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SOAH DOCKET NO. 582-22-0844
TCEQ DOCKET NO. 2021-1000-MSW

APPLICATION BY DIAMOND	§	**BEFORE THE STATE OFFICE**
BACK RECYCLING AND	§	**OF**
SANITARY LANDFILL, LP FOR	§	**ADMINISTRATIVE HEARINGS**
MSW PERMIT NO. 2404	§	**STATE OF TEXAS**

DIAMOND BACK RECYCLING AND SANITARY LANDFILL, LP'S
REPLY TO PROTESTANT'S EXCEPTIONS

COMES NOW, Diamond Back Recycling and Sanitary Landfill, LP ("Applicant") and presents this Reply to Knox Real Property Development, LLC and Jason Harrington's (collectively, "Knox" or "Protestant") Exceptions to the Proposal for Decision ("PFD") in the above-styled matter, and would respectfully show the following:

I. Burden of Proof

As noted in prior briefings and in the PFD, the filing of the draft permit and supporting documentation with the State Office of Administrative Hearings ("SOAH") in the administrative record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.[1] In a contested case hearing, a party can rebut this demonstration by presenting evidence that relates to a matter referred under § 5.557 of the Texas Water Code and demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.[2] The PFD correctly observes that, while the burden of production is shifted to

[1] *See* Tex. Gov't Code § 2003.047(i-1); 30 Tex. Admin. Code § 80.17(c)(1).
[2] *See* Tex. Gov't Code § 2003.047(i-2); 30 Tex. Admin. Code § 80.17(c)(2).

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the protestant, the burden of proof remains with the moving party – the Applicant, in this case – by a preponderance of the evidence.[3]

Knox misrepresents the law in its Exceptions. The law clearly places on the rebutting party – Knox, in this case – a burden to produce evidence that demonstrates that the draft permit is in violation of a specifically applicable state or federal requirement. Evidence that does not demonstrate a violation is, by law, inadequate to rebut the prima facie demonstration. Thus, mere "production" by itself is not sufficient to overcome Applicant's prima facie case: the evidence produced must tend to prove a specific violation. Furthermore, the evidence produced must be of sufficient quantity and quality to overcome the applicant's preponderance.

II. Compatible Land Use

To establish whether a proposed facility is a compatible land use, an owner must provide information regarding the likely impacts of the facility on cities, communities, groups of property owners, or individuals by analyzing the compatibility of land use, zoning in the vicinity, community growth patterns, and other factors associated with the public interest.[4] To assist in evaluating the impact of the site on the surrounding area the owner is required to provide:

> … information regarding the likely impacts of the facility on cities, communities, groups of property owners, or individuals by analyzing the compatibility of land use, zoning in the vicinity, community growth patterns, and other factors associated with the public interest. To assist the commission in evaluating the impact of the site on the surrounding area, the owner or operator shall provide the following:
>
> (1) if available, a published zoning map for the facility and within two miles of the facility for the county or counties in which the facility is ...located;

[3] *See* 30 Tex. Admin. Code § 80.17(a).
[4] *See* 30 Tex. Admin. Code § 330.61(h)

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> (2) information about the character of surrounding land uses within one mile of the proposed facility;
>
> (3) information about growth trends within five miles of the facility with directions of major development;
>
> (4) the proximity to residences and other uses... within one mile of the facility....;
>
> (5) a description and discussion of all known wells within 500 feet of the proposed facility....;[5]

Applicant provided documentation establishing compliance with all of the above referenced requirements. The facility is located in an area of Ector County that is not zoned or restricted for any use.[6] The surrounding area is used for agricultural, industrial, residential, and commercial uses.[7] An operating oil and gas waste landfill is located approximately one-half mile south of the proposed landfill, and an operating Municipal Solid Waste landfill is located approximately two miles southeast.[8] The subject application includes information about the character of surrounding land uses within one mile of the proposed facility.[9] There are no cemeteries, churches, community centers, hospitals, schools, or daycares licensed by the Texas Department of Family and Protective Services located within one mile of the facility.[10] The application identifies three water wells located within 500 feet of the Facility.[11]

Protestants have failed to present any evidence demonstrating that the draft permit is in violation of a specifically applicable federal or state requirement relating to land use compatibility. Instead, they suggest that the proposed site is not a compatible land use because of the existence of oil and gas operations in the area. The guiding rule on this issue, 30 Tex.

