

# State Office of Administrative Hearings

Kristofer S. Monson  
Chief Administrative Law Judge

March 19, 2025

TCEQ Executive Director

**VIA EFILE TEXAS**

130 Environmental Park, LLC

**VIA EFILE TEXAS**

Protestants

**VIA EFILE TEXAS**

Office of Public Interest Counsel

**VIA EFILE TEXAS**

**RE: SOAH Docket No. 582-24-13241**

**TCEQ Docket No. 2023-1559-MSW**

***Application by 130 Environmental Park, LLC for a Limited-Scope  
Amendment to MSW Permit No. 2383***

Dear Parties:

Please find attached a Proposal for Decision (PFD) in this case. Any party may, within 20 days after the date of issuance of the PFD, file exceptions or briefs. Any replies to exceptions, briefs, or proposed findings of fact shall be filed within 30 days after the date of issuance on the PFD. 30 Tex. Admin. Code § 80.257.

All exceptions, briefs, and replies along with certification of service to the above parties and the ALJ shall be filed with the Chief Clerk of the TCEQ electronically at <http://www14.tceq.texas.gov/epic/eFiling/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

CC: Service List

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**BEFORE THE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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**APPLICATION BY 130 ENVIRONMENTAL PARK, LLC FOR A  
LIMITED-SCOPE AMENDMENT TO MSW PERMIT NO. 2383**

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**TABLE OF CONTENTS**

I. Notice, Jurisdiction, and Procedural History .....	2
II. Burden of Proof and Prima Facie Case .....	3
III. Discussion .....	6
A. Background.....	9
B. Applicant's Evidence and Position.....	10
1. Odor Investigation.....	13
2. Sound Monitoring Investigation .....	15
C. ED's Evidence and Position.....	16
D. Protestants' Evidence and Position .....	18
1. Justification .....	20
2. Noise.....	21
3. Odors .....	23
E. Applicant's Reply .....	24
F. Protestants' Reply.....	26

G. OPIC’s Position .....	27
H. ALJ’s Analysis .....	29
IV. Transcript Costs .....	34
V. Conclusion and Recommendation .....	35

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**PROPOSAL FOR DECISION**

Applicant, 130 Environmental Park, LLC, filed an application (Application) with the Texas Commission on Environmental Quality (Commission or TCEQ) for a limited-scope amendment to its Municipal Solid Waste (MSW) Permit No. 2383 to authorize expansion of facility hours at its MSW landfill facility (Landfill) located in Caldwell County, Texas. The Application was opposed by several protestants. The Administrative Law Judge (ALJ) of the State Office of Administrative Hearings (SOAH) recommends denying the Application and not issuing the draft limited-scope amendment.

## **I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY**

No party contested jurisdiction or notice. The ALJ will address jurisdiction and notice in the findings of fact and conclusions of law in the Proposed Order attached to this Proposal for Decision (PFD).

Applicant submitted the Application to the Commission on December 22, 2021, for a limited-scope amendment to its MSW Permit No. 2383 to authorize expansion of facility hours at the Landfill.<sup>1</sup> The TCEQ Executive Director (ED) found the Application to be administratively and technically complete and prepared a draft limited-scope amendment (Draft Permit) with the following provision: “Description of Change: The limited-scope amendment expands 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 Saturday. It expands operating hours 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.”<sup>2</sup> Environmental Protection in the Interest of Caldwell County, Patton King on behalf of the King Family Trust, Frank Sughrue, Susan Lane, and Claudia Shroyer Brown and Robert Brown (collectively, Protestants) opposed the issuance of the Draft Permit.

The Commission determined that Protestants qualified as affected persons, granted their hearing requests, and referred the matter to SOAH for a contested case

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<sup>1</sup> Applicant (Appl.) Exhibit (Ex.) 3. On January 31 and September 6, 2022, Applicant submitted revisions to the Application. In its initial submission, Applicant sought to expand authorized operating and waste acceptance hours to 24 hours per day, seven days per week. Appl. Ex. 3 at 20.

<sup>2</sup> Appl. Ex. 5; Appl. Ex. 16 at 17.

hearing. At the preliminary hearing on May 30, 2024, the administrative record and jurisdictional documents were admitted into evidence; and Applicant, the ED, the Office of Public Interest Counsel (OPIC), and Protestants were named parties to the proceeding.<sup>3</sup>

On January 14-15, 2025, SOAH ALJ Katerina DeAngelo convened a hearing on the merits. Applicant was represented by attorney Brent W. Ryan. The ED was represented by attorneys Anthony Tatu and Caroline Catchings. OPIC was represented by attorneys Josiah Mercer and Pranjali Mehta. Protestants were represented by attorneys Marisa Perales and Eric Allmon. The record closed after submission of replies to closing briefs on February 19, 2025.

## **II. BURDEN OF PROOF AND PRIMA FACIE CASE**

Applicant, as the moving party, bears the burden of proof by a preponderance of the evidence.<sup>4</sup> The Application was filed after September 1, 2015, and TCEQ referred it to SOAH under Texas Water Code section 5.556, which governs referral of environmental permitting cases to SOAH.<sup>5</sup> Therefore, this case is subject to Texas Government Code section 2003.047(i-1)-(i-3), which provides:

(i-1) In a contested case regarding a permit application referred under Section 5.556 [of the] Water Code, the filing with [SOAH] of the application, the draft permit prepared by the executive director

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<sup>3</sup> The administrative record is Applicant's Exhibits 1-6 and consists of Tabs A-F.

<sup>4</sup> 1 Tex. Admin. Code § 155.427; 30 Tex. Admin. Code § 80.17(a). TCEQ rules, found in Title 30, part 1, chapters 1 to 352 of the Texas Administrative Code, are referred to herein as "Rule \_\_\_\_."

<sup>5</sup> Tex. Water Code §§ 5.551(a), .556.

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 . . . 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.
- (i-3) If in accordance with Subsection (i-2) a party rebuts a presumption established under Subsection (i-1), the applicant and the executive director may present additional evidence to support the draft permit.<sup>6</sup>

Neither the statute nor TCEQ rules elaborate as to the burden that must be met for the evidence to “demonstrate that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.” The ordinary meaning of “demonstrate” is “[t]o show to be true by reasoning or adducing evidence;

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<sup>6</sup> Tex. Gov’t Code § 2003.047(i-1)-(i-3), added by Acts 2015, 84th Leg., R.S., ch. 116 (S.B. 709), §§ 1 and 5, eff. Sept. 1, 2015.

prove.”<sup>7</sup> In contested case hearings, like civil trials, the longstanding general or default rule is that facts are deemed proven to exist or to be true by a preponderance of the evidence.<sup>8</sup> As applied in the context of the S.B. 709 framework, an opposing party’s burden under Texas Government Code section 2003.047(i-2) would be to present evidence that would, as compared to the contents of the administrative record filed with SOAH and admitted into evidence, preponderate in favor of a finding or conclusion that “one or more provisions in the draft permit violate a specifically applicable state or federal requirement,” thereby rebutting material facts that would otherwise be deemed proven by the mere filing and admission of the administrative record.<sup>9</sup>

The applicant and the ED have the right to “present additional evidence to support the draft permit” to augment or elaborate upon the administrative record. The burden of proof on the ultimate merits of the issue remains with the applicant. In this respect, an opposing party’s burden under section 2003.047(i-2) is similar to one of production rather than proof in the sense of ultimate persuasion. The ALJ notes that neither the statute nor TCEQ rules require the applicant to rely solely on the administrative record unless and until it is rebutted. Rather, the applicant may

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<sup>7</sup> Demonstrate. The American Heritage Dictionary of the English Language (5th ed. 2022).

