

TCEQ DOCKET NO. 2023-0265-MSW

APPLICATION BY	§	BEFORE THE
USA WASTE OF TEXAS LANDFILLS, INC.	§	TEXAS COMMISSION
FOR MUNICIPAL SOLID WASTE	§	ON
PERMIT NO. 2185A	§	ENVIRONMENTAL QUALITY

**WESTWIND INDUSTRIES LP'S REPLY TO RESPONSES TO HEARING REQUESTS
AND REQUESTS FOR RECONSIDERATION**

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

Westwind Industries LP (“Westwind”) files this Reply to the Responses to Hearing Requests and Requests for Reconsideration of Applicant, the Executive Director (“ED”), and the Office of Public Interest Counsel (“OPIC”).

I. Affected Person Status.

Each of the Applicant, the ED, and OPIC have indicated that Westwind is an affected person.¹ Westwind agrees that it squarely qualifies as an affected person, as Westwind discussed in Westwind’s Request for Contested Case Hearing and Request for Reconsideration, attached for convenience as **APPENDIX A**. For purposes of the Commissioners’ analysis of standing issues in this matter, Westwind highlights that while TCEQ rules provide an extensive list of factors to be considered, the rules also require consideration of all factors presented relating to a requestor’s personal justiciable interest, including, but not limited to the list provided by rule.²

II. Reply to Responses to Westwind’s Issues for Contested Case Hearing.

¹ Applicant expressly declined to challenge Westwind’s right to request a contested case hearing as an affected person.
² 30 Tex. Admin. Code § 55.203(c).

Westwind respectfully requests that the Commissioners consider each issue submitted in its Request for Contested Case Hearing and Request for Reconsideration.³ Further, Westwind submits the following specific replies regarding issues of notice, impacts on the surrounding minority community, and the history of the site as a sand and gravel mine and illegal dump location.

A. Compliance with Notice Requirements is a Relevant and Material Issue.

Westwind agrees with the ED and OPIC that whether the Applicant complied with all notice requirements is a relevant and material issue that should be included in any contested case hearing on this application. Applicant argues in a conclusory manner, without reference to evidence, that notice disputes are somehow not relevant and material to its application. Applicant spuriously argues that notice is sufficient (and therefore not an issue even though contested) because everyone that complained of notice deficiencies in this matter has also appeared in this matter to make their complaint. Applicant completely fails to address any potentially affected persons who did not receive notice of the application as required by TCEQ rules and have not had the opportunity to participate in this matter. Thus, Applicant's argument ignores the basic purpose of notice. Accordingly, the ED and OPIC are correct—whether Applicant complied with all notice requirements is a relevant and material issue that must be included in any contested case hearing on the subject application.

B. Issues of Environmental Justice are squarely relevant and material.

Whether the proposed facility expansion would impose disproportionately high and adverse human health or environmental effects on minority and low-income populations⁴ is a relevant and material issue. Federal law mandates it to be so. Westwind believes that this issue is

³ See Appendix A (Westwind's. Request for Contested Case Hearing and Request for Reconsideration).

⁴ See Appendix A at 5.

included within land use considerations, but also requests it be added as a stand-alone issue to ensure it is not improperly ignored or mistreated as it was in the Applicant's, ED's, and OPIC's responses.

In their respective responses, Applicant ignored environmental justice issues entirely, the ED issued merely a conclusory statement that TCEQ considers the surrounding community without regard to socioeconomic or racial status and then, without basis, deemed the issues not relevant or material, and OPIC correctly recited the suite of federal laws and guidance that TCEQ is required to follow relating to environmental justice. OPIC further explained that these laws have the purpose of “ensuring [TCEQ's] actions are not intentionally discriminatory and will not have discriminatory effects.”⁵ This is the applicable legal standard.

OPIC recites that “Executive Order 12898 addresses the environmental and human health conditions of minority communities and low-income communities and calls on agencies to make achieving environmental justice part of their mission.”⁶ However, later OPIC improperly claims that issues regarding impacts upon minority and low-income populations cannot be addressed in proceedings on this application and should not be referred to SOAH because the issues “are not currently addressed by concrete guidance or permitting rules.”⁷

TCEQ is not allowed to sidestep environmental justice issues merely by failing to promulgate specific guidance and rules relating to environmental justice. Regardless of whether TCEQ has promulgated such rules and guidance, federal law requires TCEQ to ensure that its permitting actions are not intentionally discriminatory and will not have discriminatory effects. Because federal law mandates this upon TCEQ, the issue of “whether the proposed facility

⁵ See OPIC's Response to Requests for Hearing and Requests for Reconsideration at 21 (citations omitted).

