

**SOAH DOCKET NO. 582-24-13241  
TCEQ DOCKET NO. 2023-1559-MSW**

<b>APPLICATION OF</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
<b>130 ENVIRONMENTAL PARK, LLC</b>	§	<b>OF</b>
	§	
<b>FOR A LIMITED-SCOPE AMENDMENT</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
	§	
<b>TO MSW PERMIT NO. 2383</b>	§	

**APPLICANT’S EXCEPTIONS TO THE PROPOSAL FOR DECISION**

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

130 ENVIRONMENTAL PARK, LLC, (130EP), the Applicant in this proceeding, files these Exceptions to the Proposal for Decision, and respectfully requests that the Commission reject the recommendation in the proposal for decision and issue an order approving 130EP’s permit application and the issuance of the requested amended permit.

**INTRODUCTION**

The proposal for decision (PFD) and proposed order in this case recommend denial of the application for a limited scope permit amendment to change the authorized operating hours at the 130 Environmental Park Landfill (130EP Landfill) located in northern Caldwell County. The contested case hearing and the analysis and recommendation in the PFD and the proposed order are affected by various errors. They:

- Failed to limit the scope of the contested case proceeding and do not comply with applicable procedures, as required by statutory and rule provisions;
- Ignore the important role of the Executive Director’s review of the application and preparation of the draft permit, as established by applicable statutory and rule provisions;
- Ignore the significant evidence supporting the reasons for the requested change in hours, including findings by the Capitol Area Council of Governments (CAPCOG) and the Caldwell County Commissioners Court, and their recommendations that TCEQ approve the application; and
- Improperly conclude that Protestants’ unsupported testimony regarding odor and noise is controlling and sufficient to support the denial recommendation, especially in light of the contrary,

credible, data-driven analyses and testimony by 130EP's well-qualified and experienced expert witnesses.

## **BACKGROUND**

As discussed below, the PFD's denial recommendation relies exclusively on unsupported anecdotal lay witness testimony regarding odor and/or noise from three nearby residents, and ignores testimony from two expert witnesses based on actual data, including data collected during their site investigations. The original permit for the 130EP Landfill (MSW Permit No. 2383) was issued in 2017 and the facility began operating in April 2021. Since that time, no complaints regarding noise at the facility have been made to TCEQ, and the one odor complaint made to TCEQ was investigated by TCEQ staff and no notice of violation or notice of enforcement was issued. The Executive Director's Compliance History Report for the facility gives it a Classification of "High" and an outstanding Rating of 0.00. *App. Ex. 5 pp.6-7.*

### **PFD ERROR: FAILURE TO COMPLY WITH THE COMMISSION'S LIMITED SCOPE AMENDMENT RULE AND THE SB 709 PROVISIONS 30 TAC §305.62(j)(2) and (3) and Government Code § 2003.047(i-1) and (i-2)**

The errors in this case relate primarily to the failure to properly apply two sets of legal requirements to the hearing process and the PFD: the Commission's limited scope major amendment (LSMA) rule provisions (applicable only to certain types of amendments to municipal solid waste facility permits), and the SB 709 provisions (applicable to all TCEQ permitting actions). These two sets of requirements have had dramatic impacts on permitting matters to which they apply: significantly limiting the scope of applications, increasing the importance of the Executive Director's role in the application review process, and streamlining contested case hearings. Although their impacts are substantial, the requirements themselves are relatively straight forward.

For permit amendment applications to which it applies, the LSMA rule, at 30 TAC §305.62(j)(2) and (3), provides that:

- Only the portions of the permit and attachments to which changes are being proposed are required to be submitted, and
- The executive director's review and any hearing or proceeding shall be limited to the proposed changes, including additional information requested by the executive director during the application review process.<sup>1</sup>

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<sup>1</sup> The applicability of these provisions to this case is clearly established by the rule itself:

*(footnote continued)*

The SB 709 provisions relevant here, at Government Code § 2003.047(i-1) and (i-2),<sup>2</sup> specify that the filing with SOAH of the administrative record (the application, the draft permit, the Executive Director’s preliminary decision, etc.) establishes a prima facie demonstration (a rebuttable presumption) that the draft permit meets all legal and technical requirements and would protect human health and safety, the environment, and physical property. They also specify that, in order to rebut the prima facie demonstration, an opposing party must present evidence that relates to a referred issue and that, most significantly, demonstrates that “one or more provisions in the draft permit violate a specifically applicable state or federal requirement”.

The analysis in the PFD starts off well, by correctly acknowledging:

- A. The applicability of the LSMA rules at 30 TAC 305.62(j) to an application to amend MSW facility operating hours. *PFD at pp.8 and 29; Proposed Conclusion of Law 12.*
- B. The Application is subject to the SB 709 provisions. *PFD at pp.3-4; Proposed Conclusion of Law 4.*
- C. The Administrative Record, filed with SOAH and admitted into evidence, established a prima facie demonstration that: (1) the Draft Permit meets all state and federal legal and technical requirements; and (2) a permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property. *PFD at p.8; Proposed Conclusion*

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Examples of changes for which less than a full application may be submitted for a major amendment include...changes in waste acceptance and operating hours outside the hours identified in §330.135 of this title (relating to Facility Operating Hours), or authorization to accept waste or operate on a day not previously authorized.  
*30 TAC § 305.62(j)(2)(B).*

<sup>2</sup> S.B. 709 in the 2015 legislative session amended/added various statutory provisions applicable to TCEQ permit applications and contested case hearings regarding them. § 2003.047(i-1) and (i-2) are:

(i-1) In a contested case regarding a permit application referred under Section 5.556 or 5.557, Water Code, the filing with the office of the application, the draft permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:

(1) the draft permit meets all state and federal legal and technical requirements; and

(2) a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.

(i-2) A party may rebut a demonstration under Subsection (i-1) by presenting evidence that:

(1) relates to a matter referred under Section 5.557, Water Code, or an issue included in a list submitted under Subsection (e) in connection with a matter referred under Section 5.556, Water Code; and

(2) demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.

of Law 5.

- D. Applicant has the burden of proof on the issue referred by the Commission...However, the admission of the administrative record into evidence met Applicant's burden of proof, subject to rebuttal. *PFD at p.5 and p.6 at fn.10; Proposed Conclusion of Law 6.*
- E. Applicant, protesting parties, the public interest counsel, and the executive director may present evidence after admittance of the administrative record by the judge. *PFD at p.5 and p.6 at fn.10.*<sup>3</sup>
- F. Rebuttal of the prima facie demonstration is governed by the SB 709 provision at Government Code § 2003.047(i-2):  
A party may rebut a demonstration under Subsection (i-1) by presenting evidence that:
  - (1) relates to a referred issue; and
  - (2) demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement. *PFD at pp.3-4; Proposed Conclusion of Law 7.*
- G. The ordinary meaning of "demonstrate" is "[t]o show to be true by reasoning or adducing evidence; prove." *Demonstrate*. The American Heritage Dictionary of the English Language (5th ed. 2022). *PFD at pp.4-5.*

However, after that, the hearing procedures and the PFD's analysis break down as the result of ignoring/failing to properly apply procedures and standards in the LSMA rule at 305.62(j)(2) and the SB 709 provisions in 2003.047(i-1) and (i-2).

In this case, pursuant to the LSMA rule, the hearing should have been limited to the proposed changes to 130EP's permit,<sup>4</sup> including additional information requested by the Executive

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<sup>3</sup> The Administrative Record was admitted at the May 30, 2024 preliminary hearing. All parties except the public interest counsel submitted prefiled evidence between then and the November 14, 2024 deadline in the September 23, 2024 scheduling order. Each time 130EP submitted or offered such evidence, it included a statement to the effect that it was subject to its position that Protestants had not and could not meet their burden to rebut the prima facie demonstration, and that the presentation of such evidence should not be considered an admission or acknowledgement by 130EP that the prima facie demonstration had been rebutted.

<sup>4</sup> The proposed changes are set out in 130EP's application:

The current approved permit provides authorization for acceptance of waste between 7:00 a.m. to 7:00 p.m. and to operate equipment between 5:00 a.m. and 9:00 p.m. on Monday through Friday. This limited scope amendment will extend the landfill operating hours. Authorized hours for acceptance of waste will be between 5:00 a.m. and 7:00 p.m., Monday through Friday and between 6:00 a.m. and 5:00 p.m. on Saturday. For a minimum of ten years after approval of this permit amendment, any Caldwell County resident may dispose of up to 6 cubic yards of accepted waste at no charge during Saturday waste acceptance hours. Site operations may be conducted between 5:00 a.m. and 9:00 p.m. Monday through Friday, and between 6:00 a.m. and 6:00 p.m. on Saturday. Site operations include construction, material delivery, maintenance, earthmoving, monitoring, transportation of construction materials, heavy equipment operation, and other non-waste acceptance operations.