<sup>8</sup> See *Granek v. Tex. State Bd. of Med. Exam’rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.).

<sup>9</sup> Accord 40 Tex. Reg. 9688 (Dec. 25, 2015) (explaining, in regard to TCEQ rules implementing S.B. 709 that, while the burden of proof remains with the applicant, that burden can be met “by the submittal of the administrative record to and its admittance into the evidentiary record by SOAH, subject to rebuttal as provided in new Texas Government Code § 2003.047(i-2). In addition, SB 709 does not establish the evidentiary standard for any party in a [contested case hearing], nor does it provide any direction to SOAH or the commission to establish a new standard for the rebuttal demonstration in new Texas Government Code § 2003.047(i-2). Because [contested case hearings] are similar to non-jury civil trials in district court, the evidentiary standard in [contested case hearings] for permit applications is ‘preponderance of the evidence.’”).



present any additional evidence to support the permit once the administrative record is admitted.<sup>10</sup> To the extent an applicant does so, the S.B. 709 analysis, as a practical matter, could reduce simply to weighing the totality of competing evidence presented by both sides, as contemplated by section 2003.047(i-3), and determining whether the applicant carried its burden of proof on each contested issue.

In this case, the Application, the Draft Permit, and the other materials listed in Texas Government Code section 2003.047(i-1), which are collectively referred to as the *prima facie* demonstration, were offered and admitted into the record at the preliminary hearing. The burden of proof remains with Applicant to establish by a preponderance of the evidence that the Application would not violate applicable requirements and that the permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property.<sup>11</sup> Applicant presented evidence beyond the administrative record. Accordingly, the ALJ focused the analysis on whether Applicant met its burden of proof based on the totality of evidence ultimately presented.

### **III. DISCUSSION**

The Commission referred the Application to SOAH for a contested case hearing on one issue: whether Applicant has provided an adequate justification for

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<sup>10</sup> Rule 80.117(c)(2) (the applicant, protesting parties, OPIC, and the ED may present evidence after admittance of the administrative record by the ALJ); *see also* Rule 80.117(b) (the applicant's presentation of evidence to meet its burden of proof may consist solely of the filing with SOAH, and admittance by the ALJ, of the administrative record).

<sup>11</sup> Rule 80.17(a), (c); 1 Tex. Admin. Code § 155.427.

expanding its facility hours beyond those established in Rule 330.135.<sup>12</sup> At the TCEQ Commissioners' December 13, 2023 public meeting regarding the Application, Chairman Jon Niermann noted:

[O]n a limited scope amendment such as this, it would be inappropriate to re-litigate other parts of [Applicant's] 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.<sup>13</sup>

TCEQ is authorized to manage the disposal of MSW and adopt rules to establish minimum standards of operation for facilities that dispose of MSW.<sup>14</sup> The Commission's rules in 30 Texas Administrative Code Chapter 330, Subchapter D establish operational standards for MSW landfill facilities, including the following:

[MWS landfills'] site operating plans must specify the waste acceptance hours and the facility operating hours when materials will be transported on or off site, and the hours when heavy equipment may operate. Waste acceptance hours may be any time between 7:00 a.m. and 7:00 p.m. Monday through Friday, and material transport and heavy equipment operation must not be conducted between 9:00 p.m. and

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<sup>12</sup> Appl. Ex. 1. Protestants argue that the Application should be denied because the Draft Permit violates applicable statutes and rules due to improper applicant/permittee. They argue that Applicant is not a proper permittee because it does not own or operate the Landfill and has no employees. Prot. Closing Brief (Br.) at 14-16; Prot. Reply Br. at 17. Applicant responded that it is the owner of the Landfill, the proper permittee for the current permit, and the proper applicant for the Application. Appl. Reply Br. at 9. The alleged issue of improper applicant/permittee was not an issue referred to SOAH for a contested case hearing and no party requested to add this issue; therefore, the ALJ declines to consider it and will not address this allegation further. Tex Gov't Code § 2003.047(f), Rule 80.4(c)(15).

<sup>13</sup> Appl. Ex. 44 at 4-5.

<sup>14</sup> See Tex. Health & Safety Code § 361.024(a).

5:00 a.m., unless otherwise approved in the authorization for the facility.<sup>15</sup>

Applicants may request expansion of operating hours beyond those specified hours through a limited-scope major amendment.<sup>16</sup> An application for any such amendment must describe the reason for the requested changes.<sup>17</sup>

The administrative record in this case 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.<sup>18</sup>

At the hearing on the merits, Protestants had nine exhibits admitted, which included the prefiled testimony of Susan Lane, Byron Friedrich, and Patton King.<sup>19</sup> Applicant had 39 exhibits admitted, which included the prefiled testimony of Jonathan Ferdinand, Ted Bowie, and Edgar Lozano.<sup>20</sup> The ED had two exhibits admitted, which included the prefiled testimony of Adam Schnuriger.<sup>21</sup> OPIC offered no testimony or exhibits.

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<sup>15</sup> Rule 330.135(a). Waste acceptance hours within the 7:00 a.m. to 7:00 p.m. weekday span and operating hours for other activities do not require specific approval.

<sup>16</sup> Rule 305.62(j)(2)(B).

<sup>17</sup> Rule 305.62(b).

<sup>18</sup> Tex. Gov't Code § 2003.047(i-1).

<sup>19</sup> Protestants (Prot.) Exs. 1-9.

<sup>20</sup> Appl. Exs. 1-28, 30, 31, 33, 35-39, 42-44.

<sup>21</sup> ED Exs. 1, 2.

## A. BACKGROUND

Applicant owns and operates the Landfill, which covers 520 acres, of which approximately 202 acres are approved for waste disposal. The Landfill is authorized to accept MSW resulting from municipal, community, commercial, institutional, recreational, and industrial activities, including garbage, putrescible wastes, rubbish, ashes, brush, street cleanings, construction waste, demolition waste, and yard waste. The Landfill is also authorized to accept Class 2 and Class 3 industrial solid waste and certain special waste, such as asbestos.<sup>22</sup> The total disposal capacity of the Landfill, including waste and daily cover, is 33.1 million cubic yards.<sup>23</sup>

The Landfill's current waste acceptance hours are 7:00 a.m. to 7:00 p.m. and operating hours are 5:00 a.m. to 9:00 p.m., both Monday through Friday.<sup>24</sup> The Applicant seeks to expand 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 Saturday; and operating hours 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.<sup>25</sup>

In the Application, Applicant provided the following reason for the requested change: to better serve communities, businesses, and customers because the

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<sup>22</sup> Appl. Ex. 16 at 16-17; Appl. Ex. 33; Appl. Ex. 35 (Lozano Direct (Dir.)) at 45. The Landfill is not authorized to accept certain wastes, including untreated medical waste, dead animals, slaughterhouse waste, sewage sludge, and grease and grit trap waste. Appl. Ex. 18 (Bowie Dir.) at 7; Appl. Ex. 33. Mr. Lozano testified that the Landfill mostly receives construction, demolition, and residential MSW. Appl. Ex. 35 (Lozano Dir.) at 10-11.