⁶ See *id.* (citations omitted).

⁷ See *id.* at 22.

expansion would impose disproportionately high and adverse human health or environmental effects on minority and low-income populations” is a relevant and material issue that must be included in any contested case hearing. (The standard or test to be applied to this issue is whether the application is intentionally discriminatory or will have discriminatory effects.)

C. Historical Site Use (including illegal dumping) is relevant and material.

The site’s history as a sand and gravel mining operation and its history as an illegal dumping site prior to passage of Subtitle D are relevant and material issues that should be included in any contested case hearing. As its issue U), Westwind requested inclusion of “Whether the proposed application, design, and operation adequately addresses all known past uses of the site, such as unpermitted waste disposal and commercial sand and soil mining operations.”⁸ Although Westwind asserts that these issues are already encompassed within larger site characterization considerations, Westwind requests that the issue be included as a stand-alone issue to prevent it from being ignored or claimed to be not relevant or material as was done in Applicant’s, ED’s, and OPIC’s responses.

The history of past site uses are highly relevant and material to the subject application, because the past uses of the site for sand and gravel mining and for unpermitted dumping directly impact the character of the subsurface immediately beneath the proposed landfill expansion. Without considering this history and the impacts of these past uses, the site cannot be adequately characterized in compliance with TCEQ rules. Further, the use of portions of the site for historical illegal dumping also raises legal questions regarding whether TCEQ is allowed to build upon pre-Subtitle D dumps to substantially extend their life when Subtitle D was passed in order to close

⁸ See Appendix A at 7 (requesting issue “U) Whether the proposed application, design, and operation adequately addresses all known past uses of the site, such as unpermitted waste disposal and commercial sand and soil mining operations.”).

those same dumps. This issue is certainly relevant and material and Westwind contends that it must be included in any contested case hearing.

III. Reply to Responses to Westwind's Request for Reconsideration.

Each of the Applicant, the ED, and OPIC have declined to respond to the substance of Westwind's Request for Reconsideration. Westwind's Request for Reconsideration relates to a pattern of significant false submissions by the Applicant for which this application may be immediately denied pursuant to applicable TCEQ rules. To avoid a scenario in which Commissioners are not provided a copy of Westwind's Request for Reconsideration, it is attached as **APPENDIX A**.

Westwind's Request for Reconsideration provides that the ED's Decision on this Application should be overturned for two reasons. First, pursuant to 30 Texas Administrative Code § 330.57(d), the subject application should be denied because the Applicant repeatedly provided significant false information to TCEQ. Second, the ED's Decision should be overturned because the proposed overliners in the application fails to meet TCEQ rules requiring an underlying formation of sufficient strength to ensure stability and long-term viability of the proposed overliners.

Westwind's Request for Reconsideration provides documented and conclusive evidence sufficient to deny the Application for submission of false information. The Request for Reconsideration demonstrates that Applicant falsely represented that in-situ or recompacted clay liners existed, failed to disclose the existence of slurry walls as an existing primary liner, and that this hampered TCEQ's review and resulted in an inadequate design. The Applicant, the ED, and OPIC each wholly failed to substantively address or refute Westwind's evidence justifying application denial.

Based on the evidence Westwind presented, TCEQ Commissioners are authorized to deny the subject application for submission of material false information pursuant to 30 Texas Administrative Code § 330.57(d) (stating that “submission of false information shall be grounds for permit denial.”)⁹ Because the Applicant, ED, and OPIC failed to refute Westwind’s evidence of material false submissions leading to inadequate design that could result in adverse effects on health, welfare, environment, or physical property of nearby residents and property owners in violation of 30 Texas Administrative Code § 330.57(d), Westwind respectfully requests that the Commissioners deny the subject application.

Respectfully submitted,

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⁹ The rule in full states: “(d) Required information. The information required by this subchapter defines the basic elements for an application. All aspects of the application and design requirements must be addressed by the owner or operator, even if only to show why they are not applicable for that particular site. **It is the responsibility of the applicant to provide the executive director data of sufficient completeness, accuracy, and clarity** to provide assurance that operation of the site will pose no reasonable probability of adverse effects on the health, welfare, environment, or physical property of nearby residents or property owners. **Failure of the owner or operator to provide complete information as required by this chapter may be cause for the executive director to return the application without further action** in accordance with §281.18 and §281.19 of this title (relating to Applications Returned and Technical Review). **Submission of false information shall constitute grounds for denial of the permit application.**” (emphasis added).

