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

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

PROTESTANTS KNOX REAL PROPERTY DEVELOPMENT, LLC AND JASON HARRINGTON'S EXCEPTIONS TO THE SUPPLEMENTAL PROPOSAL FOR DECISION ON REMAND

July 6, 2023

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TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Protestants Knox Real Property Development, LLC and Jason Harrington (collectively, "Protestants" or "Knox") submit these Exceptions to the Administrative Law Judge's Supplemental Proposal for Decision on Remand ("PFD") relating to the application by Diamond Back Recycling and Sanitary Landfill, LP ("Diamond Back" or "Applicant") for new MSW Permit No. 2404. For the reasons presented below, Protestants urge a denial of Diamond Back's application and requested permit.

I. INTRODUCTION AND SUMMARY

The PFD and proposed Order, in this case, were they adopted, would create dangerous new precedent—one that is inconsistent with TCEQ's rules, its guidance document, and past landfill permitting decisions. It would allow the construction and operation of a landfill, without the requisite comparative analysis of existing drainage patterns to fully developed drainage patterns, at the proposed surface water discharge points. And it would authorize construction of detention ponds that were *not* designed based on a 24-hour duration storm event, even though this is required by Commission rules.

In fact, with regard to the issue of whether the Applicant's detention ponds were designed based on the regulatorily-required design storm event, the Executive Director's ("ED") witness, Mr. Yadav, testified that he has *never* reviewed an application for a new landfill permit or for a major amendment where the applicant relied on the method (the Modified Rational Method or "MRM") that Diamond Back used here[1]—a method that did not account for a 24-hour duration storm, as required by the Commission rules.

The objective of a landfill permit application's surface water drainage report is ultimately to demonstrate that the proposed landfill will cause no adverse alterations to existing surface water drainage patterns. This is the standard set by Commission rules,[2] and the Commission's guidance document details how an applicant may satisfy this standard.[3]

The reason for this requirement is especially evident when considering the site of the Diamond Back proposed landfill. Aside from the oil and gas infrastructure that exists throughout the site, the site is mostly undeveloped. As described in the application and by the various witnesses presented during the hearing, the site is flat with scrubby vegetation throughout.

If the requested permit were granted, however, the site would ultimately be developed into six waste disposal mounds, with a final cover that is intended to minimize

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[1] Tr. V. 3, p. 83.
[2] 30 Tex. Admin. Code §§ 330.63(c); 330.305.
[3] Ex. Knox-15.

surface water infiltration. Thus, the surface water drainage patterns on the site will be transformed by the development of the landfill.[4]

TCEQ's rules are intended to ensure that those changes to existing surface water drainage patterns do not cause adverse impacts beyond the permit boundary. It is the permit applicant's burden to make this demonstration and to properly locate, calculate, and design necessary drainage infrastructure to ensure that the proposed landfill development will not adversely alter existing drainage patterns.[5]

Following an initial hearing on the merits regarding Diamond Back's permit application, the ALJ determined that Diamond Back failed to satisfy its burden of proving compliance with the Commission's surface water drainage requirements—namely, Diamond Back failed to demonstrate that its proposed landfill would not adversely alter existing drainage patterns. This is because Diamond Back failed to: (1) properly analyze and determine existing, baseline surface water drainage conditions at specific discharge points to be compared to the proposed discharge points under fully developed landfill conditions and (2) design its detention ponds based on the 25-year, 24-hour storm event.

The remand hearing presented Diamond Back with a *second* opportunity to attempt to satisfy its burden of proving compliance with TCEQ's regulations regarding surface water drainage issues. TCEQ Commissioners remanded this matter to allow additional

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[4] Mr. Harrington has raised this concern—regarding how the proposed landfill will impact surface water flows and flooding that drains to the east and towards Mr. Harrington's property—since the beginning of this application process, even before he retained any attorneys or expert consultants. *See* Attachment A.
[5] *See* Ex. Knox-15, p. 5.

evidence regarding whether the Applicant has provided a sufficient surface water drainage report, "including providing the underlying documents to support the methodologies and calculations used to meet the burden of proof of the surface water drainage issue."

Despite having been provided with this second bite at the apple, however, Diamond Back failed to present the additional evidence sought by the Commissioners in support of the surface water drainage report. It did not provide any evidence, during the remand hearing, addressing the two issues that the ALJ identified in her initial PFD. More specifically, Diamond Back did not demonstrate that the peak flow rates for existing conditions that it calculated and assigned to its "comparison points" accurately reflect the peak flow rates at those two points. Nor did Diamond Back provide any evidence demonstrating that its detention ponds were designed based on the 24-hour duration storm; instead, Diamond Back continues to maintain that it is not necessary to do so.[6] New evidence offered by Diamond Back during the remand hearing only confirmed what Protestants' evidence had already demonstrated: that the surface water drainage report fails to comply with TCEQ's regulations, and Diamond Back cannot demonstrate that the proposed landfill will not adversely alter existing drainage patterns.

Although the ALJ's supplemental PFD, on remand, recommends granting Diamond Back's requested permit, a review of the PFD and the ALJ's analysis reveals that the

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[6] *See* Tr. V. 2 at 91:12-15 (Stiggins testifying that the Surface Water Drainage Report does not provide the required storage volume for a 24-hour duration storm because that storm event *is not relevant* to the critical storage volume); *see also* Tr. V. 3, p. 66 (Stiggins explaining that required storage volume for south pond *decreases* after 50-minute duration storm and "that trend continues for longer durations of storm into the future").

evidence does not support this recommendation—not even the new evidence submitted during the remand hearing. To the contrary, the basis of the ALJ's recommendation appears to be that because the ED approved the surface water drainage report, it must comply with TCEQ's rules.[7] But the point of the contested case hearing is to require the Applicant to present sufficient, competent, reliable evidence—in accordance with the evidentiary rules—to prove that its application complies with TCEQ's rules; this is the Applicant's burden. Indeed, the ED's witness explained that the ED does not verify the information in a permit application when reviewing it for compliance with its rules; he only confirms that the required information has been included in the application and sealed by a professional engineer.[8] Here, Diamond Back failed to satisfy its burden—twice.

Because Diamond Back failed to satisfy its burden of demonstrating that its proposed landfill facility will not cause adverse alterations to existing drainage patterns—even after having been provided two opportunities to do so—the Commission must deny Diamond Back's permit application.

II. ISSUES PRESENTED

The main issue presented here is whether Diamond Back has demonstrated that its proposed landfill *will not adversely alter existing drainage patterns*.[9] This demonstration is required to be included in the Surface Water Drainage Report. To be sure, this is a

[7] *See, e.g.,* Supplemental PFD, pp. 34, 50.
[8] Tr. V. 4, p. 146 (initial hearing on the merits).
[9] 30 Tex. Admin. Code §§ 330.63(c); 330.305.

mandatory requirement, and the comparative analysis necessarily contemplates a competent and reliable evaluation of existing drainage patterns.

A. Has the applicant properly analyzed and determined existing drainage conditions at its designated comparison or discharge points, for purposes of comparison to its proposed fully developed landfill drainage patterns—to ensure that the existing conditions will not be adversely altered?

TCEQ technical guidance explains how an applicant demonstrates compliance with the regulatory surface water drainage requirements. According to the guidance, the applicant "*must* include a point-by-point analysis of the surface water drainage conditions to demonstrate that existing drainage patterns will not be adversely altered."[10] To conduct this comparative analysis, a permit applicant must establish the baseline existing drainage patterns, which can then be compared to the proposed surface water drainage patterns to determine whether the landfill will create an adverse alteration. The existing drainage patterns of the site are intended to provide: "(1) a baseline for comparison with the post-development drainage patterns of the facility and (2) a basis for the demonstration that the existing drainage patterns will not be adversely altered."[11]

To determine existing surface water drainage conditions, TCEQ has prescribed a five-step exercise:

> 1. Determine the specific discharge points for the runoff with respect to existing conditions at the permit boundary . . . . Discharge points include the locations where storm water runoff leaves the permit boundary by open channel flow, overland flow, flow through hydraulic structures, etc.

[10] Ex. Knox-15, p. 3 (emphasis added).
[11] Ex. Knox-15, p. 4.

2. Determine drainage subareas, and calculate the peak flow rates for existing conditions for each of the discharge points.

3. Calculate the volume of the runoff for the design storm event for each of the discharge points for existing conditions.

4. Determine the velocity of the peak runoff at each of the discharge points for existing conditions.

5. Determine the areas offsite that contribute flows onto the permit boundary (runon), and calculate the peak flow rate, velocity, and volume of run-on from each offsite area onto the site for existing conditions.[12]

Then, these five steps must be repeated for the proposed fully-developed landfill conditions. The applicant must compare the peak flow rate, velocity, and volume under existing conditions with peak flow rate, velocity, and volume under fully-developed landfill conditions, to ensure that drainage patterns will not be adversely altered.[13]

For purposes of Diamond Back's Surface Water Drainage Report, the following images help illustrate the drainage areas identified by Diamond Back under existing conditions, including its designated "comparison points," and the proposed fully developed landfill drainage conditions, including the designated "comparison points," which coincide with its proposed detention ponds:

[12] Ex. Knox-15, p. 3.
[13] Ex. Knox-15, p. 3.

