TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 13, 2022

Laurie Gharis, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, TX 78711-3087

Re: Diamond Back Recycling and Sanitary Landfill, LP, TCEQ Docket No. 2021-1000-MSW, SOAH Docket No. 582-22-0844

Dear Ms. Gharis:

The Office of Public Interest Counsel did not file Exceptions and will not be filing a Reply to Exceptions in the above-referenced matter. OPIC maintains the positions previously stated in our Closing Brief. Please find attached a copy of OPIC's Closing Brief to be included in future Agenda backup materials.

Sincerely,

Garrett T. Arthur
Public Interest Counsel

cc: Service List

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2022, the foregoing document was filed with SOAH and the TCEQ Chief Clerk, and all parties listed below were served via email.

Garrett T. Arthur

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SOAH DOCKET 582-22-0844
TCEQ DOCKET 2021-1000-MSW

DIAMOND BACK RECYCLING	**§**	**BEFORE THE**
AND SANITARY LANDFILL, LP	**§**	**STATE OFFICE OF**
PROPOSED PERMIT 2404	**§**	**ADMINISTRATIVE HEARINGS**

OFFICE OF PUBLIC INTEREST COUNSEL'S CLOSING BRIEF

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this closing brief and would respectfully show as follows:

I. Introduction

OPIC finds that Diamond Back Recycling and Sanitary Landfill, LP (Diamond Back or Applicant) met its burden of proof for all but one of the referred issues. Diamond Back failed to meet its burden of proof on Issue M regarding surface water drainage, and that failure is a basis to deny the application.

II. Procedural Background

On October 6, 2021, the TCEQ Commissioners granted hearing requests from Knox Real Property Development, LLC, Jason Harrington, Moss Dean Ranch, Betty Moss Dean, and C.A. and Betty Moss Dean FLP.[1] By Interim Order

[1] On October 7, 2021, Moss Dean Ranch, Betty Moss Dean, and C.A. and Betty Moss Dean FLP withdrew their hearing requests and protest of the application.

dated October 19, 2021, the Commission referred the following issues to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

A. Whether the Applicant has demonstrated a sufficient property interest as required by TCEQ rules.

B. Whether the application includes a sufficient odor control plan.

C. Whether the application includes a sufficient landfill gas management plan.

D. Whether the Applicant has sufficiently demonstrated evidence of competency, as required by TCEQ rules.

E. Whether the proposed facility is a compatible land use.

F. Whether the roads used to access the facility site are available and adequate.

G. Whether the proposed design and operation of the landfill liner meets all applicable requirements.

H. Whether the proposed design and operation of the landfill cover meets all applicable requirements.

I. Whether the Applicant has adequately addressed potential seismic impact zones at the proposed facility.

J. Whether the Applicant has provided an adequate wetland delineation and adequately addressed potential impacts of the proposed facility on wetlands.

K. Whether the Applicant has provided an adequate delineation of the relevant floodplains and floodways and adequately addressed potential impacts of the proposed facility on floodplains and floodways.

L. Whether the Applicant has demonstrated that the design and operation of the facility includes sufficient measures for erosion control and prevention.

M. Whether the Applicant has provided a sufficient surface water drainage report.

N. Whether the Applicant has adequately addressed endangered and threatened species, as required by TCEQ rules.

0. Whether the application adequately delineates and addresses easements.

P. Whether the Applicant has proposed adequate waste screening measures.

Q. Whether the Applicant has demonstrated that the landfill is protective of groundwater.

R. Whether the Applicant has provided an adequate Site Operating Plan.

S. Whether the application and draft permit have adequately addressed the oil and gas and water well provisions in 30 TAC § 330.61(l).

Administrative Law Judge (ALJ) Megan Johnson convened a preliminary hearing on February 2, 2022, and Knox Real Property Development, LLC, Jason Harrington (collectively Knox), and Diversity Trucking were admitted as parties. On May 23-26, 2022, ALJ Megan Johnson conducted the hearing on the merits.