APPENDIX A

Westwind's Request for Contested Case Hearing and
Request for Reconsideration of the Executive Director's Decision



February 23, 2023

Transmitted electronically via TCEQ website

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

Re: **TCEQ DOCKET NO. 2023-0265-MSW**
Request for Contested Case Hearing of Westwind Industries LP
Request for Reconsideration of Executive Director's Decision
USA Waste of Texas Landfill, Inc., CN60256090 ("Applicant")
Municipal Solid Waste Major Permit Amendment Application
Hawthorn Park Recycling and Disposal Facility
10550 Tanner Road
Houston, Harris County, Texas
TCEQ Permit MSW-2185A

Dear Ms. Gharis:

Our firm, along with VBPena Law, PLLC and McGuffey Law, PLLC, represent, Westwind Industries LP, 10423 W. Gulf Bank Rd., Houston, Texas 77040 ("Westwind"). Westwind may be contacted through our office. Westwind timely files this Request for Contested Case Hearing for the referenced application, and furthermore timely files this Request for Reconsideration of the Executive Director's Decision.

I. Summary.

As discussed in Section II of this document, Westwind requests a contested case hearing regarding the referenced Application by USA Waste of Texas Landfill, Inc. ("Applicant") for a Municipal Solid Waste (MSW) Major Permit Amendment, Proposed Permit MSW-2185A. Westwind requests a contested case hearing on all issues raised in its written comments, prior

hearing request, and oral comments at public meetings. The Executive Director's Response to Public Comments ("RTC") does not resolve the issues previously raised by Westwind.

In addition, as discussed in Section III of this document, Westwind respectfully requests that the Commission Reconsider the Executive Director's Decision dated January 24, 2023, due to (1) repeated omissions and false submissions to TCEQ regarding the nature of the existing liners, and (2) Applicant's failure to provide required stability analysis for its overliner system proposed to be on top of closed and near-capacity landfills.

II. Westwind's Request for Contested Case Hearing.

Westwind hereby requests a contested case hearing regarding the referenced Application by USA Waste of Texas Landfill, Inc. ("Applicant") for a Municipal Solid Waste (MSW) Major Permit Amendment, Proposed Permit MSW-2185A.¹ Westwind previously raised issues related to this application in the following filings: (1) in Westwind's comments, request for public meeting, and request for contested case hearing dated August 30, 2021; (2) in Westwind's more extensive public comments dated June 28, 2022; and (3) in oral comments at TCEQ public meetings held on January 18, 2022 and June 28, 2022. The Executive Director's Response to Public Comments ("RTC") does not resolve the issues previously raised by Westwind.

A. Westwind is an "affected person."

TCEQ rules govern the determination affected person status for purposes of a contested case hearing. "For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An

¹ Westwind previously requested a contested case hearing in comments submitted on August 30, 2021, and this is a supplement to that hearing request.

interest common to members of the general public does not qualify as a personal justiciable interest.”² TCEQ rules provide an extensive list of factors to be considered, but notably, the rules also mandate that “[i]n determining whether a person is an affected person, all factors shall be considered, including, but not limited to [the list provided by rule].”³ Thus, TCEQ is bound to consider all information provided that relates to a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.

Undoubtedly, Westwind qualifies for affected person status in this matter. First, Westwind is an adjacent property owner that will be adversely affected by the nuisance conditions, soil contamination, and water contamination issues that accompany this proposed landfill expansion. Westwind owns approximately 23 acres of land adjacent to the landfill facility—18 acres across Tanner Road, and 5 acres across Crawford Road. This fact alone is sufficient to secure Westwind’s affected person status.

The proposed landfill expansion directly across Tanner Road will transform the subject landfill from a barely-active, appointment-only, virtually-closed, and nearing capacity legacy landfill site into a 10-12 story high nuisance to the eyes, ears, nose, and throat of Westwind and its new residents and business tenants. If approved, the landfill expansion will present a myriad of adverse consequences—it will be visually unappealing, will generate noise and traffic from large trucks, will release foul odors, and worst of all, will contaminate and damage the soil and shallow groundwater of Westwind, Westwind’s residents and business tenants, and the other nearby property owners.

² 30 Tex. Admin. Code § 55.203(a).

³ 30 Tex. Admin. Code § 55.203(c) (emphasis added).