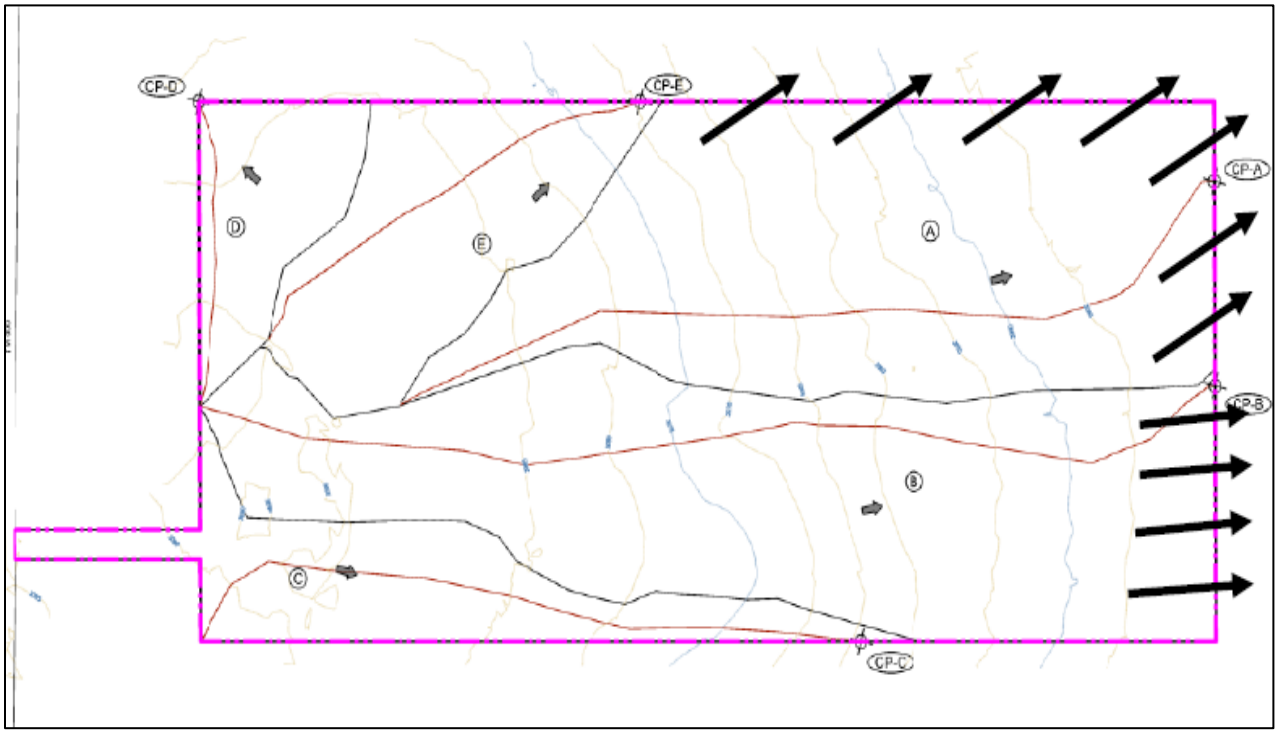

Figure 1 – Application Figure III.C1.1 with Notations[14]

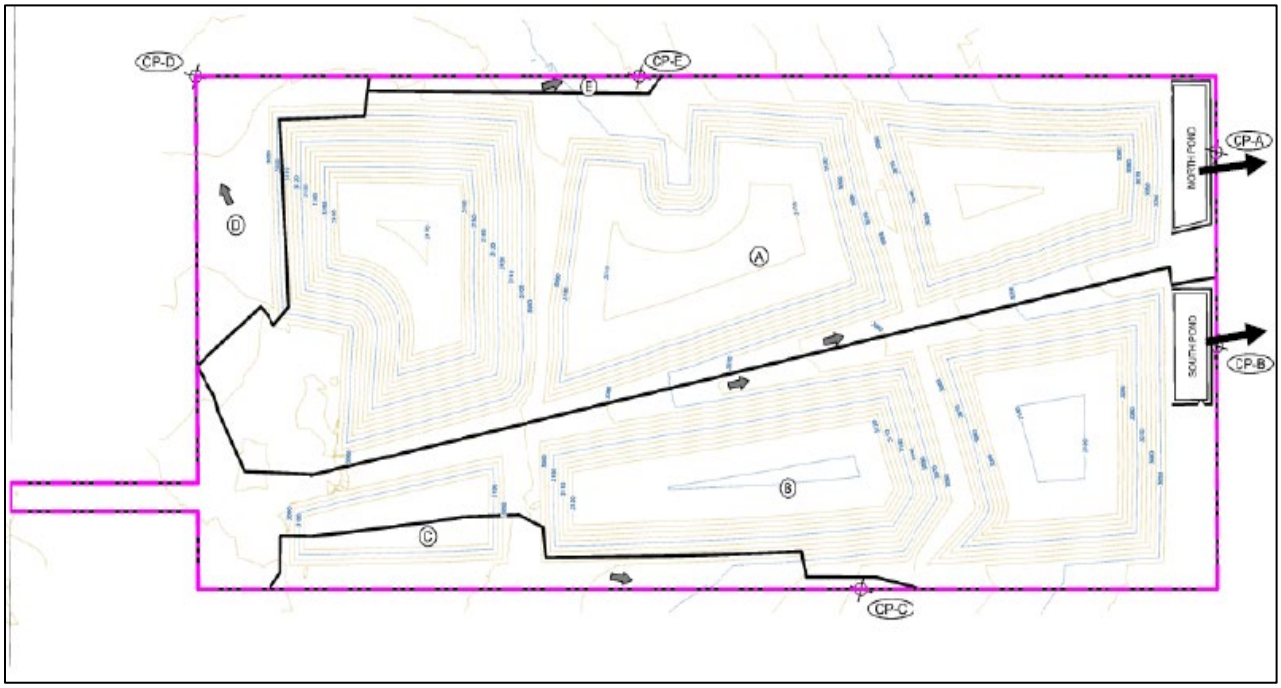

Figure 2 – Application Figure III.C2.1 with Notations[15]

[14] Ex. Knox-202. Note that there is some dispute about whether the surface water exiting the boundary of drainage area A flows to the north and the east or only to the east. For purposes of calculating peak flow rates using the Rational Method, however, the surface water flow direction is not relevant. Tr. V.2, p.70.
[15] Ex. Knox-203.

The issue presented here is whether Diamond Back properly and reliably determined what its baseline existing conditions are—*i.e.,* peak flow rates, volumes, and velocities—for each of its comparison or discharge points (namely, CP-A and CP-B), so that those baseline conditions, at those specific points, can be compared to fully developed drainage conditions, at those same discharge points. Diamond Back calculated a peak flow rate of 65 cfs for drainage area A, and assigned that peak flow rate to its CP-A. For drainage area B, Diamond Back calculated a peak flow rate of 54 cfs, and assigned that peak flow rate to its CP-B. Diamond Back's Surface Water Drainage Report includes no other peak flow values, indicating what the peak flow rates are, under existing conditions, for CP-A and CP-B. Yet, there is no dispute that water is not leaving the site at CP-A, at a peak flow rate of 65 cfs, under existing conditions. And water is not leaving the site at CP-B, at a peak flow rate of 54 cfs, under existing conditions. The evidence remains undisputed that Diamond Back did not determine what the baseline peak flow rates, under existing conditions, are for its designated comparison or discharge points.

To be clear, the issue here is *not* whether Diamond Back properly executed the Rational Method calculation for purposes of deriving a peak flow rate for its designated drainage areas. The parties did not dispute whether Diamond Back properly executed the Rational Method.

The Rational Method is but a tool, among many, in a toolbox that allows an applicant to analyze and determine what existing conditions are. But the Rational Method, alone, does not always provide the requisite data necessary to conduct a reliable and competent comparative analysis of proposed fully developed drainage patterns to the

drainage patterns under existing conditions. This case presents such an example, because the Applicant used the Rational Method to calculate the peak flow rates for the entire drainage areas, as delineated by Diamond Back's engineer, but the Applicant did not provide the peak flow rates for the designated comparison or discharge points—preventing Diamond Back from conducting the necessary comparative analysis to determine whether the proposed landfill will adversely alter existing drainage patterns.

In sum, it was Diamond Back's burden to demonstrate the baseline existing conditions for its designated comparison points; its burden was *not* to simply employ the Rational Method to calculate peak flow rates for its entire drainage areas, assign that peak flow rate to its designated comparison points, check that box, and call it a day. The issue presented here is, thus, whether Diamond Back satisfied its burden of establishing existing drainage conditions—peak flow rates, velocities, and volumes—at the specific points that it chose to designate as "comparison points" for purposes of comparing those existing conditions values to the proposed fully developed landfill drainage patterns at those same comparison points. After two evidentiary hearings, the answer remains the same: no.

B. Did the Applicant employ the required 25-year, 24-hour design storm event for purposes of designing its detention ponds?

The detention ponds are the infrastructure proposed by the Applicant to ensure that existing drainage patterns will not be adversely altered at the permit boundary. TCEQ rules and its guidance document instruct applicants that the 25-year, 24-hour storm event must be used for calculations and designs of drainage structures to address runoff control, such

as detention ponds.[16] But Applicant failed to demonstrate that its detention ponds are properly sized in accordance with TCEQ's requirements.

To the contrary, the Applicant has insisted that it need not rely on a 24-hour duration storm event. Because the Applicant relied on the novel "Modified Rational Method" with a uniform rainfall distribution to calculate required storage volumes for its detention ponds, the Applicant's ponds are designed for only a *50- or 60-minute duration storm* event. This is undisputed, as demonstrated by the charts (reproduced below) from the Applicant's Surface Water Drainage Report:[17]

Table III.C.F – NORTH POND (DRAINAGE AREA A) VOLUME CALCULATION

Storm Duration	I25	Peak Q	Proposed Condition Volume	Allowable Release Volume	Required Storage
(min)	(in/hr)	(cfs)	(cf)	(cf)	(cf)
10	6.96	367.8	201,691	85,175	116,516
20	5.02	265.3	291,036	104,533	186,503
30	3.96	209.4	344,528	123,890	220,638
40	3.29	173.9	381,459	143,248	238,211
50	2.82	149.2	409,169	162,606	246,562
60	2.48	131.0	431,119	181,964	249,155
70	2.21	117.0	449,182	201,322	247,860
80	2.00	105.9	464,469	220,680	243,790
90	1.83	96.8	477,688	240,038	237,650
100	1.69	89.2	489,312	259,395	229,916
110	1.57	82.8	499,673	278,753	220,920
Required Storage (maximum storage volume for 60-minute storm)					249,155 cf
					5.72 ac-ft

[16] Ex. Knox-15, p. 9; 30 Tex. Admin. Code § 330.305.

[17] Ex. Knox-20, pdf p. 3. Applicant used the "60-minute storm" to calculate the maximum storage volume require for Pond A and the "50-minute storm" to calculate the maximum storage volume required for Pond B.

Table III.C.G – SOUTH POND (DRAINAGE AREA B) VOLUME CALCULATION

Storm Duration	I25	Peak Q	Proposed Condition Volume	Allowable Release Volume	Required Storage
(min)	(in/hr)	(cfs)	(cf)	(cf)	(cf)
10	6.96	237.1	142,259	68,028	74,230
20	5.02	171.1	205,276	84,226	121,051
30	3.96	135.0	243,006	100,423	142,583
40	3.29	112.1	269,055	116,620	152,434
50	2.82	96.2	288,599	132,817	155,781
60	2.48	84.5	304,081	149,015	155,067
70	2.21	75.4	316,822	165,212	151,610
80	2.00	68.3	327,604	181,409	146,195
90	1.83	62.4	336,927	197,607	139,321
100	1.69	57.5	345,126	213,804	131,322
110	1.57	53.4	352,435	231,001	122,434
Required Storage (maximum storage volume for 50-minute storm)					155,781 cf
					3.58 ac-ft

On remand, Diamond Back did *not* present evidence demonstrating that its method of calculating the required storage volume for its detention ponds is comparable to or more conservative than the methods that are typically used by applicants to design ponds for a 25-year, 24-hour storm event. Instead, it argued—rather remarkably—that the 24-hour duration storm is not relevant here.[18] This is because Diamond Back maintains that it was required to use the novel MRM, with a uniform rainfall distribution (because it had used the Rational Method to analyze existing conditions), to determine the required storage volume for its detention ponds, and using this method, a 50- or 60-minute duration storm event was all that was required to determine the pond storage volumes.