III. Burden of Proof

By rule, the burden of proof is on the moving party by a preponderance of the evidence.[2] In a permit hearing, the applicant is the moving party. Therefore, Diamond Back bears the burden of proof on each of the referred issues.

Regarding the burden of proof in an SB 709 case, 30 TAC § 80.117(b) states that an applicant's presentation of evidence to meet its burden of proof may consist solely of the filing with SOAH, and admittance by the ALJ, of the administrative record. Section 80.17(c)(1) states that the filing of the administrative record establishes a prima facie demonstration that the ED's

[2] 30 TAC § 80.17(a).

draft permit meets all state and federal legal and technical requirements, and if issued consistent with the ED's draft permit, would protect human health and safety, the environment, and physical property. Section 80.17(c)(2) further states that a party may rebut this presumption by presenting evidence demonstrating that the draft permit violates a specifically applicable state or federal legal or technical requirement. If a rebuttal case is presented, section 80.17(c)(3) states that the applicant and the ED may present additional evidence to support the ED's draft permit.

IV. Referred Issues

Applicant bears the burden of proof on each referred issue, and OPIC finds that Applicant failed to meet that burden for Issue M. For the remaining issues, OPIC finds that Applicant met its burden of proof, by a preponderance of the evidence, through a combination of the administrative record and Applicant's additional submitted evidence. OPIC also notes that by stipulation, the Parties are not contesting Issues B, C, J, K, and N. Therefore, the following discussion is limited to Issue M regarding surface water drainage.

V. Applicable Law for Surface Water Drainage

The TCEQ rules concerning municipal solid waste (MSW) are found in 30 Texas Administrative Code (TAC) Chapter 330. Rules specific to surface water drainage come from Subchapter B, Permit and Registration Application Procedures, and Subchapter G, Surface Water Drainage. The following rule excerpts apply to the surface water drainage issue in this case.

§ 330.63 Contents of Part III of the Application

(c) Facility surface water drainage report. The owner or operator of a municipal solid waste (MSW) facility shall include a statement that the facility design complies with the requirements of §330.303 of this title (relating to Surface Water Drainage for Municipal Solid Waste Facilities). Additionally, applications for landfill and compost units shall include a surface water drainage report to satisfy the requirements of Subchapter G of this chapter (relating to Surface Water Drainage) and shall include the following.

(1) Drainage analyses. The owner or operator shall submit the following information and analyses:

(A) drawing(s) showing the drainage areas and drainage calculations;

(B) designs of all drainage facilities within the facility area, including such features as typical cross-sectional areas, ditch grades, flow rates, water surface elevation, velocities, and flowline elevations along the entire length of the ditch;

(C) sample calculations provided to verify that existing drainage patterns will not be adversely altered;

(D) a description of the hydrologic method and calculations used to estimate peak flow rates and runoff volumes including justification of necessary assumptions:

(i) the 25-year rainfall intensity used for facility design including the source of the data; all other data and necessary input parameters used in conjunction with the selected hydrologic method and their sources should be documented and described;

(ii) hydraulic calculations and designs for sizing the necessary collection, drainage, and/or detention facilities;

(iii) discussion and analyses to demonstrate that existing drainage patterns will not be adversely altered as a result of the proposed landfill development; and

(iv) structural designs of the collection, drainage, and/or storage facilities.

§ 330.303 Surface Water Drainage for MSW Facilities

(a) A facility must be constructed, maintained, and operated to manage run-on and runoff during the peak discharge of a 25-year rainfall event and must prevent the off-site discharge of waste and feedstock material, including, but not limited to, in-process and/or processed materials.

(b) Surface water drainage in and around a facility shall be controlled to minimize surface water running onto, into, and off the treatment area.

§ 330.305 Additional Surface Water Drainage Requirements for Landfills

(a) Existing or permitted drainage patterns must not be adversely altered.

(b) The owner or operator shall design, construct, and maintain a run-on control system capable of preventing flow onto the active portion of the landfill during the peak discharge from at least a 25-year rainfall event.