Second, Westwind will face considerable economic injury resulting from the identified impacts on the use and enjoyment of their property if this landfill expansion is approved. Westwind is expending considerable money and effort to develop its acreage into a mixed residential and commercial development. Development of the Westwind property is not speculative in nature—it is already occurring. There is currently construction on Westwind's property for Westover Apartments, a development of 324 residential apartment units, that anticipates leasing will begin April 1, 2023. Additionally, a new 7/11 convenience store and gas station is located on Westwind's property at the corner of Tanner Road and Beltway 8. This 7/11 was recently constructed to serve the new area residents and businesses and is set to open March 7, 2023.

Area landowners, including Westwind, have reasonably expected imminent closure of this landfill facility for many years. This landfill has been near-capacity and virtually closed for approximately 6 years, and this site has a sordid 50-year history of sand and soil mining operations followed by unpermitted and permitted disposal operations predating the year 1977. However, the Applicant now proposes to add more than 46 more years to this landfill's life through an ill-advised vertical expansion upon a poorly characterized and questionable foundation with shallow groundwater at less than 10 feet below ground surface. Though Westwind's residential and commercial tenants may be able to relocate and/or avoid the area entirely, Westwind will be faced with the corresponding economic losses caused by an irresponsible and unjustified expansion of this legacy landfill site.

Accordingly, Westwind squarely qualifies for designation as an affected person under applicable TCEQ rules. As an adjacent landowner and residential and commercial property developer, Westwind is dramatically and adversely affected by the subject application.

B. Westwind requests a contested case hearing.

The Executive Director's Response to Public Comments ("RTC") does not resolve the issues previously raised by Westwind. Westwind requests a contested case hearing on all issues raised in its written comments, prior hearing request, and oral comments at public meetings, including, without limitation:

- A) Whether the Applicant mailed notice and provided information regarding adjacent and potentially affected landowners in accordance with TCEQ statutes and rules;⁴
- B) Whether the proposed facility expansion is a compatible land use;⁵
- C) Whether the proposed facility expansion would impose disproportionately high and adverse human health or environmental effects on minority and low-income populations;⁶
- D) Whether the Applicant has demonstrated that the proposed landfill would be adequately protective of groundwater;⁷
- E) Whether the Applicant's current drainage configuration and proposed surface water drainage design, respectively, satisfy existing permit requirements and satisfy applicable requirements of TCEQ rules;⁸
- F) Whether the facility operations will contaminate the soil and whether the information provided in the application regarding measures to prevent soil contamination will be effective;⁹

⁴ RTC Comment 66; Westwind's Comments dated August 30, 2021 at 1.

⁵ RTC Comment 40; Westwind's Comments dated August 30, 2021 at 2-3.

⁶ RTC Comment 57; Westwind's Comments dated August 30, 2021 at 3.

⁷ RTC Comment 28; RTC Comment 31; RTC Comment 33; Westwind's Comments dated August 30, 2021 at 4-5, 7-8.

⁸ RTC Comment 9; RTC Comment 29; Westwind's Comments dated August 30, 2021 at 9.

⁹ RTC Comment 3.

- G) Whether dust from the proposed facility and other access roads will become a nuisance to surrounding areas;¹⁰
- H) Whether the application includes a landfill gas management plan, gas monitoring system, and passive gas venting that meets all applicable TCEQ rules and is sufficient to protect human health and the environment;¹¹
- I) Whether the application includes proposed liner and overliner designs that comply with TCEQ rules and will be protective of human health and the environment;¹²
- J) Whether the proposed overliner system will provide sufficient protection against landfill gas migration, leachate spills, and protect groundwater quality, and will be protective of human health and the environment;¹³
- K) Whether the Applicant demonstrated that all existing subsurface liners meet or exceed TCEQ rules and will be protective of human health and the environment;¹⁴
- L) Whether the facility design and operation will satisfy all applicable TCEQ rule requirements regarding flood plain siting and flooding;¹⁵
- M) Whether the Applicant has adequately addressed the control of vectors at the proposed facility in accordance with applicable TCEQ rules;¹⁶
- N) Whether the application adequately demonstrates that land subsidence and/or settlement will not occur as a result of the proposed landfill expansion above existing landfills;¹⁷
- O) Whether the Applicant has performed an adequate subsurface investigation or characterization;¹⁸
- P) Whether the cross sections contained in the application accurately depict or describe the subsurface;¹⁹

¹⁰ RTC Comment 7.

¹¹ RTC Comment 8; RTC Comment 6.

¹² RTC Comment 10; RTC Comment 28; RTC Comment 31.