And, as required by 30 TAC § 305.62(b), the application includes "a statement describing the reason

*(footnote continued)*

Director.<sup>5</sup> But that is not what happened here. Remarkably, the PFD does not even mention the LSMA rule limitations on the scope of this proceeding. And, pursuant to the SB 709 provisions, once the determination was made in the PFD that the prima facie demonstration was established by the filing of the Administrative Record, the next determination should have been that Protestants did not rebut the prima facie demonstration by presenting evidence that relates to the only issue referred in this case and that “demonstrates that one or more provisions in the draft permit violate a specifically applicable...requirement”. But, again, that is not what happened here.

Protestants submitted testimony from three individual Protestants (Susan Lane, Byron Friedrich, and Patton King), none of whom is an expert, consisting of anecdotal testimony (unsupported by any data, logs, notes, documentation of complaints, or other corroboration) regarding past experiences of odors and noise on their properties near the 130EP Landfill facility. 130EP objected to and moved to strike the entirety of that testimony on relevance grounds (and to

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for the requested changes”:

The 130 Environmental Park provides waste disposal for individuals, businesses, and communities in Caldwell County and the surrounding counties. The service area for the facility is a wide area with significant haul distances from some of the serviced communities. To better serve those communities, businesses, and customers, expanded operating hours will allow for more efficient waste collection and disposal outside typical working hours and peak traffic times, and reduce traffic and other impacts to infrastructure. The addition of Saturday operating hours will provide available weekend disposal, including for individuals who, for work or other reasons may be unable to get to the landfill on weekdays, and for businesses (restaurants, grocery stores, etc.) needing waste collection and disposal services on Saturday. Authorizing waste acceptance hours to begin at 5 a.m. (6 a.m. on Saturday) will allow vehicles collecting waste in the very early morning hours to get their first loads of the day to the landfill and return to their collection routes before the peak morning traffic times for persons travelling to work, students travelling to schools, and others travelling on area roadways, thereby reducing peak hour traffic on roadways providing access to the landfill.

*Administrative Record (AR) Tab D/Applicant's Exhibit (App. Ex.) 3, at p.143.*

<sup>5</sup> Here, the only additional information requested by the Executive Director was by way of one administrative notice of deficiency (NOD) asking for the website address where the application would be posted, addresses for publishing notice, the verified or corrected latitude and longitude of the facility, the name of the consultant's company, the State Senator's office number, etc. *App. Ex. 10; Hearing Transcript Volume (Tr. Vol.) 1 p.138, l.7 thru p.139, l.3 and p.139, l.18-22.* 130EP submitted revisions to the Application that provided all of the requested information. *AR Tab D/Applicant's Ex. 3, at pp.96-123; Applicant's Ex. 11; Tr. Vol. 1 p.138, l.7 thru p.139, l.17.* The Executive Director did not request any information regarding odors, noise, access roads, nuisance conditions, land use compatibility, or any other substantive issue. *Tr. Vol. 1 p.139, l.18-22.*

specific portions of it based on various other evidentiary shortcomings), pointing out that such testimony does not relate to the proposed changes to the permit (as required by § 305.62(j)(2)) and does not demonstrate that a provision in the draft permit violates a specifically applicable requirement (as required by § 2003.047(i-2)). *Applicant's Objections to and Motion to Strike Prefiled Evidence of Aligned Protestants (November 18, 2024)*. However, in violation of the express limitation in the LSMA rules (“any hearing or proceeding shall be limited to the proposed changes”), the requirement in the SB 709 provisions that evidence rebutting the prima facie demonstration must demonstrate that “a provision in the draft permit violates a specifically applicable state or federal requirement”, and the specific proscription in Texas Rule of Evidence 402 (“Irrelevant evidence is not admissible”), the ALJ overruled 130EP’s objections, denied its motion to strike, and subsequently admitted all of Protestants’ testimony into the record. Not only that, but without ever making a necessary determination on the important issue of whether that testimony “demonstrates that one or more provisions in the draft permit violate a specifically applicable...requirement”, the PFD relies exclusively on that testimony in recommending denial of 130EP’s permit application.

A major flaw in the PFD and the proposed order is the complete absence of a determination regarding rebuttal of the SB 709 prima facie demonstration by way of presented evidence that relates to the issue referred for hearing and that demonstrates (“shows to be true; proves”) that the draft permit violates a “specifically applicable requirement”. Such a determination is, of course, critical to evaluating a SB 709 case like this one because, unless the prima facie demonstration is rebutted in accordance with those provisions, the prima facie demonstration stands and it is conclusively established that (1) the draft permit meets all state and federal legal and technical requirements; and (2) a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property. The applicant has then conclusively met its burden of proof, and that is the end of the analysis. However, the PFD in this case includes no discussion or determination at all of whether Protestants’ evidence meets the stringent rebuttal standard set out in the SB 709 provisions. In fact, the PFD does not identify a “specifically applicable requirement” that Protestants’ evidence even could demonstrate is violated by the draft permit. The only substantive provision in the draft permit is the Description of Change:

The limited-scope amendment expands waste acceptance hours to 5:00 am to 7:00 pm, Monday through Friday, and 6:00 am to 5:00 pm on Saturday. It expands

operating hours to 5:00 am to 9:00 pm, Monday through Friday, and 6:00 am to 6:00 pm on Saturday.

The only state or federal requirement that is “specifically applicable” to facility operating hours is TCEQ’s MSW rule at 30 TAC 330.135(a), which includes:

The waste acceptance hours of a municipal solid waste facility may be any time between the hours of 7:00 a.m. and 7:00 p.m., Monday through Friday, unless otherwise approved in the authorization for the facility...Transportation of materials and heavy equipment operation must not be conducted between the hours of 9:00 p.m. to 5:00 a.m., unless otherwise approved in the authorization for the facility.

Not only does the draft permit not violate this rule provision, it is entirely consistent with it: specifying hours “approved in the authorization for the facility” that differ from the standard hours set out in the rule.

### **The 2006 and 2008 Rulemakings**

The PFD should have followed the SB 709 provisions and made the only supportable determination regarding rebuttal of the prima facie demonstration: that Protestants did not rebut the demonstration by presenting evidence that demonstrates the draft permit violates a specifically applicable requirement. Instead, the PFD goes off on an unsupported and unsupportable tangent and suggests that this case should be decided based on statements in a 2006 rule preamble and a flawed exercise of weighing evidence in the record regarding odor and noise. Not only is that approach completely inconsistent with and contrary to the controlling statutory and rule provisions, the 2006 rule preamble does not establish any requirement that is “specifically applicable” to 130EP’s application and/or this proceeding.

The 2006 rule adoption preamble on which the PFD relies was part of the Commission’s action in moving the MSW facility operating hours rule to new section 330.135, where it remains. The portions of the 2006 preamble quoted nearly *verbatim* in the PFD are: “The commission believes that it needs to retain flexibility to continue authorizing operating hours on a case-by-case basis considering the potential impact on surrounding communities.” and “The commission is justified in limiting operating hours by the need to protect communities from the potential impacts from landfills. Landfill operations outside the stated hours are more likely to disturb people in residential areas.” However, there is nothing in this preamble language that imposes any “specifically applicable requirement” on a permit application or on a draft permit prepared based on such an application. In 2006, prior to the adoption of the LSMA rule, § 330.61(g) and (h) did

impose requirements on an MSW permit application (whether for a new permit or a permit amendment) to provide the sorts of information that would allow a thorough evaluation of potential impacts: “information regarding the likely impacts of the facility on cities, communities, groups of property owners, or individuals by analyzing the compatibility of land use, zoning in the vicinity, community growth patterns, and other factors...”, a land use map and information on surrounding land uses, growth trends, proximity to various types of land uses, detailed information on the number of and distance and direction to residences and businesses within one mile, etc. That information is still required to be submitted with every application for a permit for a proposed new MSW facility and, for every such facility, the Executive Director and the Commission still consider land use compatibility and potential impacts as part of the permit review and evaluation process. But, for applications to amend an existing facility permit to change the authorized operating hours, all that ended in 2008.

The LSMA rule at 30 TAC § 305.62(j)(2) and (3) was adopted in 2008 and provides that, for an application to amend a permit to change facility operating hours:

(2)...only the portions of the permit and attachments to which changes are being proposed are required to be submitted. The executive director's review and any hearing or proceeding on a major amendment subject to this paragraph shall be limited to the proposed changes, including information requested under paragraph (3) of this subsection...

(3) The executive director may request any additional information deemed necessary for the review and processing of the application.