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[5] *Id*.
[6] *See* Exhibit Applicant-202 at II-12.
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*

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Admin. Code § 330.61(h), does not provide specific requirements pertaining to oil and gas operations. The rule does not operate to deem a land use incompatible because of oil and gas operations, and it certainly does not require an owner to obtain approval from nearby operators when submitting an MSW application. The Protestant's concerns about local mineral interests are not addressed by the specific requirements of the rules, and they do not provide a basis for challenging whether the proposed facility is a compatible land use.

The existence of pipelines in the vicinity of the proposed site also fails to rebut the prima facie demonstration. The rules do not prohibit a landfill from being located in proximity to pipelines. Knox points to the mere existence of the pipelines as evidence that the proposed facility would not be a compatible land use. This showing does not establish how the draft permit is in violation of any state or federal requirements pertaining to land use compatibility.

It is unclear what the Protestant seeks to demonstrate by pointing out the number of water wells within one mile of the site. Pursuant to Rule 330.61(h), the Applicant identified wells within 500 feet of the facility. Wells within a one-mile radius do not relate to a particular requirement within the rule. Again, their mere existence does not demonstrate that the draft permit violates a specific state or federal requirement. The existence of wells within one mile of the proposed facility fails to rebut the prima facie demonstration that the proposed facility would be a compatible land use.

A suggestion that the proposed site would frustrate oil and gas operations, without more, entirely fails to demonstrate a violation of a specifically applicable state or federal requirement. Knox's continued reliance on Aghorn Energy's ("Aghorn") public comments is misplaced. Aghorn's protest was withdrawn prior to the hearing on the merits.[12] While their specific comments may not have been withdrawn (and the Applicant is unsure how anyone

[12] *See* Exhibit Applicant-102.

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would go about engaging in such a withdrawal, as there is no apparent mechanism provided by TCEQ rules to do so), the withdrawal of the protest demonstrates that Aghorn itself no longer opposes the proposed facility, going so far as to state in its letter that that it has "no objection to the use of the surface."[13] The Texas Commission on Environmental Quality's ("TCEQ") obligation to consider Aghorn's comments was fully discharged when the Executive Director filed its response to said comments.[14] Contrary to Knox's claim, there is no legal requirement for the Commission to ignore other evidence and substantively re-consider only these comments before making a final decision.[15]

III. Groundwater Protection

TCEQ rules at 30 Tex. Admin. Code § 330.63(f) direct an applicant to prepare a groundwater sampling and analysis plan in accordance with Chapter 330, Subchapter J of the TCEQ rules. The Subchapter J rules require a sufficient number of monitoring wells, installed at appropriate locations and depth, to yield representative groundwater samples for the uppermost aquifer. Background monitoring wells are required to be installed, and the design of the system must be based on site-specific technical information that must include, among others, characterization of aquifer thickness; groundwater flow rate; and groundwater flow direction, including seasonal and temporal fluctuations in flow.[16]

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[13] *Ibid.*
[14] *See* 30 Tex. Admin. Code § 50.117(f): "…the commission shall consider all timely public comment in making its decision and shall either adopt the executive director's response to public comment in whole or in part or prepare a commission response."
[15] Knox cites 40 CFR § 239.6(b), which reads in full: "The state shall have procedures that ensure that public comments on public determinations are considered." Note that this fails to support Knox's proposition that the commission is required to substantively consider all comments at the time of final decision; the Federal rule merely requires procedures to be in place ensuring that public comments are considered. This requirement is met, in part, by 30 Tex. Admin. Code § 50.117(f), as noted above.
[16] *See* 30 Tex. Admin. Code §§ 330.401 – .421, particularly § 330.403.

