

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. § ADMINISTRATIVE HEARINGS
2383 §
§

TJFA, LP's & ENVIRONMENTAL PROTECTION IN THE INTEREST OF CALDWELL COUNTY'S (and ALIGNED INDIVIDUAL PROTESTANTS') RESPONSE TO CLOSING ARGUMENTS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES KERRIE JO QUALTROUGH 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 Response to Closing Arguments. Protestants urge the Honorable ALJs to deny the application for a landfill permit submitted by Applicant 130 Environmental Park, LLC (Applicant). For support, Protestants respectfully offer the following:

TABLE OF CONTENTS

I. INTRODUCTION..... 4

II. ISSUES RAISED..... 5

1. Sufficiency of Property Rights 5

2. Evidence of Competency..... 11

3. Compliance History..... 11

4. Land Use Compatibility..... 17

5. Transportation and Traffic 24

6. Geology and Soils..... 26

7. Hydrogeology 37

8. Faults 38

9. Groundwater Monitoring..... 38

10. General Facility Design..... N/A

11. Waste Management Unit Design..... 39

12. Unstable Areas..... N/A

13. Landfill Gas Monitoring..... N/A

14. Endangered or Threatened Species..... N/A

15. Wetlands..... 41

16. Surface Water and Drainage..... 47

17. Floodplains 51

18. Local Regulations/Approvals 55

19. Waste Acceptance Plan..... 55

20. Site Operating Plan 58

21. Odor 62

22. Water Supply N/A

23. Buffer Zones..... N/A

24. Screening N/A

25. Permit Duration..... N/A

26. Closure Plan..... N/A

27. Post-Closure Plan N/A

28. Financial Assurance N/A

**29. Impacts on health, welfare, environment, or physical property of
nearby residents and property owners..... N/A**

30. Enforceability of Draft Permit..... N/A

31. Permit Special Provisions 65

32. Transcript Costs 66

33. Additional Issues..... N/A

III. CONCLUSION X

Attachments

Attachment A: Affidavit of Patton Spencer King

Attachment B: Order Denying the Application of Juliff Gardens, LLC.

I. INTRODUCTION

Applicant 130 Environmental Park, LLC's (Applicant) closing brief reads much like its permit application. That is, it is devoid of any meaningful discussion regarding the actual and specific facts and circumstances that exist at the proposed landfill site.

Applicant gave short shrift to the extensive evidence presented by the protesting parties regarding the unique and sensitive features that pervade the proposed landfill site, making it unsuitable for the landfill proposed by Applicant. Via its closing brief, Applicant essentially argued that because the application includes *some* information regarding each of the issues identified by the parties, Applicant has met its burden of proof regarding each of those issues.

But TCEQ rules require more, and the sensitive features that exist at this proposed landfill site compel an exacting examination of the evidence presented to ensure that human health and the environment will be protected. The various protesting parties in this case, along with OPIC, have presented arguments that focus on and describe the unique circumstances that exist at the proposed landfill site—including, but not limited to, the extensive floodplains; the existence of a high hazard dam and reservoir; unreliable and inaccurate geology report that is based on legally insufficient evidence; inadequate soil for daily, intermediate, and final cover; close proximity to an aquifer; disturbance of wetlands; property ownership issues; inadequate site operating plan (including hours of operation and proposed use of alternative daily cover); and inadequate and uncertain site access. These arguments are all supported by extensive evidence in the record.

In many instances, Applicant was made aware of these deficiencies and inaccuracies before its application was even declared technically complete. For instance, on numerous occasions, the Executive Director informed Applicant that it needed to acquire the necessary approvals for developing its proposed access road in a floodplain. The ED requested that Applicant provide accurate and sufficient information regarding

persons who owned more than a 20% interest in 130 Environmental Park. Applicant was also aware of the “high hazard” classification of the dam at Site 21. The extensive presence of gravel at the site should have been apparent to any observer. And if Applicant’s consultants’ prior landfill hearing experience (and applicable rules) did not alert them to the need to preserve field logs and samples, Protestants’ counsel sent Applicant a letter advising Applicant to preserve all field logs and samples—before the technical review of the application was even completed—because a hearing was likely.

Applicant, however, has continually demonstrated a complete disregard for TCEQ’s rules and its own professional responsibilities and duties. It did not acquire all necessary property rights, or even include Plum Creek Conservation District in its list of property right owners. It did not initiate the process of obtaining local government approval for construction of an access road over a floodplain. Its land use expert touted the “organic” shape of the proposed landfill as a factor that contributes to the compatibility of the landfill with surrounding land uses, without considering the increased risks that arise from siting a landfill so close to significant floodplains. Its consultants did not conduct an evaluation of potential impacts to the high hazard dam. And its consultants discarded all field logs and samples, even though they should have known that doing so constituted destruction of evidence.

Applicant’s landfill permit application must be denied for the various reasons presented below.

II. ISSUES RAISED

1. SUFFICIENCY OF PROPERTY RIGHTS

The Plum Creek Conservation District (the District) has identified serious deficiencies regarding Applicant’s property rights to the proposed landfill site. Specifically, the District calls into question whether Applicant possesses sufficient property interests in the site—property interests that are necessary for the operation of the

proposed landfill—and whether the proposed landfill will adversely impact the District’s own property interests.

These deficiencies are not surprising, considering that the Applicant initially failed to satisfy an even more basic TCEQ requirement regarding property interests. It failed to identify the District as a property interest and major easement owner. TCEQ’s rules specifically require an applicant to list all property owners within $\frac{1}{4}$ of the facility¹ and all potentially affected landowners.² Yet, Applicant failed to do so. This omission of this basic, yet essential, information was corrected only after the Executive Director learned, via public comments, that the District possessed an easement on the site and instructed the Applicant to revise its application to reflect the District’s easement.³ 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.⁴ But Applicant dismissively responded that its landowners list was sufficient to comply with TCEQ’s requirements.⁵

Moreover, recognizing that Applicant’s drainage analysis—which is intended to determine whether the landfill would result in adverse impacts to drainage conditions—contemplated use of the District’s reservoir to mitigate impacts to drainage patterns, the Executive Director instructed the Applicant that it needed to acquire a drainage easement. As explained by the ED, “the requirement that drainage patterns not be altered at the permit boundary is not met where the alterations are mitigated on off-site property, even if the property is owned by the applicant, without a drainage easement. A drainage easement should be acquired for areas between CP5 through CP8 and CP9 through

¹ 30 Tex. Admin. Code § 330.59(c)(3)(B).

² 30 Tex. Admin. Code § 281.5(6).

³ Ex. ED-SO-9, Response to Comments, p. 7.

⁴ See Ex. P-22, pp. 4-5.

⁵ Ex. P-22, p. 5.

CP10.”⁶ Yet, Applicant failed to abide the ED’s instruction. This is discussed in further detail elsewhere in this brief; namely, in the section that addresses drainage.

Similarly, Applicant failed to address or consider the impacts of its proposed facility on the District’s property rights—*i.e.*, the reservoir, the dam, and the District’s easement. This failure is particularly disconcerting, because the Applicant has relied on the reservoir to mitigate the adverse impacts to drainage conditions caused by the proposed landfill. That is, without the reservoir, Applicant cannot demonstrate that drainage conditions will not be adversely altered at the permit boundary. (Protestants argue that Applicant should have been required to demonstrate no adverse impacts at the literal permit boundary, independent of the reservoir; applying this standard, Applicant has failed to demonstrate that the landfill will result in no adverse drainage impacts.) Applicant simply argues, however, that any changes to drainage conditions and any impacts to Site 21 will be insignificant. This is yet another example of the Applicant cavalierly dismissing the concerns first raised by the ED and later by the District regarding the proposed changes to drainage conditions and potential impacts on Site 21.⁷

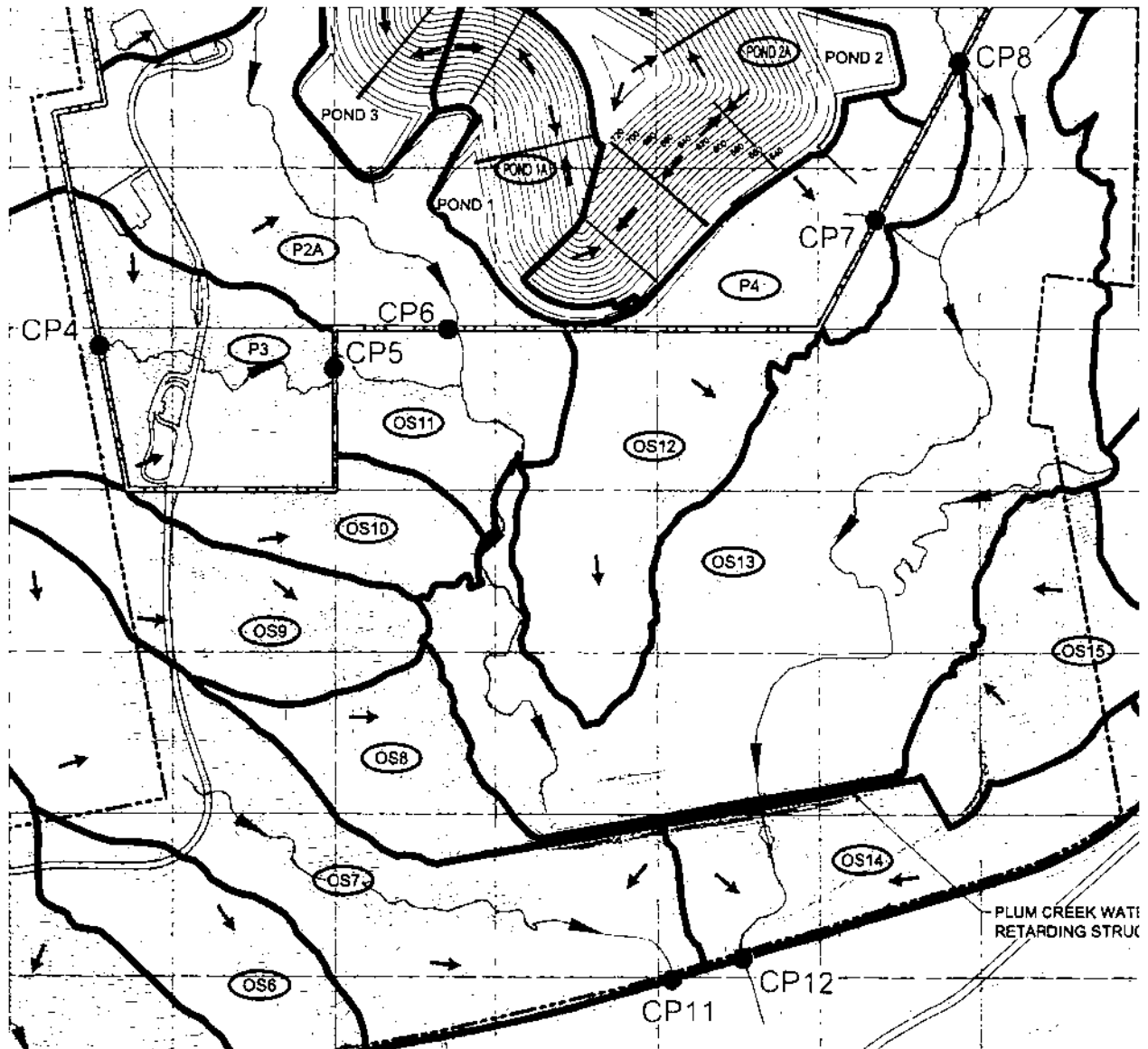
Encumbrance of the PCCD easement

Protestants support the arguments presented by PCCD regarding its “Site 21” reservoir. Basically, the Applicant is using PCCD’s easement to offset the adverse alterations it, the Applicant, is making along the southern flank of its facility boundary. The relevant excerpt from the drainage plan⁸ presented by the Applicant is set out immediately below.

⁶ Ex. ED-SO-4, p. 4.

⁷ As recognized by the District in its Closing Arguments, these arguments regarding impacts to the District’s property rights and responsibilities are relevant to the issue of “property rights” as well as to the issue of “land use compatibility.” These arguments are also relevant to the discussion on drainage. For consistency, Protestants have included a discussion regarding impacts to Site 21, here, under the heading of “sufficiency of property rights.” Related arguments are also included in the land use compatibility section and the drainage section.

⁸ Ex. 130EP-2, p. 78.



The volumes of water flow in the 25-year and 100-year storm events from the southern facility boundary and that affect the volumes of storm water to be managed by the Site 21 reservoir are presented for CPs 5, 6, 7 and 8. For the 25-year storm event, CP 7 and CP 8, respectively, contribute 23.3 acre-feet and -10.5 acre-feet post-landfill development to flows into the Site 21 reservoir than is presently the case. CPs 5 and 6, respectively, contribute 0.9 and 16.7 acre-feet to the reservoir in the same storm event. These figures sum to 30.4 acre-feet (9,906,000 gallons) additional flow to the reservoir. This is confirmed by the 30.4 additional acre-feet the Applicant reports for this storm event at the outflow from the reservoir at CP 12. For the 100-year storm event, the

increased release from the southern facility boundary (and, thus, from the reservoir) post-landfill development is 33.7 acre-feet (10,981,000 gallons).⁹

The Applicant dismisses as “insignificant” its acknowledged alterations of drainage volumes, which alterations it considers to be small. However, quantitative significance or insignificance is no longer the legally-relevant factor in the consideration of drainage alteration.

The present regulatory requirement is that “existing drainage patterns will not be adversely altered.” Before 2006, however, the rule regarding alterations to drainage patterns had required that “natural drainage patterns will not be significantly altered.”¹⁰ In 2006, the TCEQ made the explicit decision that the degree of alteration would no longer be the important consideration; instead, the important consideration would be whether the alteration were in some respect “adverse.” Waste Management, Texas, commented that the term “adverse” was too imprecise and that TCEQ should elaborate on it. TCEQ responded that the plain meaning of “adverse” was sufficient.¹¹

The *Oxford English Dictionary* defines “adverse” as “unfavourable or harmful,” and notes it “is normally used of conditions and effects rather than people, as in adverse weather conditions.”¹² The *American Heritage Dictionary* defines “adverse” as “harmful or unfavorable: *adverse circumstances*.”¹³ Mr. Traw interpreted the phrase “adversely altered” to mean “changed in a negative way.”¹⁴

Certainly, an increase in post-development drainage to and through the Site 21 reservoir of 30.4 acre-feet (9,906,000 gallons) of water in the 25-year storm event or of

⁹ All flows are reflected in the middle table of Ex. 130EP-2, p. 79.

¹⁰ See 18 Tex.Reg. 4023, 4051 (June 18, 1993) for the text of the predecessor of 30 Tex. Admin. Code § 330.63(c)(1)(C), 30 Tex. Admin. Code § 330.55(b)(5)(D).

¹¹ 31 Tex.Reg. 2502, 2558 (March 24, 2006).

¹² *Oxford English Dictionary*, Oxford University Press (2016), URL: <https://en.oxforddictionaries.com/definition/adverse> (visited November 27, 2016).

¹³ *The American Heritage Dictionary of the English Language*, 3rd Ed. (Houghton Mifflin Co.1992).

¹⁴ Tr. Vol. 5, p. 517, ll. 2-3.

33.7 acre-feet (10,981,000 gallons) of water in the 100-year event will be harmful and unfavorable to the interests of the Plum Creek Conservation District. There will be additional sediment delivered to the reservoir and additional pressure on the embankment that is the reservoir dam and on the spillway from the dam; possibly, there will be additional erosion risk below the dam spillway.¹⁵ Furthermore, this additional volume of water will (unfavorably) increase flooding risks for some or all of the farther-downgradient landowners.

Then, there is the matter of the function the Site 21 reservoir was constructed to serve. The Site 21 reservoir was constructed by PCCD, as the primary local sponsor, with funding from the U.S. Natural Resource Conservation Service and pursuant to the terms of the Watershed Protection and Flood Prevention Act of 1954.¹⁶

That Act was passed to facilitate small-watershed enhancement in, primarily, rural agricultural areas. Thus, it is a requirement of the Act that local sponsors, such as the PCCD, “obtain agreements to carry out recommended soil conservation measures and *proper farm land plans* from owners of not less than 50 per centum of the land situated in the drainage area above each retention reservoir to be installed with Federal assistance.”¹⁷ The “Watershed Work Plan Agreement” between PCCD, the tri-county conservation district, and what is now the Natural Resource Conservation Service reinforced this requirement. At paragraph 6, it directed that PCCD and the tri-county conservation district “obtain agreements from owners of not less than 50 percent of the

¹⁵ The hearing testimony suggests that, given a constant soil type, erosion is a function primarily of water velocity. The Application reported, at Ex. 130EP-2, p. 79 (middle table), estimates of changes in pre- and post-development peak velocities, but did not report data on changes in the durations of those peak velocities or any data at all on the magnitudes or durations of elevated, but less-than-peak, velocities that would be experienced post-development.

¹⁶ Ex. PCCD-1.0., pp. 3-6, and 16. U.S.C. §§1001-1008, 1010 and 1012. *See also* the financial details set out at Ex. PCCD-1.2, pp. 2-5, the “Watershed Work Plan Agreement.”