A review of that 2008 rulemaking process reinforces that the LSMA rule means exactly what it says and that the Commission has vested in the Executive Director the discretion to determine whether and what additional information should be submitted with a LSMA application and, as a result, considered in a contested case proceeding. 30 TAC § 305.62(j) was proposed by the Commission in November 2007 and adopted in May 2008.<sup>6</sup> In the 2007 rule proposal, the Commission stated:

This rulemaking would provide applicants a method of requesting a substantive change to a permitted municipal solid waste (MSW) facility through submittal of only those portions of a permit affected by the proposed change. Currently, the established practice for making a substantive change to a permitted MSW facility requires that the permittee file a major amendment application under

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<sup>6</sup> The current 30 TAC § 305.62(j) was proposed and adopted as 30 TAC § 305.62(i), but was subsequently redesignated as § 305.62(j). *34 TxReg 1629, 1630 (March 6, 2009)*.



§305.62 that addresses all aspects of facility design and operation. The time and effort to process an amendment application is almost identical to that of a new permit application...The current permit amendment process is costly and time consuming to all involved. To remedy this inequity yet retain an opportunity for contested case hearing, these proposed rules would specify that under certain conditions, the application, review, and any subsequent hearing for some substantive permit changes would be limited to the requested change and related materials...

The commission determined that some substantive changes to facility design or operation, such as an alternate liner design or the acceptance of a new waste stream, may in some circumstances have little or no impact on the surrounding community. The rule would allow other substantive changes to the permit to be proposed by submittal of only related permit documents and attachments.

*Proposed Rule, 32 TexReg 8681, 8688 (November 30, 2007).*

The adopted rule includes specific examples of amendments that are subject to its provisions. Section 305.62(j)(2)(A-C) includes the two changes that the proposal stated “may in some circumstances have little or no impact on the surrounding community” (alternate liner design and acceptance of a new waste stream). It also included another category: “changes in waste acceptance and operating hours outside the hours identified in §330.135...or authorization to accept waste or operate on a day not previously authorized” – the very changes sought by 130EP’s application in this case. This category of changes was specifically included within the scope of the LSMA rule, even though the Commission did not identify it as having “little or no impact on the surrounding community”.

The adopted rule also includes a mechanism that provides for including, in the Executive Director’s review of an application to change operating hours and in the scope of any contested case hearing regarding such an application, consideration of other issues, including the potential impact of the change on the surrounding community: Subsection (j)(3) gives the Executive Director broad authority to “request any additional information deemed necessary for the review and processing of the application” and subsection (j)(1) provides, “The executive director's review and any hearing or proceeding on a major amendment subject to this paragraph shall be limited to the proposed changes, including information requested under paragraph (3) of this subsection.”

The preamble to the 2008 rule adoption includes:

The commission does not agree that the limited application process will allow design or operational issues impacted as a result of the proposed changes to be exempt from evaluation or a contested case hearing, as it is the applicant’s responsibility to submit any affected portions of the application. The commission

acknowledges that there may be issues that are relevant to the proposed changes that are not immediately recognized by the applicant and that all necessary application materials may be not provided in the initial submittal. If this information is not submitted it will be requested by the executive director in accordance with the rule.<sup>7</sup>

*Adopted Rule Preamble, 33 TexReg 4157, 4163-4164 (November 30, 2008).*

In the 2008 rulemaking, the Commission thus made it clear that an application to change MSW facility operating hours is governed by the provisions in the LSMA rule and that the Executive Director would, through the process of requesting additional information during the application review process, make the determination of the scope of application materials to be submitted for a limited scope amendment in a particular situation, and that the scope of a hearing on the application would be expanded to include any such requested additional information. The 2008 rulemaking superseded any inconsistent preamble language in the 2006 rulemaking, and any suggestion in the PFD in this case that the 2006 preamble language establishes or controls applicable procedural or substantive requirements for a limited scope amendment must be rejected.

#### **The Commission's Determination at the Hearing Request Agenda**

Here, the issues on which the PFD bases its recommendation of denial (odor and noise)

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<sup>7</sup> The rule provision making the Executive Director responsible for determining the appropriate scope of and requesting additional information "deemed necessary for the review and processing of the application" is consistent with the holding of the Austin Court of Civil Appeals in *Starr County v. Starr Industrial Services, Inc.*, 584 S.W.2d 352 (Tex. Civ. App. – Austin 1979; writ ref'd n.r.e.), a bedrock Texas case on arbitrary and capricious agency action. In that case, the Texas Water Quality Board (a TCEQ predecessor agency) denied an application for an industrial solid waste landfill permit based on local opposition to the project. As set out in the Court's opinion:

The details of many aspects of the application were modified and supplemented by additional information and specifications subsequently submitted as a result of conferences with, and requests by, the Board's staff. The Board's technical staff, using the application and information supplied by appellee, along with its own information resources, drafted a proposed permit...

The major factor that runs throughout arbitrary-capricious review cases is that parties must be able to know what is expected of them in the administrative process. We believe this notice was lacking in the present case. As we stated above, the appellee worked quite closely with the Board's staff, and, apparently, had complied with all of the staff's requirements for a permit when, to its surprise, the Board denied the permit citing additional requirements that had neither been expected by appellee nor proposed by the Board's staff.

[W]e find that a significant part of the Board's action herein was arbitrary and capricious under...the Administrative Procedure Act....Because appellee's substantial rights were prejudiced by entry of the agency order, the district court correctly set aside the order...

were, appropriately, not included in the hearing referral order. But they were included within the determination made by the Commissioners at the December 13, 2023 hearing request agenda that such issues are “outside the scope of this amendment”:

CHAIRMAN NIERMANN: Turning to the issues, I would refer just one: Whether the applicant adequately justifies extending the operating hours. On a limited scope amendment such as this, it would be inappropriate to re-litigate other parts of their permit as independent issues. To put it differently, issues such as odor control, access roads, nuisance prevention, and land use compatibility are outside the scope of this amendment. Those concerns may be relevant as rebuttal evidence on the issue of whether the extended hours are justified but do not stand as independent issues. Commissioner Lindley, what do you think?

COMM. LINDLEY: I’m in agreement.

COMM. JANEKA: Likewise.<sup>8,9</sup>

The Commissioners clearly, unmistakably, and correctly determined that “issues such as odor control, access roads, nuisance prevention, and land use compatibility are outside the scope of this amendment.” The statement that “Those concerns may be relevant as rebuttal evidence on the issue of whether the extended hours are justified but do not stand as independent issues” did not and, in this case, could not expand the scope of the hearing process to include odor and noise. That statement did not expand the scope because it (and its “may be relevant” language) simply acknowledged Protestants’ opportunity to present rebuttal evidence, and the statement could not expand the scope because the Commission has, by the adoption of § 305.62(j)(3), specifically vested in the Executive Director the authority to expand the scope of the review and hearing process by requesting additional information, which did not happen here.<sup>10</sup> Otherwise, the scope of the review and hearing “shall be limited to the proposed changes”. § 305.62(j)(2).

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<sup>8</sup> See, *App. Ex. 44*, transcript of Item 5 at December 13, 2023 Commissioner’s agenda meeting.

<sup>9</sup> As set out in their Interim Order, the Commissioners referred only one issue to SOAH: Whether 130 Environmental Park has provided an adequate justification for expanding its facility hours beyond those established in 30 TAC § 330.135. *App. Ex. 2*.

<sup>10</sup> There are several potential circumstances in which evidence regarding those concerns could have been relevant:

1. If matters related to those concerns had been included in the discussion of the reasons for the proposed changes in 130EP’s permit application, evidence from Protestants regarding any included matters could have been relevant as standard rebuttal evidence, defined as “evidence offered to disprove or contradict the evidence presented by an opposing party.” *Rebuttal Evidence. Black’s Law Dictionary (12th ed. 2024)*. However, the Application did not address

**PFD ERROR: SIGNIFICANT EVIDENCE SUPPORTING THE REASONS FOR THE REQUESTED CHANGE IN HOURS IGNORED**

At page 32, the PFD references the statement in the application describing the reason for the requested changes to the facility operating hours (at AR Tab D/App. Ex. 3, p.143), then states, “Besides providing general statements of the need for the extended hours, Applicant presented no evidence to support those statements...” However, the record contains significant evidence supporting the reason for the changes.

When 130EP initially submitted its application for an operating hours permit amendment, it sought authority to accept waste and conduct other facility operations 24 hours per day, 7 days per week. After objections were raised, including by the Capitol Area Council of Governments (CAPCOG) and Caldwell County, the application was revised to limit requested waste acceptance hours to 5 am to 7 pm Monday through Friday and 6 am to 5 pm on Saturdays, with hours for other operations of 5 am to 9 pm Monday through Friday and 6 am to 6 pm on Saturdays. So, the revised application seeks authorization to begin accepting waste two hours earlier on weekdays (beginning at 5 am - the same time currently authorized for beginning the operation of heavy equipment) and to accept waste and conduct other operations on Saturdays.