<sup>23</sup> Appl. Ex. 16 at 16-17; Appl. Ex. 33.

<sup>24</sup> Appl. Ex. 33 at 41.

<sup>25</sup> Appl. Ex. 3 at 20, 143; Appl. Ex. 5 at 3; Appl. Ex. 9 at 12.

extended hours would allow for more efficient waste collection and disposal outside typical working hours and peak traffic times and reduce traffic and other impact to infrastructure. Applicant further represented that the addition of Saturday hours would 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 Saturdays. According to Applicant, authorizing earlier waste acceptance hours 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.<sup>26</sup>

## **B. APPLICANT’S EVIDENCE AND POSITION**

Applicant requests issuance of the Draft Permit and asserts that Protestants failed to meet their burden, as they did not demonstrate a violation of any specifically applicable state or federal requirement.<sup>27</sup>

Mr. Lozano is the Landfill’s operations manager and responsible for ensuring that the Landfill is operated in compliance with its MSW permit.<sup>28</sup> According to Mr. Lozano, for daily operations, the Landfill uses a compactor, a motor grader, a

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<sup>26</sup> Appl. Ex. 3 at 20, 130, 143.

<sup>27</sup> Appl. Closing Br. at 9-10.

<sup>28</sup> Appl. Ex. 35 (Lozano Dir.) at 8-9, 21-22; Transcript Volume (Tr. Vol.) 1 at 51, 53.

dozer, and an excavator, all generally operating at the same time. He stated that waste is brought to the Landfill in “residential” vehicles, trash truck front-loaders, pickup trucks with trailers, and 18-wheeler dump trucks. Approximately 220 vehicles come to the Landfill daily.<sup>29</sup>

Mr. Lozano testified that odor, dust, and noise do not leave the boundary of the Landfill. He stated that the Landfill does not have any measures in place to control the noise; however, there have not been any noise complaints, and he does not hear any noise from the Landfill when he makes his daily rounds.<sup>30</sup> He added that any banging and beeping noises are coming from the vehicles coming to the Landfill and that the machinery at the Landfill is equipped with alarms that make the white noise when they are moving in reverse.<sup>31</sup>

The Landfill’s odor management plan identifies sources of odors, includes general instructions for the control of odors or sources of odors, and discusses wastes that require special attention due to potential odors. The Landfill 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.<sup>32</sup>

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<sup>29</sup> Appl. Ex. 35 (Lozano Dir.) at 17-18, 24.

<sup>30</sup> There is no defined noise ordinance or limit currently in place for the Landfill. Appl. Ex. 14 at 2. TCEQ has received no complaints regarding noise associated with operation of the Landfill. Appl. Ex. 18 (Bowie Dir.) at 8; Appl. Ex. 26.

<sup>31</sup> Appl. Ex. 35 (Lozano Dir.) at 14, 17-18, 33, 39. Mr. Lozano stated that any dust caused by the vehicles on site is sprayed with water. Appl. Ex. 35 (Lozano Dir.) at 32.

<sup>32</sup> Appl. Ex. 18 (Bowie Dir.) at 8; Appl. Ex. 33 at 43, 46-47. The working face at the Landfill is the area where active operations of waste deposition, spreading, and compaction are occurring. Appl. Ex. 18 (Bowie Dir.) at 5; Appl. Ex. 21. The odor management plan identifies ponded water, decomposed waste, leachate, contaminated water, and landfill gas as sources of odor at the Landfill. Appl. Ex. 33 at 46.

Mr. Lozano explained that the Landfill controls odors by opening a small section for waste collection and covering it as fast as possible; making sure that every vehicle in the scale has the waste covered; and moving dirt around the working face area to block the odors. Mr. Lozano testified that he can only smell some odors in the working face area, but he never noticed any odors anywhere else at the Landfill. According to Mr. Lozano, since October 2023, the Landfill has received at least four or five phone calls from neighbors regarding the odors. He stated that, when the Landfill receives the complaints, they log them, obtain contact information of the complainants, and start an investigation right away by driving around the Landfill and to the complainant's address. He added that they never have confirmed any odors coming from the Landfill.<sup>33</sup>

David Butler, the Landfill's general manager, testified that the extended hours would be a benefit to the Landfill's customers as well as to the economic viability of the Landfill.<sup>34</sup> Mr. Lozano explained that some Landfill customers start their operations early in the morning and, sometimes, they arrive at the Landfill an hour before the Landfill opens. He added that there is a lot of traffic in the morning hours. He stated that, with the extended hours, it will be easier to operate the Landfill and to manage the peak hours because some of the customers will get access earlier and do not have to wait. According to Mr. Lozano, he has received a lot of requests from customers asking for the extended hours, especially on Saturdays, because they do

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<sup>33</sup> Appl. Ex. 35 (Lozano Dir.) at 9-13, 38; Tr. Vol. 1 at 62-63. Mr. Lozano testified that the most recent odor complaint was in October 2024. He stated that, on that occasion, he determined that the source of the odor issue was a "trash container that they just emptied that day." Tr. Vol. 1 at 62-63.

<sup>34</sup> Prot. Ex. 4 (Butler Deposition) at 6, 55-56.

not have a chance to come during the regular hours when they work.<sup>35</sup> He also stated that, if the Landfill is open on Saturdays, it could accept waste from trash haulers who work on Saturdays and usually go to different landfills.<sup>36</sup>

## **1. Odor Investigation**

Mr. Bowie, an odor inspector retained by Applicant, conducted an odor investigation at the Landfill and its vicinity on August 14 and 15, 2024.<sup>37</sup> Mr. Bowie stated that on August 14, 2024, he did not observe any odors along the northern boundary of the Landfill, which he opined would be the most likely potential source of odor. According to Mr. Bowie, there were no odors at the stockpile area located in the northeastern portion of the Landfill, south of the eastern section of the screening berm, or near the perimeter of the Landfill. He testified that an average wind speed at the time was typical and light enough to be favorable for detecting odors.<sup>38</sup>

Mr. Bowie testified that on August 15, 2024, he observed a very light, intermittent odor that resembled garbage at the stockpile area of the Landfill. He used a portable olfactometer to quantify the strength of the odor. He testified that

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<sup>35</sup> Appl. Ex. 35 (Lozano Dir.) at 18-19, 30-32; Tr. Vol. 1 at 57-58.

<sup>36</sup> Tr. Vol. 1 at 59. Mr. Lozano was not involved in the decision to seek the extended hours. Tr. Vol. 1 at 56-57.

<sup>37</sup> Mr. Bowie was at the Landfill three or four hours on each day; however, he was not at the Landfill when it first opened in the mornings. Tr. Vol. 1 at 95, 110.