To be clear, the issue presented here is not whether the Applicant was wrong to use the MRM to design its detention ponds. Nor is the issue here whether Mr. Dunbar (one of

[18] Tr. V. 2 at 91:12-15 (Stiggins testifying that the Surface Water Drainage Report does not provide the required storage volume for a 24-hour duration storm because that storm event *is not relevant* to the critical storage volume).

Protestants' expert engineers with significant hydrology and modeling experience) should have calculated or modeled the required storage volumes, using the appropriate 25-year, 24-hour storm event, for Diamond Back's detention ponds; this was not Protestants' burden.

The issue presented here is whether the Applicant designed its detention ponds using a 24-hour duration storm event. And although there are some narrative statements in the application indicating that the 24-hour duration storm event was used, neither the calculations in the application nor the evidence presented during the hearing indicate that the 24-hour duration storm was used to design the ponds. There is nothing in the evidentiary record indicating that the storage volumes for the detention ponds were calculated based on a 24-hour duration storm; they were calculated, as indicated in the application itself, based on a 50-minute and 60-minute duration storm.[19]

Because Diamond Back's detention ponds were not designed based on the required 25-year, 24-hour storm event, Diamond Back simply cannot satisfy its burden of demonstrating that its proposed drainage infrastructure will prevent adverse alterations to existing drainage patterns.

III. BURDEN OF PROOF & OTHER RELEVANT LEGAL STANDARDS

A number of relevant legal standards apply, here, that are worth reviewing.

Surface Water Drainage Analysis. First, TCEQ's rules plainly state that existing drainage patterns *must* not be adversely altered by the proposed landfill. The applicant *must*

[19] Ex. Knox-20, pdf p. 3.

assess the existing and proposed drainage characteristics of the facility, and it must include calculations to demonstrate that existing drainage patterns will not be adversely altered.[20] A method recognized by TCEQ's rules for purposes of calculating peak flow rates for areas of 200 acres or less is the Rational Method, although equivalent or better methods may also be used. In any event, the objective of TCEQ's rules is to ensure that existing drainage patterns are not adversely altered, not to ensure that the Applicant properly used the Rational Method calculation.

Burden of Proof. Second, Diamond Back bears the burden of proof here. This is worth emphasizing, as Diamond Back has repeatedly demonstrated confusion regarding its evidentiary burden. Diamond Back argues, for instance, that Protestants have relied on "a shameful attempt to distort the burden of proof," by asserting that "'Diamond Back could not verify that existing drainage patterns will not be adversely altered…', and 'Diamond Back… failed to demonstrate that its ponds are adequately sized,' and therefore it 'failed to demonstrate, by a preponderance of the evidence, that existing conditions would not be adversely altered by its proposed landfill.'"[21] But Diamond Back indeed bore the burden of demonstrating compliance with these regulatory requirements.

TCEQ Rules 80.17 and 80.117(c)(3) and related statutory authority serve as the regulatory basis for the parties' respective legal burdens. Under the process established by Senate Bill 709, the prima facie evidentiary presumption now embodied in TCEQ Rule

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[20] 30 Tex. Admin. Code §§ 330.305; 330.63(c).
[21] *Diamond Back's Reply to Closing Arguments on Remand,* p.9 (quoting Protestants' Closing Arguments on Remand).

80.117(c) shifted the starting point for the contested case hearing process in a manner that spares an applicant from the initial need to submit testimony addressing every requirement applicable to a permit. Under Rule 80.117(c)(1), the filing of the administrative record in a case creates a rebuttable presumption that the draft permit satisfies all legal requirements. But the prima facie presumption found in Rule 80.117(c) may be rebutted, once protestants present some evidence on an issue relevant to the case.

To be clear, even under the process established by Senate Bill 709, at no stage and on no issue do Protestants bear a *burden of proof*. Rather, in order to rebut the prima facie presumption, Protestants need only present evidence on an issue.[22] Protestants in this case produced more than enough evidence to rebut the prima facie presumption.

Diamond Back, therefore, bears the burden of proving, by a preponderance of the evidence presented, that "existing drainage patterns will not be altered" and that "its ponds are adequately sized." Indeed, to the extent Diamond Back was confused about its evidentiary burden, a review of the Commission's Order remanding this matter for a second hearing should have alerted the Applicant that this second hearing was intended to provide Diamond Back with another opportunity to present evidence demonstrating that its surface water drainage report complies with TCEQ's rules.

Rule Interpretation and Application. Administrative rules are construed using statutory construction principles, giving effect to the plain meaning of words. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438-39 (Tex. 2011); Tex. Gov't Code §§

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[22] Tex. Gov't Code § 2003.047(i) (i-2).

311.011(a). An administrative agency acts arbitrarily and capriciously when: (1) it defies its own rules' clear, unambiguous language, *Zimmer US, Inc. v. Combs*, 368 S.W.3d 579, 585 (Tex. App.—Austin 2012, no pet.) or (2) when it acts without reference to guiding rules and principles, *Nucor Steel-Tex. v. Pub. Util. Comm'n of Tex*., 363 S.W.3d 871, 884 (Tex. App.—Austin 2012, no pet). *See also* Tex. Gov't Code § 2001.174(2) (B)-(C), (F) (requiring reversal of findings, inferences, conclusions, or decisions that exceed agency authority, are unlawful procedure, or are arbitrary or capricious). A guidance document, reflecting the agency's longstanding application and interpretation of its rules, is entitled to some deference.

Expert Witness Evidence Standards: In order for expert testimony to be admissible, the expert must be qualified, and the testimony must be relevant and based on a reliable foundation. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). If an expert's testimony is not reliable, it is not evidence. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 713 (Tex. 1997). The data underlying an expert opinion must be "independently evaluated in determining if the opinion itself is reliable." *Merrell Dow*, 953 S.W.2d at 713; *accord Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 728 (Tex. 1998). "[A]n expert must show the connection between the data relied on and the opinion offered." *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 906 (Tex. 2004); *accord Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 642 (Tex. 2009). Courts must "rigorously examine the validity of facts and assumptions on which the testimony is based, as well as the principles, research, and methodology underlying the expert's conclusions and the manner in which

the principles and methodologies are applied by the expert to reach the conclusions." *Whirlpool Corp.*, 298 S.W.3d at 637.

Further, an expert's opinion is not admissible if it is based on flawed methodology and reasoning. *Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388, 410 n.23 (Tex. 2016); *Merrell Dow*, 953 S.W.2d at 714. Among the relevant factors that can be considered when assessing the reliability of expert testimony is the following: Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community. *Volkswagen of Am.*, 159 S.W.3d at 910; *Robinson*, 923 S.W.2d at 557; *see, e.g.*, *Neal v. Dow Agrosciences, LLC*, 74 S.W.3d 468, 473-74 (Tex. App.—Dallas 2002, no pet.).

A court is not required to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 257-58 (Tex. 2004); *Gammill*, 972 S.W.2d at 727. Such an unreliable connection is an impermissible analytical gap if an expert fails to demonstrate how his or her observations support his or her conclusions. *See Burns v. Baylor Healthcare Syst.*, 125 S.W.3d 589, 596-97 (Tex. App.—El Paso 2003, no pet.) (citing *Gammill*, 972 S.W.2d at 727).

An expert's mere assertion that his methodology is "generally accepted" in the relevant field does not suffice. *See, e.g.*, *Robinson*, 923 S.W.2d at 559 (expert's "self-serving statements that his methodology was generally accepted and reasonably relied on by other experts in the field are not sufficient to establish the reliability of the technique"). Further, an expert's unsubstantiated assertion that his conclusions are true (*i.e.*, the expert's "ipse dixit") does not make the evidence reliable. Experts must explain how their opinions are connected to the *facts* of the case; otherwise, the expert's mere subjective opinion has

no probative value. *See Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 801 (Tex. 2006).

IV. RELEVANT PROCEDURAL HISTORY

During the first hearing on the merits in this case, Protestants presented evidence demonstrating that Diamond Back failed to comply with TCEQ's surface water drainage requirements in at least two respects.

First, Knox demonstrated that Diamond Back could not verify that existing drainage patterns will not be adversely altered by its proposed landfill because Diamond Back did not accurately assess existing drainage patterns (baseline conditions). Diamond Back overestimated peak flow rates for existing conditions at its designated comparison points, rendering the results of its comparison to fully developed landfill conditions unreliable and inaccurate.

Second, Diamond Back failed to satisfy its burden of demonstrating that its proposed detention ponds were designed for the 25-year, 24-hour storm, as required, and thus, it failed to demonstrate that its ponds are adequately sized.

Accordingly, the ALJ recommended that Diamond Back's permit application be denied, because it had failed to demonstrate, by a preponderance of the evidence, that existing conditions would not be adversely altered by its proposed landfill. Importantly, Knox, who owns property to the East of the proposed landfill, would be most impacted by any adverse alterations to the existing drainage patterns; hence, their advocacy for denial of the permit.

Thereafter, by Order dated December 20, 2022, TCEQ commissioners remanded the application back to SOAH to provide Diamond Back with another opportunity to present evidence in support of its surface water drainage report in its application.

Less than one month later, Diamond Back concocted dubious allegations in support of a Rule 202 Petition seeking to take the deposition of Jason Harrington and his counsel, Eric Allmon, and seeking production of documents, including confidential documents—ostensibly to investigate certain claims related to Protestants' opposition to the pending landfill permit application.[23] Diamond Back filed its Petition in Ector County district court—even though Mr. Allmon does not reside in that venue. Ultimately, the district court properly denied Diamond Back's Rule 202 Petition.[24] But Diamond Back achieved part of its objective—requiring Protestants and their counsel to expend additional resources on legally indefensible proceedings.