(c) The owner or operator shall design, construct, and maintain a runoff management system from the active portion of the landfill to collect and control at least the water volume resulting from a 24-hour, 25-year storm.

(d) The landfill design must provide effective erosional stability to top dome surfaces and external embankment side slopes during all phases of landfill operation, closure, and post-closure care in accordance with the following.

(1) Estimated peak velocities for top surfaces and external embankment slopes should be less than the permissible non-erodible velocities under similar conditions.

(2) The top surfaces and external embankment slopes of municipal solid waste landfill units must be designed to minimize erosion and soil loss through the use of appropriate side slopes, vegetation, and other structural and nonstructural controls, as necessary. Soil erosion loss (tons/acre) for the top surfaces and external embankment slopes may be calculated using the Soil Conservation Service of the United States Department of Agriculture's Universal Soil Loss Equation, in which case the potential soil loss should not exceed the permissible soil loss for comparable soil-slope lengths and soil-cover conditions.

(e) Dikes, embankments, drainage structures, or diversion channels sized and graded to handle the design runoff must be provided. The slopes of the sides and toe will be graded in such a manner as to minimize the potential for erosion. The surface water protection and erosion control practices must maintain low non-erodible velocities, minimize soil erosion losses below permissible levels, and provide long-term, low maintenance geotechnical stability to the final cover.

(1) The owner or operator shall maintain the collection, drainage, and/or storage units as designed, and shall restore and repair the drainage system in the event of washout or failure; and

(2) The owner or operator shall control erosion and sedimentation, including having interim controls for phased development.

(f) The owner or operator shall assess the existing and proposed drainage characteristics of the facility using the following methods.

(1) Calculations for areas of 200 acres or less must follow the rational method and utilize appropriate surface runoff coefficients, as specified in the Texas Department of Transportation (TxDOT) Bridge Division Hydraulic Design Manual. Time of runoff concentration as defined within the manual generally will not be less than ten minutes for rainfall intensity determination purposes. The owner or operator may use equivalent or better methods approved by the executive director.

(2) Calculations for discharges from areas greater than 200 acres must be computed by using United States Geological Survey/Department of Transportation Federal Highway Administration hydraulic equations compiled by the United States Geological Survey and the TxDOT (TxDOT Administrative Circular 36-86); the Hydrologic Engineering Center-Hydrologic Modeling System, Hydraulic Engineering Center-River Modeling System, or legacy computer programs developed through the Hydrologic Engineering Center of the United States Army Corps of Engineers; or equivalent or better methods approved by the executive director.

(g) The owner or operator shall handle, store, treat, and dispose of surface or groundwater that has become contaminated by contact with the working face of the landfill or with leachate in accordance with §330.207 of this title (relating to Contaminated Water Management). Storage areas for this contaminated water must be designed with regard to size, locations, and methods.

VI. Whether the Applicant has provided a sufficient surface water drainage report (Issue M)

The overarching regulatory requirement for surface water drainage is that existing drainage patterns must not be adversely altered.[3] This requirement means that existing drainage patterns must be accurately characterized so that pre- and post-development drainage patterns can be compared. Knox asserts that Applicant has failed to verify that existing drainage patterns will not be adversely altered because existing drainage patterns have been miscalculated and the proposed detention ponds are undersized.[4]

Applicant used a modified rational method to calculate the volume of storage needed to mitigate surface water drainage from pre-development to post-development conditions.[5] Applicant asserts that drainage infrastructure was designed to mitigate impacts to surface water drainage from landfill development, and the drainage analysis was performed to compare pre-development and post-development conditions.[6] Applicant concluded that the landfill would not adversely alter existing drainage patterns.[7]

The Executive Director (ED) found Diamond Back's application, including the surface water drainage report, to be administratively and technically

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[3] *See* 30 TAC §§ 330.63(c)(1)(C), 330.63(c)(1)(D)(iii), and 330.305(a).
[4] Knox-200 at 5:1-6:13.
[5] App-200 at 17:30-34.
[6] App-200 at 18:29-33.
[7] *Id.*

complete, and made a preliminary decision that the application meets the requirements of applicable law.

