

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

APPLICATION BY DIAMOND BACK RECYCLING AND SANITARY LANDFILL, LP FOR MUNICIPAL SOLID WASTE PERMIT NO. 2404	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGES
PROPOSAL FOR DECISION**

To the Commissioners of the Texas Commission on Environmental Quality:

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) respectfully submits his Exceptions to the Proposal for Decision relating to the application by the Diamond Back Recycling and Sanitary Landfill, LP Municipal Solid Waste for MSW Permit No. 2404. In this response, The Executive Director will respond to the issue of whether the Applicant provided an adequate surface water drainage report.

I. BACKGROUND

The TCEQ received the application on August 5, 2019. The application was declared administratively complete on November 1, 2019. The Notice of Receipt of Application and Intent to Obtain Permit (NORI) was published on October 30, 2019, in The Odessa American. The Application was declared technically complete on September 2, 2020, and the Executive Director prepared a draft permit. The Notice of Application and Preliminary Decision (NAPD) was published on September 29, 2020, in The Odessa American. The application and related permitting documents were available for public review and copying at the Ector County Library, 321 W 5th St, Odessa, TX 79761. The public comment period originally ended on January 14, 2021 but was later extended to April 19, 2021. A public meeting was held on January 14, 2021. The Executive Director responded to all timely, relevant and material or significant public comments on June 21, 2021.

At the October 6, 2021, Commission agenda, the Commission granted the hearing requests of Knox Real Property, LLC; Jason Harrington; Moss Dean Ranch; and C.A. and Betty Mos Dean FLP. The Commission also referred nineteen issues to the State Office of Administrative Hearings (SOAH). Four of these issues were subsequently dismissed pursuant to an agreement reached between the parties and no evidence was presented on these issues at hearing.

The preliminary hearing was held virtually via Zoom on February 1, 2022. The Administrative Law Judge (ALJ) found that notice of the hearing was properly provided and established jurisdiction. On May 23-26, 2022, an evidentiary hearing was held virtually via Zoom.

The ALJ issued her Proposal for Decision (PFD) to the Commission on September 13, 2022. In the PFD, the ALJ recommends the application be denied because the evidentiary record does not support issuance of the draft permit. Specifically, the ALJ recommends denial based on the issue of whether the Applicant provided a sufficient surface water drainage report.

II. BURDEN OF PROOF

Because the application was received after September 1, 2015, the application is subject to the procedural requirements adopted pursuant to HB 801, 76th Legislature (1999) and Senate Bill (SB) 709, 84th Legislature (2015), both implemented by the Commission in its rules in 30 TAC Chapters 39, 50, and 55.¹ The Texas Legislature enacted SB 709, effective September 1, 2015, amending the requirements for comments and contested case hearings. This application is subject to those changes in the law. One of the major changes to the contested case hearing process as a result of SB 709 is that the filing of the administrative record with SOAH establishes a prima facie case that the draft permit meets all applicable state and federal legal and technical requirements and, if issued, will protect human health and safety and the environment. According to Commission rules at 30 TAC Section 80.118(c), the administrative record includes: the application submitted by the applicant, including any revisions to the original application; the executive director's final draft permit, including any special provisions or conditions; the executive director's preliminary decision, or the executive director's decision on the permit application, if applicable; the summary of the technical review of the permit application; the compliance summary of the applicant; copies of the public notices relating to the permit application, as well as affidavits regarding public notices; and any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application.

The statute further provides that a party may rebut the prima facie case by presenting evidence relating to one of the issues referred by the Commission and demonstrating that the draft permit violates an applicable state or federal requirement.² The statute also provides that

¹ SB 709 was codified in Tex. Gov't. Code § 2003.047.

² Tex. Gov't. Code § 2003.047(i-2).

the applicant and the Executive Director may present additional evidence to support the draft permit.³

III. SURFACE WATER DRAINAGE REPORT

The ALJ recommends that the Commission deny Diamond Back's application for a new MSW permit because the evidentiary record does not support issuance of the draft permit.

Issue M. Whether the Applicant has provided an adequate surface water drainage report.

The ALJ found that the Protestants successfully rebutted the Applicant's prima facie demonstration that the Applicant provided an adequate surface water drainage plan.

Specifically, the ALJ concluded that the Applicant overestimated the existing runoff velocity and peak flow rates by making assumptions that do not accurately reflect on-site conditions. In addition, The ALJ found that the Applicant's proposed ponds are undersized, that the Applicant did not use a 24-hour, 25-year storm for its calculation of pond size and that the resulting discharge will adversely alter existing drainage patterns.

The Executive Director does not agree with the ALJ's conclusions and analysis regarding the Surface Water Drainage Report and the sizing of the ponds.

The PFD accurately summarized the applicable rules which require the Applicant to submit a Surface Water Drainage Report in the application. The Executive Director's expert witness, Chandra Yadav, testified that TCEQ rules in 30 TAC §§ 330.63(c), 330.303, 330.305, and 330.307 require the Applicant to provide a Surface Water Drainage Report that demonstrates that the owner or operator will design, construct, maintain, and operate the landfill to manage run-on and runoff during the peak discharge from at least a 25-year storm and prevent the off-site discharge of waste and contaminated stormwater; provide structures to collect and control at least the water volume resulting from a 24-hour, 25-year storm; protect the landfill from washouts; and demonstrate that the existing drainage pattern is not adversely altered.⁴

Mr. Yadav further testified that in this case the Applicant provided a Surface Water Drainage Report in Attachment C (Facility Surface Water Drainage Report) to Part III of the Application that provides discussions and detailed designs, calculations, and operational considerations for the collection, control, and discharge of storm water from the landfill as required by the above-referenced rules. According to Attachment C to Part III of the

³ Tex. Gov't. Code § 2003.047(i-3).