Meanwhile, at SOAH, Diamond Back resisted providing Protestants with all the information they were entitled to under the discovery rules. Prefiled testimony was submitted by Applicant, based on modeling that had not been produced to Protestants. Substantial revisions to Diamond Back's prefiled testimony and evidence were submitted on the eve of the contested case hearing, based on new modeling that had been performed by Applicant's witnesses. And despite having been provided an opportunity to prepare and submit written prefiled rebuttal testimony and evidence, Diamond Back continued to

[23] *See* Attachment B, a copy of Diamond Back's Rule 202 Petition.
[24] *See* Attachment C.

develop additional testimony and exhibits and offered them into evidence on the last day of the hearing. Because this new rebuttal evidence did not respond to any new or surprising evidence offered by Protestants during the hearing, and because it was irrelevant to the issues presented, Protestants objected to the admission of the improper rebuttal evidence.[25] Their objection was overruled, but Protestants urge reconsideration of their objections.

In any event, Diamond Back still failed to present sufficient evidence to satisfy its burden of proof. This is made evident when reviewing the ALJ's PFD. Although the ALJ recommended granting the permit, nothing in the PFD indicates that Diamond Back presented the requisite evidence to address the deficiencies in the Surface Water Drainage Report that the ALJ first noted in her initial PFD.

Diamond Back offered *no* evidence indicating that its calculated peak flow rates for existing conditions accurately represented the peak flows discharging from the permit boundary at the designated comparison points. Instead, Diamond Back re-urged that it relied on the Rational Method to compute the peak flows for existing conditions, and that was all that was required.

The additional evidence offered by Diamond Back, on this issue, actually supported Protestants' case, as discussed in more detail below.

Similarly, Diamond Back offered *no* evidence indicating that its detention ponds were designed based on the 24-hour duration storm. Instead, Diamond Back reiterated that

[25] Tr. V. 4, pp. 11-15.

because it used the novel MRM, a 50- or 60-minute duration storm event was all that was required to determine the appropriate pond storage volume.

Yet, ultimately, the ALJ recommended granting the permit, concluding that Diamond Back relied on acceptable methods for developing its Surface Water Drainage Report, as evidenced by the ED's issuance of a draft permit and determination that the application was technically complete.

V. SUMMARY OF EVIDENCE PRESENTED

A. Evidence presented on remand continues to demonstrate that Applicant has overestimated peak flow rates under existing conditions, confirming what the evidence from the initial hearing demonstrated.

Protestants maintain that Diamond Back failed to accurately and reliably represent existing surface water drainage conditions for purposes of the requisite comparative analysis to ensure that existing conditions will not be adversely altered. To be clear, the issue is *not* whether Diamond Back should have used the Rational Method to calculate peak flows; Knox does not contend that Diamond Back was mistaken in relying on the Rational Method to calculate peak flow rates. Nor does Knox contend that Diamond Back's inputs into the Rational Method equation were inappropriate.

Furthermore, there is no dispute regarding how water flows across and off the site. The evidence presented during the remand hearing has made it clear that Diamond Back recognizes that surface water flows across and exits the site via overland flow (sheet flow and/or shallow concentrated flow), not via channelized flow.

There is also no dispute that Diamond Back's peak flow rates, calculated via the Rational Method, do not accurately reflect the peak flows leaving the site at specific points

along the permit boundary.[26] So, for instance, even though Diamond Back has represented that drainage area A, under existing conditions, has a peak flow rate of 65 cfs at CP-A (or comparison point A), water does not discharge at that specific discharge point at a rate of 65 cfs; there is no single point along the drainage area A boundary where water leaves the site at a peak discharge rate of 65 cfs. And even though Diamond Back has represented that drainage area B, under existing conditions, has a peak flow rate of 54 cfs at CP-B (or comparison point B), water does not discharge at that specific discharge point at a rate of 54 cfs; there is no point along the drainage area B boundary where water leaves the site at a peak discharge rate of 54 cfs.[27]

In fact, Mr. Stiggins, Diamond Back's engineer of record, testified that he could not say what the peak flow rate is for water discharging at CP-A under existing conditions—at least not based on his use of the Rational Method equation.[28] Nor could he say what the peak flow rate is for water discharging at CP-B under existing conditions, based on his use of the Rational Method. Thus, there is no dispute that the surface water drainage report does not accurately reflect the peak flow rates for existing conditions occurring at comparison points A and B.

Diamond Back takes exception to the surface water flow directions for drainage area A as reflected in Knox's Exhibit 202, but Diamond Back's engineer of record (Stiggins)

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[26] *See, e.g.,* Tr. V. 2, p. 29 (Stiggins testifying that "not all of the peak flow leaves at a single point" but rather, water leaves the permit boundary via diffuse overland flow).
[27] Tr. V. 2, p. 29.
[28] Tr. V. 2, p. 30.

admitted that the flow directions are irrelevant to his calculated peak flow rates. So, the dispute regarding flow direction for drainage area A is irrelevant to the issue presented here: whether Diamond Back has accurately represented peak flow rates for existing conditions occurring at the site.

In sum, the following points are undisputed, based on the evidence presented:

--water discharges from the site, under existing conditions, via overland diffuse flow, not via channelized flow;

--Diamond Back calculated a peak flow rate of 65 cfs for drainage area A, under existing conditions, and a peak flow rate of 54 cfs for drainage area B, under existing conditions;

--these peak flow rates represent the peak flows for the entire drainage areas, not the peak flows that discharge from a specific discharge point;

--although CP-A is reflected as having a peak flow rate of 65 cfs, water does not discharge from CP-A at a rate of 65 cfs;

--Diamond Back does not know what the actual peak flow rate is at the CP-A discharge point, but it is much less than 65 cfs;

--although CP-B is reflected as having a peak flow rate of 54 cfs, water does not discharge from CP-A at a rate of 54 cfs; and

--Diamond Back does not know what the actual peak flow rate is at the CP-B discharge point, but it is much less than 54 cfs.

On this issue—regarding peak flow rates for existing conditions—Diamond Back offered only two new pieces of information during the remand hearing: the modeling analysis developed by Dr. Cleveland (the SWMM model) and a RAS 2D model developed by Mr. Stiggins. But neither Dr. Cleveland's evidence nor the new model by Mr. Stiggins provides reliable and persuasive evidentiary support for Diamond Back's representations of the peak flow rates, under existing conditions at the site. Neither demonstrates that peak

flow rates at CP-A are 65 cfs or that peak flow rates at CP-B are 54 cfs under existing conditions.

To the contrary, Diamond Back's evidence on remand supports Knox's experts' opinions—that Diamond Back's calculated peak flows for existing conditions at the site vastly overestimate the actual flow conditions at the site. Diamond Back's remand evidence demonstrates that its calculated peak flow rates for existing conditions do not provide a reliable baseline for purposes of comparing existing conditions to fully-developed conditions, as required to determine whether the proposed landfill will adversely alter existing conditions. Peak flow rates, under existing conditions, are much lower at CP-A and CP-B than the peak flows calculated by Diamond Back, and thus, when compared to the peak flow rates under fully developed conditions at these two locations, it is apparent that the proposed landfill will adversely alter existing drainage patterns.

Professor Cleveland's Testimony & Evidence

On remand, Diamond Back offered the testimony of a new expert: Professor Cleveland. Professor Cleveland was tasked with verifying the Applicant's results from the rational method equation as reflected in the surface water drainage report in the application. In fact, he developed his SWMM model in order to conduct an independent analysis using the same values that were used in the permit application.

Professor Cleveland explained that the rational method calculates the peak flows for a contributing drainage area, but does not provide information regarding where those flows are occurring—or at what point along the boundary those flows are discharging:

A The rational method produces a peak discharge estimate based upon a fully contributing area.
Q And here, the point of interest that was used were control point A and control point B. Is that right?
A That's correct.
Q *And so that's the -- where the peak flow rate was attributed for that fully contributing area. Is that right?*
A Proximal to those locations, yes.[29]
* * *
Q And if we were to focus on drainage area B, is it correct that the peak flow rate for drainage area B was calculated as 54 cfs per the rational method?
A I don't recall exactly, but it's somewhere in that vicinity.
Q Okay. And so that is the collective overland flow or the total sum of the discharges for drainage area B coming off the site. Is that right?
A Yes.
Q *Which using the rational method, that total sum of peak flow was designated or assigned to comparison point B. Is that right?*
A That's right.[30]

According to Dr. Cleveland, if water were actually discharging from drainage area A at 65 cfs at Comparison Point A, there would be evidence of this—in the form of substantial erosion features, for instance; there is no such evidence.[31] To the contrary, it is undisputed that surface water is discharging, via overland flow, along the drainage area A boundary—at least along the eastern boundary of drainage area A and perhaps along the northern boundary of drainage area A, as well. Yet, there is no information in the permit application indicating what the peak flow rate is for any specific point along the drainage area A boundary. The only information provided is that water discharges from drainage area A at a peak flow rate of 65 cfs, represented at a point labeled "CP-A."

[29] Tr. V. 1, pp. 40-41.
[30] Tr. V. 1, p. 71.
[31] Tr. V. 1, p. 46.

Dr. Cleveland's SWMM model, on the other hand, provides a better estimate of the peak flows leaving the permit boundary via overland flows:

> Q And so the SWMM program allows a modeler to examine distributed flow behavior, whereas the rational method is not designed to do that. Isn't that right?
> A The SWMM model would allow a modeler to approximate distributed flow behavior, whereas the rational method does not allow you to proximate distributed flow behavior.[32]
> * * *
> Q And you were able to calculate the peak flow of the discharges leaving the site at each of the cells along that drainage area A perimeter. Is that right?
> A Yes. . . .[33]

Using the SWMM, Dr. Cleveland calculated peak flow rates for each of the cells along the drainage area A boundary, and the resulting peak flow rates ranged between 4.6 to 10.4 cfs for each of those cells.[34] These cells spanned 334 feet; so, the 4.6 to 10 cfs peak flow rates reflect the peak flows for a 334-foot area or cell boundary. Dr. Cleveland did the same exercise for drainage area B, which resulted in similar peak flow rates.[35]

When asked to estimate what the peak flow rate would be for an 86-foot boundary width (that is, the width of the weir for the north detention pond, or CP-A), versus the 334-foot wide cells used in his model, Dr. Cleveland explained that the peak discharge rate would be even smaller: "Q: Could you say that it's [peak flow rate] going to be less than whatever value you calculated for a 334-foot-wide stretch? A: Under predevelopment

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[32] Tr. V. 1, pp. 44-45.
[33] Tr. V. 1, p. 53.
[34] Tr. V. 1, pp.54 & 67.
[35] Tr. V. 1, p. 65.

conditions, if you look at less width and you apportion the discharge, yes, it would be smaller [than the 4.6 to 10.4 cfs peak flow rates for the 334-foot-wide cells]."[36]

To be clear, the only peak flow rate reflected in the surface water drainage report for drainage area A, under existing conditions, is 65 cfs, and this value is shown at comparison point A. Dr. Cleveland's model demonstrated a range of peak flow rates coming off of the drainage area A boundary, along 334-foot-wide stretches. The highest peak flow rate calculated by Dr. Cleveland's SWMM model for a cell along the drainage area A boundary was 10.5 cfs—far less than 65 cfs. And as Dr. Cleveland admitted, the peak flow would be even lower, if he had been looking at a cell width less than 334 feet.