¹⁷ 16 U.S.C. § 1004(5) (emphasis added).

land above each floodwater retarding structure that they will carry out *conservation farm and ranch plans* on their lands.”¹⁸

Both the Act and its implementation by the NRCS clearly anticipated floodwater retarding structures, such as the Site 21 reservoir, would manage flood waters from upgradient farms and ranches. If the Applicant is allowed to alter the drainage patterns from its proposed landfill so as to increase the storm water burden on the Site 21 reservoir by 30, plus, acre-feet in all large rainfall events, the PCCD easement will be encumbered to manage industrial, not farm or ranch, flood waters and will be encumbered without the consent of the NRCS or the PCCD. These increased flows through the reservoir, at the least, will generate increased dam and spillway maintenance burdens on PCCD.

2. EVIDENCE OF COMPETENCY and

3. COMPLIANCE HISTORY¹⁹

Here, again, Applicant has given short shrift to the evidence of competency requirements, arguing that because *some* information was included in the application regarding competency, Applicant satisfied its burden regarding this issue. But, as with other issues, Applicant’s information is inadequate and not accurate or reliable. In fact, virtually every factual statement about competency asserted by Applicant in its Closing Argument is false.²⁰

Assertion: “The Application includes the names of the principals and supervisors of 130 Environmental Park’s organization, together with previous affiliations with other organizations engaged in solid waste activities[.]”

This statement is false.

¹⁸ Ex. PCCD-1.2, Work Plan, p.3 (emphasis added).

¹⁹ Because these 2 issues are related, they are discussed here together.

²⁰ Applicant’s Closing Argument, page 5.

TCEQ Rule 330.59(f)(4) requires the applicant to provide the names of the principals and supervisors of the owner's or operator's organizations, along with previous affiliations with other organizations engaged in solid waste activities.²¹

The Application identifies Ernest Kaufmann as the President and Manager of 130 Environmental Park. It also identifies Oscar Allen and Thad Owings, but does not specify their positions or roles with respect to 130 Environmental Park.²² Kaufmann's deposition testimony, however, revealed that Allen and Owings were neither officers nor employees of 130 Environmental Park.²³

There is no information in the application regarding these individuals' (or Green Group Holdings') affiliations with other organizations engaged in solid waste activities. Yet, it is undisputed that the proposed Pintail landfill, in Waller County, Texas, is a project of another Green Group Holdings' entity or organization.²⁴ And Kaufmann testified that he is the CEO of Pintail and an officer of several other similar companies.²⁵

Now, it appears that Ernest Kaufmann is no longer the President or Manager of 130 Environmental Park or of Green Group Holdings. At an October 25, 2016 public meeting convened by TCEQ regarding a new Pintail Landfill permit application (filed after the previous one was returned by TCEQ's Executive Director), David Green asserted that he was the CEO of Green Group Holdings and that Kaufmann has no authority regarding anything to do with Green Group Holdings or any of its affiliated entities. These admissions were made in the presence of the Executive Director's legal counsel and representatives.²⁶

²¹ 30 Tex. Admin. Code § 330.59(f)(4).

²² Ex. 130 EP-1, p. 50.

²³ Ex. P-11, pp. 5 & 9.

²⁴ Ex. P-11, p. 7, ll. 13-17.

²⁵ Ex. P-11, p. 7, ll. 1-24.

²⁶ *See Attachment A. Affidavit of Patton King.* Protestants have filed, concurrently with the filing of the Reply to Closing Arguments, a motion to re-open the evidentiary record to admit the affidavit of Patton King.

Thus, not only is the application deficient in failing to identify affiliated solid waste organizations and activities, but the representations included in the pending application regarding the Applicant's principals and supervisors are no longer accurate. As of the date of the filing of its closing brief, October 24, Applicant was aware of the fact that the representations in the Application regarding 130 Environmental Park's officers and supervisors were no longer accurate. Yet, Applicant made no efforts to correct these inaccuracies.

The other person identified in the Application as having a position of responsibility within 130 Environmental Park is Thad Owings. But there is no evidence that demonstrates Owings has actually had any involvement with 130 Environmental Park or that he has any experience related to the operation of a landfill.

The departure of Kaufmann also calls into question whether Applicant has complied with the requirements of Rule 305.44, which requires that the application be signed by a responsible corporate officer.²⁷ Kaufmann signed the application,²⁸ but he is no longer a responsible corporate officer, as defined by the rules. And Applicant has made no attempt to correct this deficiency.

In sum, the Application fails to include accurate information regarding evidence of competency, as required by TCEQ Rule 330.59(f). Because Applicant knowingly failed to comply with TCEQ Rule 330.59(f), the Application should be denied. There has been a failure to demonstrate competency.

Assertion: "130 Environmental Park does not have a direct financial interest in any solid waste site other than the proposed Facility."

TCEQ Rule 330.59(f)(2) requires an owner or operator to submit a list of all solid waste sites in all states, territories, or countries in which the owner or operator has a

²⁷ See also 30 Tex. Admin. Code § 330.59(g).

²⁸ See Ex. 130EP-1, p. 33.

direct financial interest.²⁹ Details regarding the sites must also be disclosed, including the name under which the site was operated.³⁰

Undisputed facts demonstrating that 130 Environmental Park has no existence independent of Green Group Holdings were identified in Protestants' Closing Arguments on pages 5 through 7. The 130 Environmental Park landfill is, thus, a proposed facility of Green Group Holdings. The other landfills owned by Green Group Holdings were not identified as required by TCEQ Rule 330.59(f). Nor were all of Green Group Holdings' environmental permits listed, as required by Rule 305.45(a)(8). For instance, at the proposed Pintail site, Applicant has a permit to operate a transfer station and applied for a landfill permit; yet this was not disclosed in the application.

Green Group Holdings has a website, but 130 Environmental Park does not. On its website, Green Group Holdings has a page where it identifies its facilities:

<http://www.gghcorp.com/facilities/>.

Both Green and Kaufmann also testified, via deposition, regarding other landfill projects that they are involved with, on behalf of Green Group Holdings, including: a landfill in Wichita, Kansas; Wagon Mound, New Mexico; Grand Junction, Colorado; and Guam.³¹ And the permit application states that Thad Owings is "currently managing the permitting of MSW facilities in Texas,"³² although the application provides no further information about the Texas facilities Owings is managing.

None of the facilities that were mentioned by Green and Kaufmann, during their depositions, were disclosed in the competency section of the Application as required by TCEQ Rule 330.59(f). And the general information regarding Owings' involvement in "managing the permitting" of solid waste facilities in Texas provides no useful

²⁹ 30 Tex. Admin. Code § 330.59(f)(2). *See also* 305.45(a)(8), requiring an applicant to list all other environmental permits received or applied for.

³⁰ 30 Tex. Admin. Code § 330.59.

³¹ Ex. 11, p. 16, ll. 6-24 (listing landfill projects that Green Group Holdings, or its affiliated company, are involved with); Ex. 10, p. 6, ll. 11-16 (describing landfill operations acquired by Green Group Holdings from Herzog) & p. 11, ll. 1-7 (same).

³² Ex. 130EP-1, pp. 50-51.

information regarding the competence of the Applicant, as required by the aforementioned rule.

In sum, Applicant failed to provide the information necessary to demonstrate competency, as required by the TCEQ rules. Because Applicant failed to provide all of the information required by Rule 330.59(f), the Executive Director (and now, SOAH) was not provided with all of the information necessary to thoroughly review Applicant's compliance history.³³ See Tex. Health & Safety Code § 361.084(c).

Assertion: "The Application contains the number and size of each type of equipment to be dedicated to facility operation. . . . 130 Environmental Park will provide sufficient equipment to conduct site operations in accordance with the landfill design and permit condition."

TCEQ Rule 330.59(f)(5) requires the applicant to demonstrate evidence of competency to operate the facility, including landfilling and earthmoving experience and other pertinent experience, and the number and size of each type of equipment to be dedicated to facility operation.

Applicant has not demonstrated that its principals or supervisors possess the requisite landfill operation and earthmoving experience, as required by the rules. Nor has the Applicant provided accurate or reliable information to demonstrate that the equipment it listed is sufficient for the volume of waste projected.

The waste acceptance rate provides the basis for information in the Application as to the number, size, type and function of the equipment used at the landfill in the site operating plan.³⁴ The Applicant's assertions regarding equipment were contradictory. The site operating plan in the Application calls for a 40,000-pound trash compactor to "minimize future consolidation and settlement, and provide for the application of intermediate and final cover."³⁵ At the hearing, however, when the Applicant's expert on

³³ See also Ex. ED. SO-8, compliance history report, wherein there is no information provided regarding sites outside of Texas.

³⁴ 30 Tex. Admin. Code § 330.127(2).

³⁵ Vol. 4, 130EP5, p. 147.

odor was asked on cross whether the Applicant's odor management plan addressed the odor emanating from the trash compactor, Applicant's attorney made a statement and judicial admission: "There's no trash compactor proposed for this facility."³⁶ See *Horizon/CMS Healthcare Corp. v. Aulel*, 34 S.W.3d 887, 905 (Tex. 2000); *Lee v. Lee*, 43 S.W.3d 636, 641 (Tex. App. – Fort Worth 2001, no pet.) ("Counsel's statements on behalf of a client may serve as judicial admissions"). The seemingly arbitrary conflict between in-hearing admissions and the contents of the Application undermines the Applicant's contention in its Closing Statement that the Application contains the number and size of each type of equipment to be dedicated to facility operations. These contradictory statements about equipment are consistent with the testimony of Applicant's expert, who testified that accurate information is not required in the Application.³⁷

In sum, Applicant has failed to meet the competency requirement regarding relevant experience and equipment.

Applicant's assertions and assurances are not reliable.

The promises asserted by 130 Environmental Park are simply not reliable in light of its current and past conduct. In its Closing Argument, 130 Environmental Park made the following promise: "130 Environmental Park will employ a licensed solid waste facility supervisor and qualified equipment operators in compliance with TCEQ's rules before commencing operation."³⁸

³⁶ Q. Can odor emanate from a trash compactor?

A. To some degree, some degree of odor could, depending on what's in it.

Q. Where does 130 Environmental Park's odor management plan address the odor emanating from trash compactors?

A. I don't know that it does

Brent Ryan: "Objection. There's no trash compactor proposed for this facility He's asking about something that doesn't exist."

Tr. V. 4, p. 991, ll. 12-14 & 20-25; p. 992, ll. 3-4 & 8-9.

³⁷ Tr. V. 8, p. 1793, ll. 7-13.

³⁸ *Applicant's Closing Argument*, p. 5.

Applicant, however, failed to retain professionals who could follow basic professional standards of preservation of records and samples. Applicant's retained consultants affixed their seals to portions of the Application even when they had no personal knowledge or any basis for the information included in the sealed documents.³⁹ TCEQ Rule 305.45(a)(8) requires that reports submitted with permit applications be prepared by qualified, competent, and experienced experts who are "thoroughly familiar with the operation or project for which the application is made." Yet, Applicant failed to comply with this basic requirement. Given this track record, a simple unsupported promise to employ "qualified equipment operators" cannot override evidence demonstrating Applicant's repeated failure to employ qualified personnel who abide by the standards of their professional licenses.

Finally, Protestants support and agree with the arguments presented by OPIC regarding these issues.

4. LAND USE COMPATIBILITY

Protestants agree with and support the arguments presented by OPIC, Caldwell County, and Plum Creek Conservation District regarding land use compatibility.

The District, in particular, compellingly explains why in this case, a land use compatibility analysis cannot be limited to an evaluation of only those factors listed in Rule 330.61. The proposed landfill site in this case is not a typical landfill site. To the contrary, the site includes a number of unique and sensitive characteristics, including the District's reservoir, dam (or retarding structure), easement and the surrounding floodplains.

³⁹ See, e.g., Tr. V. 9, p. 2084, ll. 15-20 (cross-examination of Kerry Maroney):

Q: So the waste acceptance rates were provided to you by HHNT?

A: Yes, which was our client.

Q: What, if anything, did you do to verify the reliability of those waste acceptance rates?

A: I didn't do anything.

As explained in the District's Closing Brief, there is a Plum Creek Small Watershed Protection Work Plan that is in place for the area of the proposed landfill site. Furthermore, the District is responsible, under the Texas Dam Safety Act program, for assuring that the dam at Site 21 complies with current regulatory standards applicable to dams.

The District expressed concerns regarding the impacts of an increase in the quantity of water projected for discharge to the Site 21 reservoir as a result of the landfill's operation.⁴⁰ Another District concern was whether the landfill's operation would contribute debris or pollutants to the water in Site 21 reservoir. These concerns were shared by Protestants' expert Dr. Ross in her prefiled testimony.

Consistent with the District's arguments, Dr. Ross described the Site 21 dam as a flood control measure, constructed in 1962, with a projected life of 50 years.⁴¹ It was designed to temporarily store runoff from a 25-year frequency rainfall or 5.45 inches of runoff from the contributing watershed, without flow through the auxiliary spillway.⁴² This design standard was based on low-hazard conditions, meaning that if there were a dam failure, it would affect downstream agricultural land and facilities, but was not expected to result in potential loss of life.⁴³

A dam assessment report, however, reclassified the dam as high hazard, because of downstream urban development.⁴⁴ More specifically, based on TCEQ's "breach method" analysis, a catastrophic flood breach wave would place at risk 26 downstream houses, 3 Farm-to-Market roads, and 3 county roads used by more than 6,000 vehicles daily.⁴⁵ Thus, based on the reclassification of the Site 21 structure as a high-hazard dam,

⁴⁰ *District's Closing Argument*, p. 6.

⁴¹ Ex. P-5, p. 38.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* & Ex. P-5X.

⁴⁵ Ex. P-5, p. 38.

the appropriate design standard would be temporary storage of the 100-year, 10-day storm without flow through the auxiliary spillway, with a drawdown of at least 85% of the temporary storage within 10 days, and capacity to pass runoff from the “probably maximum precipitation (PMP) storm without overtopping.”⁴⁶

Because the current Site 21 dam does not meet the above-described standards, the failure potential for the structure is “judged to be high.”⁴⁷ Additional factors contribute to the failure potential of the dam, beyond its current deficient hydrologic capacity. As explained by Dr. Ross, poor vegetation on the dam and auxiliary spillway increases the risk of soil erosion and further contributes to the failure potential of the dam.⁴⁸

Dr. Ross further explained that a number of improvements are proposed for the Site 21 dam, which would provide a safer dam by allowing for water evacuation behind the dam more quickly and by providing a dam and spillway structure more resistant to failure.⁴⁹ The costs for the dam improvements are projected to be over \$6 million. The availability of the funds necessary for the improvements, however, is questionable.

Even if the proposed improvements were funded, however, it is not clear that the improvements would achieve the design standards required for high-hazard dams. Particularly disconcerting is the fact that the preliminary design for the Site 21 improvements fails to account for construction of the proposed landfill and supporting facilities within the Site 21 contributing watershed.⁵⁰ Instead, the Site 21 improvements design assumes that future development in the watershed—including the proposed landfill—will fully mitigate storm runoff impacts. But this assumption has no reliable, factual basis.

⁴⁶ Ex. P-5, pp. 38-39.

⁴⁷ Ex. P-5, p. 39, ll. 4-6 & Ex. P-5X.

⁴⁸ Ex. P-5, p.39, ll. 6-12.

⁴⁹ Ex. P-5, pp. 38-39.

⁵⁰ Ex. P-5, p. 40.

As explained by Dr. Ross, the final cover system proposed for the landfill would limit infiltration of surface water into the proposed landfill subsurface, as compared to the current water capacity of the soils under existing conditions. The proposed final landfill cover would also limit the available water capacity on the proposed landfill site. In other words, the final cover would limit ability for water infiltration into the subsurface, and the final cover itself would have limited available water capacity. These two factors would increase storm water runoff volume from the site, compared to current conditions.⁵¹

Of course, if the improvements to the Site 21 structure are *not* funded and completed, then, the proposed landfill will increase the risk of downstream flooding, for a number of reasons. Dr. Ross outlined her concerns regarding the various factors that would contribute to the increased risk of downstream flooding, if the proposed landfill is constructed as proposed and the Site 21 structure is not improved.⁵²

The District's concerns regarding potential impacts of debris from the landfill on the Site 21 structure are also well-founded. Dr. Ross shared these concerns. As she explained, vegetation clearing and regrading associated with construction and operation of the proposed landfill will result in erosion. And the proposed improvements to the Site 21 structure fail to account for increases in flood flows associated with sedimentation into the Site 21 reservoir or flood pool.⁵³

In sum, the existence of the Site 21 structure, alone, is an indispensable factor that should have been considered during any land use compatibility analysis. That this structure has been reclassified as "high hazard" and requires significant improvements, even without the addition of a landfill to its watershed, should have alerted Applicant that the proposed landfill site is not a suitable site for the landfill.

⁵¹ Ex. P-5, p. 41, ll. 5-16.

⁵² Ex. P-5, p. 44.

⁵³ Ex. P-5, p. 43, ll. 20-30.

As explained above, the risks of increased runoff into the flood pool and dam failure are exacerbated with the construction and operation of the proposed landfill. Yet, rather than acknowledge these risks, Applicant instead designed a landfill that is likely to encroach into the floodplain, includes questionable drainage structure designs, provides only vague and noncommittal erosion and sedimentation controls, and otherwise fails to acknowledge increased risks resulting from adding a landfill to the watershed of a high-hazard flood control structure.

Applicant's land use expert, Mr. Worrall, admitted that he had no expertise regarding increased risks to Site 21 resulting from the proposed landfill. Thus, Applicant should have retained an expert who could evaluate the compatibility of the proposed landfill with the existing Site 21 dam and reservoir. Having failed to do so,⁵⁴ Applicant also failed to provide the Executive Director's staff with the information necessary to analyze the compatibility of the proposed landfill with the existing Site 21 structure. This is yet another reason that Applicant failed to satisfy its burden of proof regarding land use compatibility.