<sup>38</sup> Appl. Ex. 18 (Bowie Dir.) at 4-5; Appl. Ex. 21. To understand the wind patterns in the vicinity of the Landfill, Mr. Bowie relied on the wind rose plot based on data processed by TCEQ for the Austin-Bergstrom International Airport, which is located approximately 14 miles to the north of the Landfill. Appl. Ex. 18 (Bowie Dir.) at 4; Appl. Ex. 20.



the odor measurements were so low as to be consistently below the detection limit of the device, so he could not quantify intensity levels. Furthermore, Mr. Bowie stated that he did not observe any odors, with or without the portable olfactometer, near the northern boundary of the Landfill.<sup>39</sup> Mr. Bowie did a comparative analysis of the wind rose for the current waste acceptance hours to the wind rose for the proposed waste acceptance hours and opined that there was no significant difference in wind conditions when the additional hours are included.<sup>40</sup>

Mr. Bowie also reviewed the TCEQ record of complaints regarding the Landfill and noted six complaints. He testified that, two of the complaints were from 2013, when the Landfill was originally being permitted, and expressed general concerns about the proposed landfill; one was from January 2023 regarding “materials along route to site;” and another two were from February and September 2024, referencing dust and lack of daily roadside cleanup. There was one complaint from October 2023 referencing an intermittent odor—TCEQ investigated on February 21, 2024, and no notice of violation or notice of enforcement was issued.<sup>41</sup> Mr. Bowie opined that the scarcity of odor complaints meant that odor was not a significant issue for persons living near the Landfill.<sup>42</sup>

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<sup>39</sup> Appl. Ex. 18 (Bowie Dir.) at 5-6; Appl. Ex. 21. A field olfactometer is a portable odor detection and measuring device that is commonly used in field evaluations. Mr. Bowie explained that the field olfactometer dilutes the ambient air values, allowing the strength or intensity of detected odor to be quantified. Appl. Ex. 18 (Bowie Dir.) at 5.

<sup>40</sup> Appl. Ex. 18 (Bowie Dir.) at 8; Appl. Ex. 36 (Bowie Dir. Supplement (Suppl.)); Appl. Ex. 25.

<sup>41</sup> Appl. Ex. 18 (Bowie Dir.) at 8; Appl. Ex. 36 (Bowie Dir. Suppl.); Appl. Exs. 26, 37.

<sup>42</sup> Appl. Ex. 18 (Bowie Dir.) at 8; Appl. Ex. 36 (Bowie Dir. Suppl.). Mr. Bowie did not solicit any information regarding odor complaints from any of the surrounding residents. Tr. Vol. 1 at 94-95, 97.

Finally, Mr. Bowie testified that the Landfill is doing most of the things that he would want them to do to manage odors.<sup>43</sup> Mr. Bowie opined that the extended hours would not impact the effectiveness of the Landfill's odor control measures.<sup>44</sup> Mr. Bowie did not offer an opinion regarding the requisite duration, frequency, and intensity of odors that would need to occur before he would agree that they are disruptive or otherwise problematic.<sup>45</sup>

## **2. Sound Monitoring Investigation**

Mr. Ferdinand, a vibration and noise specialist retained by Applicant, conducted a sound monitoring investigation at the Landfill.<sup>46</sup> Mr. Ferdinand's investigation involved placing sound level monitors around the Landfill, compiling 24-hour sound level averages over a period of eight days, from August 8 to August 15, 2024, and comparing the levels to those in guidelines developed by the United States Environmental Protection Agency (EPA) and Department of Housing

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<sup>43</sup> Appl. Ex. 18 (Bowie Dir.) at 8-9; Appl. Ex. 33 at 46-47; Appl. Ex. 36 (Bowie Dir. Suppl.); Tr. Vol. 1 at 131. Mr. Bowie stated that he requested information relevant to the evaluation of odors from the Landfill, but he did not receive any documentation regarding procedures to verify or inspect odor complaints, complaint logs, or daily inspection reports. Tr. Vol. 1 at 106.

<sup>44</sup> Tr. Vol. 1 at 89-90.

<sup>45</sup> Tr. Vol. 1 at 112-15.

<sup>46</sup> Appl. Ex. 12 (Ferdinand Dir.) at 3. Mr. Ferdinand prepared a report describing and providing results of his investigation. Appl. Ex. 14. Mr. Lozano testified that the Landfill had normal operations at the time of the investigation. Appl. Ex. 35 (Lozano Dir.) at 15.

and Urban Development (HUD).<sup>47</sup> Mr. Ferdinand concluded that existing noise levels near the Landfill did not exceed the EPA and HUD noise guidance levels and would not interfere with conversation, sleeping, working, or recreating.<sup>48</sup>

Mr. Ferdinand, however, did not have an opinion on potential consequences of additional hours on weekdays and Saturdays or whether additional sound would be acceptable. He did not make any determination of the sound intensity during the extended hours. Mr. Ferdinand did not do any specific analysis of the impact the beeping and backup alarms during the extended hours would have on the community. He also did not evaluate any mitigation measures that would potentially reduce the noise produced by the Landfill.<sup>49</sup>

### **C. ED'S EVIDENCE AND POSITION**

The ED argues that the Draft Permit should be granted because Protestants did not introduce evidence to show that the Draft Permit violates a specifically applicable state or federal legal or technical requirement regarding the issue referred

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<sup>47</sup> Appl. Ex. 12 (Ferdinand Dir.) at 5-6. Out of the monitored period of August 8 to August 15, 2024, the Landfill had normal operations on August 8, 9, 12, 13, 14, and 15. Tr. Vol. 2 at 19. Mr. Ferdinand stated he did not consider the highest noise levels collected on August 9, 2024, after checking local wind conditions for that day claiming that the wind was likely the culprit for the higher levels. Appl. Ex. 12 (Ferdinand Dir.) at 5-6; Appl. Ex. 15; Tr. Vol. 2 at 10, 12, 18-19. Mr. Ferdinand explained that wind can interfere with accurate readings by recording sound levels that are higher than actual levels. The monitors are equipped with wind screens that function well up to wind speeds of about 12 miles per hour. Above that, wind noise will produce readings higher than the actual sound levels. Appl. Ex. 12 (Ferdinand Dir.) at 4.

<sup>48</sup> Appl. Ex. 12 (Ferdinand Dir.) at 6.

<sup>49</sup> Tr. Vol. 2 at 16-17, 20, 28, 39. Mr. Ferdinand stated that the information he gathered cannot be used to determine the particular amount of sound that would be produced during the extended hours. Tr. Vol. 2 at 20.

to SOAH. The ED notes that there are no noise or odor violations pending concerning the Landfill nor have there been in the past.<sup>50</sup>

Mr. Schnuriger, the ED's environmental permit specialist, testified that the Draft Permit meets all applicable statutes, rules, and regulations and would protect human health and safety, the environment, and physical property. Mr. Schnuriger opined that Applicant provided the adequate justification for the amendment to expand hours; however, he noted that the regulations do not require a justification for such amendment. According to Mr. Schnuriger, when the ED's staff (Staff) reviews justification provided for extended hours, they typically review it alongside the application and determine whether the justification "seems" sufficient. He added that, as long as all appropriate documents have been submitted with the application and the information is consistent, the application is declared technically complete, irrespective of how many additional hours are requested.<sup>51</sup>

Mr. Schnuriger could not speak to whether Staff attempts to analyze or to even verify statements included as justification in applications for extended hours. He stated that Staff relies on the sworn signature included in the application and presumes that whoever signed is telling the truth. Mr. Schnuriger further testified that, when conducting a technical review of an application, Staff looks at "what is in

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<sup>50</sup> ED Closing Br. at 1, 6-7.