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The subject application includes a groundwater monitoring system that consists of 11 wells, including one upgradient well.[17] The application also includes a thorough Geology Report, prepared by a licensed professional geoscientist, which contains site stratigraphy, groundwater occurrence, and groundwater flow direction and rate.[18] Because the information provided in the application meets all applicable requirements of 30 Tex. Admin. Code § 330.63(e) and Subchapter J, the Executive Director, the TCEQ Office of Public Interest Counsel, and the PFD concluded that Applicant met its burden of proof to show that the facility will be protective of groundwater.

Knox attempts to cast doubt on the Applicant's groundwater monitoring system by questioning the definition of a "seasonal high-water level" recognized by the PFD. Citing the statutory definition found in TCEQ Rule § 330.3(143),[19] the PFD properly concluded that the rule only requires the highest measured level in an aquifer during permit application investigations.[20] Without providing any basis for departing from the regulatory definition, Knox seeks to fault Applicant and the PFD for adhering to it. Notably, Knox entirely failed to present any evidence to suggest that groundwater sampling for seasonal variations in accordance with the regulatory definition would not be sufficiently protective. The PFD's finding that Knox did not rebut the Applicant's prima facie demonstration on this issue is appropriate.

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[17] *See* Exhibit Applicant-202 at III.F-5.
[18] *See id.* at III.F-2.
[19] 30 Tex. Admin. Code § 330.3(143): "Seasonal high-water level—The highest measured or calculated water level in an aquifer during investigations for a permit application and/or any groundwater characterization studies at a facility.
[20] Knox's arguments regarding the "seasonal high-water level" fail to recognize that the shallowest aquifer identified at the site is found approximately 140 feet below the ground surface, which is over 100 feet below the depth of the planned deepest excavation of the proposed landfill. Additionally, onsite investigation shows that the intervening layers of rock beneath the bottom of the proposed landfill and the top of the aquifer to be highly impermeable and that these conditions combined with the rigorous landfill design and operations reduce potential impact to groundwater to negligible levels.

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IV. Transcript Costs

Knox again attempts to sidestep the rules by citing to "precedent." The applicable rule pertaining to hearing transcripts is found at 30 Tex. Admin. Code § 80.23: "Consistent with its court reporting services agreement, the commission will provide a certified court reporter to make a verbatim record and transcript of any commission meeting, hearing, or other proceeding upon the timely request of any person."[21] "A request for a verbatim record or transcript of a proceeding may be submitted at any time, but shall be submitted in writing to the chief clerk or the judge and shall specify: the name, mailing address, and daytime telephone number of the requester; the name and date of the commission proceeding; and a statement of whether a transcript is requested."[22] The Applicant did not submit any such request in writing to the chief clerk or the judge. The Applicant is unaware of whether the Protestants did so, or whether they just assumed that the Applicant had.

Regardless, on the Thursday afternoon preceding the Monday hearing, the Applicant was made aware that the ALJ expected the Applicant to obtain a court reporter for the hearing.[23] To avoid any further delay, the Applicant undertook the task of obtaining a court reporter in a market that is under a severe labor shortage, eventually finding one company that had four different court reporters available, one for each day of the hearing. Knox's argument that "Diamond Back engaged a court reporter with apparently no experience in TCEQ matters" is baseless and misunderstands the role of a court reporter. If Knox desired a specific court reporter, or a TCEQ court reporter, they should have been the one to obtain them. In

[21] 30 Tex. Admin. Code § 80.23(a) (emphasis added).
[22] *Id.* at § 80.23((b)(1) (emphasis added).
[23] The ALJ's Order No. 2, dated February 28, 2022, stated that "Arrangements shall be made for a court reporter to be present for the multi-day hearing." This statement was not addressed to the Applicant or any other party in particular. An email from the ALJ's legal secretary to the Applicant's counsel, dated May 19, 2022, stated that the ALJ "would like to confirm that you (Applicant) have secured a court reporter for the Hearing per our rules." The email did not cite a specific rule or set of rules.