The ED, in his closing arguments and in the prefiled testimony of Mr. Odil, claimed that "MSW staff contacted the Dam Safety Program about the Site 21 Reservoir and Dam." According to Mr. Odil, the unnamed "staff" from that Dam Safety Program indicated that increases in volume to the reservoir will be insignificant and that Site 21 is proposed for rehabilitation, which will include upstream land uses in the new hydrology.⁵⁵ But this argument is based on legally insufficient evidence; Mr. Odil's

⁵⁴ See testimony of engineer-of-record K. Maroney:

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.

Tr. V. 9, p. 2073, ll. 9-14.

⁵⁵ ED's *Closing Argument*, "Surface Water and Drainage" section (citing Ex. ED-SO-1, p. 26).

testimony basically constitutes no evidence on this issue. This testimony by Mr. Odil is based on hearsay; that is, Mr. Odil relies on information provided to him (or, rather, provided to “MSW staff,” which was then made known to him) by some unnamed Dam Safety Program staff to support his opinion testimony that impacts to Site 21 will be insignificant, and the proposed rehabilitation will address any impacts from development upstream.

Texas Rule of Evidence 703 allows experts to rely on hearsay as a basis for their expert opinions, if the data is of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.⁵⁶ But the ED conceded that Mr. Odil is not a hydrologist or an expert on land use.⁵⁷ He is a chemical engineer. His testimony was limited to describing his review of the Application, and his review was, in turn, “limited to confirming that the required information was submitted in the Application.”⁵⁸ Thus, Mr. Odil was not qualified to offer expert opinion testimony, and as the ED conceded, he was not offering expert opinion testimony regarding impacts on the Site 21 dam and reservoir.⁵⁹ So, Rule of Evidence 703 does not apply to his testimony on this issue.

Even if Mr. Odil’s testimony could be considered expert opinion testimony, the information he obtained from Dam Safety Program staff cannot be characterized as “facts or data” reasonably relied upon by experts. In fact, the information provided by the Dam Safety Program staff is simply another opinion, based, at least in part, on facts that were presumably provided to the Dam Safety Program staff by MSW staff. In other words, Mr.

⁵⁶ Tex. R. Evid. 703.

⁵⁷ See ED’s *Response to Objections to and Motion to Strike the Prefiled Testimony of TCEQ Expert Witnesses*, p. 2, conceding that Mr. Odil is not an expert in hydrology or land use, and his testimony addresses his review of the application.

⁵⁸ *Id.*

⁵⁹ See Tex. R. Evid. 702; *Thomas v. Alford*, 230 S.W.3d 853, 857 & 860 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (holding that to be qualified, expert must have knowledge, skill, experience, training, or education regarding specific issue that would qualify expert to provide opinion on that issue).

Odil is not relying on facts or data to form his opinions, as contemplated by Rule of Evidence 703; he is relying on the opinions of others—opinions that are themselves based on undisclosed facts or data—for his testimony. In fact, he is simply repeating the opinions of others. Even if this were allowed by the rules of evidence (which it is not), there is no indication that this information is reliable.⁶⁰ There is no indication that the staff on whom he relied was/were qualified to offer the opinions they shared with Mr. Odil or that their opinions are reliable and based on reliable data.⁶¹ Consequently, there is no basis for concluding that Mr. Odil’s opinion testimony is reliable or admissible.

The testimony offered by Mr. Odil regarding impacts (or the absence of impacts) on Site 21 is, therefore, legally insufficient evidence. The ED’s arguments relying on this testimony should be disregarded, as they are based on no evidence.

Mr. Odil also testified, via his prefiled testimony, that the issuance of a landfill permit does not authorize the invasion of any personal rights or any violation of any federal, state, or local law or regulations.⁶² Even so, this does not absolve the Applicant and the Executive Director from considering whether the landfill and permit, as proposed, can be operated without violating property rights or federal, state, or local laws. At the very least, this should have been a part of the land use compatibility analysis, especially where, as here, it is clear that the facility will necessarily have some impact on nearby structures, such as the Site 21 Reservoir, and is incompatible with that surrounding land use.

In sum, evidence regarding land use compatibility was devoid of any consideration of the unique land uses surrounding this proposed facility—land uses that will be impacted by the proposed landfill. Instead, Applicant offered the testimony of Mr.

⁶⁰ See *Collini v. Pustejovsky*, 280 S.W.3d 456, 466 (Tex. App.—Fort Worth 2009, no pet.) (holding that physician may rely on opinions of others who have rendered reports or diagnoses but physician must still demonstrate his/her own qualifications & must demonstrate that others on whom physician relied are also qualified and that their opinions are reliable).

⁶¹ See *id.*

⁶² Ex. ED-SO-1, p. 26, ll. 20-21.

Worrall, who basically applied a well-worn and generic formula to reach the same conclusion that he has reached for each of the 34 solid waste permit applications he has reviewed throughout his career.⁶³ the proposed landfill is compatible with surrounding land uses. Considering the limited factors and data that he chose to incorporate into his land use compatibility analysis, his opinion was a foregone conclusion.

5. TRANSPORTATION AND TRAFFIC

In its closing argument, Applicant states, without citation, that the “roads to be used by 130 Environmental Park to access the Facility will be available and adequate.”⁶⁴ Applicant has not demonstrated, via evidence in the record, that this statement is true. Applicant’s expert, Mr. Denholm, expressly stated that he was not familiar with the terms “adequate” and “available” under TCEQ’s regulations.⁶⁵

Moreover, the access road is not intended to be used only by 130 Environmental Park, as suggested by Applicant’s statement. The access road must be available and accessible to TCEQ, waste haulers, the public, and emergency personnel, and it must be available and accessible for the life of the facility, including during closure and post-closure.

Yet, the Facility entrance road that is proposed to access the Facility is not within the permit boundary and is not part of the draft permit. This proposed roadway is a private roadway on private property that is not owned by Applicant. This roadway extends for more than a mile and must cross the 100-year floodplain at multiple locations.⁶⁶ Mr. Denholm did not evaluate this entrance road.⁶⁷

Whether the entrance road is available and adequate has not been established. There was no evaluation to determine whether additional development would impact the

⁶³ See Tr. V. 1, p. 53, ll. 4-19.

⁶⁴ *Applicant’s Closing Argument*, p. 8.

⁶⁵ Tr. V. 1, p. 24, l. 25; p. 25, ll. 1-7.

⁶⁶ Ex. 130EP-1, p. 140.

⁶⁷ Tr. V. 1, p. 247, ll. 1-25; p. 248, l. 1.

entrance road. There was no review to determine whether it would be adequate and available during severe rainfall events. And there is no evidence in the record that ensures that it will be available and adequate for the life of the Facility, or that it will be adequately maintained.

That the entrance road was intended to be included as part of the permit is made evident in the ED's technical summary, the draft permit, and TCEQ's rules. The ED's technical summary lists the access road as part of the "facility."⁶⁸ It is also included in the description of the proposed permitted landfill in the draft permit, at Section II.F.⁶⁹ And TCEQ's rules contemplate the inclusion of an access road in the permit. For instance, Rule 330.153 addresses site access road requirements. They must be "all-weather" roads, which must be maintained in a clean and safe condition and routinely regraded. Dust control for the access roads must be provided, and litter and debris must be picked up. And all of these procedures must be included in the site operating plan.⁷⁰

However, the ED's ability to enforce these regulatory requirements is questionable if the access road is on private property and not included in the permit. Maintenance of private roadway conditions is achieved via permit requirements. TCEQ does not possess the inherent authority to regulate private roadways on private property, unless they are part of a permitted facility.⁷¹

In fact, because the entrance road is not included in the draft permit, it is not even clear that the entrance road will be constructed at the location that Applicant proposed. If, for instance, Applicant is unable to obtain approval to construct the roadway in the floodplain, Applicant may need to consider another location for the entrance road. The entrance road could be moved to any number of other locations, which would impact the traffic analysis. It is possible that Applicant could construct an entrance road that

⁶⁸ Ex. ED-SO-8, Technical Summary at p. 3.

⁶⁹ Ex. ED-SO-8, Draft Permit for MSW Permit No. 2383.

⁷⁰ See 30 Tex. Admin. Code §§ 330.139 & .153.

⁷¹ See, e.g., Atty. Gen. Op. JC-0016 (explaining that counties have no authority over private roads).

connects the Facility to Farm to Market Road 1185, instead of US Highway 183N. Yet, there was no evaluation of this intersection by Denholm, or of any other possible entrance road location.

Because the boundary of the proposed permit does not extend to the point of connection with any public roadway, the private access road connecting the facility entrance within the permit boundary could be connected to Hohmanville Road, County Road 179, Farm-to-Market Road 1185, or to US Highway 183N. And, arguably, the access road could be changed from one public roadway to one of the other public roadways without a permit amendment or modification, since the access road connecting the facility to the public roadway is not within the permit boundary.

By failing to include the private access road in the permit and by failing to provide data on the adequacy and availability of the private entrance road that is proposed to be used to access the facility, Applicant has failed to demonstrate compliance with Rule 330.61(i). Further, by failing to include the entrance road in the draft permit, Applicant has failed to demonstrate that the property owner will ensure adequate access to the Facility for the life of the Facility.

6. GEOLOGY & SOILS

Applicant's basic argument regarding geology and soils is that the geology portion of the application, coupled with what it refers to as its supplemental geology report, includes sufficient information to satisfy the MSW rules. Applicant further maintains that the report was "prepared, sign, and sealed by John Michael Snyder, P.G., a qualified groundwater scientist."⁷² This argument, alone, demonstrates how the Applicant's geology report and evidence were *not* sufficient to satisfy the rules. Affixing one's seal to a report that includes unreliable and insufficient data and that fails to conform to professional standards is not what was contemplated by the TCEQ's rules regarding a subsurface investigation. This deficiency cannot be cured by attempting to "supplement"

⁷² *Applicant's Closing Argument*, pp. 8-10.

the inadequate geology report after the TCEQ staff has conducted its technical review of the permit application, especially if the belatedly-submitted supplemental data is inconsistent with the original geology report that was included in the application, as is the case here.

Applicant's attempt to revise its geology report, at this juncture, is improper.

As an initial matter, Applicant was tasked with presenting sufficient accurate and reliable information regarding geology and soils *in its application*. It is the application that forms the basis for the Executive Director's draft permit. The application is, thus, what was the subject of the Executive Director's administrative and technical review, public notice,⁷³ the public comments, and the contested case hearing.

If Applicant wished to revise its application, then, it should have sought a remand and formally submitted its revisions to the Executive Director. The Executive Director could then have conducted a technical review, and the revised application and draft permit (based on the revised application) would have then been the subject of the contested case hearing. **Indeed, counsel for the Executive Director acknowledged that without a remand, the Executive Director did not have jurisdiction to conduct a technical review of the so-called supplement to the geology report.**⁷⁴

Applicant is well-aware of this remand process. In the Pintail matter, the Applicant's geologist, Mr. Snyder, signed an affidavit in support of a motion to remand, when he realized that the Pintail landfill permit application needed to be revised based on new information.⁷⁵ In particular, Snyder explained that based on the discovery of groundwater elevations that were higher than represented in the application, he expected

⁷³ See, e.g., 30 Tex. Admin. Code § 330.57(i)(1) (requiring an owner/operator to provide complete copy of application, "including all revisions and supplements to the application," on internet website).

⁷⁴ See audio recording of August 10, 2016 prehearing conference, at 52:38: [Anthony Tatu] "We wanted to reiterate what Ms. Perales has stated, we don't have jurisdiction of the application currently and it has not been presented to us as an amendment to the application. I think you've characterized it sufficiently at this point."

⁷⁵ Tr. V. 2, p. 352, ll. 6-25; p. 353, ll. 1-25 & Ex. P-31.

“to revise the design of the groundwater monitoring system for the facility because the new data shows some minor changes to groundwater flow directions under higher groundwater level conditions.”⁷⁶

Of course, in that case, the Executive Director refused to allow another revision to the permit application, because the ED had already conducted an extensive technical review of the application (over 1400 hours of staff time) and the Applicant had already been issued numerous formal written Notices of Deficiencies, documenting over 400 instances of deficiencies.⁷⁷ And yet, the application was still deficient. According to the ED, the discovery of elevated seasonal water levels affected the basis under which the draft permit was prepared.⁷⁸ And so the ED returned the application to the applicant, because it was deficient.⁷⁹

In light of this history, Applicant, in this case, attempted to revise its application without requesting a formal remand to the ED, to avoid the possibility of achieving the same fate as in the Pintail matter. Its 2016 “supplemental geology report” is nothing more than an attempt to amend or revise its initial 2013 geology report, which was the subject of the ED’s technical review and draft permit. But this is not how a revision to a landfill permit application is accomplished, particularly after the application has been referred to SOAH for a contested case hearing.

Moreover, Applicant disingenuously suggests, via its argument, that the Executive Director conducted a technical review of the “supplement” to the geology report. Applicant cites to Mr. Avakian’s testimony in support of its argument that the supplemental geology report demonstrates compliance with TCEQ rules.⁸⁰ In fact, Mr. Avakian made clear, in response to questioning by Applicant’s counsel, that “it would be

⁷⁶ Ex. P-31.

⁷⁷ Ex. P-32.

⁷⁸ Ex. P-32.

⁷⁹ Ex. P-32.

⁸⁰ *Applicant’s Closing Brief*, p. 10.

more correct if I clarified that the May 2016 supplement was submitted after we had already handed off jurisdiction of the application. And so technically, it's not available to me to decide whether or not it complies.”⁸¹

In sum, the 2016 subsurface data collected by Applicant and the “supplemental geology report” that is based on this data and that attempts to correct errors in the initial 2013 geology report cannot be considered a “supplement” or revision to the application, at this juncture. It is simply not part of the application that formed the basis of the draft permit and that is the subject of this contested case hearing.

Applicant's 2013 geology report is inaccurate, unreliable, and fails to comply with TCEQ rules.

Applicant's arguments also suggest that so long as there is some information in the application that purports to address the elements of the geology report mandated by TCEQ rules, and so long as that information is sealed by a geologist, then, its burden has been satisfied. But the rules—TCEQ rules, rules governing geoscientists, and legal and evidentiary rules—require more than this.

TCEQ rules, for instance, make clear that the information required by Subchapter B of the 330 rules (the sub-chapter addressing application requirements) “defines the *basic elements* for an application.”⁸² In addressing those “basic” elements, the rules require that an applicant provide the ED “data of sufficient completeness, accuracy, and clarity to provide assurance that operation of the site will pose no reasonable probability of adverse effects on the health, welfare, environment, or physical property of nearby residents or property owners.”⁸³ In other words, the rules contemplate that even if an applicant addresses the “basic elements” required by the rules, more data may be required to provide assurance that the health, welfare, environment, and properties will be protected. As Mr. Avakian explained, it is essential that an applicant provide complete

⁸¹ Tr. V. 9, p. 1991, ll. 7-11; *see also* Tr. V. 9, p. 2003, ll. 7-14.

⁸² 30 Tex. Admin. Code § 330.57(d) (emphasis added).

⁸³ *Id.*

and accurate information, because the ED does not verify the information in the application.⁸⁴ The ED relies on an applicant's accuracy and veracity when reviewing an application.⁸⁵

The presence of a geoscientist's seal on the geology report does not guarantee that the data provided is sufficiently accurate to comply with TCEQ's rules. Indeed, TCEQ's rules specify that preparation of the application must conform with the Texas Geoscience Practice Act, in addition to requiring that specific portions of the application bear the appropriate professional seals.⁸⁶ And as explained in Protestants' initial closing arguments, Snyder failed, in a number of respects, to comply with the Texas Geoscience Practice Act.

Snyder has a history of placing his seal on geology investigations and data that are inaccurate and fail to comply with the Texas Geoscience Practice Act. The Pintail landfill permit application is one example. In that case, as in this case, Snyder (or his colleagues) discarded original boring logs and soil samples that formed the basis of the geology section of the landfill permit application. Fortunately, some of the original logs were later discovered. A comparison of these few original logs and the final logs, however, revealed that Snyder made changes from the original logs to the final logs.

As explained by Dr. Ross, for some of the borings, the presence of clay is overstated in the final logs included in the Pintail application, when compared to the original, handwritten driller's logs.⁸⁷ Also, the presence of gravel or silt noted in the handwritten driller's logs is missing in some of the final logs included in the Pintail application.⁸⁸ Dr. Ross outlined the specific differences between the original handwritten

⁸⁴ Tr. V. 9, p. 2001, ll. 1-24; p. 2002, ll. 1-5.

⁸⁵ *Id.*

⁸⁶ 30 Tex. Admin. Code § 330.57(f).

⁸⁷ Ex. P.-5, p. 19.

⁸⁸ *Id.*

driller's logs and the final application logs that she noted, after comparing the two sets of logs.⁸⁹

Had those original logs not been discovered, there would have been no way of knowing that changes to the original logs had been made. And without the soil samples, the basis for the changes that were made (and, thus, the basis for Snyder's opinions regarding the soil descriptions included in the final logs) are unknowable.

Significantly, in that same case, Snyder also mischaracterized the seasonal high water level elevation. This error would also have been missed if the protesting parties in that case had not persisted in demanding access to the proposed landfill site to take their own water level measurements.