¹³ RTC Comment 47.

¹⁴ RTC Comment 27; RTC Comment 28; RTC Comment 31; Westwind's Comments dated August 30, 2021 at 4–5.

¹⁵ RTC Comment 12.

¹⁶ RTC Comment 18.

¹⁷ RTC Comment 28.

¹⁸ RTC Comment 33.

¹⁹ RTC Comment 34.

- Q) Whether the hydrogeologic properties in the application, and information related to the extent of the lower confining unit and conclusions related to the strata defined as Layers I through III are accurate and satisfy applicable TCEQ rules;²⁰
- R) Whether the proposed groundwater monitoring system is in compliance with applicable TCEQ rules, and is adequate to detect any contamination from the facility prior to migration off site;²¹
- S) Whether the application adequately delineates and addresses rights-of-way and whether the Applicant has demonstrated sufficient property interest as required by TCEQ rules;²²
- T) Whether the Applicant is prohibited from accepting waste other than Type IV waste as defined by 30 TAC §330.42(4) (as it existed in 1992) by recorded agreement declaring restrictions on Applicant's property;²³
- U) Whether the proposed application, design, and operation adequately addresses all known past uses of the site, such as unpermitted waste disposal and commercial sand and soil mining operations;²⁴
- V) Whether proceeding with the proposed expansion over largely inactive and already-closed landfill facilities is in compliance with permit requirements, TCEQ rules, and protective of human health and the environment, as opposed to proceeding to final closure;²⁵
- W) Whether the proposed expansion will improperly authorize injury to persons or property, invasion of other property rights, or infringement of state or local law or regulation;²⁶
- X) Whether the application adequately meets the applicable requirements for addressing visual impacts;²⁷
- Y) Whether the Applicant has adequately addressed traffic impacts and traffic safety in accordance with applicable TCEQ rules;²⁸

²⁰ RTC Comment 35; Westwind's Comments dated August 30, 2021 at 7.

²¹ RTC Comment 36; Westwind's Comments dated August 30, 2021 at 8.

²² RTC Comment 45.

²³ RTC Comment 46.

²⁴ RTC Comment 47; RTC Comment 71.

²⁵ RTC Comment 50.

²⁶ RTC Comment 52.

²⁷ RTC Comment 53.

²⁸ RTC Comment 54.

Z) Whether the Applicant has adequately addressed the control of windblown waste and debris;²⁹

AA) Whether the application includes a sufficient odor management plan.³⁰

C. Conclusion of Request for Contested Case Hearing.

As demonstrated above, Westwind is dramatically and adversely affected by this application. Westwind has timely commented, attended public meetings, and exercised its rights of public participation at every available opportunity. Westwind respectfully request that it be found to be an affected person, and that the issues above be referred to a contested case hearing for the referenced application.

III. Westwind's Request for Reconsideration

Westwind respectfully requests that the Commissioners reconsider and reverse the Executive Director's Decision ("ED's Decision") dated January 24, 2023 that the referenced permit application meets the requirements of applicable law. The ED's Decision should be overturned for two reasons.³¹ First, pursuant to 30 Texas Administrative Code § 330.57(d), the subject application should be denied because the Applicant repeatedly provided significant false information to TCEQ. Second, the ED's Decision should be overturned because the proposed overliners in the application fails to meet TCEQ rules requiring an underlying formation of sufficient strength to ensure stability and long-term viability of the proposed overliners.³²

²⁹ RTC Comment 55.

³⁰ RTC Comment 56.

³¹ There are a number of additional ways the application fails to meet applicable requirements, however; in the interest of efficiency this Request for Reconsideration will focus only on these two egregious and apparent defects.

³² 30 TAC §330.339(a).

A. The application should be denied because Applicant repeatedly provided false information about existing liners, resulting in an inadequate design.

Because the Applicant misrepresented existing liner information, the subject application should be denied. Applicant repeatedly failed to disclose the existence of slurry trench cutoff walls (or “slurry walls”) in its descriptions of the existing liners, misrepresenting the makeup of the existing liner system. This precluded development of an informed and adequate landfill expansion design and prevented any discussion by TCEQ staff about the continuing impacts of the slurry walls on groundwater resources.