<sup>51</sup> ED Ex. 1 (Schnuriger Dir.) at 6-7; Tr. Vol. 1 at 141-43, 147. Mr. Schnuriger is a project manager assigned to the Application after the previous project manager retired from the Commission. Mr. Schnuriger was not the initial reviewer of the Application. ED Ex. 1 (Schnuriger Dir.) at 4-5; Tr. Vol. 1 at 142, 146-47.

the regulations specifically for noise and odor,” but Staff does not analyze impacts on the surrounding community.<sup>52</sup>

#### **D. PROTESTANTS’ EVIDENCE AND POSITION**

Protestants seek the denial of the Application. They argue that TCEQ must consider each request for alternative operating hours on a case-by-case basis, as well as the potential impacts to the surrounding community from landfill operations, before approving alternative hours.<sup>53</sup> Protestants assert that the proposed hours expansion will have a significant and unacceptable impact on the surrounding community.<sup>54</sup> Each of Protestants’ witnesses described the impact the Landfill currently has on their lives and properties, and their concerns about the possibility of these impacts being extended on weekdays and Saturdays.

Ms. Lane lives directly across from the Landfill. She testified that the Landfill has impacted her ability to reside peacefully on her property and to enjoy the “once tranquil rural community” due to “very disruptive” odors emanating from the Landfill. She stated that she has a lot of animals and a nursery at her property. She specified that the odors and noise are present when the Landfill operates. She testified that the smell that comes from the Landfill makes it seem “like you are inside the Landfill in the thick of a large pile of trash.” She added that it smells so horrible and toxic, that she feels like she should have a mask on. Ms. Lane added that,

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<sup>52</sup> Tr. Vol. 1 at 144.

<sup>53</sup> Prot. Closing Br. at 4; 31 Tex. Reg. 2565 (Mar. 24, 2006).

<sup>54</sup> Prot. Closing Br. at 7.

during the weekdays, she can tolerate the noise and odors because she leaves the house for work. Ms. Lane stated that she had expressed her concerns to TCEQ, Caldwell County, and her neighbours.<sup>55</sup>

Ms. Lane stated that the odors and noise are not typically present during the weekends or at night. She added that on weekends she is mostly outside, doing farm chores, riding horses, and watering plants. She testified that the idea of having to do those activities with the sounds and smells of the landfill is very unappealing. She stated that at night, she often sits outside and listens to the quiet natural sounds of the night and looks at the stars. Ms. Lane expressed her concerns that if the Landfill is allowed to start accepting waste on Saturdays and at 5:00 a.m. on weekdays, it would impact how she spends her time at home and her ability to enjoy her property and quality of her life. She stated that, at least for now, she has some peace during the weekends.<sup>56</sup>

Mr. Friedrich testified that his property is adjacent to the Landfill. He stated that he is experiencing odors, noise, trash along the road, and an increase in large vehicular traffic due to the Landfill. Although he does not experience odors coming from the Landfill every day, he testified that, when he does, the odors are “pretty potent,” and it is really unpleasant to be outside. He added that the odors are particularly bad on days where there is little air movement. Mr. Friedrich also

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<sup>55</sup> Prot. Ex. 1 (Lane Dir.) at 1-4; Appl. Ex. 42. Ms. Lane’s property is located approximately 380 meters away from the working face at the Landfill. Appl. Ex. 18 (Bowie Dir.) at 6. Mr. Lozano disagreed with Ms. Lane that there are disruptive odors emanating from the Landfill. Appl. Ex. 35 (Lozano Dir.) at 37-38.

<sup>56</sup> Prot. Ex. 1 (Lane Dir.) at 2-3.

testified that, when the Landfill is in operation, he can hear constant, all-day sound of equipment and landfill vehicles—banging and beeping noises. He stated that the noise is especially noticeable early in the morning when the Landfill opens. He said that he no longer can sleep with his windows open due to the noise coming from the Landfill. Extending the hours and allowing operation on Saturdays, he said, “will make things so much worse for us and for our neighbors.”<sup>57</sup>

Mr. King testified that his family trust owns a property near the Landfill. He described how the extended hours would affect the property and their long-standing uses of the property—they operate a cattle ranch, have orchards, host Boy Scout troops, and gather for significant family events and holidays. Mr. King described the extensive impact that the Landfill has already had on his family’s property, including odors, noise, and dust. He described the weekends, early mornings, and evenings as the only time when the area “bears a slight resemblance to what it once was—before the Landfill came in.”<sup>58</sup>

## **1. Justification**

Protestants argue that Applicant offered no “real” justification for the extended hours. The only rationalization offered by Applicant, Protestants claim, is based on unsupported speculation regarding the needs of others—mainly, unnamed

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<sup>57</sup> Prot. Ex. 2 (Friedrich Dir.) at 1-4; Tr. Vol. 1 at 21-23; Appl. Ex. 42. Mr. Friedrich also testified that, since the Landfill has opened, local populations of Rio Grande turkeys and other native birds have decreased, and the populations of feral hogs and buzzards have increased. Mr. Lozano testified that he has seen some buzzards at the Landfill, mostly during summertime; however, he stated that there are no feral hogs at the Landfill. He added that there are no measures to keep feral hogs out of the Landfill. Appl. Ex. 35 (Lozano Dir.) at 40-41.

<sup>58</sup> Prot. Ex. 3 (King Dir.) at 1-4; Appl. Ex. 42.

haulers and residents. Moreover, Protestants assert that the ED did not conduct any analysis to determine whether the justification offered by Applicant was adequate. Furthermore, Protestants argue, neither Applicant nor the ED considered the impacts of Landfill operations on the surrounding community, nor did they consider how the extended hours would exacerbate those impacts.<sup>59</sup>

## **2. Noise**

Protestants note that Ms. Lane, Mr. Friedrich, and Mr. King testified to the particular sensitivity of the area to noise impacts occurring during the requested extended hours. Protestants claim that: Applicant's sound analysis failed to consider background and surrounding conditions; Applicant failed to address the noise conditions resulting from the amendment in consideration of the timing, hours, and type of noises involved; and Applicant failed to address the Landfill conditions that will exist during the extended hours.<sup>60</sup>

Protestants rely on the EPA's Guidelines for Noise Impact Analysis to argue that Mr. Ferdinand's investigation was inadequate because he did not follow the guidelines.<sup>61</sup> Specifically, they argue that Mr. Ferdinand did not: provide projection of the noise levels that would be expected to be produced as a result of the extended hours; consider existing conditions in the absence of the Landfill; provide any

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<sup>59</sup> Prot. Closing Br. at 6-7; Prot. Reply Br. at 13.

<sup>60</sup> Prot. Closing Br. at 7-11.

<sup>61</sup> Prot. Ex. 9 at 15, 23-24. Mr. Ferdinand did not disagree with the EPA's Guidelines for Noise Impact Analysis but stated that he did not follow them. He explained, however, that he relied on a different EPA document in his investigation, EPA's Guidelines for Environmental Noise. Tr. Vol. 2 at 25-26; Appl. Ex. 14 at 2.



determination of ambient sounds; and perform analysis of the impact that backup alarms produced by Landfill equipment would have on the community during the extended hours. Protestants also claim that Mr. Ferdinand did not consider the uses of nearby properties and the general use of the area as one where urban dwellers go to escape city noise. Without such considerations, Protestants argue, it is not possible to determine whether the noise levels resulting from the Landfill are consistent with the governing regulations, including compatibility with surrounding land uses. Moreover, Protestants argue that Mr. Ferdinand's evaluation of sound levels produced by the Landfill solely involved monitoring of current 24-hour average sound levels on eight days and included no projection of the noise levels that would be produced during the extended hours.<sup>62</sup>

Finally, Protestants argue that Mr. Ferdinand's investigation solely reflects particular operating conditions during a total of six days when the Landfill was in operation; however, he provided no analysis demonstrating that the conditions during the days monitored reflected normal operating conditions in terms of the number and type of equipment present or the location of the working face, nor did he address or consider foreseeable changed conditions such as the operation of the Landfill equipment at higher elevations.<sup>63</sup>

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<sup>62</sup> Prot. Closing Br. at 8-10; Tr. Vol. 2 at 20, 24, 26-28; Prot. Ex. 9 at 17-18; Appl. Ex. 43 at 2.