In another earlier landfill case, the proposed IESI landfill in Jack County, Snyder missed an entire aquifer.⁹⁰ Indeed, he characterized that aquifer as an "aquiclude," even though there was evidence that this aquifer provided usable, good-quality groundwater to nearby residents. And part of the reason he missed this aquifer was because he failed to rely on a relevant published source that described the presence of this aquifer formation in the exact area of Jack County that the proposed landfill was to be sited.⁹¹ Significantly, in that case, the ALJ described the boring logs included in the application as nearly identical—much like the logs in this case.⁹²

This history of over-simplifying the subsurface geology and discarding the data on which the geology report is based is consistent with the facts and circumstances of this case. This was made clear after Protestants were allowed to conduct their own, limited investigation of the subsurface geology of the site. More importantly, Applicant's own

⁸⁹ *Id.*

⁹⁰ Ex. P-5, p. 17, ll. 19-24 & Ex. P-39, pp. 23-24 & 29 ("the ALJ disagrees with IESI's characterization of the Pennsylvanian as an aquiclude").

⁹¹ Ex. P-39, pp. 23-24; *see also* pp. 15-16 ("IESI also ignored valuable information about area wells as outlined in TWDB's Report 308. . . . Information in TWDB Report 308 provides a foundation for assuring land use compatibility and water resource protection, and it should have been considered.").

⁹² Ex. P-39, p. 29 ("All of Applicant's remarks for the boreholes said the same thing; thus, no distinct information for particular borings can be gleaned from them.").

“supplemental” geology report also reveals that the oversimplified subsurface characterization included in the application was inaccurate and unreliable. In other words, Applicant’s own “supplemental” geology report actually impeaches the 2013 geology report included in the application—yet another reason that referring to this additional data as a “supplemental geology report” is erroneous and unwarranted.

As explained in Protestants’ initial closing arguments, Applicant’s 2016 subsurface investigation revealed the presence of 19 fractures, which is inconsistent and irreconcilable with the Applicant’s failure to find any fractures in its initial subsurface investigation. As Dr. Ross explained, the likelihood of finding 19 fractures in 2016 and 0 in 2013 is miniscule: 1×10^{-40} .⁹³ Applicant’s belated acknowledgement that the subsurface of the site has significant fractures (which are migration pathways for contaminants) proves that its initial 2013 geology report that was included in the application was inaccurate. It presented an inaccurate characterization of the subsurface geology and of the potential for contaminant migration off-site. And the destruction of Applicant’s original field logs and soil samples made it impossible to determine the source or the reason for this omission of information regarding secondary features; it is simply not possible to verify the final boring logs included in the application to determine the various ways in which those final logs were revised and the basis for those revisions.

The loss of circulation at one of the boring locations also evidences a significant migration pathway that was not reported in the original geology report. In fact, a review of that initial geology report would lead one to believe that no significant migration pathways—whether they be fractures or faults—exist in the subsurface of the proposed landfill location. The subsurface description presented in the application is simply at odds with what was encountered—by both the Applicant and the Protestants—during the 2016 subsurface investigation.

In other words, Applicant’s own so-called “supplemental” geology report impeaches the representations in the original geology report included in the application.

⁹³ Ex. P-5, p. 27, l. 25.

They are not consistent. This is, undoubtedly, why Applicant has attempted to label the 2016 geology report as a “supplemental” report, and why it has mischaracterized Mr. Avakian’s testimony to argue that the ED reviewed this information for compliance with the rules (even though Mr. Avakian made clear that the ED no longer had jurisdiction to conduct a technical review of the “supplemental” data). By attempting to characterize this inconsistent 2016 data as a “supplement” to its original geology report, Applicant is attempting to avoid a comparison of the two sets of data, because a comparison reveals the inconsistencies. So, instead, Applicant has attempted to, improperly, revise its application with this new, inconsistent 2016 subsurface data. This creative effort, however, is not allowed by TCEQ rules and basic legal principles.

Again, there is no evidence or data to support, or verify, the representations in the 2013 geology report. On the other hand, evidence regarding the 2016 subsurface data includes: (1) witnesses who observed the extraction of the soils from the subsurface (*e.g.*, Mr. Rubinov); (2) original logs prepared by Mr. Stamoulis (the driller) documenting his observations of the soils as they were extracted from the subsurface; (3) the soil samples that were preserved from the 2016 subsurface investigation; and (4) laboratory analyses of some of the soil samples. Further, Mr. Snyder testified that he observed all of the soil samples collected from the 2016 subsurface investigation, whereas he only observed some of the soil samples when preparing the final boring logs for the 2013 borings. Thus, to the extent that the 2013 subsurface characterization is inconsistent with the 2016 subsurface data, the 2013 geology report must be deemed unreliable and legally insufficient. There is no reliable and verifiable basis for the 2013 subsurface characterization, and the 2016 data demonstrates that the 2013 geology report is inaccurate. The 2013 geology report, therefore, does not comply with TCEQ’s rules, irrespective of the seal of a licensed geoscientist.

Because Applicant has failed to present accurate and reliable data that conforms to the requirements of TCEQ’s rules, and because the geology report included in the application has now been shown to present an inaccurate description of the subsurface at

the site, Applicant has failed to satisfy its burden of proof on this issue, and its application should be denied.

Applicant's procedures for collecting and maintaining data that formed basis of geology report violated relevant rules and professional standards.

Protestants' closing arguments documented the various ways in which Applicant failed to comply with relevant regulatory requirements, legal requirements, and professional standards of conduct in collecting data and preparing expert opinions and reports regarding geology and hydrogeology. This issue has been raised by Protestants throughout this SOAH proceeding, months before the evidentiary hearing commenced. And yet, Applicant did not even address this issue in its closing arguments. This, again, reflects Applicant's cavalier approach to preparing a landfill permit application.

As a recap, Applicant drilled its borings before it obtained approval of its soil boring plan.⁹⁴ Despite his representations in the application to the contrary, Snyder did not supervise the drilling of borings.⁹⁵ Snyder sealed piezometer logs that did not represent the soils encountered during the drilling of the piezometers; the logs were not based on data obtained from the drilling of the piezometers. Snyder did not personally observe all of the soil samples that were recovered from the subsurface investigation in 2013. Snyder and Adams revised the boring logs before submitting them to TCEQ. Adams made revisions to the logs even though he is not a geologist. The logs were sealed by Snyder, even though Adams was responsible for final revisions to the logs.⁹⁶ Adams claimed that his soil classifications were based on laboratory analyses, but on at least one boring, the laboratory results did not support the soil classification or description that Adams included on the log.⁹⁷

⁹⁴ See the ED's response to comment number 37, wherein the ED acknowledges that he was unaware that Applicant had completed its soil borings before the soil boring plan had been approved, and this was a violation of the rules. Ex. ED-SO-8, ED's Response to Comments.

⁹⁵ See Ex. 130EP-4, p. 005 (Attachment G) and 30 Tex. Admin. Code § 330.63(e)(4)(H).

⁹⁶ Tr. V. 4, p. 786, ll. 15-22.

⁹⁷ Tr. V. 4, p. 780, ll. 7-21.

Applicant's experts do not rely on or even possess written QA/QC procedures. No chain of custody was used for soil samples sent to the laboratory for analysis. And Applicant's record retention and soil sample retention policies, to the extent they exist, fail to comply with basic professional standards and with TCEQ requirements.⁹⁸

Applicant's principal, David Green, was aware of its consultants' practice of discarding original field logs and samples.⁹⁹ He acknowledged that this was the first time he had heard of an expert or environmental scientist employ the practice of discarding field notes and samples.¹⁰⁰ And yet, Mr. Green, an attorney, was not concerned with this practice.¹⁰¹ In fact, he testified that neither he nor anyone in his company (that he's aware of) has had a conversation with Snyder regarding document and sample retention policies.¹⁰²

During the cross-examination of Protestants' expert, Dr. Lauren Ross, Applicant's counsel suggested that because the TCEQ MSW rules addressing QA/QC procedures had expired, those procedures do not apply to Applicant. This is a remarkable argument. If there is any doubt that an expert is expected to employ QA/QC procedures in collecting data and preparing an expert opinion or report, the rule history provides a useful explanation regarding its purpose. As TCEQ explained in response to comments regarding Rule 330.261, it "developed Subchapter F requirements for owners and operators submitting analytical data to the commission to aid and ease compliance with the upcoming NELAC [National Environmental Laboratory Accreditation Conference Standards] requirements to be implemented within the next three years."¹⁰³ The Commission further explained that it adopted these requirements "to ensure that the data

⁹⁸ See 22 Tex. Admin. Code § 851.106(f)(2, (5).

⁹⁹ Ex. P-10, p. 24, ll. 7-23.

¹⁰⁰ Ex. P-10, p. 25, ll. 9-15.

¹⁰¹ Ex. P-10, p. 24, ll. 17-23 & p. 26, ll. 1-8 (testifying that it is his understanding that the discarding of original field logs and samples does not constitute spoliation of "relevant evidence").

¹⁰² Ex. P-10, p. 40, ll. 7-14.

¹⁰³ 31 Tex.Reg. p. 2570 (2006).

required to be submitted to the agency under these rules meets national quality assurance (QA) and quality control (QC) standards.”¹⁰⁴ “Until NELAC standards are adopted, the Subchapter F requirements establish QA and QC measures to be used by owners or operators” of MSW facilities.¹⁰⁵ Contrary to Applicant’s suggestion, the expiration of Subchapter F does not mean that permit applicants no longer have to comply with any QA/QC procedures. The expiration date was included because the Commission contemplated that national standards would be implemented to govern QA/QC procedures, and the TCEQ rules would be redundant of those standards.

Applicant simply has no good, legally or ethically justifiable argument for failing to comply with applicable agency standards, professional standards, and legal requirements regarding collection of data and preparation of expert reports.

Applicant’s negligent procedures resulted in several inaccuracies in its expert report.

Below is a summary of the inaccurate representations included in the geology report in the application:

- Snyder did not supervise the drilling of borings.¹⁰⁶
- Drilling methods are not accurately described in the boring logs.
- Contrary to the representation in Applicant’s soil boring plan, no in-situ permeability test was performed.
- Soil classifications (*i.e.*, fat clay) included in the boring logs are not consistent with laboratory results and are not consistent with soils encountered during the 2016 subsurface investigation.
- Descriptions of soils in Stratum I underrepresent, significant deposits of gravel, and the application is dismissive of the implications of these existing gravel deposits.

¹⁰⁴ *Id.* at p. 2,517.

¹⁰⁵ *Id.* at p. 2,570.

¹⁰⁶ *See* Ex. 130EP-4, p. 005 (Attachment G) and 30 Tex. Admin. Code § 330.63(e)(4)(H).

--The 2013 geology report misrepresents the presence of secondary features; it states that no fractures were encountered. This is not consistent with the significant secondary features, including multiple fractures, that were encountered in the 2016 subsurface investigation. Multiple potential pathways for leachate migration encountered during the 2016 investigation are not represented in the application.

--The loss of circulation, coupled with the displacement of the interface between Stratum II and Stratum III, at one of the boring locations indicates a significant migration pathway that was not discussed in, and is not consistent with, the 2013 geology report.

--Evidence obtained from the 2016 subsurface investigation indicates that hydraulic conductivity of soils at the site are higher than what was reported in the 2013 landfill permit application.¹⁰⁷

--The piezometer logs are wholly inaccurate, in that they are simply duplicates of the boring logs for the corresponding soil boring drilled near the piezometer boring.

--Applicant failed to acknowledge or describe subsurface conditions that evidence a transitional subsurface depositional environment, with indications of Wilcox materials present on the site.

--Applicant's elevation data for piezometers (and some of the location data), in the application, were inaccurate.

Applicant's representations regarding subsurface conditions are simply unreliable and inaccurate and fail to comply with TCEQ rules.

7. HYDROGEOLOGY

Here, again, Applicant attempts to rely on its "supplemental" geology report to satisfy its burden regarding the subsurface hydrogeology. The reason it must do so is because the piezometer elevations and locations included in the original 2013 geology report were inaccurate. And as Mr. Avakian explained, a change in the elevation of the top of a piezometer also impacts the elevation of the screened interval at the bottom of

¹⁰⁷ Ex. P-5, p. 32.

the piezometer. And as Mr. Avakian testified, if the top of casing elevations are wrong, then, the screened intervals are also wrong, which means that the recorded potentiometric levels are also wrong.¹⁰⁸ In other words, Applicant's groundwater conceptual model was based on inaccurate information. This alone renders it unreliable and legally insufficient.

Applicant has presented nothing in its closing arguments that remedies or justifies this fatal defect in its groundwater conceptual model. Applicant simply failed to provide reliable information regarding groundwater elevations and groundwater flow direction. And its application should therefore be denied.

Moreover, as explained by Dr. Ross, based on Applicant's representations in the application regarding groundwater levels, it appears that portions of the landfill would be excavated to depths that are lower than the measured groundwater elevations.¹⁰⁹ Yet, Applicant did not make the demonstrations required under TCEQ Rule 330.337, which addresses excavations that extend below the seasonal high water table.

8. FAULTS

Applicant has failed to acknowledge the significance of the loss of circulation its driller experienced while conducting the subsurface investigation in 2016. There is no indication that Snyder even evaluated this data to determine whether it is indicative of a fault.

As explained in Protestants' closing argument, however, Mr. Rubinov and Dr. Ross analyzed the significance of the loss of fluid circulation and determined that it indicated the presence of a fault. No evidence was presented to refute their opinions. This fault impacts the subsurface characterization and potential migration pathways. Applicant's failure to analyze the significance of this fault calls into question the reliability and veracity of its subsurface investigation and presents another reason for denying the application.

¹⁰⁸ Tr. V. 9, p. 2005.

¹⁰⁹ Ex. P-5, p. 37, ll. 17-29 & Ex. P-5AE.

9. GROUNDWATER MONITORING

Because Applicant has failed to provide an accurate and reliable subsurface characterization and failed to identify all potential migration pathways—including fractures, fissures, and faults—its groundwater monitoring plan is not based on accurate, reliable, site-specific conditions. Consequently, it fails to comply with TCEQ rules.

Protestants have addressed this issue in their closing arguments, and Applicant has provided nothing to contradict this argument. Instead, Applicant simply asserts that monitoring wells will be spaced no more than 600 feet apart, in compliance with TCEQ rules. But this representation fails to account for TCEQ’s requirement that the monitoring system be based on “site-specific technical information.”¹¹⁰

11. WASTE MANAGEMENT UNIT DESIGN

In his closing arguments, the Executive Director incorrectly asserts that “Chapter 330 of the TCEQ rules does not place any limitations on the waste management unit design of the landfill.”¹¹¹ To the contrary, the TCEQ rules contain several requirements mandating an applicant to demonstrate a sufficient design for the facility. Rule 330.61(a), for instance, requires that an applicant “determine and report to the executive director any site-specific conditions that require special design considerations.” Rule 330.63(d) sets forth specific showings required of an applicant during the permitting process in order to demonstrate a sufficient waste management unit design. As addressed in Protestants’ Closing Arguments, the TCEQ regulations contain design requirements related to the stability of site liners (including final cover), the low maintenance geotechnical stability of surface water controls, and the suitability of on-site soils for the purposes they are proposed to be used.¹¹² TCEQ bears a duty to determine whether an applicant has met these requirements.

¹¹⁰ 30 Tex. Admin. Code § 330.403(e)(1).

¹¹¹ ED’s *Closing Arguments*, at p. 13.

¹¹² 30 Tex. Admin. Code §§ 330.337, .305(e), .63(e)(5).

With regard to liner design, Applicant's argument on the liner design consists of a single sentence asserting that the requirements of Subchapter H have been met. Given the extensive discussion of liner stability issues during the hearing, such a sentence wholly fails to address the deficiencies identified during the hearing.

As set forth in Protestants' Closing Arguments, the materials contained within the application fail to demonstrate compliance with waste management unit design requirements. In some cases, the required analysis is simply missing. For example, no analysis has been performed regarding local stability of swales in the final cover. This is a problem from a geotechnical standpoint, and reflects a failure to demonstrate compliance with Rule 330.305(e) requiring that the final cover provide for long-term low maintenance geotechnical stability. Likewise, as addressed in Protestants' Closing Arguments, the Applicant has failed to demonstrate that the final cover liners at the landfill will remain stable as required by the TCEQ regulations.

The problems associated with the proximity of the facility components to the floodplain in the area are discussed elsewhere in this brief and prior briefing. That proximity constitutes a site-specific condition, which at the least requires special design considerations in the design of the landfill. Although Applicant has adopted an amoeba shape for the landfill as a design measure to purportedly address this site-specific condition, that change alone fails to adequately address the issues associated with the extent of potential on-site flooding, as detailed above.

Similarly, as discussed elsewhere in this brief, the proximity of a dam that has been characterized as high hazard and that already requires extensive improvements is a site-specific condition that warrants special design considerations. Yet, Applicant failed to consider the impacts that the proposed landfill would have on the existing or revised dam, or the impacts of a dam failure on the proposed landfill site. This, too, demonstrates Applicant's failure to comply with TCEQ's requirements.

15. WETLANDS

The Executive Director's initial closing argument, addressing the "Wetlands" section, acknowledges that non-jurisdictional wetlands will be affected by the proposed 130EP landfill. However, the closing argument contends that "TCEQ does not have authority to regulate and protect non-jurisdictional wetlands under MSW rules." This is an insupportable legal conclusion. TCEQ Rule 330.553(b) provides that no landfill may be located in wetlands, unless certain demonstrations are made. That is clearly a statement of law providing that TCEQ may enforce wetlands protection. Rule 330.553(b)(3) provides that no landfill unit or solid waste recovery unit may cause or contribute to significant wetlands degradation. This, again, is a clear statement that TCEQ may protect wetlands.