1. Submission of false information is grounds for application denial.

Applicable TCEQ rules require all applicants to provide sufficiently **complete, accurate,** and clear data to assure that operation of the site will pose no reasonable probability of adverse effects on the health, welfare, environment, or physical property of nearby residents or property owners. **Submission of false information shall constitute grounds for denial of the permit application.**³³ The rule in full states:

(d) Required information. The information required by this subchapter defines the basic elements for an application. All aspects of the application and design requirements must be addressed by the owner or operator, even if only to show why they are not applicable for that particular site. **It is the responsibility of the applicant to provide the executive director data of sufficient completeness, accuracy, and clarity to provide assurance that operation of the site will pose no reasonable probability of adverse effects on the health, welfare, environment, or physical property of nearby residents or property owners.** Failure of the owner or operator to provide complete information as required by this chapter may be cause for the executive director to return the application without further action in accordance with §281.18 and §281.19 of this title (relating to Applications Returned and Technical Review). **Submission of false information shall constitute grounds for denial of the permit application.**³⁴

³³ See 30 Tex. Admin. Code § 330.57(d).

³⁴ 30 Tex. Admin. Code § 330.57(d).

2. Applicant repeatedly submitted false information.

In Applicant’s first submittal of Major Permit Amendment Application for MSW-2185A, misrepresentations of the existing liners were made in Table III-3D-1 in Part III, Appendix III-3D, shown in Figure 1 below.

TABLE III-3D-1: Existing Liner Systems

Permit No.	Liner System
MSW-1135	In-situ clay bottom liner, or; Constructed 3-ft (min.) clay sidewall liner extended 2-ft into clay strata
MSW-1148 and MSW1148A	3-ft (min.) in-situ clay bottom liner, or; In-situ clay, clay fill for total 3-ft (min.) bottom liner
MSW-1643	3-ft (min.) in-situ clay bottom liner, or; 3-ft (min.) in-situ liner; 3-ft (min) constructed and/or in-situ sidewall liner, 1-ft protective cover
MSW-2185	3-ft compacted clay liner, 1-ft protective cover

Figure 1. Original Table III-3D-1.

Below this table, Applicant further misrepresented that ***“[a]ll the waste areas developed to date have sidewall liners composed of minimum 3 foot thick clay liner that is in-situ, constructed, or a combination of both.”*** Applicant completely failed to disclose that existing slurry trench cutoff walls (or “slurry walls”) were used as primary liners in MSW 1448A (the east block) and MSW 1643 (the west block). Not only did the Applicant omit the presence of these slurry walls within the existing liner systems, but it further misrepresented that the existing liner systems for all waste areas have in-situ or constructed clay liners. This is a material omission and misrepresentation because Applicant sought continued and expanded utilization of the existing liners for which it provided incomplete and inaccurate information in violation of 30 TAC §330.57(d).

Following Applicant's initial false information submittal, TCEQ questioned the Applicant about the liners, requesting that Applicant "[p]rovide the liner design detail of [the] closed landfills[.]" Applicant responded by conferring with TCEQ permitting staff and revising its application to include an overliner system on top of the old landfills that were constructed prior to 1985.³⁵ (The proposed overliner system proposal is defective, as discussed later.)

Alarming, the proposed overliner system did not include areas above MSW-1643—one of the old landfills with slurry trenches in the liner system that were not disclosed by the Applicant. Notably, in the Applicant's own words, "TCEQ expressed concern about the lining system design used in MSW-1643 and whether the regulations at the time the unit was permitted required a liner system that meets the current requirements in 30 TAC §330.331(d), and, consequently, whether such a liner system was constructed."³⁶ Following is the Applicant's false and misleading response to TCEQ's concern:

"A review of the Soils and Liner Evaluation Reports (SLER) for the constructed liner systems in MSW-1643 revealed that all the disposal areas were in fact constructed with either a 4-foot in situ liner, a 3-foot in situ liner with a 1-foot protective cover, or a constructed 3-foot recompacted liner with a 1-foot protective cover."³⁷

Again, the Applicant submitted false information omitting the non-compliant slurry wall liners. Furthermore, although Applicant referenced its review of the SLER's for MSW-1643, actual review of the SLER's for the constructed liner systems in MSW-1643 reveals voluminous and detailed construction information concerning the slurry walls, the difficulties encountered in

³⁵ Applicant's Response to NOD 3 dated August 17, 2021, Response to NOD ID T4 ("...based on discussions with TCEQ staff, the [...] Liner Quality Control Plan was revised to address placement of waste over existing landfills developed before 1985").

³⁶ Applicant's Response to NOD 3 dated August 17, 2021, Response to NOD ID T4.