<sup>63</sup> Prot. Closing Br. at 10-11; Tr. Vol. 2 at 22-23.

### 3. Odors

Protestants argue that Applicant presented conclusory, unreliable, and unsupported opinions of Mr. Bowie in an attempt to refute and invalidate the testimony and experiences of neighboring residents. They claim that Mr. Bowie's opinion that the Landfill operations could not be the cause of disruptive odor was based primarily on his short visit to the Landfill; his review of wind data and the Landfill's site operating plan; and the absence of formal complaints filed with TCEQ. Moreover, Protestants claim that Mr. Bowie's visit to the Landfill, which excluded the early morning hours of Landfill's operations, was pre-announced and at the behest of Applicant for purposes of developing evidence regarding the validity of Protestants' testimony. Moreover, Protestants note that Mr. Bowie did not reference the numerous comments and hearing requests submitted in opposition to the Application relaying the disruptive impacts that the Landfill's operations have created in the surrounding community.<sup>64</sup>

Protestants claim that Mr. Bowie could not say reliably and credibly that, if the operating hours were extended, the odors that Protestants currently experience will not be exacerbated. To the contrary, Protestants argue, there is every reason to believe that, if the operating hours are extended, the nearby residents will experience the disruptive odors earlier in the morning on weekdays and on Saturdays.<sup>65</sup>

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<sup>64</sup> Prot. Closing Br. at 11-13; Prot. Reply Br. at 16.

<sup>65</sup> Prot. Closing Br. at 12-13; Prot. Reply Br. at 17.

Furthermore, Protestants assert that there have been occasions when the odor control measures at the Landfill were not effectively employed. In November 2021, the working face consisted of three open cells, contradicting Mr. Bowie's assumption that the operator limited the size of the working face.<sup>66</sup> Inspection reports from October 19 and 20, 2021, also revealed that ponding of water has been an issue at the Landfill.<sup>67</sup> On at least one occasion, the leachate pump on the leachate tank was "busted," causing some leachate to leak.<sup>68</sup>

### **E. APPLICANT'S REPLY**

Applicant argues that Protestants incorrectly interpreted and applied Texas Government Code section 2003.047(i-1)-(i-3); Rule 330.135; and Charman Niermann's statement, in their effort to expand the scope of this proceeding.<sup>69</sup> Specifically, Applicant asserts that it is not enough for a party seeking to rebut the presumption to simply "present some evidence on an issue relevant to the case." Instead, a party must demonstrate that one or more provisions in the draft permit violate a specifically applicable state or federal requirement that relates to a referred issue.<sup>70</sup> Applicant argues that Protestants did not present evidence that shows or proves that one or more provisions in the Draft Permit violate a specifically

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<sup>66</sup> Prot. Closing Br. at 13; Prot. Ex. 7. Mr. Lozano could not recall this incident. Tr. Vol. 1 at 77-78.

<sup>67</sup> Prot. Exs. 5, 6, 7. Mr. Lozano stated that these incidents happened in the middle of a rain event. He added that a water pump was added to manage the water and erosion was fixed. Tr. Vol. 1 at 73-74, 76-78.

<sup>68</sup> Prot. Ex. 8. Mr. Lozano testified that there was something wrong with the pump, which was then replaced. Tr. Vol. 1 at 70-71.

<sup>69</sup> Appl. Reply Br. at 1, 7.

<sup>70</sup> Tex. Gov't Code § 2003.047(i-2)(2); Appl. Reply Br. at 1-2; Prot. Closing Br. at 2-3.

applicable state or federal requirement that relates to a referred issue.<sup>71</sup> Moreover, Applicant asserts that changes in waste acceptance and operating hours do not require “a case-by-case basis considering the potential impact on surrounding communities;” they require a limited-scope major amendment, which limits the ED’s review and any hearing to the proposed changes.<sup>72</sup>

Applicant argues that the only way issues of odor control, access roads, nuisance prevention, and land use compatibility could be relevant on rebuttal would be if Applicant had referenced or relied on such issues as part of its discussion of the proposed changes to the permit and the reasons for them, or if the ED had requested information regarding those matters during review of the Application. Because neither of those occurred, Applicant claims, there is no basis for expanding the scope of this proceeding as sought by Protestants.<sup>73</sup>

Specifically, regarding Protestants’ odor-related testimony, Mr. Bowie opined that such testimony is not consistent with the frequency, duration, intensity, and offensiveness of the odors he observed at the Landfill, even near the working face. He added that such odors are not expected to occur there under the extended hours. Even if the odors associated with the Landfill were detectable at Protestants’ properties, he stated that the odors would tend to be low intensity and infrequently detected or detected for only limited periods of time. Mr. Bowie opined that, because Protestants’ properties are downwind from the working face, the wind generally

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<sup>71</sup> Appl. Reply Br. at 3.

<sup>72</sup> Appl. Reply Br. at 4-6; Rule 305.62(j).

<sup>73</sup> Appl. Reply Br. at 8-9.

blows in the properties' direction for only one or two hours at a time. According to Mr. Bowie, while there are situations when the wind can blow towards these properties for more than two hours at a time, those situations are much less common.<sup>74</sup>

Mr. Bowie, therefore, disagreed with Ms. Lane's statements that she experiences the odors from the Landfill continuously while the Landfill is operating. He stated that the odors that he did experience while he was on-site were short-lived and intermittent. Mr. Bowie also stated that the wind does not blow in Ms. Lane's property's direction frequently enough and for sufficient duration to support her statements. Mr. Bowie testified that he conducted an off-site evaluation at the berm, which is right across the street from where Ms. Lane lives, and he did not smell odors there. He opined that, based on his investigation, the odor is not reaching Ms. Lane's property.<sup>75</sup>

## **F. PROTESTANTS' REPLY**

Protestants argue that Applicant is not entitled to extend the Landfill's operating hours by right, so long as it offers some justification that is acceptable to the ED. Otherwise, the Commission would not have determined that Protestants presented a disputed issue of fact that is relevant and material to the decision regarding the Application and referred it to SOAH. Protestants further argue that they presented evidence regarding odor and noise to rebut the *prima facie*

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<sup>74</sup> Appl. Ex. 18 (Bowie Dir.) at 6-7.

<sup>75</sup> Tr. Vol. 1 at 108, 111-12, 123.

demonstration in accordance with Chairman Niermann's statement as to how the prima facie demonstration may be rebutted.<sup>76</sup> Protestants claim that they satisfied their burden by demonstrating that current Landfill operations already have resulted in disruptive and incompatible impacts on the surrounding community.<sup>77</sup>

Finally, Protestants argue that Applicant, ultimately, did not prove that its request for the extended hours is justified. Therefore, the proposed hours in the Draft Permit fail to comply with TCEQ's regulations. According to Protestants, the evidence in the record demonstrates that the Landfill is already creating incompatible, adverse impacts and nuisance-type conditions for the surrounding community and extending operations would exacerbate those issues.<sup>78</sup>

## **G. OPIC'S POSITION**

OPIC argues against the issuance of the Draft Permit. OPIC notes that Protestants have provided evidence demonstrating that the Landfill currently generates significant odor and noise during operations and that they raised concerns that expanding the Landfill's hours could intensify existing negative impacts and extend them into previously unaffected periods, including evenings, early mornings, and weekends.<sup>79</sup>

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<sup>76</sup> Appl. Ex. 44.