⁴ Exhibit ED-3, p. 10, lines 33-48.

Application, stormwater runoff will be collected in swales (drainage terraces) located on the top deck and side slopes of the landfill and conveyed to letdown structures, and from there to the perimeter drainage system. The swales, letdown structures, and perimeter channels are designed to convey the peak flows from a 25-year runoff from the developed landfill consistent with TCEQ regulations. The perimeter drainage system consists of a network of perimeter channels and two detention ponds designed for a 25-year, 24-hour storm event. Runoff from Drainage Area A (north part of the landfill) is routed through perimeter channels along the north sides into the North Pond. Runoff from Drainage Area B (south part of the landfill) is routed through perimeter channels along the south sides into the South Pond. Each detention pond includes a broad-crested weir outfall structure. The weir mitigates increases in stormwater exiting the facility on the eastern permit boundary resulting from development of the landfill. Under low-flow conditions, weirs will allow stormwater to flow at rates and velocities less than those calculated for existing conditions. Under high-flow conditions expected during a 25-year, 24-hour rainfall event, each weir is sized to meter stormwater flow not to exceed existing condition flow rates.⁵

The ALJ noted that Mr. Yadav testified that he did not independently verify the Applicant's design or calculations; he relied on the fact that the drainage report is sealed by a professional engineer. The Applicant's Surface Water Drainage Report was sealed by their expert witness on this issue, Mr. Todd Stiggins.

The ALJ was persuaded by Protestant's expert witness, Mr. Larry Dunbar, who testified that the Applicant overestimated existing runoff velocity and peak flows. Protestants argue that the Applicant did not meet its burden of proof that the post development drainage patterns will not be adversely altered. The ALJ also concluded that the Applicant's detention ponds are not properly sized and states that Mr. Stiggins testified that he did not use a 25 year/24-hour storm event for his analysis, which could result in water drainage at peak flow higher than the Applicant's predictions, adversely altering drainage patterns.

As stated in the Executive Director's testimony, TCEQ rules require the Applicant to demonstrate that existing drainage patterns will not be adversely altered. TCEQ's guidance document, RG-417, was introduced into evidence during the contested case hearing.⁶ TCEQ guidance recommends using the "The Rational Method" in calculating drainage flows. The application used the Rational Method to calculate the peak flow. The Applicant used the Modified Rational Method for calculating detention pond sizes which may have resulted in some confusion for the fact finder when evaluating the testimony. The Modified Rational

⁵ Exhibit ED-3, p. 11.

⁶ Exhibit Knox-15.

Method was accepted for use by the TCEQ when reviewing the application and Mr. Stiggins testified that the Modified Rational Method was selected because it is consistent with the Rational Method recommended by TCEQ guidance. In addition, Protestant's witness, Mr. Dunbar, testified that the Modified Rational Method is an accepted method for calculating stormwater runoff values.⁷

The Executive Director does not agree with the ALJ that the Applicant did not use the 25-year, 24-hour storm when designing the detention ponds. As stated above, the Executive Director testified that the Surface Water Drainage Report contained in Part III of the application contains information on how the swales, letdown structures, and perimeter channels are designed to convey the peak flows from a 25-year runoff from the developed landfill consistent with TCEQ regulations. The perimeter drainage system consists of a network of perimeter channels and two detention ponds designed for a 25-year, 24-hour storm event. The application states in several places that the perimeter drainage system channels and ponds are designed in accordance with rules to accommodate peak runoff for the 25-year, 24-hour rainfall event, The Applicant's expert witness also testified in his pre-filed testimony that the 25-year, 24 hour storm was used in his calculations.⁸ The testimony by Mr. Stiggins that is cited in the PFD by the ALJ regarding not using the 25-year, 24-hour storm is specific to a particular hydrograph.

IV. CONCLUSION

The Executive Director disagrees with the ALJ's findings and recommendations as discussed above. Based on reviewing the application and considering all the evidence and arguments, the Executive Director concludes that all regulatory requirements for an MSW landfill have been met. The Executive Director stands by the preliminary decision to issue the MSW permit. The Executive Director recognizes that there is some confusion regarding the use of the Modified Rational Method and whether the Applicant used the 25-year, 24-hour storm even when designing the detention ponds. Therefore, the Executive Director respectfully recommends that the Commission either overturn the PFD and grant the permit or in the alternative, remand the application to allow additional evidence regarding the issue of whether the Applicant has provided an adequate surface water drainage report.

⁷ Tr. Vol. II, 13:11-14.

⁸ Exhibit Applicant-200 at page 18.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd of October, 2022, the “Executive Director’s Exceptions to the Proposal for Decision” for Diamond Back Recycling and Sanitary Landfill, application for Municipal Solid Waste Permit No. 2404, SOAH DOCKET NO. 582-22-0844, TCEQ Docket 2021-1000-MSW, was filed with the TCEQ Office of the Chief Clerk and the State Office of Administrative Hearings via e-Filing and served to the party representatives and persons included on the attached service list via e-mail.



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Diamond Back Recycling and Sanitary Landfill
SOAH Docket No. 582-22-0844
TCEQ Docket No. 2021-1000-MSW
SERVICE LIST

State Office of Administrative Hearings

Via e-filing

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