³⁷ Applicant's Response to NOD 3 dated August 17, 2021, Response to NOD ID T4.

constructing them with consistency and confidence, numerous equipment breakdowns, equipment being stuck, and weather-related problems. Applicant further failed to disclose the slurry walls in its revised Table III-3D-1:

TABLE III-3D-1: Existing Liner Systems

Permit No.	Liner System
MSW-1135	In-situ clay bottom liner, or; Constructed 3-ft (min.) clay sidewall liner extended 2-ft into clay strata
MSW-1148-1448 and MSW1148AMSW-1448A	3-ft (min.) in-situ clay bottom liner, or; In-situ clay, clay fill for total 3-ft (min.) bottom liner
MSW-1643	34-ft (min.) in-situ clay bottom liner, or; 3-ft (min.) in-situ liner, 1-ft protective cover; 3-ft (min) constructed and/or in-situ sidewall liner, 1-ft protective cover
MSW-2185	3-ft compacted clay liner, 1-ft protective cover

Figure 2 - NOD3 Revised Table III-3D-1.

Here again, Applicant failed to disclose the slurry walls, misrepresenting the existing liner system to TCEQ. Applicant’s repeated failure to disclose the slurry walls is a material misrepresentation with real-world consequences. Failure to disclose the slurry walls prevents TCEQ from performing an adequate analysis of the existing subsurface liner system, prevents assurance of an informed and protective design for proposed expansions, and stonewalls against any potential TCEQ inquiry into continued impacts of the slurry walls on shallow groundwater. Although the Applicant failed to disclose, discuss, or defend the past and proposed continuing use of slurry walls in its application, it is now undisputed that MSW-1643 utilized slurry walls as permanent liners—the Executive Director directly acknowledges the slurry trench cutoff walls of the MSW-1643 area in RTC Comment 31.

3. Applicant's misrepresentations led to non-compliant design.

Applicant's misrepresentations led to a grossly inadequate design for the vertical expansion areas above MSW-1643. Based on the Applicant's representations regarding existing liner systems, TCEQ required the Applicant to propose an overliner above certain old landfills. This is plainly explained in ED RTC 27: "**For parts of the landfill where the previous liner may not meet the current requirements, the facility proposed an overliner installed on top of the current landfill to provide protection to groundwater.**" (emphasis added). However, Applicant did not propose an overliner for areas installed on top of MSW-1643, one of the areas for which Applicant failed to disclose the slurry walls. **Applicant was not required to include an overliner system over the MSW-1643 area as a result of Applicant's repeated failure to disclose the slurry wall liners.**

4. The ED's Decision should be overturned and the application denied.

The confusion and inadequacy of the existing and proposed liners in this application are a direct result of Applicant's material omissions, misrepresentations, and ongoing false submissions to TCEQ. According to TCEQ rules prohibiting submission of false information, it is not the job of TCEQ, the public, or affected persons to navigate false information and its consequences. Rightfully, 30 TAC § 330.57(d) places the burden of submitting correct information and the consequence for submitting false information upon the Applicant. Accordingly, the ED's Decision should be overturned, and this application should be denied.

B. The ED's Decision should be overturned because the proposed overliner fails to meet TCEQ rule requirements.

In addition to Applicant's submission of false information relating to the nature of existing liners discussed above, the ED's Decision should be overturned because the application failed to

provide information to demonstrate the underlying old landfills will be a sufficient foundation to ensure stability of the proposed overliners. Such an omission violates TCEQ rules and is cause to overturn the ED's Decision.

30 TAC §330.339(a) and (e) require: "Unless alternative construction procedures are approved in writing by the executive director, all constructed liners shall be keyed into an underlying formation of sufficient strength to ensure stability of the constructed lining." Applicant provided no demonstration that the underlying landfills were a formation of sufficient strength to ensure stability of the proposed overliner system. Rather, Applicant only provided a stability analysis for one specific location in an area of new lateral expansion outside the existing waste footprint. Applicant failed to provide any stability or settlement analysis for the vertical expansion over the existing and closed landfills with non-compliant liners concerning the stability to support the long-term viability of and ability to withstand the stresses from underlying settlement placed on the proposed overliners. This omission violates rule 330.339(a), and accordingly, the ED's Decision should be overturned and the application should be denied.

