2 of the Office of Public Interest Counsel's Exceptions to Proposal for Decision ("OPIC Exceptions"):

Before the Commission may issue a municipal solid waste permit a substantive review of compliance and competency must be completed. 30 TAC §§ 60.1, .3. The first step is a full disclosure in the application of all persons and sites subject to review. *See* 30 TAC §§ 281.5, 305.50, 330.59. Unfortunately, 130 Environmental Park LLC refused to comply with this basic requirement – preventing full review – as well as providing false or misleading information to the Executive Director. Therefore, the permit must be denied.⁷⁴

Protestants agree with the arguments of OPIC concerning Competency and Compliance history on pages 2 through 10 of its Exceptions and incorporates these arguments, authority and evidence by reference into its Exceptions and this Reply.

5. *OPIC's arguments regarding Odor control are adopted by reference.*

Protestants ask that the permit be denied because the Applicant has failed to demonstrate that it has met the Odor control requirements of the statutes and TCEQ regulations and because the proposed landfill would create a nuisance. The reasons for this are set forth in this Reply, in Protestants' Exceptions, and in Protestants Final Arguments.

In addition and in the alternative, if the permit were to be granted, Protestants agree with and incorporate by reference the arguments of OPIC on pages 15 through 17 regarding Odor. Not only should the landfill operation be limited to no more than standard TCEQ hours, but if any permit were issued it should prohibit alternative daily cover and modify the boundary of the landfill to encompass the vegetative screening berm.

⁷⁴ OPIC's Exceptions to the PFD, p. 2.

III. CONCLUSION & PRAYER

Because Applicant has failed to demonstrate compliance with a number of TCEQ requirements, Protestants urge the ALJs to issue a Proposal for Decision, recommending denial of the permit application.

Respectfully submitted,



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CERTIFICATE OF SERVICE

By my signature, below, I hereby certify that a true and correct copy of the foregoing document has been served on the following attorneys of record by electronic mail, facsimile, or US Mail on this 23rd day of March, 2017.



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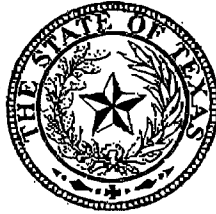
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Via E-Filing

Attachment A



STATE OF TEXAS
COUNTY OF TRAVIS

CERTIFICATION OF OFFICIAL
RECORD OF THE STATE OFFICE
OF ADMINISTRATIVE HEARINGS

I, Susan Gage, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated. The State Office of Administrative Hearings (SOAH) has delegated to me the authority to serve as custodian of records and documents referred to below.

Pursuant to this authority, I have attached hereto true and correct copy of the following:

*In the Matter of Application of IESI TX Landfill, L.P. For A New Type I MSW Permit;
Proposed Permit No. 2332
(SOAH Docket No. 582-08-1804)
* Amended Proposal for Decision (Issued September 4, 2009)*

Records are kept in the regular course of business by SOAH. It was in the regular course of business for an employee or representative of SOAH, with knowledge of the act or event, to make the record or to transmit information thereof to be included in such record; and the record was made at or the near the time or reasonably soon thereafter. The records attached hereto are exact duplicates of the documents on file with SOAH.

IN WITNESS WHEREOF, I have executed this certificate under the official seal of the State Office of Administrative Hearings this 2nd day of August, 2016, in the city of Austin, Travis County, Texas.



Susan Gage
Susan Gage, Custodian of Records

EXHIBIT
PROTESTANTS
39

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 4, 2009

Les Trobman, General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-08-1804; TCEQ Docket No. 2007-1302-MSW; In Re:
Application of IES1 TX Landfill, L.P. For A New Type I MSW Permit; Proposed
Permit NO. 2332

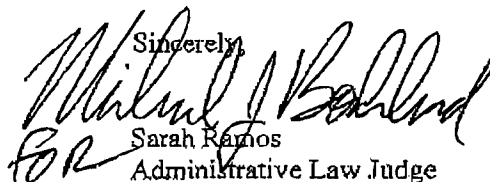
Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Amended Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **September 24, 2009**. Any replies to exceptions or briefs must be filed in the same manner no later than **October 5, 2009**.

This matter has been designated **TCEQ Docket No. 2007-1302-MSW; SOAH Docket No. 582 08-1804**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and seven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,


Sarah Ramos
Administrative Law Judge

SGR/cm
Enclosures
cc: Mailing List

Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994
<http://www.soah.state.tx.us>

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

APPLICATION OF
IESI TX LANDFILL, L.P.

FOR A NEW TYPE I MSW PERMIT;
PROPOSED PERMIT NO. 2332

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

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