What Dr. Cleveland was not able to explain, however, is how Diamond Back's calculated 65 cfs peak flow rate for drainage area A reflects the baseline (existing conditions) for purposes of comparison to fully developed conditions. That is, Dr. Cleveland was not able to explain why 65 cfs is the appropriate peak flow rate to use for purposes of establishing the existing condition at comparison point A. Nor could he explain why 54 cfs is the appropriate peak flow rate for purposes of establishing the existing conditions at comparison point B:

Q . . . So the purpose of calculating peak flow rate for existing conditions is to establish a baseline so that we can then compare the fully developed landfill conditions. Is that right?
A That's right.
Q And under the fully developed landfill conditions, the runoff at -- for drainage area B is leaving the site along the weir of the south pond. Isn't that right?
A That's right.

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[36] Tr. V. 1, p. 60.

Q And so doesn't that mean that the point of interest is that location of the weir for that south pond, for purposes of comparison?
A Yes, that's control point B [comparison point B] on the drawings.
Q Okay. And looking at your SWMM model, which we had spent some time looking at, we could estimate what the peak flow rate is under existing conditions in the area where that south pond weir is expected to be located. Isn't that right?
A Yes.[37]

While there was some dispute as to whether Dr. Cleveland's SWMM reflected a peak flow rate of 10.6 or 18.1 cfs at CP-B,[38] there is no dispute that none of the cells in drainage area B, in his SWMM, reflected a peak flow rate of 54 cfs—the peak flow rate for existing conditions at CP-B, in the surface water drainage report. All of his peak flow rates for the cells along the drainage area B boundary were far less than the 54 cfs peak flow rate at CP-B in the surface water drainage report.

In sum, Dr. Cleveland's testimony demonstrated that Diamond Back's comparison points—CP-A and CP-B—do not reflect accurate peak flow values. To the contrary, his SWMM established that the peak flows at these two points are much lower than the 65 cfs and 54 cfs calculated by the Applicant. Dr. Cleveland proved that Mr. Dunbar was right: the peak flows assigned to CP-A and CP-B for existing conditions are overestimates, and thus, they do not establish a reliable baseline for purposes of comparing to fully developed conditions. Had the appropriate peak flow rates been used, it would have been clear that the proposed landfill will adversely alter existing drainage conditions.

[37] Tr. V. 1, pp. 72-73.
[38] Tr. V. 1, p. 72.

Stiggins' Testimony & Evidence

The other new evidence offered by Diamond Back in support of the existing drainage conditions reflected in its surface water drainage report was the RAS 2D model developed by Stiggins. But as Stiggins himself acknowledged, the RAS 2D model was not completed to verify or compare the peak flow rates computed by the Rational Method equation:

> A. I mean, the RAS 2D model was not completed to compare how the rational method was done . . . .
> Q . . . . It wasn't done -- the RAS 2 model was [not] done to compare to the rational method equation; is that right?
> A. Correct. It was just done to provide confirmation to me that the -- where the water flows based on the surface topography.
> Q. Okay. And to dispute the way that Mr. Dunbar put his arrows on your topographic map?
> A. Yes, in part, because I disagree with his arrows.[39]

Stiggins' RAS 2D model does provide some useful information, in that it provides further proof that surface water leaves the site in a diffuse manner.[40] Yet, the model was not run to determine the distributed flow rates for water exiting the eastern boundary of the site in a diffuse manner:

> Q. And so, it can't tell us the distributed flow rates for the water as they leave the eastern boundary of Drainage Area A, right?
> A. As this model was run -- the model -- *the program itself is capable of doing that* but this model was not run to that level of detail.[41]

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[39] Tr. V. 2, pp. 77-78; *see also* Tr. V. 2, pp. 68-70 (Stiggins testifying that his RAS 2D model does not provide any specific information regarding the flows existing the site along the eastern boundary).
[40] Tr. V. 2, p. 66.
[41] Tr. V. 2, p. 69.

In other words, although Stiggins *could have* developed the RAS 2D model to provide the peak flow rates for the water as it exits the drainage boundaries via diffuse overland flow, Stiggins elected not to run the model "to that level of detail."

Other testimony offered by Stiggins only confirms that his surface water drainage report did not include accurate peak flow rates occurring under existing conditions at his designated comparison points. Instead, he relied on the calculated peak flow rates for the entire drainage areas and assigned those peak flow rates to his comparison points. As Stiggins explained it, he did not need to determine what the peak flow rates are for existing conditions at CP-A and CP-B for purposes of his comparative analysis, because these comparison points do not represent discharge points. In fact, he could have assigned his computed peak flow rates to any point along the eastern boundary—according to his interpretation of the term "discharge point." The discharge point can be selected "*at the engineer's discretion*," he testified; "it is just a reference point for the direction of flow where water's headed," according to Stiggins.[42]

But Stiggins' explanation of his comparison points is at odds with TCEQ's regulations and guidance document. A review of the language in the guidance document makes evident that the applicant must identify "specific" discharge points where surface water exits the site, even if the surface water exits via overland flows. And the applicant

[42] Tr. V. 3, p. 63.

must then calculate peak flows occurring under existing conditions at those specific discharge points.[43] Stiggins did not do this, and he admitted as much.

It is worth noting that Stiggins could have analyzed existing drainage conditions in a manner that would have allowed him to determine peak flow rates at specific discharge points along the drainage area boundaries. But he elected not to do so.

For instance, he admitted that the TCEQ rules allow him to use a method other than the Rational Method for purposes of calculating peak flow rates, with approval from the ED. So, he could have used a model like Dr. Cleveland's SWMM or like his own RAS model to determine the distributed peak flow rates occurring along the eastern permit boundary, including at comparison point A.

He also could have delineated smaller drainage sub-areas and applied the Rational Method equation to those smaller drainage areas.[44] This means that he could have determined the area that contributes flow to his comparison point A and calculated the peak flow rate for that area—providing a better understanding of the peak flow rate for water that exits the site at that specific point.

And finally, Stiggins confirmed that he could have determined what portion of the calculated 65 cfs exits the site at comparison point A—similar to the manner in which Dunbar estimated the peak flow rate occurring at comparison point A. But to do so accurately, he explained that he would need on-the-ground specific data. Stiggins visited

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[43] Ex. Knox-15, p. 3.
[44] Tr. V. 3, p. 14.

the site on multiple occasions and presumably could have gathered the requisite on-the-ground data that is required to determine what portion of the calculated 65 cfs occurs at comparison point A; yet, he did not undertake this exercise.

Protestants' Witness: Cezary Saxon

Protestants offered the testimony of Cezary Saxon, on remand. Mr. Saxon has extensive experience with the Rational Method. He also has extensive experience in designing detention ponds and analyzing surface water hydrology for purposes of designing hydrologic infrastructure. He is well-versed in developing and running various hydrologic models and programs. And he is a surveyor-in-training.

Mr. Saxon, unlike Mr. Stiggins, was able to conduct an in-depth review of Dr. Cleveland's SWMM. And based on his review of Dr. Cleveland's initial SWMM, he opined: "I don't agree with all of the inputs he [Dr. Cleveland] used for the SWMM model. . . . But overall, I do agree that the SWMM model gives us a better idea of the peak flow rates that occur in a diffuse manner along the permit boundary than the point discharge peak flow rates that Mr. Stiggins calculated using the Rational Method and assigned to his points of interest or comparison points."[45]

Mr. Saxon also reviewed Mr. Stiggins' analysis of existing drainage conditions at the site, including his calculation of peak flow rates. Mr. Saxon explained that while Stiggins properly calculated the peak flow rates, he improperly represented that the peak

[45] Ex. Knox-300, p. 14.

flow rates occur at specifically identified discharge or comparison points along the permit boundary:

> Mr. Stiggins computed these peak flows at these two points as if all of the runoff from his two subbasins or drainage areas naturally drain to these two points. In reality, based on the contour maps in the application, the runoff leaves the permit boundary in a diffuse manner at various locations all along the permit boundary, as testified to by Mr. Dunbar and shown by Dr. Cleveland's SWMM model. Only a small portion of this runoff actually leaves the permit boundary at the locations where these two detention ponds will be discharging their developed landfill flows. *So, his peak flows for existing conditions at the points of interest are too high*.[46]

In sum, Mr. Saxon explained (consistent with Dr. Cleveland's testimony and Mr. Dunbar's testimony) that if Diamond Back is going to use the Comparison Point A discharge location for purposes of comparing existing drainage conditions to proposed fully developed conditions, then, it must provide a reliable estimate of the peak flows that are occurring under existing conditions at that comparison point. More specifically, if Diamond Back's proposed pond weirs are intended to discharge runoff at peak flow rates that match those occurring under existing conditions at the same discharge location, then, Diamond Back must determine the peak flow rates occurring under existing conditions at the location of the proposed pond weirs. Diamond Back failed to do this.

Dunbar's Testimony

The new evidence and testimony provided by Diamond Back on remand did not impact Mr. Dunbar's opinions as expressed during the initial hearing on the merits. In fact,

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[46] Ex. Knox-300, p. 7 (emphasis added).

some of the new evidence (namely, Dr. Cleveland's analysis and testimony) supported Mr. Dunbar's opinions: "My primary opinions have not changed. My opinion remains that natural, existing drainage conditions and flow patterns were not reliably and adequately characterized and calculated in the Permit Application, and so, the Applicant cannot demonstrate that the landfill, once fully developed, will not result in significant adverse alterations/impacts to natural/existing drainage patterns. In fact, the additional modeling offered by Dr. Cleveland on behalf of the Applicant confirms my initial opinion."[47]

Mr. Dunbar also explained how Mr. Stiggins' latest RAS 2D model further supports his opinions as expressed during the initial hearing on the merits, in that the model demonstrates that flows exit the site via diffuse overland flows, not at certain discharge points:

> Even Mr. Stiggins' computer modeling of this site for Existing/pre-project conditions (using the computer software HEC-RAS) shows that the runoff leaves the site at various locations along the north and east portions of the site associated with Drainage Area A. Mr. Stiggins' modeling, described in his latest prefiled testimony, demonstrates that the total peak flows for Drainage Area A, under existing conditions, do not discharge at one specific discharge point; the flows discharge along the north and east portions of the permit boundary. The same is shown for Drainage Area B as runoff leaves the site along the southeast portions of the site. Thus, it is incorrect to compute the peak flows for Drainage Areas A and B using the Rational Method for their respective drainage area sizes and delineations that are distributed along large portions of the permit boundary, but then apply those total peak flow values when comparing them to the Proposed Conditions peak flows

[47] Ex. Knox-400, p. 3. *Compare with* Dr. Cleveland's testimony at Tr. V. 1, pp. 68 & 72.

being discharged from the two detention ponds across a very small portion of the permit boundary.[48]

Based on the evidence presented during the initial hearing and the remand hearing, it is apparent that Diamond Back did not present accurate information regarding the peak flow rates occurring under existing conditions at its comparison points.