C. Conclusion of Request for Reconsideration.

Although it is rare for a permit to be denied prior to a contested case hearing, in this case, denial is appropriate, warranted, and prudent. Due to Applicant's material false statements regarding existing liners and the insufficient, unsubstantiated, and ill-conceived overliner system, denial is readily available relief under applicable TCEQ rules. Such a denial would only work to protect human health and the environment, including groundwater resources. In weighing its decision, Westwind urges the Commissioners to consider that this site is located within a secondary aquifer and recharge zone, and the shallowest historical water levels for each monitor well at this facility

range between a mere 3.5 feet below ground surface to 9.8 feet below ground surface—as shallow as the bottom of a small backyard pool.³⁸ Westwind respectfully requests that the Commissioners overturn the ED’s Decision and deny this application.

Respectfully submitted,



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³⁸ See ATTACHMENT A (Historical Shallowest Water Table Depths).

ATTACHMENT A
Historical Shallowest Water Table Depths

Historical Shallowest Water Table Depths (ft.)

TABLE III-4-10
HAWTHORN PARK RECYCLING & DISPOSAL FACILITY
EXISTING MONITORING WELL WATER ELEVATION

Well ID	TOC	Groundwater Elevations (ft msl)												Historical Minimum Depth Below Surface				
		12/9/2004	12/19/2004	12/19/2005	12/13-14/2006	12/17-18/2007	12/29/2008	12/21/2009	12/9/2010	12/1/2011	12/10-11/2012	12/9-10/2013	12/8-9/2014		12/7-8/2015	12/19/2016	12/11-12/2017	12/17-19/2018
MW-6	107.80	95.67	91.56	93.25	93.25	97.56	93.30	96.02	92.35	89.85	89.45	89.55	85.97	93.15	94.10	95.22	97.10	95.75
MW-7	105.34	93.06	89.68	92.09	92.09	96.29	89.99	94.52	91.34	88.24	87.44	86.24	79.46	89.96	92.93	93.96	97.19	95.86
MW-8	105.29	92.47	89.34	91.64	91.64	95.34	89.49	93.74	90.84	87.76	87.06	85.91	78.89	89.34	92.44	93.39	96.49	95.19
MW-9	108.45	90.15	87.65	89.90	89.90	94.45	86.91	88.54	87.30	77.45	78.67	84.23	81.55	87.95	92.80	93.44	95.46	94.31
MW-10	105.20	92.85	90.25	90.76	90.76	94.36	90.20	92.85	90.00	88.72	86.60	87.40	83.52	90.40	92.46	93.10	95.20	93.80
MW-11	105.51	93.54	89.03	88.09	88.09	94.31	91.09	90.71	88.73	86.16	87.51	89.31	88.46	92.60	92.73	93.10	94.61	93.21
MW-12	105.10	93.19	86.75	89.30	89.30	96.42	89.63	84.25	87.08	85.12	87.70	88.30	91.50	94.77	93.50	94.03	95.20	94.20
MW-13	105.14	91.21	86.99	87.92	87.92	95.44	88.01	88.42	86.76	85.59	87.14	87.94	88.69	95.04	93.22	93.64	95.69	94.24
MW-14	106.43	86.90	84.29	88.93	88.93	95.43	82.98	79.13	81.43	82.05	83.83	87.35	88.05	95.15	94.57	95.53	100.03	95.63
MW-15	106.76	87.86	85.97	88.89	88.89	95.39	85.51	84.06	84.26	84.76	86.43	87.82	88.56	95.06	93.96	94.84	96.21	94.86
MW-16	106.26	88.89	86.40	89.34	89.34	95.76	86.08	84.81	84.91	84.96	87.08	88.16	88.86	95.53	92.38	95.26	96.74	95.26
MW-17	105.83	87.37	85.15	87.91	87.91	95.61	82.33	79.78	80.73	83.41	85.07	87.33	87.98	95.28	95.31	96.70	98.03	96.33
MW-18	106.34	90.44	86.99	89.82	89.82	95.94	86.69	83.54	83.59	84.74	86.19	86.34	88.44	95.76	96.19	97.34	98.79	96.96
MW-19	109.07	91.81	88.31	90.75	90.75	97.40	88.77	86.92	86.37	86.52	87.77	89.57	89.22	96.37	96.17	97.57	98.92	97.02
MW-20	110.69	93.93	89.87	91.66	91.66	98.19	92.31	92.09	89.79	88.69	89.97	91.79	90.74	97.44	96.59	97.74	99.04	97.24
MW-21	107.94	95.17	90.79	92.73	92.73	97.44	93.54	95.02	91.94	89.64	89.64	90.04	87.24	93.73	94.39	95.62	96.92	95.89

*From monitoring well boring logs Part III, Attachment 4, Appendix 4B

■ Historical Highest Water Level Measurement for Each Monitoring Well.

All markings in red added by the author of these comments.