**CAPCOG and Caldwell County Support**

After the application was revised to reduce the requested expanded hours, CAPCOG and Caldwell County both recommended approval of the application: The CAPCOG Solid Waste Advisory Committee reviewed the revised application for conformance with the goals and objectives in the Regional Solid Waste Management Plan and made a recommendation of

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those issues. (In addition, Protestants did not offer any evidence at all to rebut the Application’s discussion of the reasons for the changes.)

2. If, during review of the application, the Executive Director had requested information regarding those concerns pursuant to 30 TAC § 305.62(j)(3), in which case the scope of the Executive Director’s review and the hearing would have been expanded to include them. But *(footnote continued)*

the Executive Director did not request any such information.

3. If the draft permit included one or more provisions addressing such concerns, in which case evidence demonstrating those provisions violates a “specifically applicable state or federal requirement” would be relevant pursuant to § 2003.047(i-2). But the draft permit does not include any such provisions.

Because none of those circumstances are present in this case, evidence regarding the identified “concerns” is not relevant to this proceeding and should not have been admitted, much less relied upon as the basis for the recommendation in the PFD.

conformance; the CAPCOG Executive Committee then made a unanimous determination of conformance and recommended approval of the permit application. *App. Ex. 7.*

After the requested hours were reduced, the Caldwell County Commissioners Court found that:

With the reduction in requested extended operating hours and the proposed benefits to the County and its residents, 130EP has allayed the County's concerns regarding possible impacts of extended hours of operation at the facility.

*App. Ex. 17 p.2.* The Commissioners Court also adopted a resolution in support of the application with the reduced proposed additional hours, including findings regarding benefits to the public, businesses, the solid waste collection system, area roadways, the County, and its residents:

- The addition of Saturday operating hours for the landfill will provide available weekend disposal, including for individuals who, for work or other reasons, may be unable to get to the landfill on weekdays, and for businesses (restaurants, grocery stores, etc.) needing waste collection and disposal services on Saturday;
- Authorizing waste acceptance hours to begin at 5 a.m. (6 a.m. on Saturday) will allow vehicles collecting waste in the very early morning hours to get their first loads of the day to the landfill and return to their collection routes before the peak morning traffic times for persons travelling to work, students travelling to schools, and others travelling on area roadways, thereby reducing peak hour traffic on roadways providing access to the landfill; and
- With the reduction in requested extended operating hours and the proposed benefits to the County and its residents, the Commissioners Court finds that it would be beneficial to and in the best interest of the County and its residents to support the revised application by 130EP.

*App. Ex. 8.* The Commissioners Court also adopted a revised solid waste facility siting ordinance, finding that the 130EP Landfill is “a more suitable location for the disposal of municipal solid waste” than the previously approved location in the County, and designating the 130EP Landfill as the only location in the County where solid waste processing and disposal is not prohibited. *App. Ex. 9 pp.1,5.*

### **Other Supporting Evidence**

David Butler, the Operations Manager at the 130EP Landfill, testified that landfill customers who come to the facility at the current opening time of 7:00 a.m. are then exiting at peak traffic times, and that beginning waste acceptance hours earlier on weekdays would give customers the ability to get back out on the roadways and get ahead of that peak traffic. Mr. Butler also testified that the requested Saturday operating hours would benefit area residents by giving them the option of accessing the landfill outside of their normal working hours. *App. Ex. 38, p.59 l.22 - p.60 l.15.* Edgar Lozano, the Operations Manager at the 130EP Landfill, testified that with the

expanded operating hours it would be easier to manage peak hours of operation. Because waste collection trucks start working at 2 am or 3 am and the landfill does not currently begin accepting waste until 7 am, trucks sometimes now wait at the landfill for an hour before they can drop their loads, and beginning waste acceptance hours earlier would spread out truck traffic to the landfill that currently arrives during the first hour of operations. Mr. Lozano also testified that Saturday operations would allow waste collection trucks that work on Saturdays to bring waste to the 130EP Landfill, that the landfill receives a lot of comments from residents in Caldwell County who work Monday to Friday asking if the landfill can open on Saturdays to accept their trash, and that he is aware of requests to the landfill for earlier or later acceptance of waste on weekdays *App. Ex. 35 Sub. 2 p.28 l.24 – p.29 l.11, p. 30 l.16-p.31 l.13, p.31 l.18-p.32 l.8*. In addition, the statements in the application regarding the reasons for the requested changes to operating hours are, of course, also evidence that supports the change. *AR Tab D/ App. Ex. 3, at p.143*. They, like the other evidence of support referenced above, are uncontroverted.

**PFD ERROR: IMPROPER CONCLUSION THAT PROTESTANTS' EVIDENCE  
REGARDING ODOR AND NOISE IS CONTROLLING**

The PFD improperly concludes that Protestants' evidence regarding odor and noise provides a controlling basis for the recommendation to deny the requested permit amendment.

**Odor**

Protestants presented odor testimony from Byron Friedrich and Susan Lane. Mr. Friedrich testified that he detects intermittent odors (that he believes originate from the landfill) at his property very infrequently, “you're probably talking 8, 10, 12 times a year” on “cold, kind of temperature-inversion type of days” with “low ground fog, no air movement, no wind”. *Tr. Vol. 1, p.21 l.17 – p.22 l.1. and p.25 l.9-23*. A chart showing 5 years of wind data for Caldwell County obtained from TCEQ (*App. Ex. 20*), shows that such “no wind” conditions (“calm”) occur just over 1% of the time; if one were to include only “cold, kind of temperature-inversion” times with “low ground fog”, it would significantly reduce even that tiny percentage. On her property, Ms. Lane has 12 horses, 4 cows, 5 cats, and 23 dogs. She testified that odors on her property (which she believes originate from the landfill) are “horrible”, “toxic”, “persistently present”; and “everyday it got worse, now we smell those odors every day...” A hearing request letter she submitted says that whenever the landfill is operating, she's smelling the odor. *Aligned Protestants' Ex. 1, pp.1-2; Tr. Vol. 1 p.109 l.3-7*.

Other evidence in the record shows that potential sources of odors in the area, other than

the landfill, include livestock and other animals kept on nearby properties, dead animals, feral hogs, buzzards, and individual residents' solid waste containers. *Aligned Protestants' Ex. 1 pp.1-2 and p.5 l.3-4; Aligned Protestants' Ex. 2, p.1 l.21-22, p.3 l.22-23; Aligned Protestants' Ex. 3, p.3 l.4-14, p.2 l.1-3, and p.3 l.2-3; Tr. Vol. 1 p.62 l.12-p.63 l.3.*

Evidence presented by Ted Bowie, a well-qualified and experienced odor expert and trained odor inspector who conducted an odor investigation at and near the facility, shows, based on observations from his investigation and analysis of wind data showing that Ms. Lane's property is downwind from the primary source of potential odor at the landfill (the working face, where waste is deposited) only a small percentage of the time, that the odor conditions described in Ms. Lane's testimony are not only not credible, they are not even possible. Mr. Bowie's evidence includes:

- The working face is the primary source of odor at a landfill facility. *App. Ex. 18 pp.4-5.*
- Because odors move with wind, the odor monitoring locations during the investigation were downwind from the working face at the 130EP Landfill. *App. Ex. 18 pp.4-5.*
- The odor investigation was conducted during light wind conditions, favorable for detecting odors. *App. Ex. 18 p.5.*
- Odor tends to decrease in intensity as the distance from its source increases. *App. Ex. 18 p.4.*
- The odor investigation was conducted at distances closer to the landfill working face than Protestants' properties. *App. Ex. 18 pp.4-5, App. Ex. 21.*
- During the odor investigation, no odor was detected outside the facility boundary. Odor was detected at only one location inside the facility boundary, but the odor was intermittent and so light that it was consistently below the detection limit of a portable olfactometer, an odor detection and measuring device that is commonly used in field evaluations. *App. Ex. 18 pp.5-6.*
- An analysis of five years of hourly wind data from a nearby weather station shows that Ms. Lane's property would be downwind from the landfill working face approximately 21% of the time and Mr. Friedrich's property would be downwind approximately 4% of the time. However, if only hours with odors originating at the landfill were considered, these percentages would be substantially lower. *App. Ex. 18 p.7, App. Exs. 20, 22, 23, 24.*
- If odors associated with the 130EP Landfill facility are ever detectable on nearby properties, they would tend to be low intensity odors, infrequently detected, and/or detected for only limited periods of time. *App. Ex. 18 p.7.*