The ALJ nevertheless recommended granting the permit, explaining that "nothing requires [the Applicant] to parse out additional points along the boundary where the proposed weirs are located, as Protestants and OPIC argue. . . . The ALJ also agrees that nothing requires Applicant to perform calculations or analyses other than those performed. This fact, coupled with the ED's approval of the sufficiency and accuracy of peak flow calculations for existing conditions, lead the ALJ to conclude that Applicant has met TCEQ requirements to calculate peak flow for existing conditions and provide a baseline for comparison with the post-development drainage patterns of the facility."[49]

But the issue presented is not about whether the Applicant's use of the Rational Method was proper. The issue presented is whether the Applicant accurately represented existing surface water drainage conditions, at its designated comparison points, which can reliably serve as a baseline for the required comparative analysis. The evidence presented

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[48] Ex. Knox-400, pp. 8-9; *see also* Tr. V. 3, pp. 141-146 (Dunbar explaining why Stiggins' peak flow rates for CP-A and CP-B misrepresent the actual peak flow rates that occur at those two points under existing conditions).

[49] PFD, p. 34. The PFD also references the ED's approval of the permit application, but it is worth noting that on this issue, the ED did not offer any written closing arguments, supporting the Applicant's contention that it accurately represented existing surface water drainage conditions at its designated comparison points—not after the initial hearing on the merits nor after the remand hearing.

overwhelmingly demonstrates that the Applicant failed to accurately and reliably assess the existing drainage conditions at its comparison points, and so, its comparative analysis is flawed, and it cannot demonstrate that the existing drainage conditions will not be adversely altered by the proposed landfill.

B. The evidence on remand continues to demonstrate that Diamond Back failed to design its detention ponds using the required 25-year, 24-hour design storm.

The rebuttal evidence presented by Diamond Back during the first hearing on the merits did not dispute that its application and evidence failed to demonstrate that its ponds were designed for the 25-year, 24-hour storm event. Indeed, the application did not include any calculations demonstrating that a 24-hour duration storm was used to design the detention ponds.

On remand, Diamond Back has presented no new evidence demonstrating that its detention ponds were designed based on the 25-year, 24-hour storm event. Instead, Diamond Back has attempted to justify its use of a uniform rainfall distribution method—which does not require a 24-hour storm duration, or any specific storm duration—for its detention pond designs. Diamond Back's position is that the Modified Rational Method requires use of a uniform rainfall distribution, and because Diamond Back relied on the Rational Method for its existing conditions analysis, it was required to use the Modified Rational Method (with a uniform, or constant intensity, rainfall distribution) to determine the volume for its detention ponds designs.

But this evidence is simply inadequate for purposes of demonstrating compliance with TCEQ's requirements—namely, with the requirement that the ponds be designed

based on the 24-hour duration storm. TCEQ rules do not require use of a Modified Rational Method (with a uniform, or constant intensity, rainfall distribution) for detention pond design; they require that the detention ponds be designed based on a 24-hour duration storm. Diamond Back failed to do this. Accordingly, Diamond Back cannot demonstrate that its proposed landfill will not adversely alter existing drainage patterns, and its requested permit should be denied.

Dr. Cleveland's Testimony & Evidence

Dr. Cleveland confirmed that the SWMM model he developed to reflect fully developed landfill conditions did not take into account the elevation changes for the fully developed landfill design. Accordingly, his SWMM provided little, if any, useful information for purposes of evaluating fully developed landfill conditions. That is, his calculated inflows to the proposed detention ponds are unreliable and inaccurate, because they are based on the existing site topography, not the proposed landfill topography.[50]

But Dr. Cleveland's analysis provided some useful information, in that he demonstrated what a non-uniform 25-year, 24-hour rainfall distribution hydrograph looks like. In developing his SWMM model, Dr. Cleveland used a 25-year, 24-hour design storm event, which generates rainfall hyetographs, with a non-uniform rainfall distribution. Dr. Cleveland further provided useful information explaining the SCS Type II design storm method for distributing rainfall:

[50] Tr. V. 2, pp. 121-122 (Stiggins testifying that he "absolutely disagrees" with Dr. Cleveland's SWMM model for fully developed conditions).

Q And the SCS type [II] method is a method that's commonly used in the industry for purposes of creating a hyetograph of rainfall time distribution. Right?
A Yes. It's referred to as a design storm.
Q And this method develops a somewhat balanced storm with the most intense part in the middle of the storm or at about hour 12 of a 24-hour period. Is that right?
A That is correct. So the -- the most intense parts of SCS design storms, depending on what part of the country that one works in, are at hour 12 and hour 13, one of those two time blocks.
Q Okay. And the purpose of your hyetograph was to show flow rates during an entire 24-hour period. Right?
A That's right.[51]

Dr. Cleveland explained that the SCS Type II method produces different rainfall intensities for different time blocks, which are then input into a model to generate a hydrograph.[52] By contrast, the uniform rainfall distribution that Mr. Stiggins relied on does not generate a hyetograph because it is a "constant intensity input."[53]

Dr. Cleveland also explained how his hydrograph and SCS hyetograph differ from what Stiggins provided in his surface water drainage report and from the hydrographs he prepared as Exhibits Applicant-204:

Q And looking at these tables [referring to the volume calculations for the ponds included in the application, at Exhibit Knox-20, page 3], the duration storm goes up to 110 minutes on each of these tables. Isn't that right?
A That's correct.
Q And so if looking at this, it appears that the Applicant used a constant intensity storm for 110 minutes based on these tables. Is that right?
A Yes.
Q And that's different from the SCS Type II method that you used for your SWMM model when you were -- when you were calculating the storm event over 24 hours. Is that right?

[51] Tr. V. 1, p. 55.
[52] Tr. V. 1, p. 153.
[53] Tr. V. 1, p. 154.

A That's correct. It's completely different. It's a different method.
Q And I think you also referred to the method that Mr. Stiggins used as either constant intensity or uniform distribution. Is that right?
A That's correct.
Q And the uniform distribution or constant intensity storm that -- design storm that Mr. Stiggins used produces a hydrograph that looks different from the one that you showed us earlier. Isn't that right?
A Oh, that's correct, different methods, different results.
Q And so the method that Mr. Stiggins used produces a trapezoidal-looking hydrograph. Right?
A Yes.
Q Whereas yours was more of a bell shape. Right?
A Maybe more of a bell. It's more – it's too technical – it's more of a gamma distribution, but anyway, bell shape is good enough.[54]

In sum, Dr. Cleveland explained—and provided examples of—what a non-uniform 25-year, 24-hour rainfall distribution looks like. He confirmed what Mr. Dunbar had already explained during the initial hearing on the merits—that a 24-hour duration storm event should reflect different rainfall intensities for different time blocks, and it should generate a bell-shaped or triangular-shaped hydrograph with the most intense parts of the storm near the middle of the hydrograph. Because Mr. Stiggins used a uniform rainfall distribution method for his Modified Rational Method, his volume calculations relied only on a 60-minute storm for Pond A and a 50-minute storm for Pond B, not a 24-hour duration storm event.[55]

Finally, Dr. Cleveland confirmed that Mr. Stiggins did not need to rely on a uniform rainfall distribution for use with the Modified Rational Method. Dr. Cleveland prepared a

[54] Tr. V. 1, pp. 116-117.
[55] Ex. Knox-20, p. 3; *see also* Tr. V. 1, p. 131 (Dr. Cleveland explaining that with the uniform rainfall distribution, there is no need to continue calculating volume for storm events greater than 110 minutes, "because your volumes required dropoff proportionately as the duration of the storm gets longer").

publication for TxDOT, entitled: "Use of the Rational and Modified Rational Method for Hydraulic Design."[56] In this document, he explained that the uniform rainfall distribution is not required for the Modified Rational Method; the "Modified Rational Method can be used to generate runoff hydrographs for any nonuniform rainfall event."[57] In fact, Dr. Cleveland acknowledged that he is capable of using a non-uniform rainfall event (or variable rainfall intensity) with the Modified Rational Method.[58] He also acknowledged that he did not know whether it is standard industry practice to rely on the Modified Rational Method for designing ponds based on a 24-hour duration storm.[59]

Stiggins' Testimony

Mr. Stiggins did not provide any new evidence establishing that he designed his ponds using a 24-hour duration storm. Instead, he only offered testimony attempting to explain why he did not need to use a 24-hour duration storm, despite what TCEQ rules and its guidance document require.

As he explained it, the 24-hour duration storm is implicitly recognized in his volume calculations, using the uniform rainfall distribution—as is the 63-hour duration storm and the 82-hour duration storm, and all other durations of storms, in perpetuity.[60] By contrast, a non-uniform rainfall distribution method, such as the SCS Type II hyetograph that Dr.

[56] Ex. Knox-21.
[57] Ex. Knox-21; Tr. V. 1, p. 121.
[58] Tr. V. 1, p. 125.
[59] Tr. V. 1, pp. 158-159.
[60] Tr. V. 3, pp. 64-65.

Cleveland used, can be used for purposes of generating a 24-hour duration storm, specifically—as required by TCEQ's rules and guidance document.[61]

In short, Mr. Stiggins' latest testimony only acknowledges what Mr. Dunbar explained in the first hearing on the merits: that he did not design his storms using a 24-hour duration storm event.