Were TCEQ to contend that its policy or practice is that (1) the agency just does not have wetlands regulatory authority, at all, or (2) that its regulatory authority may not be exercised in the course of landfill permitting, this is not a legally-cognizable basis on which to avoid its wetlands protection duties. Agencies have no authority to modify their APA-adopted rules in an adjudicative proceeding, absent "exceptional" circumstances of a type not present, here. *Texas Bd. of Pharmacy v. Witcher*, 447 S.W.3d 520, 541-542 (Tex. App. – Austin 2014, pet. dism'd) (license-suspension policy was an invalid "rule" adopted outside the APA and in circumstances that were not novel, did not involve the application of a new law and did not involve issues too complex to be captured in a conventional APA rule). Rule 330.533 does not disclaim or limit to some non-landfill permitting scheme the agency's wetlands-protection authority; so the agency's closing argument (really, just a bald statement) of lack of authority cannot be accepted. 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."); see also *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254-55 (Tex. 1999) (agency's

failure to follow the clear and unambiguous language of its own rules is arbitrary and capricious)

The Applicant's initial closing argument, at page 18, acknowledges the fact of different state and federal definitions for "wetlands." As Protestants explained in their initial closing argument, the state "Wetlands Act," enacted in 1989, selected the wetlands definition found in the Food Security Act of 1985 and used by the NRCS,¹¹³ instead of the definition that has now become the "federal definition" and that had been adopted earlier in the 1980s by the EPA and the Corps of Engineers.¹¹⁴

While acknowledging the fact of multiple definitions, the Applicant relies on Mr. Marusak's testimony that the state definition does not conflict with the federal definition in instances, such as MSW permitting, where TCEQ acts under state law. He offered no basis or reason why this might be so. He offered no explanation. It is worth recalling that, in Texas, when no basis is offered for an expert opinion, "the opinion is merely a conclusory statement and cannot be considered probative evidence." *City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex.2009). "This is because the evidentiary value of expert testimony is derived from its basis, not from the mere fact that the expert has said it." *Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820, 829 (Tex. 2014).

The real issue—perhaps, the rationale on which Mr. Marusak relied—is that the federal definition is not relevant to demonstrations related to non-jurisdictional wetlands. The federal wetlands definition could be anything at all, and there would be no conflict between it and the state definition, when TCEQ is making a state-law-based determination, because TCEQ would have no reason to consider, at all, the federal definition of wetlands.

¹¹³ Natural Resource Conservation Service

¹¹⁴ See the Food Security Act definition at 16 U.S.C. § 3801(27)(A) and the EPA and Corps definition at 40 C.F.R. § 230.3 and 22 C.F.R. § 328.3.

The Applicant's initial closing argument, at page 18, asserts that "there are no 'state-definition' wetlands located within the proposed Landfill footprint" and, for good measure, that "the Landfill will not be located in 'state definition' wetlands." As Protestants pointed out in their initial closing arguments, there simply is no evidence to support these statements. There was no wetlands determination made under state law. Halff Associates employed the federal definition of wetlands, which, unlike the state definition, requires a prevalence of hydrophytic vegetation at a wetlands site. Then, Halff employed a federally-sanctioned (but not state-sanctioned) short-cut to identifying wetlands, a short-cut that removed any inquiry into hydric soils, if there were not a prevalence of hydrophytic vegetation. Hydric soils are the key wetlands factor under the state definition. Compounding this error, Halff made its determinations in the summer of 2013, after an extended drought period that covered the preceding two vegetation growing seasons, and Halff made no attempt to integrate into its determinations the facts, facts it acknowledged, of earlier human modification of the proposed landfill site by terracing of land and pasturing of livestock.¹¹⁵ The two aerial photographs from the Application¹¹⁶ that were set out in Protestants' initial closing argument are again set out on the following page, with yellow highlights added around the three open water bodies that the Applicant characterizes as ponds created sometime in the past for livestock.

¹¹⁵ Protestants noted in their initial closing brief Halff's acknowledgement of historic pasture land and agricultural use of the area of the landfill footprint. *See* footnotes 330-332 of the Protestants' initial closing arguments. Exhibit 130EP-1, page 299, also invokes cattle use of the land as a rationale to characterize open water features 4, 5, and 8 as ponds for livestock use and, thus, the wetlands associated with them as non-jurisdictional.

¹¹⁶ Ex. 130EP-1, pp. 312-313.



Ex. 130EP-1, p. 312, Figure A-3 (1996), added
annotation of livestock ponds in yellow



Ex. 130EP-1. p. 313, Figure A-4 (2010), added
annotation of livestock ponds in yellow

In its initial closing argument, the Applicant provides some citations for its claim that no “state-definition” wetlands will be disturbed by the proposed landfill. First, it cites to a page of the September 6, 2013, letter from Halff to the Corps seeking a negative federal-definition wetlands determination as to certain wetlands.¹¹⁷ That letter does not establish anything about state-definition wetlands. The Applicant next cites to a page¹¹⁸ in the delineation and identification report it prepared for the Corps of Engineers, but that page discusses isolated wetlands and their association with interstate commerce, a consideration that is simply not relevant for state-definition wetlands. The Applicant cites to a brief summary, with a table and a site plan, of the federal-definition wetland acreage Halff documented within the facility boundary; that, again, is not information that sheds light on state-definition wetlands.

Finally, the Applicant cites to a subsection¹¹⁹ of the Texas Water Quality Standards that was likely, earlier, the state definition of “wetlands.” (The definitions section of the Texas Water Quality Standards is frequently amended, so the subsection numbers change frequently.) Protestants are not exactly sure of the reason for that last citation. The state definition has some exclusions, and these may explain the citation. The definition excludes from the term (a) irrigated acreage and (b) man-made wetlands constructed after 1989 that did not have wetlands creation as a “stated” purpose and (c) man-made wetlands of less than an acre. However, our record contains no evidence about irrigation of the site or about the dates of construction of man-made wetlands, if any. Since Halff did not identify state-definition wetlands, we have no information about their acreages or of their interconnectedness, which interconnectedness would require aggregation of their acreages when the acre-minimum threshold is calculated.

¹¹⁷ Ex. 130EP-1, p. 271.

¹¹⁸ Ex. 130EP-1, p. 298.

¹¹⁹ The citation is to 30 Tex. Admin. Code § 307.3(a)(81). Likely, the citation was intended to the “wetlands” definition, which is now at 30 Tex. Admin. Code § 307.3(a)(84).

In sum, Applicant has simply failed to provide any evidence demonstrating an evaluation of state-defined wetlands, and the ED has failed to provide any rational explanation for relieving Applicant of this requirement.

16. SURFACE WATER AND DRAINAGE

130 EP and the Executive Director improperly rely on downstream mitigation of drainage pattern impacts.

In claiming that the facility will not adversely impact drainage patterns, the Applicant's arguments rely upon the analysis presented in the drainage analysis and design report included in the application.¹²⁰ That report asserts that the changes occurring at the permit boundary at comparison points CP7 and CP8 are acceptable due to the alleged "net" impact of these changes in comparison to the downstream SCS Reservoir 21:¹²¹

[W]hile the 25-year storm runoff volume will increase at CP7 and decrease at CP8 (a net increase of 12.8 acre feet, approximately 12.5%), these changes will be insignificant compared to the receiving body, SCS Reservoir Site 21.

* * *

Considering the proposed net changes within the water body of less than 4% decrease in peak discharge rate and less than 1 % increase in volume, the changes at CP7 and CP8 will not result in adverse alterations of existing drainage patterns.¹²²

Likewise, the Executive Director's Closing Arguments rely heavily on the assertion that the "increase in volume represents less than 1% of the capacity of the Site 21 reservoir

¹²⁰ Applicant's *Closing Arguments*, p. 20, referencing Ex. 130EP-2, p. 70.

¹²¹ Ex. 130EP-2, p. 69.

¹²² Ex. 130EP-2, p. 69.

during the 25-year storm event.”¹²³ This reliance of the Applicant and Executive Director on off-site mitigation and an off-site comparison point is improper and contrary to TCEQ precedent.

TCEQ has repeatedly made clear that the evaluation of drainage pattern impacts must be performed based upon changes at the **permit boundary**, not a point downstream. For instance, with regard to the application of Juliff Gardens, TCEQ issued a final order denying the application in part because, “Applicant failed to demonstrate that the landfill will not significantly alter natural drainage patterns **at the permit boundaries of the site.**”¹²⁴

The logic supporting this position is rather straightforward. If an applicant is allowed to select a downstream comparison point at which to compare drainage patterns, then the comparison is not really focusing on the impact of the facility. Furthermore, the permit can only directly control or regulate what will happen in the future within the permit boundary. Thus, a drainage analysis that turns on conditions outside the permit boundary relies upon what are essentially drainage controls without any regulatory assurance that those controls will remain in place. This policy was reiterated by the Executive Director’s staff in this case in a Notice of Deficiency issued May 6, 2014, in which the Executive Director stated:

While discharge rates at CP7 and CP8 indicate reductions of 42% and 12% respectively between the pre-and post-development conditions, by the time the discharges leave the property boundary, values do not change significantly (no more than 1.2%). It appears that drainage pattern changes are limited to property owned by you; however, **the requirement that drainage patterns not be altered at the permit boundary is not met where the alterations are mitigated on off-site property, even if the property is owned by the applicant, without a drainage easement.** A drainage easement should be acquired for areas between CP5 through CP8 and CP9 through CP10. Please illustrate drainage easements on appropriate figures and expand the discussion of the comparison of pre- and post-

¹²³ ED’s *Closing Arguments*, “Surface Water and Drainage.” See also testimony of Odil at Tr. V. 8, p. 1911, ll. 10-17.

¹²⁴ *Juliff Gardens Final Order*, p. 6, (FOF 63) (Attachment B to this brief).

development drainage conditions (Attachment C1, Chapter 7) to reflect the drainage easement and its involvement in the demonstration of no adverse change to drainage.¹²⁵

During the hearing on the merits, Mr. Odil testified that no TCEQ rule allows for the mitigation of drainage impacts off-site, and he further acknowledged that “TCEQ rules are primarily focused on the facility which is bounded by the permit boundary.”¹²⁶ The Executive Director’s reliance on a downstream comparison point (namely, discharge into the Site 21 reservoir) in its closing arguments is directly contrary to this position previously expressed by the Executive Director, particularly considering the failure of the Applicant to obtain a drainage easement.

In this case, drainage patterns will be adversely altered at Comparison Point 7 and Comparison Point 8. Both of these points are located at the permit boundary.¹²⁷ At CP7, the 25-year storm runoff volume will increase from 38.5 acre-feet to 61.8 acre-feet, an increase of approximately 60.5%, and at CP8 the runoff volume will decrease from 63.8 acre-feet to 53.3 acre-feet, a decrease of approximately 16.5%.¹²⁸ Each of these changes is significant, and Applicant bears a burden to demonstrate that such changes are not adverse. Steve Odil, on behalf of the Executive Director, testified that this decrease in volume of roughly 16% at CP8 would potentially be adverse were it not for the mitigation of this reduction in the downstream reservoir.¹²⁹

In short, no demonstration has been made that the changes in drainage patterns *at the permit boundary* will not be adverse, as is required by the rules. This demonstration must be made, independent of an analysis of impacts to the reservoir. Even if downstream mitigation were to be allowed, such reliance would properly require the demonstration of a drainage easement, as the Executive Director stated in the May 6, 2014 Notice of

¹²⁵ Ex. ED-SO-4, p. 4.

¹²⁶ Tr. V. 8, p. 1901.

¹²⁷ Ex. 130EP-2, p. 69.

¹²⁸ Ex. 130EP-2, p. 69.

¹²⁹ Tr. V. 8, p. 1911, ll. 8-17.

Deficiency. Applicant has failed to demonstrate that it possesses such an easement. Furthermore, no showing has been made that such an easement would even be consistent with the easements and property rights currently held by Plum Creek Conservation District in the downstream property.

130 EP has not justified the unit hydrograph utilized in its analysis.

In its closing arguments, 130EP continues to rely upon the use of the unit hydrograph method to determine drainage patterns, without identifying the particular unit hydrograph utilized. When using the unit hydrograph method, of primary importance is the justification for the unit hydrograph selected for the analysis and whether the unit hydrograph is appropriate considering the watershed areas, watershed shape, and potential for downstream hazards and safety considerations.¹³⁰ Without an identification of the unit hydrograph used by the Applicant, it is not possible to evaluate whether that hydrograph is appropriate in light of these considerations.¹³¹

During the hearing, Mr. Traw claimed that the unit hydrograph used was identified in the hydrologic calculations provided in the application, referencing page 85 of Exhibit 130EP-2 and page 121 of Exhibit 130EP-2.¹³² While these portions of the application identify that the unit hydrograph method was used, the referenced text does not identify or provide the particular unit hydrograph utilized.¹³³ As Mr. Harden testified, the unit hydrograph utilized by the applicant simply has not been identified in the application.¹³⁴ Without identifying this hydrograph, 130EP has failed to justify the necessary assumptions underpinning its drainage analysis, as required by TCEQ Rule 330.63(c)(1).

PCCD's concerns regarding contamination of surface water are justified.

¹³⁰ Ex. P-9, p. 11.

¹³¹ Ex. P-9, p. 11.

¹³² Tr. V. 9, pp. 2021-2022.

¹³³ Ex. 130EP-2, pp. 85 & 121.

¹³⁴ Ex. P-9, p. 10.

In its closing arguments, Plum Creek Conservation District expressed concern that the measures proposed in the application to address contaminated water fail to address all potential means by which the construction and operation of the landfill could result in the contamination of nearby surface waters.¹³⁵ This is a valid concern in light of (1) the extent of operations on-site noted by the District, and (2) the potential for surface water to be contaminated by the migration of contaminants in shallow gravel deposits at the site. As Bob Harden explained, “[T]he site layout increases the potential for discharge of leachate or other problematic water quality directly into receiving streams.”¹³⁶ Gravelly soil borders the footprint of the landfill in many areas, including areas proximate to nearby streams.¹³⁷ In light of these extensive gravel deposits, Mr. Harden noted that, “even a small gravel channel could readily transmit the leachate off site.”¹³⁸ This type of release, resulting in the contamination of surface water, would escape detection because the Applicant’s proposed groundwater monitoring system monitors deeper zones.¹³⁹

This is yet another reason why surface water monitoring requirements should be added to the permit if a decision is ultimately made to grant the permit. If the permit is granted, Applicant should be required, through a special provision, to provide monthly testing of water quality in SCS Reservoir 21 with reporting to TCEQ as well as the District, with all costs of that testing to be borne by Applicant.

17. FLOODPLAINS

Applicant’s response focuses solely on the extent of the current 100-year floodplain, and whether the landfill footprint, waste processing and/or storage facilities,

¹³⁵ PCCD *Closing Arguments*, p. 10.

¹³⁶ Ex. P-9, p. 23

¹³⁷ Ex. P-19.

¹³⁸ Ex. P-9, p. 23.

¹³⁹ Ex. P-9, p. 24.

and waste disposal operations will be located within that defined floodplain.¹⁴⁰ Applicant concludes that none of these facilities or operations is within the floodplain. Protestants disagree with this claim for the reasons listed by Caldwell County in its initial closing brief. Importantly, though, even if Applicant's claims were true, those arguments do not address all requirements of the TCEQ rules related to floodplains.

TCEQ Rule 330.547(b) provides that new municipal solid waste units shall not result in washout of solid waste so as to pose a hazard to human health and the environment. This prohibition applies without limitation as to whether those units are within the current 100-year floodplain.

Furthermore, the TCEQ rules require that an applicant demonstrate that landfill units located in an unstable area shall demonstrate that engineering measures have been incorporated into the landfill unit's design to ensure that the integrity of the structural components of the landfill unit will not be disrupted. And "unstable areas" is defined as "a location that is susceptible to natural or human induced events or forces capable of impairing the integrity of some or all of a landfill's structural components responsible for preventing releases from the landfill."¹⁴¹ According to this regulation, the design of a landfill must ensure that the integrity of the landfill units will not be disrupted by flooding, irrespective of whether that flooding occurs as the result of a 100-year flood. As it relates to flooding, Applicant has failed to demonstrate compliance with this regulation.

Applicant has failed to demonstrate that the design of the landfill is protective against washout and protective against impairment of the integrity of the landfill as a result of flooding-induced instability. The evidence demonstrates that the extent of the floodplain is not static, but is constantly changing as the result of changes within a watershed.¹⁴² As Tracy Bratton testified, it is likely that development will occur upstream

¹⁴⁰ Applicant's *Closing Arguments*, pp. 21 – 22.

¹⁴¹ 30 Tex. Admin. Code § 330.559.

¹⁴² Ex. P-9, pp. 19-20.

of the landfill, and such upstream development can potentially raise the level of the floodplain within the landfill.¹⁴³ Mr. Harden also stressed this potential, noting that “the upstream watersheds will assuredly undergo additional urbanization with increases in impervious cover and landuse changes that will increase flood flows in receiving streams directly adjacent the Facility.”¹⁴⁴ Applicant has not disputed this likely expansion of the floodplain. Mr. Harden went on to opine that considering the close proximity of the modeled 100-year floodplain to the landfill footprint, “[i]ncreases in flood flow and the associated rise in flood flow elevation and expansion of extents of floodplain/flood flows would further encroach on the Landfill site and represent additional risks to the stability of the storm water pond embankments.”¹⁴⁵ Ultimately, Mr. Harden testified that these increases in flooding could cause washout of solid waste.¹⁴⁶ Applicant has simply not addressed this anticipated increase in flooding at the landfill, and the problems of instability and potential washout of waste that the increased flooding will bring.