- A scarcity of complaints about an issue to the appropriate regulatory agency (here TCEQ) from residents near a regulated facility suggests that the issue is not a significant one for persons living near the facility. *App. Ex. 18 p.8.*<sup>11</sup>

### **Noise**

Protestants presented noise testimony from Ms. Lane, Mr. Friedrich, and Patton King. Ms. Lane testified that “there have been occasions when the landfill remained in operation past its operating hours. On those occasions...the sounds of beeping machinery was disruptive.” *Aligned Protestants’ Ex. 1 p.4 l.8-11*. Mr. Friedrich testified that “When the landfill is in operation, I can hear the constant sound of equipment and landfill vehicles—banging and beeping noises. This occurs all day long during the weekdays” and “I used to enjoy sleeping with our windows open at night, but we can’t do that anymore, because we’ll end up waking up to the raucous landfill sounds coming in through our windows in the morning.” *Aligned Protestants Ex. 2 p.2 l.16-18*. Mr. King’s noise testimony, which consisted entirely of hearsay to which 130EP objected, was “My brother, who spends more time on the Ranch than I do, has experienced disruptive noise conditions when he’s out there—clanks and beeps, as many as 9 beeps for each scrape cycle with the caterpillar.” *Aligned Protestants Ex. 3 p.5 l.17-20*. Each of these witnesses submitted their above-referenced testimony as written prefiled testimony on August 12, 2024, prior to the time Edgar Lozano, the Operations Manager at the landfill, testified on November 8, 2024 that the landfill had changed the backup alarms on its equipment from “beeping” to “white noise”, that can be only heard “maybe 50 feet from the machines”. *App. Ex. 35 Substitution p.39 l.13-18*.

Evidence presented by Jonathan Ferdinand, a well-qualified and experienced noise and vibration expert who conducted a noise investigation at the 130EP facility, includes:

- There are no noise limit requirements specifically applicable to the 130EP Landfill facility. *App. Ex. 14 p.2*.
- In evaluating noise levels in the vicinity of the 130EP Landfill facility, it is appropriate to use 24-hour noise level guidelines developed by the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Housing and Urban Development (HUD). *App. Ex. 12 p.5*.

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<sup>11</sup> Since the 130EP Landfill facility began operating, no complaints regarding noise at the facility have been made to TCEQ. Only one odor complaint has been made to TCEQ; it was investigated by TCEQ staff and no notice of violation or notice of enforcement was issued. The Executive Director’s Compliance History Report for the facility gives it a Classification of “High” and an outstanding Rating of 0.00. *App. Ex. 5 pp.6-7*.



- Noise levels are lower as the distance from the source increases. *Tr. Vol. 2 p.38.*
- Monitoring of noise levels during the noise investigation at the 130EP Landfill facility was conducted at locations closer to the landfill working face than Protestants' witnesses' properties. *App. Ex. 14 p.4, App. Ex. 42.*
- During the noise investigation, with the exception of noise monitor readings on one day when high winds resulted in unreliable data, measured noise levels at the 130EP Landfill facility were below the EPA and HUD guidelines. *App. Ex. 12 p.6, App. Ex. 14.*
- Measured noise levels on days when the 130EP Landfill was operating were comparable to "ambient" noise levels measured on weekend days when the landfill was not operating. *App. Ex. 14 p.4.*

### **Insufficient Evidence**

Protestants' odor and noise testimony is not sufficient to support denial of 130EP's permit application, even if this were a case in which such evidence was relevant to a controlling legal issue. *See, e.g., Northeast Neighbors Coalition v. Texas Com'n on Environmental Quality*, not reported in S.W.3d, 2013 WL 1315078 (Tex. App. – Austin 2013, rev. denied), in which the Austin Court of Appeals considered the Commission's approval of an amendment to a MSW landfill permit based on the Commission's 2005 rules (well before the LSMA rule was adopted, when all permitting requirements and issues were required to be addressed in an amendment application and were relevant in a hearing on the application). The landfill had been the subject of more than 900 odor complaints over a seven-year period (including hundreds in a single year) and TCEQ had issued notices of violation against the landfill. Several landfill neighbors testified that they could sometimes smell the landfill, some describing the smell as "rotting garbage," while others "used more descriptive phrases", and some testified that the smells sometimes made them sick or nauseated. The Court found that,

at best, the neighbor's testimony can be said to establish only that some of the neighbors, depending on the wind and other weather-related factors, can occasionally smell offensive odors from the landfill and that, on those occasions, the odors make some of the neighbors ill or nauseated."...Even if we were to assume, however, that the neighbors' odor testimony is conclusive-i.e., the landfill continues to have a significant odor problem that is systematic and disruptive-that fact alone would not preclude TCEQ from concluding that the landfill was compatible with existing land use in the area. First, there is no rule that prohibits a

landfill from producing any odor;<sup>12</sup> rather, TCEQ rules simply require an applicant to control odors [by way of] an odor management plan that addresses the sources of odors and includes instructions on how to control odors or sources of odors<sup>13</sup>...odor is not a specifically delineated factor for land-use-compatibility determinations...At best, odor could be fairly characterized as only one part of...multiple considerations. Thus, even if the evidence here conclusively establishes that there is an ongoing odor problem, it does not preclude TCEQ from concluding that [the landfill] is compatible with existing land uses.

*Id.*, at pp.9-12.

### **UNSUPPORTED FINDINGS, ERRONEOUS CONCLUSIONS**

The proposed order included with the PFD includes proposed findings of fact and conclusions of law. The Commission is authorized, in some instances, to overturn such findings and conclusions:

(c) The commission may overturn an underlying finding of fact that serves as the basis for a decision in a contested case only if the commission finds that the finding was not supported by the great weight of the evidence.

(d) The commission may overturn a conclusion of law in a contested case only on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules.

*Health and Safety Code §§ 361.0832(c) and (d). City of Jacksboro v. Two Bush Community Action Group, not reported in S.W.3d, 2012 WL 2509804 (2012, pet. denied).*

In this case, because of errors in the PFD and in proposed findings of fact and conclusions of law in the proposed order, the Commission is statutorily authorized to overturn the following proposed findings and conclusions and should do so:

Findings of Fact 35, 38, 42, 46, 48, 49, and 51-53.

Conclusions of Law 14-17.

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<sup>12</sup> Similarly, there is no TCEQ rule provision or other legal provision that establishes, for an MSW landfill facility, any noise limits or operational requirements like the one applicable to MSW transfer stations per 30 TAC § 330.239.

<sup>13</sup> The Site Operating Plan for the 130EP Landfill includes an odor management plan that “addresses the sources of odors and includes general instructions to control odors or sources of odors, including the identification of wastes that require special attention” as required by 30 TAC § 330.149. *App. Ex. 33 p.046-047*. The facility does not accept certain special wastes that have the potential to be odorous, such as untreated medical waste, dead animals, slaughterhouse waste, sewage sludge, and grease and grit trap waste; employs odor control at the working face by limiting the size of the working face and covering it daily with at least six inches of soil; takes steps to control ponding water; and transferring leachate from the leachate collection system directly to either an enclosed liquid transfer vehicle or to an on-site enclosed leachate storage tank. *App. Ex. 18 p.8 l.39-p.9 l.2*.

### **CONCLUSION**

The uncontroverted evidence in the record, consisting of and supporting the reasons for the requested changes set out in the Application, including the findings and recommendations of CAPCOG and Caldwell County and the testimony of Mr. Butler and Mr. Lozano, is more than enough to provide adequate justification for the requested revised hours. Beyond that, in this case, the unrebutted prima facie demonstration establishes that the draft permit meets all state and federal legal and technical requirements (including any adequate justification requirement) and that the draft permit will protect human health and safety, the environment, and physical property.

### **PRAYER**

WHEREFORE, 130 ENVIRONMENTAL PARK, LLC, respectfully requests that the Commission reject the proposal for decision; overturn proposed Findings of Fact 35, 38, 42, 46, 48, 49, and 51-53 and Conclusions of Law 14-17 in the proposed order attached to the proposal for decision; and issue an order approving 130EP's permit application and the issuance of the requested amended permit, including findings of fact and conclusions of law as set out in the attached Applicant's Proposed Findings of Fact and Conclusions of Law.