Existing conditions are compared to post-development conditions by looking at the velocity, peak flow rate, and volume of surface water runoff. Knox criticizes Applicant's characterization of both velocity and peak flow under existing conditions. Based on the testimony of Knox expert witness Lawrence Dunbar,[8] OPIC is persuaded that Applicant overestimated existing runoff velocity and peak flow by making assumptions that do not accurately reflect on-site conditions. This is a problem because the overestimation makes it appear that existing drainage patterns are not being adversely altered, but in reality, the difference between existing conditions and post-development conditions is significantly greater than shown by Applicant. For example, the volume of runoff at discharge point A under post-development conditions will increase by over 50% from the existing runoff volume calculated by Applicant.[9] Also, under existing conditions, the peak flow rate at Applicant's proposed discharge point B is less than 5 cubic feet per second (cfs), but the post-development peak flow rate at the same location would be 54 cfs.[10] At Applicant's proposed discharge point A, the existing conditions peak flow rate is again less than 5 cfs, but the post-development peak flow rate at that location would be 65 cfs.[11]

[8] Knox-200.
[9] Knox-200 at 11:9-11.
[10] Knox-200 at 11:22-24.
[11] Knox-200 at 12:1-5.

Regarding the proposed detention ponds, Knox takes issue with Applicant's use of a modified rational method. For areas of 200 acres or less, like Diamond Back, TCEQ rule § 330.305 requires use of the rational method.[12] However, § 330.305 also allows an owner or operator to use equivalent or better methods approved by the ED.[13] Given the ED's preliminary decision in this matter, OPIC must conclude that Applicant's use of a modified rational method was approved by the ED.

Through Mr. Dunbar's testimony and exhibit Knox-204, Knox contends that the ponds will fill up before peak flows enter the ponds and then provide no reduction in post-development peak flows that should be reduced to existing peak flow levels.[14] Mr. Dunbar further testified that undersized detention ponds will result in post-development peak flow rates which are much higher than what Diamond Back shows in its application, leading to adverse impact on downstream property.[15]

By rule, Applicant must design, construct, and maintain a runoff management system from the active portion of the landfill to collect and control at least the water volume resulting from a 24-hour, 25-year storm.[16] Applicant's north detention pond is designed for 5.7 acre-feet of water to be stored for a 25-year, 24-hour storm, but this storm would yield about 35 acre-

[12] 30 TAC § 330.305(f)(1).
[13] *Id.*
[14] Knox-200 at 6:3-9.
[15] *Id.*
[16] 30 TAC § 330.305(c).

feet of stormwater runoff from the area that drains to the north pond.[17] Likewise, Applicant's south detention is designed for 3.6 acre-feet of water to be stored for a 25-year, 24-hour storm, but this storm would yield 25 acre-feet of stormwater runoff from the area that drains to the south pond.[18] Based on this evidence, OPIC concludes that Applicant's proposed detention ponds are too small, and the peak flow rates of water discharged from the ponds will exceed existing peak flow rates. As a result, existing drainage patterns will be adversely altered.

VII. Transcript Costs

Under 30 TAC § 80.23(d)(2), OPIC, as a statutory party, cannot be assessed reporting or transcription costs. Therefore, OPIC takes no position on this issue and defers to those parties who have incurred or may be responsible for transcript costs.

VIII. Conclusion

On Issue M, OPIC finds that Applicant has not provided a sufficient surface water drainage report. The Applicant's failure to meet its burden of proof on Issue M is a basis to deny the application.

[17] Knox-200 at 14:5-9.
[18] Knox-204.

Respectfully submitted,

Vic McWherter
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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2022, the foregoing document was filed with SOAH and the TCEQ Chief Clerk, and all parties listed below were served via email.

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