An additional important consideration related to flooding is found at Rule 330.63(d)(4), which requires that the Applicant provide provisions for all-weather operation. The proximity and configuration of the floodplain poses operational problems for all-weather operations that the Applicant has not adequately addressed. The 100-year floodplain cuts through the landfill site.¹⁴⁷ Consequently, trucks and equipment must travel across a low-water crossing within the 100-year floodplain in order to access the waste disposal areas.¹⁴⁸

Furthermore, the 100-year floodplain separates the leachate storage tanks from the leachate collection system at the landfill.¹⁴⁹ The application provides that leachate from

¹⁴³ Tr. V. 8, p. 1813.

¹⁴⁴ Ex. P-9, pp. 16-17.

¹⁴⁵ Ex. P-9, p. 20.

¹⁴⁶ Ex. P-9, p. 20.

¹⁴⁷ App. Ex. Adams-4.

¹⁴⁸ App. Ex. Adams-4.

¹⁴⁹ App. Ex. Adams-4.

the landfill unit may be transferred to these tanks either by means of transport trucks, or by force main.¹⁵⁰ Mr. Harden opined regarding the problem this creates, noting, “If the access road is unpassable because of flood damage, then leachate cannot be pumped from the collection system and transported to the storage tanks.”¹⁵¹

As Mr. Harden further observed, the way in which the floodplain eliminates access to the landfill footprint also creates a concern for periods when emergency access may be needed to the landfill area.¹⁵² The design of the landfill includes no culvert or any other design measure that would ensure preservation of this access road during periods of significant flooding. The Applicant made no attempt to address this concern raised by Mr. Harden.

The manner in which the off-site entrance road crosses the floodplain in several locations¹⁵³ also poses unaddressed problems for all-weather operation of the landfill. No specific design measures have been identified that would preserve the integrity of this roadway during flood events. Even if such measures were proposed, the location of this roadway beyond the permit boundary, and in between the permit boundary and a public roadway (US 183N, FM 1185, or Hohmanville Trail/CR 179), would raise questions as to the enforceability of these necessary design measures, as such roadway is not in the proposed permit boundary. In order to ensure the preservation of all-weather operation of the facility, the design of this roadway must address the floodplain areas that it will traverse, and in order to ensure the design requirements are met, the permit boundary must encompass the entirety of this roadway, from the access to the public road.

In short, Applicant has failed to make provisions for all-weather operation of the landfill. It failed to address the fact that the floodplain interferes with the movement of waste at the site, the operation of the leachate collection system, the ability of the facility

¹⁵⁰ Ex. 130EP-2, p. 31.

¹⁵¹ Ex. P-9, p. 21.

¹⁵² Ex. P-9, p. 21.

¹⁵³ App. Ex. Adams-4.

or emergency personnel to respond to emergency situations, and the functioning of the specific entrance road for the facility.

Applicant's narrow focus on the floodplain delineation requirements of Rule 330.547 simply fails to address all regulatory requirements relevant to the consideration of floodplains and potential flooding at the landfill.

18. LOCAL REGULATIONS/APPROVALS

Protestants agree with the arguments presented by the County regarding this issue. In short, Applicant failed to even begin the process of obtaining all necessary approvals from the County to construct its access road in a floodplain. The ED pointed out, on at least three occasions in various NODs, that Applicant needed to comply with this requirement.¹⁵⁴ Yet, the response from the Applicant was that it had begun the preliminary platting process. But the preliminary platting process is not equivalent to County approval to develop in the floodplain. Applicant's responses to the ED's NODs were inadequate and disingenuous. Applicant simply chose not to attempt to address the ED's NOD, even after multiple requests to do so. It never commenced the process for obtaining County authorization to construct in a floodplain, despite its representations to the ED to the contrary.

Having failed to comply with this requirement, Applicant's application should be denied. A special permit provision, added to the permit, is inadequate to address this deficiency. Applicant was already provided with several NODs, allowing it several opportunities to address this deficiency. Applicant has demonstrated an unwillingness to even attempt to comply with this requirement, thus far. It should not be rewarded with the approval of a permit that provides yet another opportunity for the Applicant to comply with this requirement, when Applicant has demonstrated that it does not believe compliance is necessary.

¹⁵⁴ See Exs. ED-SO-3, ED-SO-4, ED-SO-5 and ED-SO-6.

19. WASTE ACCEPTANCE PLAN

Applicant's arguments regarding its waste acceptance plan was as conclusory as its witness testimony. Tellingly, Applicant only cites to its application in support of the conclusory statements in its argument. It does not cite to any witness testimony. But the information in the application does not, in and of itself, prove compliance with TCEQ's requirements.

The waste acceptance rates and plan included in the application were sealed by Kerry Maroney.¹⁵⁵ Yet, his testimony revealed that he had no basis for the waste acceptance rates, markets, and types of waste included in the application. He made no effort to determine if this information was accurate or based on reliable factual assumptions. This alone renders the information in the application insufficient. And it calls into question whether this portion of the application was properly sealed and prepared in accordance with the Texas Engineering Practice Act, as required by the rules.

Applicant presented Hobby as a witness to support the waste acceptance rates included in the application—an engineer licensed in Mississippi.¹⁵⁶ Hobby, however, could not cure the deficiencies in the application materials. Indeed, Hobby cited no facts or sources on which to base his opinion. In fact, when asked what the basis of his opinion was—regarding the reasonability of the waste acceptance rates—he cited only his general experience.

Without specifically explaining the basis for this information regarding waste acceptance rates, it is simply not possible to verify whether the proposed waste acceptance rates are reasonable or based on reasonable assumptions. There is no way to test this information.

Applicant's argument on this issue, and the testimony presented by its witness Hobby, suggests that the waste acceptance rates and plan need not be based on any

¹⁵⁵ Tr. V. 9, p. 2084.

¹⁵⁶ Ex. 130EP Hobby-1, p. 4.

reliable facts or assumptions.¹⁵⁷ But if this were true, then, there would be no need to include this information in the application; there would be no need for the TCEQ rule requiring this information be provided in an application and sealed by an engineer.

But this cannot be what was contemplated by the rules. There would be no need for this required information, if all one had to do was concoct some general waste acceptance estimates that have no reasonable factual basis. There would be no need to seal this data. There would be no need for accuracy.

In fact, it is essential that this information be based on reasonable factual assumptions that are specific to the area for which the landfill is proposed. The waste acceptance rates provide information that is used to determine traffic impacts, roadway capacity, and the expected life of the landfill. The rates inform the information regarding necessary equipment and site operations. And in this case, in particular, the projected life of the landfill is especially important, considering its proximity to and reliance on the District's high hazard dam and reservoir and its proximity to floodplains that are likely to be impacted by future development.

If, for instance, the waste disposal market will not support the rates projected in the application, then, the landfill may be in operation for a greater number of years than anticipated, because it will take longer to fill up the permitted landfill space. During those operating years, the floodplain may expand. Or the area may see an increase in development that puts further pressure on the dam or impacts traffic projections and compatible use of the roadways accessing the facility. This is not an unreasonable assumption, considering that residents in the County are advocating for the adoption of a zero waste policy and surrounding areas have already adopted such a policy.¹⁵⁸

In sum, there are a variety of reasons that the proposed waste acceptance rates must be based on some reasonable factual assumptions, which can be tested and verified—besides the fact that TCEQ rules require this information to be accurate and

¹⁵⁷ Tr. V. 8, p. 1795, ll. 13-17.

¹⁵⁸ Tr. V. 6, pp. 1332-1333 (testimony of Byron Friedrich).

reliable. These waste acceptance rates provide the basis for a number of analyses included in the application. Applicant, however, could provide no reasonable basis for the waste acceptance rates included in the application. And so, it has failed to satisfy this basic regulatory requirement.

20. SITE OPERATING PLAN

Protestants agree with the arguments presented by OPIC, the County, and the District regarding Applicant's proposed Site Operating Plan and adopt them here.

Proposed operating hours have not been justified.

In particular, Protestants agree with the arguments presented by OPIC regarding limits to the operating hours. As explained by OPIC, Applicant presented no evidence that would justify granting expanded hours of waste acceptance or operations. In fact, Applicant's witnesses admitted that landfill equipment operations would generate noise and light, during evening hours, and these could be considered incompatible with surrounding land uses.¹⁵⁹

OPIC also referenced two other landfill cases in which the ALJs proposed limiting the operating hours to those specified in TCEQ's rules: waste acceptance would occur between 7:00 a.m. and 7:00 p.m., Monday through Friday, and transportation and heavy equipment operation should not be conducted between the hours of 9:00 p.m. and 5:00 a.m.¹⁶⁰ In this case, Applicant has not provided any evidence justifying the need to deviate from these operating hours. Therefore, if a permit is granted, Applicant's proposed operating hours should be revised so that they conform with the operating hours specified in TCEQ's rules.

The Executive Director argued that no explanation is required to justify a deviation from the default operating hours included in TCEQ's rules. But this argument defies logic. Presumably, TCEQ did not arbitrarily select the operating hours it included

¹⁵⁹ Tr. V. 6, p. 1217 (testimony of Welch).

¹⁶⁰ 30 Tex. Admin. Code § 330.135(a).

in its rules. Its rule regarding operating hours is presumed to have some basis; MSW staff is presumed to have some background and technical experience that it relied on in determining that the operating hours proposed in its rule are appropriate and reasonable.

Applicant, on the other hand, has provided no evidence to suggest that its proposed operating hours are equally appropriate and reasonable. Indeed, Applicant's own witnesses acknowledged that 24/7 operating hours could be disruptive to the surrounding residents. Thus, if a permit is recommended for approval, the site operating hours should be restricted in accordance with TCEQ's rule.

Applicant should not be allowed to use alternative daily cover for the proposed landfill.

Applicant's site operating plan acknowledges that Applicant may seek authorization to use alternative daily cover (ADC) in the future. In fact, ADC cannot be approved as part of an application for a new landfill permit; it can only be authorized via a temporary authorization and a major amendment or modification.¹⁶¹ That the Applicant has noted, in its application, its intention to seek authorization for use of ADC in the future reveals that adequate soils for daily cover may not exist at the site, as Protestants anticipated. Nevertheless, the evidence presented demonstrates that ADC would not be sufficiently protective of human health and the environment if allowed at this site.

The proposed landfill is expected to extend about 170 feet vertically. At this proposed height, management of windblown waste and odors will already present significant issues for Applicant to deal with, even without use of ADC. Furthermore, the area is known to attract feral hogs, and Applicant has not demonstrated that its current SOP is adequate to prevent scavenging by these feral hogs. Use of ADC will only exacerbate this problem.

Finally, as argued elsewhere in this brief, windblown waste and debris could have adverse impacts on the functionality of the Site 21 structure. Every effort should be taken

¹⁶¹ 30 Tex. Admin. Code § 330.165(d).

to ensure that the proposed landfill will not interfere with the District's property rights and use of Site 21.

Therefore, Applicant should be required to apply a minimum of 6 inches of earthen material as daily cover. Limiting operating hours will also ensure that the waste will be covered at some point each day and on Sundays. If the ALJs determine that a permit should be issued in this case, Protestants urge the ALJs to include a special provision that makes it clear that the evidence presented in this case demonstrates that ADC is not appropriate for this proposed landfill, and Applicant must apply 6 inches of earthen material cover daily. Applicant should not be allowed to seek a temporary authorization for use of ADC, unless it can present evidence demonstrating changed conditions, and an opportunity for a hearing should be provided to allow residents to challenge any evidence of changed conditions and to present their own evidence regarding the proposed use of ADC.

The SOP lacks sufficient detail to comply with TCEO rules.

As detailed in Protestants' closing arguments, Applicant failed to provide a detailed site operating plan that would serve as an instruction or guidance manual for operation of the landfill. Instead, the SOP simply repeats the language of the rules, in several instances. In those few instances where the SOP does include language that is more detailed than a simple regurgitation of the rules, the SOP still fails to comply with the regulatory requirements.

As explained by the District in its closing arguments, Applicant has failed to adequately explain where it will acquire sufficient water for construction and operation of the proposed landfill. This argument is also relevant to the SOP requirements.

For instance, Mr. Welch testified that an "adequate water supply" would be provided in an above-ground storage tank at the site of the proposed transfer station.¹⁶² But he could provide no specifics about the storage tank or the water supply to be stored

¹⁶² Tr. V. 6, pp. 1215-1216.

there. As he explained it, he would need to refer to the transfer station registration to obtain those details.¹⁶³

Mr. Welch also acknowledged that one of the purposes for obtaining the transfer station registration was to get a solid waste facility application submitted to TCEQ before the County could adopt a landfill siting ordinance.¹⁶⁴ In fact, Mr. Welch could provide no specifics regarding when construction might begin on the transfer station. Nor did he have any idea about when the transfer station might begin operations. He conceded that it is possible that the transfer station may not begin operations until after the landfill begins operation, if a landfill permit is granted.¹⁶⁵

It is also possible that the transfer station may never be constructed or operated. This makes the most sense, if the landfill permit is granted. If that were the case, then, the transfer station registration should be cancelled. If the transfer station authorization were cancelled, this would also necessarily impact the water storage tank requirements for the landfill. In sum, the water supply storage tank is a facility that is intended to be used for the landfill, if it is permitted, and should therefore be included within the facility boundary; it should not be part of another facility that may never be constructed or operated.

Similarly, Applicant has failed to demonstrate that adequate soils exist for fire protection. The availability of adequate soils for construction of the landfill has been discussed elsewhere in Protestants' closing arguments. In short, Applicant has not demonstrated that adequate soils exist for landfill construction. The SOP states that soils will be obtained from other suitable sources, if excavation does not provide sufficient soils.¹⁶⁶ Yet, Mr. Welch could provide no specifics regarding other suitable sources of soil.

¹⁶³ *Id.*

¹⁶⁴ Tr. V. 5, p. 1166, ll. 17-22.

¹⁶⁵ *Id.*

¹⁶⁶ Ex. 130EP-5, p. 147.

Elsewhere in this brief and in Protestants' initial closing arguments, Protestants have discussed the significance of failing to include the facility access road within the permit boundary. Those arguments will not be repeated here, other than to note that TCEQ rules contemplate regulation of site access roads. *See* 30 Tex. Admin. Code § 330.153. The access road must be maintained in a clean and safe condition and cleared of dust, debris and tracked mud. And all-weather roads must be provided from the facility to the public roads. Yet, by failing to include the access road in the permit boundary, TCEQ cannot rely on the permit to enforce these site operating provisions. Even Mr. Welch conceded that if the access road were included within the permit boundary, TCEQ's enforcement authority regarding the access road would be clearer.¹⁶⁷

In sum, Applicant's site operating plan is deficient. It has not justified the operating hours it seeks. It has failed to provide adequate water supply or soil supply. The site operating plan does not address the entire facility access road, up to where it meets any public roadway, because the access road is not included in the permit boundary. For all of these reasons, the application should be denied.

21. ODOR

Applicant's Closing Argument regarding odor, on page 30, is conclusory as to facts and is so conclusory as to the law that there is not a single citation to applicable law. Applicant asserts that an Odor Management Plan "addresses sources of odor and includes general instructions." Applicant's Closing Argument also acknowledges that the Odor Management Plan is part of the Site Operating Plan.

Applicant's Closing Argument and odor plan are conclusory.

The Odor Management Plan itself suffers from this same conclusory vagueness that is inconsistent with the requirements set forth by the Austin Court of Appeals in *BFI Waste Systems of North America, Inc. v. Martinez Environmental Group*, 93 S.W.3d 570 (Tex. App.—Austin 2002, pet. denied). There, the court noted: "Detailed site operating plans allow affected parties to maintain some oversight of these large landfills." *Id.* at

¹⁶⁷ Tr. V. 6, p. 1213, ll. 16-21.

579. Therefore, these plans must be “specific” and “detailed.” *Id.* at 580. Each plan “must provide specific enforceable procedures to govern the daily operation of a specific landfill [and] at a minimum ... must ... be more detailed than the general rules that it implements.” *Id.*

Many of the crucial statements in the plan are neither specific nor detailed, nor identify any kind of rule or standard that could be used to determine whether an odor control requirement has been breached.¹⁶⁸ Some of the provisions are not even obligatory. According to the plan, odor control measures “may include” a list of provisions limited to “special wastes.” The provisions in the Odor Control Plan are almost exclusively devoted to these “special wastes.”

There are references to “prompt placement” of wastes without any specificity as to what “prompt” means and often using a passive voice that obligates no one in particular to do any specific thing. For example, the Odor Management Plan states, “Waste that is determined to require additional procedures will be isolated” and “covered with a minimum of three feet of other solid waste or a minimum of one foot of earthen material upon receipt.” Nothing in the plan says who makes this determination or what criteria guide this determination. Contrary to what is argued in Applicant’s Closing Argument, an Odor Control Plan or any other component of the Site Operating Plan cannot simply regurgitate the broad TCEQ rule requirements. *BFI Waste Systems of North America*, 93 S.W.3d at 580.

Applicant cannot properly rely on Martha O’Brien’s testimony.

Applicant’s Closing Argument regarding odor is essentially that the testimony of Martha O’Brien establishes that the landfill “will satisfy all applicable regulatory requirements regarding odors, odor controls and avoidance of nuisance odors.”

No logical connection is drawn between O’Brien’s review and her conclusions.

¹⁶⁸ Ex. 130EP-5, p. 143.