Respectfully submitted,

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ATTORNEYS FOR 130 ENVIRONMENTAL  
PARK, LLC

By: /s/ Brent W. Ryan

## CERTIFICATE OF SERVICE

On April 8, 2025, a true and correct copy of the foregoing was sent via filing at EFILE.TXCOURTS.gov to the Honorable Katerina DeAngelo, Administrative Law Judge, and to representatives of each of the other parties to this proceeding via service at EFILE.TXCOURTS.gov and via email:

TCEQ Executive Director:

'Anthony Tatu' <anthony.tatu@tceq.texas.gov>

'Caroline Catchings' <Caroline.Catchings@tceq.texas.gov>

TCEQ Office of Public Interest Counsel:

'Pranjal Mehta' <Pranjal.Mehta@tceq.texas.gov>

'Josiah Mercer' <Josiah.Mercer@tceq.texas.gov>

Aligned Protestants:

'Marisa Perales' <marisa@txenvirolaw.com>

'Eric Allmon' <eallmon@txenvirolaw.com>

/s/ Brent W. Ryan

Brent W. Ryan, Attorney for  
130 Environmental Park, LLC

**SOAH DOCKET NO. 582-24-13241  
TCEQ DOCKET NO. 2023-1559-MSW**

<b>APPLICATION OF</b>  <b>130 ENVIRONMENTAL PARK, LLC</b>  <b>FOR A LIMITED-SCOPE AMENDMENT</b>  <b>TO MSW PERMIT NO. 2383</b>	§ § § § § § §	<b>BEFORE THE STATE OFFICE</b>  <b>OF</b>  <b>ADMINISTRATIVE HEARINGS</b>
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**APPLICANT’S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

130 Environmental Park, LLC is submitting these proposed findings of fact and conclusions of law for consideration for inclusion in an order in this matter. These proposed findings and conclusions include references to issues previously determined by the Commission to be “outside the scope of this amendment”, but discussed in the proposal for decision and the ALJ’s proposed order: odors and noise. In so doing, 130EP is not waiving its positions regarding these issues as set out in its exceptions to the proposal for decision.

**A. BACKGROUND FACTS**

1. In 2013 and 2014, 130 Environmental Park, LLC (130EP) filed with the Texas Commission on Environmental Quality (TCEQ or the Commission) the application for Permit No. 2383 (the Current Permit) for the 130 Environmental Park Landfill (130EP Landfill facility or the landfill), a new Type I municipal solid waste landfill facility to be located in Caldwell County. *Applicant’s Exhibit (App. Ex.) 31, at pp.2-3, Findings of Fact 1, 2, 8 and 9.*<sup>1</sup>
2. In 2013, the Caldwell County Commissioners Court adopted the Caldwell County Solid Waste Disposal Ordinance, which purported to authorize the disposal of solid waste in one location (property owned by the County) and to prohibit the disposal of solid waste in all other portions of Caldwell County, including at the location of the 130EP landfill facility. *App. Ex. 3, pp. 15-19.*
3. The Caldwell County Commissioners Court opposed 130EP’s original permit application. *App. Ex. 17, paragraph 3.*

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<sup>1</sup> The italicized references to supporting evidence in the record are included for the Commission’s convenience.

4. In September 2017, the Commission approved the issuance of the Current Permit, concluding that “The existence of the County’s Disposal Ordinance does not prevent TCEQ from granting the Application and issuing the permit pursuant to Texas Health and Safety Code §§ 363.112(d) and 364.012(f).” *App. Ex. 31 at p.38, Conclusion of Law 41.*
5. The Current Permit authorizes the acceptance of waste at the 130EP Landfill facility between 7 am and 7 pm Monday through Friday, and other operations (including the use of heavy equipment) between 5 am and 9 pm Monday through Friday. *App. Ex. 31, Section II.A at p.045.*
6. The “working face” at the 130EP Landfill facility is the area where active operations of waste deposition, spreading, and compaction are occurring. *App. Ex. 21; App. Ex. 18 p.005, l.22-28.*

## **B. PROCEDURAL HISTORY**

7. In December 2021, 130EP submitted to TCEQ an application (the Application) for a limited scope major amendment to the Current Permit to expand authorized operating and waste acceptance hours to 24 hours per day, 7 days per week. *Administrative Record [AR] Tab D/App. Ex. 3, at pp. 00001-00095.*
8. During the review of the Application, the only additional information requested by the Executive Director was by way of a January 18, 2022 administrative notice of deficiency letter and table requesting that 130EP provide additional information to provide/address:
  - a. An original and three copies of the response to the notice of deficiency;
  - b. The url address of an internet website where the application would be posted;
  - c. Addresses for the individual responsible for publishing notice regarding the Application;
  - d. The verified/corrected latitude and longitude of the 130EP Landfill facility;
  - e. The name of the consultant’s company;
  - f. The State Senator’s office number as part of her address;
  - g. Four sets of printed mailing labels for adjacent landowners;
  - h. An original signed, sealed, and notarized signature page.*App. Ex. 10; Hearing on the Merits Transcript (Tr.) Vol. 1 p.138, l.7 thru p.139, l.3 and p.139, l.18-22.*
9. In January 2022, 130EP submitted revisions to the Application that provided all information requested in the Executive Director’s January 18, 2022 request. *AR Tab D/App. Ex. 3, at pp. 00096-00123; App. Ex. 11; Transcript Vol. 1 p.138, l.7 thru p.139, l.17.*
10. During the review of the Application, the Executive Director did not request any information regarding odors, noise, access roads, nuisance conditions, or land use compatibility. *Tr. Vol. 1 p.139, l.18-22.*
11. In response to public comment and concerns regarding the possible impact of the extended operating hours, on April 26, 2022 the Caldwell County Commissioners Court adopted

Resolution No. 32-2022 opposing the extended operating hours; *App. Ex. 8, paragraphs 4-5; App. Ex. 17, paragraphs 4-5.*

12. In September 2022, 130EP submitted revisions to the Application to limit the proposed waste acceptance hours to 5:00 a.m. to 7:00 p.m. Monday through Friday and 6:00 a.m. to 5:00 p.m. on Saturdays, and to limit other site operations to 5:00 a.m. to 9:00 p.m. Monday through Friday and 6:00 a.m. to 6:00 p.m. on Saturday. *AR Tab D/App. Ex. 3, at pp. 00124-00149.*
13. The proposed waste acceptance hours at the 130EP Landfill facility would begin at 5 am Monday through Friday, the same time the facility is authorized by its current permit to begin operating heavy equipment. *App. Ex. 31, Section II.A at p.045.*
14. After the Application was revised to limit the proposed hours, the Caldwell County Commissioners Court concluded that “with the reduction in requested extended operating hours and the proposed benefits to the County and its residents, 130EP has allayed the County's concerns regarding possible impacts of extended hours of operation at the facility.” *Applicants. Ex. 17, paragraphs 6-7.*
15. On September 27, 2022, the Caldwell County Commissioners Court adopted Resolution 41-2022 in support of the Application with the reduced proposed additional hours, including findings regarding benefits to the public, businesses, the solid waste collection system, area roadways, the County, and its residents:
  - The addition of Saturday operating hours for the landfill will provide available weekend disposal, including for individuals who, for work or other reasons, may be unable to get to the landfill on weekdays, and for businesses (restaurants, grocery stores, etc.) needing waste collection and disposal services on Saturday;
  - Authorizing waste acceptance hours to begin at 5 a.m. (6 a.m. on Saturday) will allow vehicles collecting waste in the very early morning hours to get their first loads of the day to the landfill and return to their collection routes before the peak morning traffic times for persons travelling to work, students travelling to schools, and others travelling on area roadways, thereby reducing peak hour traffic on roadways providing access to the landfill; and
  - With the reduction in requested extended operating hours and the proposed benefits to the County and its residents, the Commissioners Court finds that it would be beneficial to and in the best interest of the County and its residents to support the revised application by 130EP.*App. Ex. 8, paragraphs 7, 8, 10 and 11.*
16. In September 2022, Caldwell County and 130EP entered into a binding agreement providing for, inter alia:
  - A 10-year term beginning on the first Saturday of landfill operations after issuance of an amended permit by TCEQ.
  - 130EP’s agreement that, during the term of the agreement and any renewals, it will not seek to expand the landfill’s hours of operation.