<sup>77</sup> Prot. Reply Br. at 2-5.

<sup>78</sup> Prot. Reply Br. at 5-6, 11-12, 14.

<sup>79</sup> OPIC Closing Br. at 9.

OPIC notes that Applicant's expert testimony seems to totally deny the existence of any impactful odors and noise. OPIC argues that Mr. Bowie's conclusions based on his two-day site visit and a review of the Landfill's policies, and Mr. Ferdinand's conclusions based on one week of data, generalized over each 24-hour period, provide no real insight into how much noise the Landfill produces during operating hours. OPIC finds Applicant's experts less convincing than Protestants' testimony, in which several local residents specifically describe frequent odor and noise conditions from the Landfill.<sup>80</sup>

Moreover, OPIC argues that Applicant presented no evidence on how the extended hours would or would not affect these current odor or noise conditions, nor did it provide specific evidence about the demand for the extended hours. OPIC asserts that the strength or weakness of Applicant's justification must be considered against the potential negative impacts to the community—which the preponderance of the evidence shows are extensive. OPIC argues that Protestants' concerns are critical factors in evaluating the justification for the extended hours and, if approved, the extension could result in increased environmental and community disruptions without sufficient safeguards. Accordingly, OPIC argues that Applicant did not provide a compelling or adequate justification demonstrating that additional hours are necessary.<sup>81</sup>

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<sup>80</sup> OPIC Closing Br. at 9.

<sup>81</sup> OPIC Closing Br. at 9-10.

## H. ALJ'S ANALYSIS

The ALJ is tasked to determine whether Applicant provided adequate justification for expanding the Landfill hours beyond those established in Rule 330.135. Chairman Niermann specifically noted that concerns of odor control, access roads, nuisance prevention, and land use compatibility may be relevant as rebuttal evidence on the issue of whether the extended hours are justified.<sup>82</sup> Rule 330.135 sets the default hours for facilities for when waste can be accepted, when materials will be transported on or off site, and when heavy equipment may operate. In order to change the default hours, permittees are required to submit an application to the Commission for a limited-scope major amendment and to describe the reason for the requested changes.<sup>83</sup>

Even though the ED's witness, Mr. Schnuriger, was not the reviewer of the Application, he opined that Applicant provided the required justification for the amendment to expand hours. Mr. Schnuriger testified that, in determining whether the provided justification is sufficient, Staff relies on the information provided in the application and, if that information is consistent, the application is declared technically complete, irrespective of how many additional hours are requested.

Both Applicant and Protestants rely on federal guidelines concerning noises in making some of their arguments; however, the ALJ does not find arguments citing to the federal provisions convincing here. Neither party to this proceeding asserted that

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<sup>82</sup> Appl. Ex. 1; Appl. Ex. 44 at 4-5.

<sup>83</sup> Rules 330.135(a), 305.62(b), 305.62(j)(2)(B).



the ED is required to follow federal procedures or guidelines and the ALJ is not in the position to de facto rewrite TCEQ rules. The ALJ, instead, will look at the rulemaking process for Rule 330.135 to determine what “adequate justification” for expanding the default hours entails.

In TCEQ’s 2006 MSW rulemaking, the Commission received comments regarding Rule 330.135 requesting that the rule specify under what circumstances authorizations will be granted for facilities to operate 24 hours per day. The Commission declined to make any changes to the rule, stating that it needs to retain flexibility to continue authorizing operating hours on a case-by-case basis *considering the potential impact on surrounding communities*. The Commission also noted that it is justified in limiting operating hours by the need to protect communities from the potential impact from landfills, because *the operations outside the default hours are more likely to disturb people in residential areas*.<sup>84</sup>

Considering the Commission’s comments, the ALJ concludes the limitations on operating hours in Rule 330.135 were intended to protect surrounding communities from potential impacts from landfills. Permittees are allowed to request to change the default hours in Rule 330.135 by providing a reason for the change and the Commission will approve the change unless there is information to justify restricting the proposed hours, including potential impacts on surrounding communities. Although the rule does not specify what kind of reasons are required

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<sup>84</sup> 31 Tex. Reg. 2565 (Mar. 24, 2006) (emphasis added).

to obtain approval beyond the default hours, the Commission made clear that a decision should involve consideration of potential impacts on nearby communities.

It is undisputed that there are residences within very short distances to the Landfill. Protestants provided credible testimony indicating that the Landfill currently causes odor and noise during its operation that negatively impacts their use and enjoyment of their properties. They also voiced concerns that increasing the Landfill's operating hours could worsen these negative effects and cause them to occur at times that were previously unaffected, such as early mornings, evenings, and Saturdays. The ALJ finds that those concerns are valid and should not be overlooked.

Applicant's experts, Mr. Bowie and Mr. Ferdinand, seem to completely deny the existence of any impactful odors and noise from the Landfill. The ALJ finds their testimony less credible and convincing than residents' specific descriptions of their daily experiences. Mr. Bowie conducted his odor investigation at the Landfill over only two days, which did not include the morning hours of operation when the Landfill experiences a lot of traffic. Mr. Bowie relied on wind patterns and review of the Landfill's policies but made no effort to contact the nearby residents or solicit information about their experience with odors coming from the Landfill. Even though Mr. Bowie denied that the odors described by Protestants are even possible, he did not provide any opinion as to at what point the odors would be disruptive or otherwise problematic.

Similarly, Mr. Ferdinand concluded that there is no impactful noise from the Landfill. He made this conclusion based on eight days of data, generalized over each

24-hour period. The ALJ finds that his general data is less convincing than Protestants' specific testimony evidencing noise coming from the Landfill during operating hours. Moreover, the ALJ is not convinced that the lack of formal complaints to the Commission means that the odors and noise are not significant issues for the nearby residents. Again, Protestants provided insight of their actual daily experiences with odors and noise coming from the Landfill.

In terms of justification for the extended hours, Applicant stated that the additional hours would better serve communities, businesses, and customers as well as increase economic viability of the Landfill. Applicant represented that additional hours would allow for more efficient waste collection and disposal outside typical working hours and peak traffic times and reduce traffic and other impacts to infrastructure.<sup>85</sup> Mr. Lozano testified that he received a lot of requests from customers asking for the extended hours, especially on Saturdays. Besides providing general statements of the need for the extended hours, Applicant presented no evidence to support those statements, including any evidence to show a demand for the extended hours, numbers of vehicles coming to the Landfill during any point of the day, amount of waste loads received at the Landfill during any point of the day, whether the volume of waste and number of customers are decreasing based on the current hours, or whether the Landfill cannot accommodate their customers with the current hours. Moreover, Applicant presented no witness who could verify the statements in the Application explaining the need for the extended hours. Although Mr. Lozano generally explained how his ability to operate the Landfill would be

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<sup>85</sup> Appl. Ex. 3 at 20, 130, 143.

positively affected by the extended hours, he was not involved in making the decision to request the extended hours.