Saxon's Testimony

Mr. Saxon prepared an exhibit, relying on information supplied by Dr. Cleveland and Mr. Stiggins, that illustrates the difference in results from a uniform rainfall distribution and a variable rainfall intensity.[62] As he explained it, the exhibit "is a comparison of 25-year/24-hour rainfall distribution patterns, based on Mr. Stiggins' constant rainfall pattern method of distribution and Dr. Cleveland's SCS method of rainfall pattern distribution. The bar chart is from Dr. Cleveland's Exhibit 1005, and I added the red line to demonstrate Mr. Stiggins' method of distributing the design storm event."[63] This exhibit demonstrates how Mr. Stiggins' use of a uniform rainfall distribution produces results that are inconsistent with a variable rainfall distribution for a 24-hour duration storm; Stiggins' method underestimates the volumes generated by such a storm.

Dunbar's Testimony

In his prefiled testimony, on remand, Mr. Dunbar identified the disputed issue presented in this matter regarding the detention pond designs: "The disputed issue here

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[61] Tr. V. 3, p. 65.
[62] Ex. Knox-304.
[63] Ex. Knox-300, p. 20.

appears to be: how does one describe the 25-year 24-hour storm event to be used for such a design?"[64] Based on his review of dozens of landfill permit applications in Texas, over several decades, Mr. Dunbar is very familiar with how the design storm event is to be applied in designing detention ponds.[65] As he explained it:

> There are a few ways to distribute the 25-year 24-hour rainfall for purposes of designing detention ponds and other drainage facilities for landfill projects in Texas in order to meet TCEQ rules. However, all of them distribute the total rainfall so as to produce a bell shape of the rainfall that varies over the 24 hours of the storm event. Dr. Cleveland's model shows such a distribution of the 25-year 24-hour storm event in his SWMM models, using the SCS Type II distribution method (see Remand Exhibit Applicant-1004).

He then contrasted the typical rainfall distribution methods used for 24-hour duration storm events (such as Dr. Cleveland's model) with Mr. Stiggins' use of the uniform rainfall distribution for designing his detention ponds:

> On the other hand, Mr. Stiggins distributed the 25-year 24-hour rainfall amount of 4.7 inches uniformly across the 24 hours, using a constant rainfall intensity of about 0.2 inches per hour. By the way, this is the rainfall pattern Mr. Stiggins used in his RAS 2D model discussed above for Existing Conditions. This is not how the 25-year 24-hour storm event is distributed when designing detention ponds for landfill projects in Texas under TCEQ rules. By applying the Modified Rational Method (MRM) the way it was done by Mr. Stiggins for the design of the two proposed detention ponds in this matter, the resulting volume of runoff flowing into these two ponds are shown in the permit application as 360,743 cubic feet for the North Pond and 248,921 cubic feet for the South Pond (from Table III.C.E in the permit application). These volumes equate to less than 1 inch of runoff for the 25-year 24-hour design storm, as assumed by Mr. Stiggins.
> However, the runoff volumes assumed by Dr. Cleveland entering the North Pond and South Pond for his 25-year 24-hour design storm of 4.69 inches of rain/runoff would have been 1.77M cubic feet for the North Pond (4.69 in/12

[64] Ex. Knox-400, p. 9.
[65] *Id.*

> in/ft x 103.9 acres x 43,560 sq ft/acre) and 1.29M cubic feet for the South Pond (4.69 in/12 in/ft x 75.6 acres x 43, 560 sq ft/acre).[66]

The consequence of Stiggins' failure to correctly apply the 25-year 24-hour storm event when designing the detention ponds is that the detention ponds are inadequate and undersized. As Mr. Dunbar explained, "Mr. Stiggins has not provided any new information indicating that the permit application properly used the 25-year 24-hour storm event in designing and sizing the detention ponds, and Dr. Cleveland's analysis of the 25-year 24-hour design storm and his assumptions would produce runoff volumes entering these two ponds far in excess of what Mr. Stiggins assumed in the permit application."[67]

It is worth noting that Mr. Stiggins testified that he had never used the Modified Rational Method for detention pond designs before this permit application.[68] And the ED's witness, Mr. Yadav, also testified that he had not reviewed a landfill permit application where the Modified Rational Method was used for the detention pond designs.[69] This is consistent with Mr. Dunbar's testimony—all of the permit applications that he has reviewed used a variable rainfall distribution method for designs based on a 24-hour duration storm.

In sum, because Mr. Stiggins incorrectly applied the 25-year 24-hour storm event, he failed to demonstrate compliance with TCEQ requirements, and his detention ponds are undersized.

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[66] Ex. Knox-400, pp. 10-11.
[67] Ex. Knox-400, p. 11.
[68] Tr. V. 3, p. 15.
[69] Tr. V. 3, p. 82.

The ALJ noted that the "preponderance of the evidence would suggest that the use of the Modified Rational Method, and its accompanying uniform rainfall distribution, to determine the volume of runoff for a 25-year, 24-hour storm for areas of this size is novel."[70] She further acknowledged that "*none* of the testifying experts had used or seen the Modified Rational Method for detention pond design."[71] She nevertheless recommended granting the permit, because, as she explained it, "the ED approved Applicant's use of this equation for this purpose, as allowed by TCEQ rules, and the preponderance of the evidence demonstrates that the Modified Rational Method was correctly applied and reflected accurately in the Surface Water Drainage Report."[72]

Here, again, the issue presented is *not* whether the Applicant properly applied the MRM. Rather, the issue presented is whether the Applicant's detention ponds were designed based on the required 25-year, 24-hour design storm event. The evidence in the record reveals that the Applicant did not use a 24-hour duration storm for purposes of designing detention ponds. That the Applicant chose to use the MRM for designing its detention ponds does not absolve the Applicant from satisfying its evidentiary burden, and on this issue, Applicant failed to do so.

CONCLUSION AND PRAYER

For the reasons described above, Protestants respectfully request that the Commission reverse the PFD and the proposed Order prepared by the ALJ, and issue an

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[70] PFD, p. 50.
[71] *Id.* (emphasis in original).
[72] *Id.*

Order denying Diamond Back's application for a landfill permit, based on the findings and conclusions provided in the ALJ's initial PFD and proposed order.

Respectfully submitted,

/s/ Marisa Perales
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Counsel for Knox Real Property Development, LLC and Jason Harrington

CERTIFICATE OF SERVICE

By my signature, below, I certify that on July 6,2023, a true and correct copy of the foregoing document was served upon the following parties via electronic service.

/s/ Marisa Perales
Marisa Perales

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For the Administrative Law Judge
(served with SOAH e-filing)
The Honorable Megan Johnson
Administrative Law Judge
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ATTACHMENT A

10/12/2020 12:55 PM	HARRINGTON, JASON	Comment - Written English	In addition to my previously submitted comments regarding flooding and drainage issues that will be caused by this landfill, the application does not contain adequate justification for the alternate liner design in the application. Just like in the case of the Post Oak landfill, the application for the Diamondback landfill fails to meet several requirements for the approval of an alternative liner design. I am not convinced that the liner proposed will be adequate in protecting residents and the water supply from contamination. Properly designing, constructing and operating a landfill in compliance with TCEQ regulations should not be entrusted to people who have no experience. Running a landfill takes years of experience and lots of expertise to make sure it is done in a way that is safe to the environment and the community. After a thorough internet search, I have never heard of this landfill company and it appears they have zero experience handling waste that could pose a threat to our air and water. Our community should not be a testing ground for this company's first try at a landfill. In addition to the deficiencies with design, the application is inadequate with regards to easements that traverse the landfill site. There are no documents showing that those pre-existing easements through parts of the landfill have been removed. Showing proper ownership rights in the proposed landfill property is an absolute requirement that has not been met. The opponents to this landfill project should not be required to expend their money and time to fight something that cannot be permitted because of this deficiency in the application. Finally, the application shows multiple active and plugged oil and gas wells on the proposed permit site. Access to those wells is a right of those well operators, and it will be violated by this proposed landfill. These wells provide a conduit to the groundwater, so they can, if improperly plugged, represent an environmental threat to the area. more
10/12/2020 11:35 AM	HARRINGTON, JASON	Comment - Written English	This landfill will alter the natural drainage patterns for rainwater in the vicinity. West Texas is prone to flooding, this is a known fact. While we may not get a lot of rain often, when we do, we struggle to deal with it. The Diamondback Landfill is only going to make this perennial problem worse. We will do everything in our power to prevent this landfill from happening. The huge mounds and structures built at a landfill will redirect flash flood waters onto neighboring property. It is TCEQ's job to regulate these facilities so that they not only function properly but also do not destroy the surrounding area. As proposed this facility has no safeguards in place to protect against flash flooding. This permit should be denied until action is taken to address this.

ATTACHMENT B

FILED FOR RECORD
Cause No.: A-23-01-0088-CV
Ector County - 70th District Court
Ector County, Texas
1/17/2023 12:45 PM
Clarissa Webster
District Clerk
By: DiAnn Espinoza, Deputy

CAUSE NO. A-23-01-0088-CV

IN RE:	§	
	§	
PETITION OF DIAMOND BACK RECYCLING AND SANITARY LANDFILL, LP	§	
	§	
REQUESTING DEPOSITION OF KNOX REAL PROPERTY DEVELOPMENT, LLC; JASON HARRINGTON; AND ERIC ALLMON OF PERALES, ALLMON & ICE, P.C.	§	**ECTOR COUNTY, TEXAS**

VERIFIED PETITION REQUESTING DEPOSITION AND DOCUMENT PRODUCTION TO INVESTIGATE CLAIMS

TO THE HONORABLE COURT:

COMES NOW, Diamond Back Recycling and Sanitary Landfill, LP, the Petitioner, requesting authority to take the deposition of a representative of and request documents from Jason Harrington; Knox Real Property Development, LLC; and Eric Allmon of Perales, Allmon & Ice, P.C. in order to investigate potential claims.

A. Parties

1. Petitioner is Diamond Back Recycling and Sanitary Landfill, LP ("Diamond Back"), a Texas Limited Partnership.

2. Respondent Jason Harrington ("Mr. Harrington"), is an individual that may be served with process at Mr. Harrington's usual place of business or abode in Ector County, Texas at 101 S. Crane Ave, Odessa, Texas 79763, or wherever Mr. Harrington may be found.

3. Respondent Knox Real Property Development, LLC ("Knox Real Property"), is a Texas limited liability company with its principal office in Ector County, Texas. Knox Real Property may be served with process on its registered agent for service, Jason Harrington, at 101 S. Crane Ave, Odessa, Texas 79763, or wherever Knox Real Property may be found.

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4. Respondent is Eric Allmon of Perales, Allmon & Ice, P.C. ("PAI"), a Texas professional corporation with its principal office in Travis County, Texas. PAI may be served with process on its registered agent for service, Eric Allmon, at 1206 San Antonio Street, Austin, Texas 78701, or wherever PAI may be found.