- No-charge disposal at the landfill for Caldwell County residents for up to six cubic yards of waste per resident per week.  
*App. Ex. 17, Sections 1.01, 2.02, and 2.06.*

17. On October 10, 2023, the Caldwell County Commissioners Court adopted a revised Solid Waste Disposal Ordinance, finding that:  
     since its 2013 Ordinance, the County has determined that a more suitable location for the disposal of municipal or solid waste exists within Caldwell County, identified as the TCEQ-permitted facility boundary at 130 Environmental Park...  
 and ordering that:  
     3.01 The processing or disposal of municipal or industrial solid waste or the operation of a solid waste facility is not prohibited in the area of Caldwell County identified as the TCEQ-permitted facility boundary at 130 Environmental Park...3.02 Except as provided in Section 3.01, the processing or disposal of municipal or industrial solid waste or the operation of a solid waste facility is prohibited in all portions of Caldwell County, Texas.  
*App. Ex. 9, p.1, paragraph 7, and p.5, Sections 3.01 and 3.02.*
18. After the Application was revised to limit the proposed hours, in an October 20, 2022 letter regarding the Limited Scope Major Amendment Application for MSW Permit No. 2383, the Capital Area Council of Governments (CAPCOG) notified TCEQ that the CAPCOG Solid Waste Advisory Committee reviewed the application for conformance with the goals and objectives identified in the CAPCOG Regional Solid Waste Management Plan and made a recommendation of conformance, and that the CAPCOG Executive Committee had made a unanimous determination of conformance with the goals and objectives identified in the CAPCOG Regional Solid Waste Management Plan “and now recommends approval of the permit application.” *App. Ex. 7.*
19. The Limited Scope Permit Amendment Narrative in the Application includes a statement describing the reasons for the requested changes, including the benefits associated with those changes as recognized in the Caldwell County Commissioners Court Resolution 41-2022:  
     For a minimum of ten years after approval of this permit amendment, any Caldwell County resident may dispose of up to 6 cubic yards of accepted waste at no charge during Saturday waste acceptance hours...The 130 Environmental Park provides waste disposal for individuals, businesses, and communities in Caldwell County and the surrounding counties. The service area for the facility is a wide area with significant haul distances from some of the serviced communities. To better serve those communities, businesses, and customers, expanded operating hours will allow for more efficient waste collection and disposal outside typical working hours and peak traffic times, and reduce traffic and other impacts to infrastructure. The addition of Saturday operating hours will provide available weekend disposal, including for individuals who, for work or other reasons may be



unable to get to the landfill on weekdays, and for businesses (restaurants, grocery stores, etc.) needing waste collection and disposal services on Saturday. Authorizing waste acceptance hours to begin at 5 a.m. (6 a.m. on Saturday) will allow vehicles collecting waste in the very early morning hours to get their first loads of the day to the landfill and return to their collection routes before the peak morning traffic times for persons travelling to work, students travelling to schools, and others travelling on area roadways, thereby reducing peak hour traffic on roadways providing access to the landfill.

*AR Tab D/App. Ex. 3, at p. 00143.*

20. The TCEQ Executive Director issued a draft permit (the Draft Permit) based on the Application. The only substantive provision in the Draft Permit is:

Description of Change: The limited-scope amendment expands waste acceptance hours to 5:00 am to 7:00 pm, Monday through Friday, and 6:00 am to 5:00 pm on Saturday. It expands operating hours to 5:00 am to 9:00 pm, Monday through Friday, and 6:00 am to 6:00 pm on Saturday.

*AR Tab F/App. Ex. 5, at p. 00001.*

21. TCEQ's December 21, 2023 Interim Order referred this matter to the State Office of Administrative Hearings (SOAH) pursuant to Texas Water Code § 5.556, specified a maximum hearing duration of 180 days from the preliminary hearing to the date the proposal for decision is issued by SOAH, and identified only one issue to be referred: "Whether 130 Environmental Park has provided an adequate justification for expanding its facility hours beyond those established in 30 TAC§ 330.135." *AR Tab A/App. Ex. 2.*

22. The administrative record includes certified copies of the Application, the Executive Director's final draft permit, the Executive Director's preliminary decision, the technical summary of the Application, the compliance summary of the applicant, the public notices and affidavits relating to the permit application; and other agency documents determined by the Executive Director to be necessary to reflect the administrative and technical review of the application. *AR Certification and Tabs E,F,G/App. Exs. 4,5,6.*

23. The preliminary hearing in this matter was held on May 30, 2024. The following persons and entities were designated as parties:

130 Environmental Park, LLC (Applicant)

Executive Director (ED) of the Texas Commission on Environmental Quality

Office of Public Interest Counsel (OPIC)

Environmental Protection in the Interest of Caldwell County, Patton King on behalf of the King Family Trust, Frank Sughrue, Susan Elizabeth Lane, and Claudia Shroyer Brown and Robert Brown (Protestants)

*Order of June 12, 2024.*

24. By agreement of the parties with the approval of the administrative law judge, the deadline for issuance of the proposal for decision was extended beyond 180 days from the preliminary hearing, until April 21, 2025. *Order of January 21, 2025.*

25. No party requested that the ALJ consider, pursuant to Government Code § 2003.047(f) and 30 TAC § 80.4(c)(15), any issue beyond the one referred.
26. The hearing on the merits was held January 14-15, 2025 at SOAH's offices in Austin. Several witnesses participated by videoconference. *Tr. Vols. 1,2.*

### **C. MATTERS ADDRESSED IN THE HEARING EVIDENCE**

27. Properties near the 130EP property include large parcels on which uses include keeping livestock and other animals, with only one or two residences per parcel. *App. Exs. 22 and 42 (App. Ex. 22 Substitution); Aligned Prot. Ex. 1 p.1, l.10-16; Tr. Vol. 1 p.16, l.5-14; Aligned Prot. Ex. 2 p.1, l.21-22; Tr. Vol. 1 p.23, l.21 thru p.25, l.3; Aligned Prot. Ex. 3 p.2, l.1-3; Tr. Vol. 1 p.30, l.3 thru p.31, l.8.*
28. Aligned Protestants presented anecdotal evidence from three lay witnesses regarding past experiences of odors and noise on properties near the 130EP Landfill facility. *Aligned Prot. Exs. 1, 2, and 3.*
29. Other potential sources of odors in the area near the 130EP Landfill facility, other than the landfill, include livestock and other animals kept on nearby properties and dead animals. *Aligned Prot. Ex. 1 p.1, l.10-16 and p.4, l.3-4; Aligned Prot. Ex. 2 p.1, l.21-22; Aligned Prot. Ex. 3 p.2, l.1-3.*
30. The Odor Management Plan for the 130EP Landfill facility identifies sources of odors at the facility, includes general instructions for the control of odors or sources of odors at the facility, and discusses wastes that require special attention due to potential odors. *App. Ex. 31, Findings of Fact 377-379 at p.032; App. Ex. 33 at pp.046-047.*
31. The 130EP Landfill facility is not authorized to accept certain wastes that have the potential to produce odors, including untreated medical waste, dead animals, slaughterhouse waste, sewage sludge, and grease and grit trap waste. (*App. Ex. 18, p.008; App. Ex. 33, pp. 027-029*)
32. The 130EP Landfill facility employs odor control at the working face, such as limiting the size of the working face and covering the working face daily with at least six inches of soil or alternative daily cover. (*App. Ex. 18, p.008; App. Ex. 33, pp. 43, 046-047*)
33. The 130EP Landfill facility takes steps to control ponding water. (*App. Ex. 18, p.008, App. Ex. 33, pp. 046-047, 53-54*)
34. Leachate is transferred from the leachate collection system either directly to an enclosed liquid transfer vehicle or an on-site enclosed leachate storage tank. (*App. Ex. 18, p.008-009, App. Ex. 33, pp.046, 058*)

35. The 130EP Landfill facility has buffer zones from storage and processing facilities to the facility boundary. (*App. Ex. 18, p.009; App. Ex. 33, p. 043*)
36. The 130EP Landfill facility takes appropriate steps to control odors. *App. Ex. 18, p.008, l.37 thru p.009, l.2.*
37. An odor investigation was conducted at and near the 130EP Landfill facility by Ted Bowie, an odor expert and trained odor inspector. *App. Ex. 18, p.004, l.4-46 thru p.006, l.11.*
38. Because odors move with wind, the odor monitoring locations were downwind from the working face at the 130EP Landfill facility. *App. Ex. 18, p.004, l.26-28 and p.004, l.41 thru p.6, l.11.*
39. Odor tends to decrease in intensity as the distance from its source increases. *App. Ex. 18, p.004, l.28-29.*
40. The odor investigation was conducted at distances closer to the landfill working face than properties outside but near the 130EP Landfill facility property. *App. Exs. 21, 22 and 42; App. Ex. 18, p.004, l.28-29 and p.004, l.41-p.5, l.2.*
41. The working face is the primary source of odor at a landfill facility. *App. Ex. 18, p.004, l.41 thru p5, l.1.*
42. The odor investigation was conducted during light wind conditions, favorable for detecting odors. *App. Ex. 18, p.004, l.41 thru p5, l.34.*
43. During the odor investigation, within the 130EP Landfill facility boundary at locations closer to the landfill working face than adjacent properties, odor was detected at only one location, but the odor was intermittent and so light that it was consistently below the detection limit of a portable olfactometer, an odor detection and measuring device that is commonly used in field evaluations. No odor was detected outside the facility boundary. *App. Ex. 18, pp. 004-006.*
44. A scarcity of complaints about an issue to the appropriate regulatory agency (here TCEQ) from residents near a regulated facility suggests that it is not a significant issue for persons living near the facility. *App. Ex.18 p008, l.17-35.*
45. TCEQ has received only one odor complaint regarding operations at the 130EP Landfill facility. TCEQ conducted an investigation, but no notice of violation or notice of enforcement was issued, which suggests that TCEQ was not able to confirm the odor. *App. Ex. 26; App. Ex. 18 p.008, l.17-35.*
46. If odors associated with the 130EP Landfill facility are ever detectable on nearby properties, they would tend to be low intensity odors, infrequently detected, and/or detected for only limited periods of time. *App. Ex. 18 p.7, l.1-3.*