It is the basis of an expert's opinion, and not the opinion itself, that holds probative value.¹⁶⁹ Ms. O'Brien's testimony does not provide any basis for her opinion, but only states that she has reviewed portions of the application and that the application meets TCEQ rules regarding odor. No reason or logic is given to connect what she reviewed and how she reached her opinion.¹⁷⁰ Because the entirety of the testimony of Ms. O'Brien is conclusory, it cannot be used to establish any facts¹⁷¹ and does not satisfy Rule 702's requirement that expert testimony be helpful in the determination of a fact in issue. Because it is conclusory and without basis, it does not meet the requirements of Rule 702 that expert testimony assist the ALJ in understanding the evidence.

No basis or expertise is shown regarding her opinion on nuisance and interference with normal use of property.

Ms. O'Brien testified that the landfill would not create a nuisance. Yet Ms. O'Brien has no special expertise in Texas nuisance law.¹⁷² She would not even acknowledge that a "strong odor ... coming in through an open window at night that wakes someone up ... would be an interference with the normal use of a property."¹⁷³ According to her, it's a "personal judgment." Residences next door to the landfill and in close proximity to the landfill include one that is 185 feet from the facility boundary. Ms. O'Brien testified that perimeter berms would block or dilute odor from the landfill but had no knowledge that the height of the landfill is proposed to be significantly higher than the perimeter berms.¹⁷⁴ She admitted that perimeter berms cannot dilute a plume of odor emanating from a landfill whose elevation is higher than the berm.¹⁷⁵

¹⁶⁹ *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009) (quoting *Coastal Transportation Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004)).

¹⁷⁰ *Elizondo v. Krist*, 415 S.W.3d 259, 265 (Tex. 2013).

¹⁷¹ *Elizondo*, 415 S.W.3d at 264.

¹⁷² Tr. V. 4, p. 970, ll. 12-25 & p. 973, ll. 1-6.

¹⁷³ Tr. V. 4, p. 972, ll. 1-9, & 18-20.

¹⁷⁴ Tr. V. 4, p. 1006, ll. 22-25.

¹⁷⁵ Tr. V. 4, p. 1009, ll. 23-25 & p. 1010, ll. 1-12.

The odor management plan doesn't meet TCEQ requirements.

For the reasons described above, Applicant's odor control plan does not meet TCEQ standards. On this basis, the application should be denied. Alternatively, if the application is not denied, at a minimum the Applicant should be required to increase whatever odor control protections can be derived from the daily cover requirements. Specifically, Protestants urge the ALJs to recommend that a special provision be added to the permit that makes clear that, based on the facts and evidence presented in this hearing, Applicant is not authorized to use alternative daily cover and is required to use a minimum of six inches of earthen material as daily cover throughout the life of the site. If Applicant desires to revise this provision of the permit, Applicant must present evidence of changed circumstances to do so, and this must be accomplished via a major amendment to the permit.

31. PERMIT SPECIAL PROVISIONS

Below is a summary of the special provisions that have been suggested by protesting parties in their closing arguments and other filings in this proceeding:

- expand the permit boundary to include the location of a specific access road;
- require Applicant to haul in adequate soils for construction and operation purposes;
- require Applicant to apply 6 inches of earthen material as daily cover;
- no temporary use of alternative daily cover and no authorization for future use of alternative daily cover without evidence of changed circumstances and opportunity for a hearing;
- surface water should be monitored to detect contamination by landfill gas, including contaminants of VOCs and hazardous air pollutants;
- prohibition on use of on-site groundwater for operation and construction purposes, because use of groundwater could have an impact on groundwater gradients beneath the proposed landfill site, which have not been analyzed;
- transfer station (including water supply tank) must be constructed before landfill can be constructed;

- prohibition on clearing of vegetation during all months of the year, except the 3 summer months;
- include a 5-year permit term;
- construction of a vegetated screening berm of sufficient height on the north side of the landfill to provide screening of landfill operations for nearby landowners north of the proposed landfill;
- limit operating hours to the following, pursuant to TCEQ regulations: “waste acceptance hours of this facility may be any time between the hours of 7:00 a.m. and 7:00 p.m., Monday through Friday, and transportation and heavy equipment operation must not be conducted between the hours of 9:00 p.m. and 5:00 a.m.”;
- include groundwater monitoring wells along southern permit boundary to ensure no adverse impacts to groundwater quality that could reach nearby water wells south of FM 1185;
- require Applicant to present the ED with evidence that it has a sufficient and continuous water supply (and potable water supply, other than bottled water) before construction and operation of landfill may commence, and during the full term of landfill operations;
- require Applicant to obtain and maintain adequate soil stockpiles for fire suppression;
- and
- prohibition on any interference with PCCD’s easement rights.
- prohibit Applicant from shortening the post-closure care period without a major amendment, so that detention ponds will continue to be maintained throughout post-closure period.

The addition of special provisions to address each of the above issues is warranted.

32. TRANSCRIPT COSTS

In its closing arguments, Applicant asserts, at p. 33, that approximately 52% of the transcript costs are attributable to TJFA/EPICC, claiming that TJFA and EPICC should be responsible for \$8,697.44 of the total \$16,725.85 amount. Applicant states that they

are responsible for only 22% of the transcript, making their total \$3,679.69. However, Applicant misses the mark on a few key factors that should be considered before assessing the transcript costs.

It should be noted that Applicant requested a direct referral to SOAH for its application. In a direct referral, the Applicant bears the burden of proving that it has complied with all applicable TCEQ regulations. So essentially, a direct referral opens up every issue to be vetted by Protestants in a contested case hearing.

To support its application, Applicant presented thirteen expert witnesses at the hearing on the merits. For comparison, TJFA and EPICC offered four expert witnesses, less than half the number of experts presented by Applicant. It goes without saying that Protestants required significant time to adequately cross-examine each witness presented by the Applicant; yet, Protestants endeavored to efficiently use their time and focused their cross-examination on deficiencies in the application, of which there were several.

All protesting parties made efforts to avoid repeating questions or eliciting redundant testimony. EPICC and TJFA, however, consist of a number of property owners who will reside near the proposed landfill, if it is permitted. Thus, their concerns were varied, and they sought to address several issues of concern to them. By aligning all of the individual protesting parties along with EPICC, however, Protestants were able to make efficient use of their time to address the various issues of concern shared by EPICC members and the aligned individual parties.

Assessing over half of the transcript costs to Protestants based on the amount of time spent questioning witnesses is not appropriate. Protestants were tasked with addressing a variety of issues and concerns, shared by the various members of EPICC and individual parties. These parties have already expended significant resources trying to protect their justiciable interests, their health, and the surrounding environment. They will realize no financial benefit from this hearing. Applicant, on the other hand, consisted of only one party—a party that stands to financially benefit from this proceeding if the requested permit is issued.

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. In the alternative, if the ALJs determine that issuance of a permit is warranted, then, Protestants urge the ALJs to recommend including the special provisions described above.

Respectfully submitted,



Marisa Perales
State Bar No: 24002750
Brad Rockwell
State Bar No: 17129600
Eric Allmon
State Bar No: 24031819

**FREDERICK, PERALES, ALLMON &
ROCKWELL, P.C.**

707 Rio Grande, Suite 200
Austin, Texas 78701
Phone: (512) 469-6000
Facsimile: (512) 482-9346

COUNSEL FOR TJFA & EPICC

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 28th day of November, 2016.



Marisa Perales

**FOR 130 ENVIRONMENTAL
PARK, LLC**

Brent W. Ryan
bryan@msmtx.com
MCELROY, SULLIVAN, MILLER,
WEBER & OLMSTEAD, LLP
P.O. Box 12127
Austin, TX 78711
Fax: 512.327.6566

**FOR TCEQ EXECUTIVE
DIRECTOR**

Anthony Tatu
anthony.tatu@tceq.texas.gov
Kayla Murray
Kayla.Murray@tceq.state.tx.us
Aaron Vargas
Aaron.Vargas@tceq.texas.gov
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Fax: 512.239.0606

**FOR TCEQ PUBLIC INTEREST
COUNSEL**

Aaron Tucker
aaron.tucker@tceq.texas.gov
Office of Public Interest Counsel, MC-
103
TCEQ
P.O. Box 13087
Austin, Texas 78711-3087
Fax: 512.239.6377

FOR CALDWELL COUNTY

Eric Magee
e.magee@allison-bass.com
ALLISON, BASS & MAGEE, LLP
402 W. 12th St
Austin, Texas 78701
Fax: 512.480.0902

FOR PLUM CREEK

Bob Wilson
bwilson@jacksonsjoberg.com
JACKSON, SJOBERG, MCCARTHY &
TOWNSEND, LLP
711 West 7th Street
Austin, Texas 78701
Fax: 512.225.5565

Ben Pesi
PO Box 242
Dale, TX 78616

VIA US MAIL

**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.	§	ADMINISTRATIVE HEARINGS
2383	§	

**MOTION TO REOPEN THE RECORD FOR ADMISSION OF AFFIDAVIT OF
PATTON SPENCER KING**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES KERRIE JO
QUALTROUGH AND CASEY BELL:

COME NOW Protestants TJFA, L.P. and Environmental Protection in the Interest of Caldwell County (collectively, "Protestants") and file this Motion to Reopen the Record for Admission of Affidavit of Patton Spencer King. For support, Protestants respectfully show the following:

On October 25, 2016, the Texas Commission on Environmental Quality held a public meeting for the proposed Pintail Landfill (MSW Permit No. 2391). The proposed Pintail and 130 Environmental Park landfills are both owned and operated by the same parent company, Green Group Holdings, LLC. A large portion of Protestants' arguments in this proceeding has centered on the competency of Green Group Holdings to operate its landfill in accordance with TCEQ rules. Patton King, a member of EPICC who testified at the hearing on the merits, attended the public meeting for the proposed Pintail Landfill, where Green Group Holdings' representatives confirmed the resignation of former President Ernest Kaufmann. Mr. King prepared the attached affidavit, which recounts the admissions made by representatives of Green Group Holdings during the October 25 TCEQ public meeting.

Counsel for Protestants has contacted all parties of record with the exception of Ben Pesl, who could not be reached and did not participate in the hearing on the merits. Of the remaining parties, TCEQ, OPIC, Caldwell County, and Plum Creek Conservation District do not oppose this motion; Applicant has not provided a response as of the filing of this motion.

PRAYER

Protestants respectfully request that this affidavit be admitted for consideration by the ALJs as Exhibit P-46.

Respectfully submitted,



Marisa Perales
State Bar No: 24002750

**FREDERICK, PERALES, ALLMON &
ROCKWELL, P.C.**
707 Rio Grande, Suite 200
Austin, Texas 78701
Phone: (512) 469-6000
Facsimile: (512) 482-9346

COUNSEL FOR PROTESTANTS

CERTIFICATE OF CONFERENCE

Pursuant to SOAH rule 155.305(b)(2), I certify that I attempted to confer with counsel for 130 Environmental Park, LLC about the foregoing Motion to Reopen the Record. As of this filing Mr. Ryan has not yet responded. All other parties are not opposed to this motion.



Marisa Perales

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 28th day of November, 2016.



Marisa Perales

**FOR 130 ENVIRONMENTAL
PARK, LLC**

Brent W. Ryan
bryan@msmtx.com
MCELROY, SULLIVAN, MILLER,
WEBER & OLMSTEAD, LLP
P.O. Box 12127
Austin, TX 78711
Fax: 512.327.6566

**FOR TCEQ EXECUTIVE
DIRECTOR**

Anthony Tatu
anthony.tatu@tceq.texas.gov
Kayla Murray
Kayla.Murray@tceq.state.tx.us
Aaron Vargas
Aaron.Vargas@tceq.texas.gov
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Fax: 512.239.0606

**FOR TCEQ PUBLIC INTEREST
COUNSEL**

Aaron Tucker
aaron.tucker@tceq.texas.gov
Office of Public Interest Counsel, MC-
103
TCEQ
P.O. Box 13087
Austin, Texas 78711-3087
Fax: 512.239.6377

FOR CALDWELL COUNTY

Eric Magee
e.magee@allison-bass.com
ALLISON, BASS & MAGEE, LLP
402 W. 12th St
Austin, Texas 78701
Fax: 512.480.0902

**FOR PLUM CREEK
CONSERVATION DISTRICT**

Bob Wilson
bwilson@jacksonsjoberg.com
JACKSON, SJOBERG, MCCARTHY &
TOWNSEND, LLP
711 West 7th Street
Austin, Texas 78701
Fax: 512.225.5565

Ben Pesl
PO Box 242
Dale, TX 78616

VIA US MAIL

Attachment A

**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.	§	ADMINISTRATIVE HEARINGS
2383	§	

AFFIDAVIT OF PATTON SPENCER KING

STATE OF TEXAS	§
	§
COUNTY OF CALDWELL	§

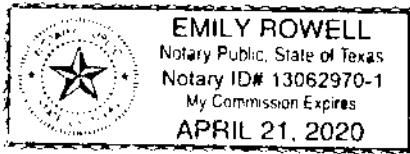
BEFORE ME, the undersigned Notary Public on this day, personally appeared Patton King, known to me to be the person whose name is subscribed hereto, and after being duly sworn on his oath stated the following:

1. My name is Patton Spencer King. I am over eighteen (18) years of age and of sound mind, have never been convicted of a felony, and am otherwise competent to make this affidavit.
2. My family owns property in Caldwell County within ½ mile of the proposed landfill site. On March 26, 2015, my family was granted party status in this contested case hearing as the King Family Trust.
3. I have been a member of Environmental Protection in the Interest of Caldwell County (EPICC) since its inception and I have personal knowledge of the facts stated within this affidavit, all of which are true and correct. EPICC has spent many hours researching Green Group Holdings, 130 Environmental Park and its associated companies.
4. On October 25, 2016, I attended the TCEQ public meeting for the proposed Pintail Landfill (proposed MSW Permit No. 2391) at the Hempstead High School Auditorium in Hempstead, Texas. I attended this meeting from 7:00pm to 11:00pm.
5. During the public meeting, David Green, Vice President of Green Group Holdings, LLC, stated that Ernest Kaufmann had retired from the company and that he, David Green, is the new President of Green Group Holdings. Mr. Green further stated that Ernest Kaufmann no longer has any authority with Green Group Holdings or with its affiliated entities, including the Pintail landfill. This information was asserted before legal counsel and representatives for the TCEQ Executive Director.

FURTHER AFFIANT SAYETH NOT.


Patton King

SUBSCRIBED AND SWORN TO BEFORE ME this 25 day of November 2016.




Notary Public, State of Texas

My Commission Expires:

April 21, 2020

Attachment B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER Denying the Application by Juliff Gardens, L.L.C., for a Permit to Operate a Type IV Municipal Solid Waste Facility (Permit No. MSW-2282); TCEQ Docket No. 2002-0117-MSW; SOAH Docket No. 582-02-1595

On September 29, 2004, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the application of Juliff Gardens, L.L.C. (Juliff Gardens or Applicant) for Permit No. MSW-2282 to authorize Juliff Gardens to operate a Type IV Municipal Solid Waste Facility in Brazoria County, Texas. Craig R. Bennett and Tommy L. Broyles, Administrative Law Judges (ALJs) with the State Office of Administrative Hearings (SOAH), presented a Proposal for Decision (PFD), which recommended that the Commission deny the requested permit. After considering the PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

A. General Findings / Procedural Issues

1. Juliff Gardens is a Texas limited liability company that filed its Articles of Organization with the Office of the Secretary of State on August 23, 1999.
2. Juliff Gardens is a family-run business owned by Juan Pupo (50%) and his son, Eduardo (50%).
3. Sentinel Resources Corporation, which was incorporated by Juan Pupo in 1992, operates a major waste hauling business in the greater Houston area and a Type V-TS Transfer Station for Type IV construction and demolition waste and Class 3 industrial non-hazardous waste in Fort Bend County under Registration No. MSW-40161.

4. Eduardo Pupo is Vice President of Sentinel Resources Corporation.
5. On December 13, 1999, Applicant submitted its application for a Type IV Municipal Solid Waste (MSW) Permit to the Texas Natural Resource Conservation Commission, now the Texas Commission on Environmental Quality (TCEQ).
6. Applicant proposes to locate the Juliff Gardens Landfill on a 253.3 acre site in Brazoria County, Texas, located approximately 2,500 feet south of the intersection of Farm to Market Road 521 ("FM 521") and County Road 56, on the eastern side of FM 521.
7. Notice that the application was administratively complete was issued by the Permits Administrative Review Section at TCEQ on February 2, 2000.
8. On February 11, 2000, the Notice of Receipt of Application and Intent to Obtain a Municipal Solid Waste Permit was published in the newspaper *The Facts*.
9. *The Facts* has the largest general circulation of any newspaper published in Brazoria County.
10. The Chief Clerk also mailed copies of the notice to interested persons and elected officials.
11. Notice of a Public Meeting was published in *The Facts* on April 12, 2000, April 19, 2000, and April 26, 2000.
12. A public meeting regarding the application was held on May 2, 2000, at the Sacred Heart Church Parish Hall in Manvel, Texas.
13. A second public meeting was held on February 15, 2001, and notice was published for that meeting on January 25, 2001, January 29, 2001, and February 6, 2001, in *The Facts*.
14. Applicant submitted an amended application (the "Application") to the TCEQ proposing, among other things, to move the eastern boundary of the landfill approximately 100 feet to the west.
15. On January 17, 2002, Applicant submitted a request to the TCEQ that this matter be directly referred to SOAH for a contested-case hearing.
16. The Application was declared technically complete by the TCEQ on February 1, 2002.
17. On February 20, 2002, Applicant mailed the Amended Notice of Amended Application, Preliminary Decision, Public Meeting, and Contested Case Hearing for Municipal Solid Waste Permit (the "Amended Notice"), as provided by the Chief Clerk, to each residential or business address located within ½ mile of the proposed landfill, as well as each owner of

real property located within ½ mile of the proposed landfill as listed in the real property appraisal records of the Brazoria County Courthouse.