B. Venue

5. Venue for this petition is proper in Ector County, Texas because Jason Harrington resides in Ector County. Tex. R. Civ. Proc. 202.2.

C. Facts Supporting Request

6. On or about August 5, 2019, Diamond Back filed an application with the Texas Commission on Environmental Quality ("TCEQ") for a new municipal solid waste ("MSW") permit to authorize the acceptance of residential and commercial municipal solid waste from Ector and the surrounding counties, which was filed as Proposed Permit No. 2404, TCEQ Docket no. 2021-10000-MSW, SOAH Docket No. 582-22-0844 ("TCEQ Proceeding"). Diamond Back's application was declared administratively complete on October 1, 2019.

7. In the course of the permit process with the TCEQ, Mr. Harrington, Knox Real Property, and Eric Allmon of PAI filed numerous comments and requests for hearing contesting the permit. During the proceeding to obtain the permit, Diamond Back took the deposition of Mr. Harrington and his and/or Knox Real Property's designated expert witnesses.

8. In his deposition, Mr. Harrington admitted he never contacted his attorney with regard to his representation, is not paying for his attorney, is not responsible for his expert's fees, and could not recall whether he had been involved in any way with the mediation referral ordered by the TCEQ Commissioners. Mr. Harrington further stated that he has no idea who pays for his attorney fees, saying that he suspects that the "land defense fund," headed by an Evan Wheeler, is

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covering them, because that is who reached out to him regarding objecting to the Diamond Back permit in the first place.

9. Diamond Back has reason to believe that Mr. Harrington, Knox Real Property, and an unknown third party has, among other things, unlawfully interfered with, conspired, or acted to restrain Diamond Back's trade or commerce. If a third party without a cognizable legal interest or standing in the TCEQ Proceeding is directing, managing, and funding the activities of Knox Real Property and Mr. Harrington, Diamond Back has been injured and will file suit against them for such conduct and to recover any and all damages to which it is entitled to recover.

D. Information Needed

10. Diamond Back needs a pre-suit deposition of Respondents and Respondents' corporate representative(s) regarding the following:

a. Any and all contracts, written or oral, between Knox Real Property and its designated experts in the TCEQ Proceeding.

b. Any and all communications between PAI and the payor of Knox Real Property and/or Mr. Harrington's attorney fees.

c. Any and all contracts, written or oral, between PAI and the payor of Knox Real Property and/or Mr. Harrington's attorney fees.

d. Amount and method of payment to PAI, and the identity of the payors, for or on behalf of Knox Real Property and/or Mr. Harrington and related to the TCEQ Proceeding.

e. Amount and method of payment to, and the identity of the payors, of Knox Real Property's expert witnesses in the TCEQ Proceeding, Scott Henke, Jorge Zornberg and Lawrence Dunbar.

11. Additionally, the following documents and communications in the actual, constructive control, custody, or possession of Respondents are crucial to the investigation of Diamond Back's potential claims:

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a. Any and all communications (including without limitation emails and text messages) from August 5, 2019 to the present between PAI and the payor of Knox Real Property and/or Mr. Harrington's attorney fees relating to the TCEQ Proceeding.

b. Any and all communications (including without limitation emails and text messages) from August 5, 2019 to the present between PAI and the payor of Knox Real Property and/or Mr. Harrington's expert witnesses in the TCEQ Proceeding.

c. Any and all items evidencing payments to PAI on behalf of Knox Real Property and/or Mr. Harrington relating to the TCEQ Proceeding.

d. Any and all items evidencing payments to Knox Real Property's expert witnesses in the TCEQ Proceeding, Scott Henke, Jorge Zornberg and Lawrence Dunbar.

e. Any and all items evidencing reimbursements to PAI on behalf of Knox Real Property and/or Mr. Harrington, if any relating to the TCEQ Proceeding.

f. Any and all items evidencing reimbursements to Knox Real Property's expert witnesses in the TCEQ Proceeding, Scott Henke, Jorge Zornberg and Lawrence Dunbar, if any.

g. Contract for services and/or payment made between PAI and the payor of Knox Real Property and/or Mr. Harrington's attorney fees, administrative/court costs, and expert fees.

h. Contracts for services hiring Knox Real Property's expert witnesses in the TCEQ Proceeding, Scott Henke, Jorge Zornberg and Lawrence Dunbar.

i. Contract for services between Knox Real Property and/or Mr. Harrington and PAI.

12. All of this information, including depositions and documents, is necessary to investigate potential claims, if any, against Respondents and/or any other third party.

13. The benefits to Diamond Back in knowing whether Respondents unlawfully interfered with or restrained trade or commerce outweigh any burden imposed by Respondents' deposition and production of documents. Diamond Back needs this information from Respondents to determine whether Diamond Back has claims against Respondents and unknown third parties. Without the information above, which Respondents have, Diamond Back cannot discover fully

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whether Respondents and/or third parties have damaged Diamond Back by seeking to illegally restrain trade or commerce. In contrast to the benefits, the burden on Respondents is minimal. The documents sought by Diamond Back were all created within the last 4 years and are presumably of easy access to Respondents.

E. Request for Relief

FOR THE REASONS STATED, pursuant to Rule 202, Petitioner requests the Court to enter an Order (i) authorizing Petitioner to take the oral depositions of Jason Harrington and Eric Allmon; (ii) directing Jason Harrington, Knox Real Property and Eric Allmon not to destroy, alter, or conceal any requested items; and (iii) directing Jason Harrington, Knox Real Property and Eric Allmon/ Perales, Allmon & Ice, P.C. to produce all items described herein. To that end, Petitioner requests a hearing on this petition as soon as practicable. Tex. R. Civ. P. 202.

Respectfully submitted,

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By: */s/ Darrell W. Corzine*
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ATTORNEYS FOR PETITIONER

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VERIFICATION

STATE OF TEXAS §
COUNTY OF ECTOR §

Before me, the undersigned authority, on this day personally appeared Michael G. Valenzuela, who, being by me duly sworn on his oath deposed and stated as follows:

1. "My name is Michael Valenzuela. I am the Managing Partner of Diamond Back Recycling and Sanitary Landfill, LP ("Diamond Back") and was (am) directly responsible for the application with the Texas Commission on Environmental Quality for a new municipal solid waste permit to authorize the acceptance of residential and commercial municipal solid waste from Ector and the surrounding counties, which was filed as Proposed Permit No. 2404, TCEQ Docket no. 2021-10000-MSW, SOAH Docket No. 582-22-0844. I am over 21 years of age and have never been convicted of a felony or a crime involving moral turpitude, nor have I ever been adjudged incompetent. I am competent and qualified in all respects to make this Verification from my personal knowledge.

2. "All factual statements contained in the foregoing petition are true and correct according to my personal knowledge and according to information obtained from others."

Further Affiant sayeth not.

MICHAEL G. VALENZUELA

SUBSCRIBED AND SWORN TO BEFORE ME on the 17th day of January 2023.

VICKI L STEEL
NOTARY PUBLIC
STATE OF TEXAS
MY COMM. EXP. 08/15/25
NOTARY ID 514847-7

NOTARY PUBLIC, STATE OF TEXAS

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ATTACHMENT C

FILED FOR RECORD
Cause No.: A-23-01-0088-CV
Ector County, Texas
04/20/2023 4:18:44 PM
Clarissa Webster
District Clerk
By Deputy: Rodriguez, Rocio

CAUSE NO. A-23-01-0088-CV

IN RE:	§	**IN THE DISTRICT COURT**
	§	
PETITION OF DIAMOND BACK RECYCLING AND SANITARY LANDFILL, LP	§	
	§	**OF ECTOR COUNTY, TEXAS**
REQUESTING DEPOSITION OF KNOX REAL PROPERTY DEVELOPMENT, LLC; JASON HARRINGTON; AND ERIC ALLMON OF PERALES, ALLMON & ICE, P.C.	§	**70th JUDICIAL DISTRICT**

ORDER DENYING MOTION TO DISMISS UNDER TEXAS CITIZENS PARTICIPATION ACT AND DENYING PETITION REQUESTING DEPOSITION AND DOCUMENT PRODUCTION UNDER RULE 202

Pending before the Court is Diamond Back Recycling and Sanitary Landfill, LP's First Amended Verified Petition Requesting Deposition and Document Production to Investigate Claims, under Texas Rule of Civil Procedure 202 ("Rule 202 Petition"), and responses and objections thereto, filed by Respondents Knox Real Property Development, LLC, Jason Harrington, and Eric Allmon of Perales, Allmon & Ice, P.C.

Also pending before the Court are the First Amended Motions to Dismiss under the Texas Citizens Participation Act ("Motions to Dismiss"), filed by Knox Real Property Development, LLC and Jason Harrington and by Eric Allmon of Perales, Allmon & Ice, P.C., and the response to the Amended Motions to Dismiss by Diamond Back Recycling and Sanitary Landfill, LP.

On April 13, 2023, the Court convened a hearing on the Motions to Dismiss and on the Rule 202 Petition. All parties appeared through counsel. Having considered the

pleadings, evidence, and the arguments presented by the parties, the Court determines that the Motions to Dismiss should be denied. The Court further determines that the Rule 202 Petition should also be denied.

It is therefore ORDERED that the First Amended Motions to Dismiss under the Texas Citizens Participation Act filed by Knox Real Property Development, LLC and Jason Harrington and by Eric Allmon of Perales, Allmon & Ice, P.C., are hereby DENIED.

It is further ORDERED that Diamond Back Recycling and Sanitary Landfill, LP's First Amended Verified Petition Requesting Deposition and Document Production to Investigate Claims, under Texas Rule of Civil Procedure 202, is hereby DENIED.

Having denied all pending requests for relief in this matter, nothing further remains pending in this Court. This Order is intended to resolve all issues and claims.

4/20/2023 4:17:47 PM

SIGNED this _____ day of _____, 2023.

DENN WHALEN
HONORABLE JUDGE PRESIDING

Approved as to form:

/s/ *Darrell W. Corzine* (with permission)
Darrell W. Corzine
Denis Dennis
Benjamin Petty
Kelly, Morgan, Dennis, Corzine & Hansen, P.C.
Attorneys for Diamond Back Recycling and Sanitary Landfill, LP

/s/ Randall L. Rouse (with permission)
Randall L. Rouse
Lynch, Chappell & Alsup, PC
Attorney for Eric Allmon of Perales, Allmon & Ice, P.C.

/s/ Marisa Perales
Marisa Perales
Perales, Allmon & Ice, P.C.
Attorney for Knox Real Property Development, LLC & Jason Harrington