47. There are no noise limit requirements specifically applicable to the 130EP Landfill facility. *App. Ex. 14 p.2, paragraph 3; 30 TAC § 330.239.*
48. Noise levels are lower as the distance from the source increases. *Tr. Vol. 2 p.38, l.13-17.*
49. Monitoring of noise levels during the noise investigation at the 130EP Landfill facility was conducted at locations closer to the landfill working face than properties adjacent to the 130EP property. *App. Ex. 14, Figure 1 at p.004; App. Ex. 22.*
50. In evaluating noise levels in the vicinity of the 130EP Landfill facility, it is appropriate to use 24-hour noise level guidelines developed by the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Housing and Urban Development (HUD). *App. Ex. 12 p.005, l.22-31; App. Ex. 14 pp. 002-003.*
51. An investigation of noise levels at the 130EP Landfill facility was designed and conducted by Jonathan Ferdinand, a noise expert and noise and vibration specialist. *App. Ex. 12 p.006, l.17-28; App. Ex. 13.*
52. Sound levels measured during times of wind speeds above 12 miles per hour may be affected by wind interference. Because sustained wind speeds of 10 to 37 miles per hour, with gusts up to 46 miles per hour or higher on August 9, 2024, noise level measurements on that day are not reliable. *App. Ex. 14, p.005.*
53. During the noise investigation, with the exception of noise monitor readings on August 9, 2024 when high winds resulted in unreliable data, measured noise levels at the 130EP Landfill facility were below the EPA and HUD guidelines. *App. Ex. 12 p.003, l.5 thru p.4, l.23, and p.006, l.17-28; App. Ex. 14.*
54. Measured noise levels on days when the 130EP Landfill was operating (August 8 and August 12-15, 2024) were comparable to “ambient” noise levels measured on days when the landfill was not operating (Saturday, August 10, 2024 and Sunday, August 11, 2024). *App. Ex. 14, p.004.*
55. TCEQ has received no complaints regarding noise associated with operation of the 130EP Landfill facility, suggesting that that noise is not a significant issue for persons living near the facility. *App. Ex. 18 p.008, l.17-35. App. Ex. 26.*

#### **D. CONCLUSIONS OF LAW**

1. As required by 30 TAC § 305.62(b), the Application includes all requested changes to the Permit.
2. As required by 30 TAC § 305.62(b), the Limited Scope Permit Amendment Narrative in the Application includes a statement describing the reasons for the requested changes to the Permit.

3. Pursuant to 30 TAC § 305.62(j)(2), the Executive Director's review of the Application and this proceeding are limited to the proposed changes to the Permit and additional information requested by the Executive Director.
4. The Application is subject to the provisions of Government Code § 2003.047 (i-1) thru (i-3) and 30 TAC § 80.117(c).
5. The TCEQ Chief Clerk filed the administrative record with SOAH pursuant to 30 TAC § 80.118(c).
6. Pursuant to Government Code § 2003.047(i-1) and 30 TAC § 80.117(c), the filing of the administrative record with SOAH established a prima facie demonstration that:
  - (a) the Draft Permit meets all applicable state and federal legal and technical requirements; and
  - (b) a permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property.
7. Pursuant to Government Code § 2003.047(i-2) and 30 TAC § 80.117(c)(3), in order to rebut the prima facie demonstration, a party must present evidence demonstrating that one or more provisions in the Draft Permit violate a specifically applicable state or federal requirement.
8. The only state or federal requirements applicable to provisions in the Draft Permit are the requirements in TCEQ's rule at 30 TAC § 330.135(a) that (1) waste acceptance hours must be between 7:00 a.m. and 7:00 p.m., Monday through Friday, unless otherwise approved in the authorization for the facility, and (2) transportation of materials and heavy equipment operation must not be conducted between the hours of 9:00 p.m. to 5:00 a.m., unless otherwise approved in the authorization for the facility. (emphasis added)
9. The Draft Permit provision authorizing waste acceptance hours of 5:00 am to 7:00 pm, Monday through Friday, and 6:00 am to 5:00 pm on Saturday, if incorporated into an amended permit, would not violate the first requirement in 30 TAC § 330.135(a) set out in Conclusion of Law No. 8 above; instead, it would be the very thing contemplated by that requirement: approved waste acceptance hours set out in the authorization for the facility.
10. The Draft Permit provision authorizing hours for other operations of 5:00 am to 9:00 pm, Monday through Friday, and 6:00 am to 6:00 pm on Saturday would not violate the second requirement in 30 TAC § 330.135(a) set out in Conclusion of Law No. 8 above because (a) it would not authorize transportation of materials and heavy equipment operation between the hours of 9:00 p.m. and 5:00 a.m., and (b) it would be the very thing contemplated by that requirement: approved hours for transportation of materials and heavy equipment operation set out in the authorization for the facility.
11. 130EP's Site Operating Plan provides sufficiently detailed information regarding the operational methods to be utilized at the Facility when using daily cover and its

- preventative effect on vectors, fires, odors, windblown waste and litter, and scavenging, as required by 30 TAC § 330.165(a). *App. Ex. 31, Conclusion of Law 44 at p.038.*
12. The odor management plan in 130EP's Site Operating Plan contains sufficient details regarding the sources of odors and general procedures for odor control and meets the requirements of 30 TAC§ 330.149. *App. Ex. 31, Conclusion of Law 47 at p.039.*
  13. There are no noise limit requirements specifically applicable to the 130EP Landfill facility. *Report of Jonathan Ferdinand, App. Ex. 14 p.2, paragraph 2; 30 TAC § 330.239.*
  14. Issues such as odors, noise, access roads, nuisance prevention, and land use compatibility are outside the scope of the requested permit amendment. *Conclusion of the TCEQ Commissioners at December 13, 2023 Agenda Meeting; App. Ex. 44.*
  15. Because odors, noise, nuisance prevention, and land use compatibility were not addressed in the Application's statement of the reasons for the requested changes to the Permit, and because the Executive Director did not request information regarding those matters (or any of them) during review of the Application, evidence regarding those matters is not relevant to this proceeding. *AR Tab D/App. Ex. 3, at p. 00143; Tr. Vol. 1 p.139, l.18-22.*
  16. The Aligned Protestants did not present evidence rebutting the reasons for the requested changes to the Permit as set out in the Limited Scope Permit Amendment Narrative in the Application. *AR Tab D/App. Ex. 3, at p. 00143.*
  17. The Aligned Protestants did not present evidence demonstrating that one or more provisions in the Draft Permit violate a specifically applicable state or federal requirement.
  18. The Aligned Protestants did not rebut the prima facie demonstration set out in Conclusion of Law No. 6 above.
  19. The Draft Permit meets all state and federal legal and technical requirements. *AR Tab F/App. Ex. 5; Government Code § 2003.047(i-1)(1).*
  20. A permit consistent with the draft permit will protect human health and safety, the environment, and physical property. *AR Tab F/App. Ex. 5; Government Code § 2003.047(i-1)(1).*
  21. 130EP met its burden of proof on the issue referred by the Commission. *30 Tex. Admin. Code § 80.117(b); August 29, 2022 Final Order Granting the Application by Kendall West Utility, LLC for TPDES Permit No. WQ0015787001 (SOAH Docket No. 582-22-0489; TCEQ Docket No. 2021-0755-MWD), Conclusion of Law No. 6 at p.9<sup>2</sup>.*

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<sup>2</sup> Conclusion of Law No. 6 is: Applicant has the burden of proof on the issues referred by the Commission. *30 Tex. Admin. Code § 80.117(a).* However, the admission of the Administrative Record into evidence met Applicant's burden of proof, subject to rebuttal. *30 Tex. Admin. Code § 80.117(b).*

22. 130EP provided an adequate justification for expanding the hours at the 130EP Landfill facility beyond those established in 30 TAC§ 330.135.