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any case, a court reporter's job is not to be familiar with TCEQ, it is to transcribe a verbatim record. The Applicant still stands by its position that it was not required to provide a transcript to SOAH, TCEQ, or Protestants. TCEQ rules only require transcripts be provided by a "person requesting a transcript."[24] Because the Applicant did not request a transcript within the meaning of the rule, it is not required to provide copies.

Further, Knox argues that the ALJ "makes no recognition of this disproportionate procedural benefit accruing to Diamond Back" resulting from the mere existence of a transcript. The Applicant disputes the claim that it disproportionally benefitted from the existence of a transcript; any benefit resulting from the existence of a transcript can fairly be deemed to have accrued to every party that cited the transcript in its closing arguments, which both Knox and the Applicant did. Nevertheless, the relative benefit is just one of five applicable factors listed in the TCEQ rule.[25] Even if the "relevant benefit" factor leaned toward the Applicant (which, again, the Applicant disputes), the "party requesting the transcript" factor leans towards Knox because they were the party complaining about access to the transcript; the "financial ability" factor leans towards Knox because they are being bankrolled by some unknown entity, and the "extent to which the party participated in the hearing" factor leans towards Knox because they caused the hearing in the first place and refused mediation.

Finally, Knox urges reliance on so-called "precedent" from two previous TCEQ orders. However, Knox's reliance on previous orders is misplaced. An agency that has rule-making powers, such as the TCEQ, "has less reason to rely upon ad hoc adjudication to formulate new standards of conduct" and "[t]he function of filling in the intricacies of the act

[24] *Id.* at § 80.23(b)(3).
[25] *Id.* at § 80.23(d)(1).

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should be performed as much as possible" through formal rulemaking.[26] While substantive rules have the force and effect of statute and are binding on those concerned, an ad hoc rule is merely a "guide" to be applied to those parties in substantially similar conditions,[27] or likewise characterized as a "norm" or "standard" that has not been fairly characterized by the language at issue.[28]

Here, there is no "filling in the intricacies" required. The rule is plain and clear and outlines seven factors, five of which are applicable to this case. Further, the orders cited by Knox are not as similarly situated to this case as Knox implies. As quoted by Knox, the Blue Flats case apparently involved "publicly owned resources," which is not the case here. Additionally, the analysis of the factors is very different. In the Blue Flats case, the applicant requested the transcript, the protestants were not funded by some shadow entity, and the protestants presumably did not refuse mediation. As for the Altair case cited by Knox, virtually no relevant facts are included in the order to determine whether the parties are similarly situated. In fact, there is no analysis or findings of fact on the factors prescribed in 30 Tex. Admin. Code § 80.23. The Applicant cannot be required to fairly rely upon that order because of its lack of findings and analysis pertaining to transcript cost allocation. Knox's attempt to manufacture precedent out of a slim portfolio of dissimilar facts should not be given any credence.

V. Conclusion

Knox's Exceptions to the PFD fail to demonstrate any basis for amending the referenced findings of fact or conclusions of law. While the Applicant maintains that the PFD must be amended with regard to the issue of surface water drainage and its ultimate

[26] *S.E.C. v. Chenery Corp*., 332 U.S. 192, 202 (1947) (as adopted by *City of El Paso v. Pub. Util. Comm'n*, 883 S.W.2d 179, 188 (Tex. 1994)).
[27] *See* City of El Paso, 883 S.W.2d at 188.
[28] *Office of Pub. Util. Counsel v. Pub. Util. Comm'n*, 185 S.W.3d 555, 571 (Tex. App.—Austin 2006).

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recommendation, the findings and conclusions on the issues of compatible land use and groundwater protection are adequate. The evidence presented by Knox does not tend to demonstrate that any provision of the draft permit violates any specifically applicable state or federal regulatory requirement. The Applicant met its burden of proof and Knox failed to rebut the prima facie demonstration that a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.

Respectfully Submitted,

HANCE SCARBOROUGH, LLP

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of Diamond Back Recycling and Sanitary Landfill, LP's Reply to Protestant's Exceptions was served by email to the following parties on this 13th day of October, 2022.

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