18. The Amended Notice was published in *The Facts* on February 20, 2002 and *The Houston Chronicle* on February 21, 2002.
19. On February 15, 2002, the Chief Clerk mailed the Amended Notice to State Representatives and persons who submitted comments on the Application and hearing requests.
20. On February 20, 2002, Applicant placed in the Angleton Public Library:
 - the Final Draft Permit dated February 1, 2002;
 - the TCEQ Technical Summary for the amended Application dated February 4, 2002;
 - TCEQ Compliance Summaries dated November 14, 2000 and February 4, 2002;
 - the Executive Director's Preliminary Decision dated February 1, 2002; and
 - the Amended Notice.
21. On February 20, 2002, the technically complete Application was already on file at the Angleton Public Library.
22. The third public meeting regarding the Application was held on April 2, 2002.
23. Public comments regarding the landfill and the Application were received by TCEQ from December 13, 1999 to April 2, 2002.
24. The Executive Director's Response to Public Comments was filed with the Chief Clerk on June 3, 2002.
25. The preliminary hearing convened on April 3, 2002 in Manvel, Texas, and the following persons/entities sought and were granted party status:
 - a. Chocolate Bayou Water Company (Chocolate Bayou);
 - b. Citizens Against the Dump;
 - c. Brazoria County;
 - d. Brazoria County Drainage District # 5 ("BCDD#5");
 - e. Sienna Point Homeowners Association; and
 - f. individual protestants Joe Stuckey, Maurice Angley, David Grissom, Ramone Bingham, Don Irvin, and John Craig.
26. On October 28, 2003, the ALJs granted Chocolate Bayou's request to withdraw as a party from this case.
27. The evidentiary hearing regarding the Juliff Gardens Landfill was held at the Iowa Colony City Hall from January 26 to January 30, 2004.

28. The Commission did not narrow the issues to be considered during the evidentiary hearing in this case.
29. By agreement, the parties identified six issues in dispute:
 - a. drainage and flooding;
 - b. groundwater protection and stability of the detention pond;
 - c. land use;
 - d. consistency with regional planning;
 - e. applicability of TEXAS HEALTH & SAFETY CODE ANN. § 361.122; and
 - f. interest in the property.

B. Texas Health and Safety Code § 361.122

30. Brazoria County Commissioners adopted a resolution recommending denial of the Juliff Gardens application on April 17, 2000.
31. The population for Brazoria County in 2001 was approximately 249,832 persons.
32. Brazoria County is located adjacent to the Gulf of Mexico.
33. A canal referred to as the "Prison Canal" is directly south of the proposed landfill site and located on Texas Department of Criminal Justice-Darrington Unit property less than 100 feet from the landfill site.
34. The Prison Canal is part of the Chocolate Bayou Water Company System organized for the delivery of water for irrigation, industrial and municipal purposes in Fort Bend, Brazoria, Harris and Galveston Counties.
35. The integrated Chocolate Bayou Water canal system consists of approximately 45 miles of main-line canals, 50 miles of secondary canals, 105 miles of lateral canals and three reservoirs.
36. Chocolate Bayou Water Company's main-line canal, originating in Juliff, Texas, on the Brazos River, runs parallel to the eastern boundary of the proposed Juliff Gardens Landfill site in Brazoria County.
37. The Prison Canal is a lateral of the main-line canal running parallel to the entire length of the southern boundary of the proposed landfill site, approximately 18-25 feet from the southern property line of the landfill site.
38. The Prison Canal has existed since at least the early 1950s and has been regularly used for the purpose of furnishing row crop irrigation water.

39. The Prison Canal has been maintained and repaired over its more than 50-year life, including replacing the 24-inch pipe and control gate from the Chocolate Bayou main canal to the Prison Canal in 1998.
40. The Texas Department of Criminal Justice-Darrington Unit has used the Prison Canal to irrigate its crops since at least the 1960s.
41. Most recently, the Prison Canal was used in May and June of 2003 to irrigate corn.
42. The corn irrigated was used as feed for livestock, poultry, and hogs within the prison system.

C. Interest In the Property

43. Sentinel Resources, Inc. (a business owned by the same principal that owns Applicant) owns the surface estate at the landfill site.
44. Applicant owns some, but not all, of the mineral interests underlying the landfill site.

D. Drainage and Flooding

45. The Application indicates that the proposed landfill site is not within a 100-year floodplain.
46. The Application indicates that none of the proposed landfill site would be inundated during the 100-year frequency flood.
47. Applicant relied on the FEMA flood insurance map to reach its conclusion that the proposed landfill site is not within the 100-year floodplain of Hayes Creek.
48. FEMA did not study the upstream area of Hayes Creek closest to where the Landfill is located.
49. FEMA marked on its Flood Insurance Rate Map (FIRM), at Section 0 along Hayes Creek (with a flood elevation of 54.6 feet), that the limit of its detailed study of the floodplain stopped at that location along Hayes Creek, east and downstream of the landfill site.
50. Applicant determined during the hearing that the 100-year flood level at the proposed Landfill site is 54.6 feet msl.
51. Significant parts of the southeast portion of the landfill site are as low as 54 feet msl, below the 54.6 feet msl 100-year flood level calculated by Applicant's expert during the hearing.

52. There are two box culverts under the Chocolate Bayou Water Company Canal at Hayes Creek that allow floodwaters to pass under the canal from the west side to the east side along Hayes Creek.
53. Significant head loss occurs at these culverts located in Hayes Creek under the Chocolate Bayou Water Company Canal that could cause the elevation of the 100-year flood along Hayes Creek immediately upstream and west of the canal to be substantially higher than 54.6 feet.
54. Applicant failed to determine the extent of the 100-year floodplain at the site and failed to determine the 100-year flood level at the site, given the restriction in Hayes Creek that has existed for decades.
55. The Hayes Creek restriction will back-up water and affect the drainage patterns and flooding conditions at the proposed landfill site, for both the 25-year and 100-year frequency event.
56. Applicant failed to calculate the impacts from restrictions along Hayes Creek such as the box culverts on drainage and flooding patterns at the proposed landfill site, for either the 25-year or 100-year event.
57. Applicant failed to calculate the capacity of these culverts, or calculate the backup that would occur on the landfill site from restrictions such as these culverts.
58. Applicant failed to determine how much of the site is inundated during a 100-year flood.
59. Applicant failed to identify and calculate surface water entering the site of the proposed landfill from both the west side of the landfill and the east side of the landfill during rainstorms.
60. Applicant failed to calculate the carrying capacity of the ditch running along the east side of the site immediately to the west of the Chocolate Water Bayou Company canal, from which surface water enters the site.
61. Applicant failed to calculate the carrying capacity of the ditch running along the west side of the landfill site, from which surface water enters the landfill site.
62. Applicant failed to evaluate how the proposed landfill will affect surface water entering the site from the east and the west.
63. Applicant failed to demonstrate that the landfill will not significantly alter natural drainage patterns at the permit boundaries of the site.

64. The Application does not include sufficient calculations or any comparative analysis of existing and post-development runoff volumes at the permit boundaries.
65. The Application and the evidence in the record provide insufficient information to make a reasonable determination of what the existing natural drainage patterns are at the site and whether development of the proposed landfill will significantly alter natural drainage patterns.

E. Discharge into Waters of the State and Groundwater Monitoring

66. The uppermost aquifer at the site is Stratum II. The geology at the site includes shallow sands and shallow groundwater in Stratum II.
67. Measured groundwater levels in the uppermost aquifer, Stratum II, are considerably above the floor elevation of the detention pond.
68. A pilot channel will traverse down the center of the detention pond at a slightly lower elevation than the remainder of the pond; the elevation of the pilot channel is 45.5 feet msl.
69. The landfill detention pond will cut into the uppermost aquifer, below recorded water levels, resulting in the possibility that groundwater could flow out of the aquifer and into the pond.
70. Applicant planned a perpetual pump system to evacuate the detention pond in order to maintain its storage capacity.
71. The pumping may create a groundwater sink, pulling water inward toward the pond rather than allowing it to move naturally towards the monitoring well system.
72. Groundwater pulled into the detention pond may be pumped out along the discharge route, bypassing the groundwater monitor wells.
73. The design and proposed operation of the detention pond results in the potential for contaminated groundwater to be released, undetected by the groundwater monitor system.
74. Applicant's proposed monitoring system may not monitor the groundwater sufficiently to assure detection of all contaminated groundwater migrating from the proposed facility.
75. If the landfill leaks and the uppermost aquifer becomes contaminated, contaminated groundwater can enter the pond and be discharged into waters of the state.
76. There is no liner design for the detention pond in the application.

77. Even if the floor of the detention pond were somehow sealed, there would be a groundwater uplift pressure during times when the water level in Stratum II is above the floor of the pond.
78. A last-minute offer by Applicant to line the pond is insufficient to address these problems; adequate groundwater and surface water protection plans were not included in the Application nor offered during the hearing.

F. Land Use Compatibility

79. Upon completion, the proposed Juliff landfill would be 140 feet above ground level, the equivalent of a 10-12 story building.
80. The topography surrounding the proposed landfill is flat and relatively treeless.
81. There are no 10-12 story buildings in the vicinity of the proposed landfill and, because of its height and the surrounding terrain, the landfill would be visible two to three miles away.
82. There is no screening or landscaping proposed for the landfill.
83. The current character of surrounding land uses within one mile of the proposed facility is primarily agricultural and vacant land.
84. The Highway 288 Corridor is rapidly developing towards the landfill site.
85. Sienna Point, a subdivision within the Sienna Plantation development, is located within two miles of the proposed landfill.
86. A major planned community known as Canyon Gate at Iowa Colony will be situated, in part, within a mile of the landfill.
87. Canyon Gate at Iowa Colony will be located within Regional Analysis Zone (RAZ) 169, the same RAZ as the proposed landfill.
88. Canyon Gate at Iowa Colony will bring approximately 3,000 residences.
89. Canyon Gate at Iowa Colony has agreed to provide facilities for emergency medical services and a fire station within its proposed development.
90. Canyon Gate does not oppose the landfill.

G. Conformance to Regional Plan

91. Applicant failed to prove that the landfill conforms to H-GAC regional solid waste management plan.

92. The H-GAC board of directors unanimously found that the Application was not consistent with its regional solid-waste management plan on October 17, 2000.
93. H-GAC's finding of non-conformance was based on four areas of concern:
 1. need;
 2. drainage and flooding;
 3. lack of screening; and
 4. poor past operational practices.
94. Need is not a relevant consideration under the H-GAC Plan, except as it relates to encouraging the development of landfills.
95. The landfill fails to meet the H-GAC Plan goal concerning adequate runoff control to eliminate uncontrolled surface water runoff.
96. The landfill fails to meet the H-GAC Plan goal concerning avoiding areas that flood.
97. The landfill fails to minimize the negative visual impacts of solid waste disposal, handling, and management facilities as Applicant proposed no landscaping or visual screening of the Site.
98. The landfill is expected to be approximately 140 feet above ground level.
99. The terrain surrounding the landfill is flat and relatively treeless.
100. The view from residences located to the south and southeast of the landfill site is unobstructed.
101. The landfill may be seen from a distance of up to three miles away.
102. The landfill fails to meet the H-GAC Plan goal encouraging landscaping and visual screening of sites.
103. The landfill fails to meet the H-GAC Plan goal allowing aerial buildup appropriate to surrounding topography and screening.
104. Sentinel Resources owns the property where the Juliff Gardens landfill is proposed.
105. Sentinel Resources is owned by the same individuals as Juliff Gardens, LLC and operates a transfer station in Fort Bend County.

106. Juan and Eduardo Pupo, owners of the Juliff Gardens, do not have a poor operational record for their operations of Sentinel Resources, a waste and recycling business.

H. Transcript Costs

107. The total reporting and transcription costs of the hearing are \$6,460.20.
108. The parties agreed that, of the total transcript costs, \$4,895.10 is assessed to Applicant and \$1,565.10 is assessed to Protestant CAD.
109. The parties agreed that the costs for Protestant CAD's copy of the transcript is assessed separately to CAD.

II. CONCLUSIONS OF LAW

1. The TCEQ has jurisdiction over the disposal of municipal solid waste, and the authority to issue municipal solid waste permits. TEX. HEALTH & SAFETY CODE ANN. § 361.061 (Vernon 2002).
2. SOAH ALJs have jurisdiction to conduct a hearing and prepare a Proposal for Decision on contested cases referred by the TCEQ. TEX. GOV'T CODE ANN. § 2003.47 (Vernon 2002).
3. Notice of the application was provided in accordance with TEX. HEALTH & SAFETY CODE ANN. § 361.0665, 30 TEX. ADMIN. CODE § 39.5 and 39.101, and TEX. GOV'T CODE ANN. § 2003.051 and 2003.052 (Vernon 2002).
4. Based on the above Findings of Fact, the proposed Juliff Gardens landfill permit application is prohibited by TEX. HEALTH & SAFETY CODE § 361.122.
5. The definition of "canal" found in TEX. WATER CODE § 30.003(11) does not apply to the term "canal" found in TEX. HEALTH & SAFETY CODE § 361.122.
6. Applicant has not shown that it accurately identified whether the Site is located within a 100-year floodplain, as required by 30 TEX. ADMIN. CODE § 330.56(f)(4)(B)(i).
7. Applicant has not shown that the Landfill will not cause a discharge of solid waste or pollutants adjacent to or into the water of the state in violation of TEX. WATER CODE § 26.121, as is required by 30 TEX. ADMIN. CODE § 330.55(b)(1).
8. Applicant has not shown that the Landfill Site will be protected from flooding by suitable levees constructed to provide protection from a 100-year frequency flood that, among other things, shall not significantly restrict the flow of the 100-year frequency flood nor

significantly reduce the temporary water storage capacity of the 100-year floodplain, as required by 30 TEX. ADMIN. CODE § 330.55(b)(7).

9. Applicant has not adequately provided information identifying the 100-year flood level and any other special flooding factors that must be considered in designing, constructing, operating, or maintaining the proposed facility to withstand washout from a 100-year flood, as required by 30 TEX. ADMIN. CODE § 330.56(f)(4)(B)(i).
10. Applicant has not properly identified drainage patterns at and adjacent to the site, as required by 30 TEX. ADMIN. CODE § 330.56(c).
11. By failing to properly identify drainage patterns or to analyze substantively the impact that the proposed landfill would have on the volume of surface water draining off the site, Applicant has failed to comply with 30 TEX. ADMIN. CODE § 330.56(f)(4)(A) and 30 TEX. ADMIN. CODE § 330.55 (b)(5)(D), which require demonstration that natural drainage patterns will not be significantly altered by proposed landfill development.
12. The proposed Juliff Gardens landfill permit application violates TEX. WATER CODE § 26.121(2) and 30 TEX. ADMIN. CODE § 330.55(b)(1)(a) because, as designed, contaminated groundwater may be discharged from the landfill into waters in the state.
13. The design of the stormwater detention pond may interfere with the detection of groundwater contamination in the uppermost aquifer in violation of 30 TEX. ADMIN. CODE § 330.231.
14. Pursuant to TEX. HEALTH & SAFETY CODE § 363.066(a) and 30 TEX. ADMIN. CODE § 330.566(d), a permit application must conform to the goals and objectives of the Regional Solid Waste Management Plan unless a variance is granted by the TCEQ.
15. The Application fails to conform to the H-GAC Regional Plan and, therefore, is in violation of TEX. HEALTH & SAFETY CODE § 363.066(a) and 30 TEX. ADMIN. CODE § 330.566(d).
16. Applicant failed to demonstrate compliance with the Regional Solid Waste Plan, as required by 30 TEX. ADMIN. CODE § 330.51(b)(10).
17. Based on the foregoing findings of fact and conclusions of law, Applicant failed to demonstrate that construction and operation of the proposed landfill will not result in adverse effects on the health, welfare, environment or physical property of the public and failed to demonstrate that the Application complies with all statutory and regulatory requirements.

III. EXPLANATION OF CHANGES

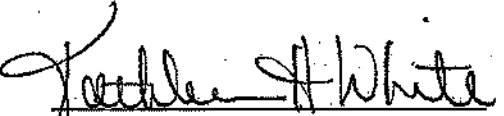
1. The Commission deleted from the ALJs' Proposed Order proposed Finding of Fact Nos. 45 and 46 and proposed Conclusion of Law No. 6 related to mineral interests and sufficiency of a property interest. The Commission determined that those findings were or could be inferred to be in conflict with its interpretation of its rules and policies regarding how an applicant proves that it has a sufficient interest in property. The remaining Findings of Fact and Conclusions of Law were renumbered accordingly.

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

1. The application by Juliff Gardens, L.L.C., for a permit to operate a Type IV Municipal Solid Waste Facility (Permit No. MSW-2282) in Brazoria County, Texas is denied.
2. All other motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief not expressly granted herein, are hereby denied for want of merit.
3. The Chief Clerk of the Commission shall forward a copy of this Order to all parties.
4. If any provision, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of such shall not affect the validity of the remaining portions of the Order.
5. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE § 2001.144.

Issue Date: **OCT 04 2004**

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY


Kathleen Hartnett White, Chairman