Finally, neither Applicant nor the ED considered the potential impacts to the communities surrounding the Landfill. Mr. Schnuriger specifically stated that Staff does not analyze impacts on the surrounding community when reviewing applications for extended hours. He also did not speak to whether Staff attempts to analyze or to even verify the provided justification in applications. Mr. Bowie only determined that the wind conditions in the area would not be different with the extended hours. Mr. Ferdinand also did not opine on potential consequences of the extended hours or whether additional sound would be acceptable. He simply stated that the information he gathered cannot be used to determine the particular amount of sound that would be produced during the extended hours.

The preponderance of the evidence shows that nearby residents are already negatively affected by the Landfill operations; and, if the operating hours are extended, negative impacts to the community will be even more extensive, spreading into the morning and evening hours and weekends. The ALJ finds that the provided justification for the extended hours does not outweigh the potential negative impacts to the community. Therefore, Applicant did not meet its burden to prove that it has provided an adequate justification for expanding its facility hours beyond those established in Rule 330.135.

#### IV. TRANSCRIPT COSTS

Rule 80.23(d) provides for the allocation of transcript costs among the parties, excluding the ED and OPIC. In allocating those costs, the Commission is to consider the following applicable factors in allocating reporting and transcription costs among the other parties:

- the party who requested the transcript;
- the financial ability of the party to pay the costs;
- the extent to which the party participated in the hearing;
- the relative benefits to the various parties of having a transcript;
- the budgetary constraints of a state or federal administrative agency participating in the proceeding; and
- any other factor which is relevant to a just and reasonable assessment of costs.<sup>86</sup>

No evidence was presented as to the amount of the reporting and transcription costs. Applicant did not address the reporting and transcription costs in its briefing. Protestants argue that Applicant should pay the transcript costs, claiming that as an ongoing business with multiple investors, Applicant has the financial ability to pay the cost of the transcript. Moreover, Protestants note that Applicant is already profiting from the Landfill operations while Protestants have already been adversely impacted by the operations. Protestants further claim that Applicant's discovery abuses resulted in a delayed hearing and in additional expenses incurred by Protestants.<sup>87</sup>

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<sup>86</sup> Rule 80.23(d)(1).

<sup>87</sup> Prot. Closing Br. at 16-17.

Applicant and Protestants were the primary participants at the hearing. They both benefited from the transcript and frequently cited to the transcript in their closing arguments, proposed findings of fact, and reply arguments. There is no direct evidence concerning the respective financial abilities of Applicant and Protestants to pay the transcript cost. Applicant, however, as a business operating the Landfill, is more likely to have the ability to pay than Protestants. Applicant also seems to have more financial ability to pay the costs because it retained experts and presented expert testimony. In this matter, Applicant is the party seeking a benefit—a permit amendment for the Landfill. After considering the relevant factors, the ALJ determines that Applicant should bear 100% of the transcript costs.

## **V. CONCLUSION AND RECOMMENDATION**

Applicant did not provide an adequate justification for expanding its facility hours beyond those established in Rule 330.135 and the Draft Permit should not be issued.

**Signed March 19, 2025.**

ALJ Signature:

A handwritten signature in dark ink, reading "Katerina DeAngelo", is written over a horizontal line.

Katerina DeAngelo

Presiding Administrative Law Judge



## **TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

**AN ORDER  
DENYING THE APPLICATION BY  
130 ENVIRONMENTAL PARK, LLC FOR  
A LIMITED-SCOPE AMENDMENT TO MSW PERMIT NO. 2383  
IN CALDWELL COUNTY, TEXAS;  
SOAH DOCKET NO. 582-24-13241;  
TCEQ DOCKET NO. 2023-1559-MSW**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of 130 Environmental Park, LLC (Applicant) for a limited-scope amendment to its Municipal Solid Waste (MSW) Permit No. 2383 to authorize expansion of facility hours at its MSW landfill facility (Landfill) located in Caldwell County, Texas. A Proposal for Decision (PFD) was issued by Katerina DeAngelo, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH) and considered by the Commission.

After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

## **I. FINDINGS OF FACT**

### **Application, Landfill, and Draft Permit**

1. Applicant owns and operates a MSW landfill in Caldwell County, Texas.
2. Applicant holds MSW Permit No. 2383 (Permit) for the Landfill, which authorizes the Landfill to accept MSW resulting from, or incidental to, municipal, community, commercial, institutional, recreational, and industrial activities, including garbage, putrescible wastes, rubbish, ashes, brush, street cleanings, construction waste, demolition waste, and yard waste. The Landfill is also authorized to accept Class 2 industrial solid waste, Class 3 industrial solid waste, and certain special waste, such as asbestos.
3. MSW is brought to the Landfill in personal vehicles, trash truck front-loaders, pickup trucks with trailers, and 18-wheeler dump trucks. Approximately 220 vehicles come to the Landfill daily.
4. For daily operations, the Landfill uses a compactor, a motor grader, a dozer, and an excavator, all generally operating at the same time.
5. The Landfill's current waste acceptance hours are 7:00 a.m. to 7:00 p.m., Monday through Friday.
6. The Landfill's current operating hours are 5:00 a.m. to 9:00 p.m., Monday through Friday.
7. In December 2021, Applicant submitted to TCEQ an application (Application) for a limited-scope major amendment to the Permit to expand authorized operating and waste acceptance hours at the Landfill.
8. On January 31 and September 6, 2022, Applicant submitted revisions to the Application.
9. Applicant seeks to expand the 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.
10. Applicant seeks to expand the operating hours 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.



11. Applicant provided the following reason for the hours expansion: “to better serve those communities, businesses, and customers, extended 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.”
12. TCEQ’s Executive Director (ED) declared the Application administratively complete on March 7, 2022, and technically complete on May 25, 2022.
13. The ED prepared a draft permit (Draft Permit) based on the Application and made the Draft Permit available for public review and comment.
14. The Draft Permit contains the following provision: Description of Change: The limited-scope amendment expands 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 Saturday. It expands operating hours 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.

### **Notice and Jurisdiction**

15. The final revised Notice of Application and Preliminary Decision (NAPD) was published on October 12, 2022, in the *Austin American-Statesman* and on October 12, 2022, in the *Lockhart Post-Register*.
16. The revised Spanish NAPD was published on October 13, 2022, in *El Mundo*, in Caldwell County, Texas.
17. The comment period for the Application ended on November 14, 2022.
18. On August 24, 2023, the ED preliminarily determined that the Application met the requirements of applicable law.
19. On August 4, 2023, the ED filed a Response to Public Comment as required by 30 Texas Administrative Code section 55.156.
20. The 30-day period to request a contested case hearing or reconsideration of the ED’s decision ended September 25, 2023.
21. On December 13, 2023, the Commission considered during an open meeting all requests for hearing and/or reconsideration concerning the Application.

22. The Commission determined that Environmental Protection in the Interest of Caldwell County, Patton King on behalf of the King Family Trust, Susan Elizabeth Lane, Frank Sughrue, Claudia Shroyer Brown and Robert Brown, and Dora Gudino Trejo are affected persons under applicable law; and that their hearing requests should be granted. The remaining hearing requests and requests for reconsideration were denied.
23. By Interim Order, dated December 21, 2023, TCEQ referred the Application to the State Office of Administrative Hearings (SOAH) to consider one issue: whether Applicant has provided an adequate justification for expanding its facility hours beyond those established in 30 Texas Administrative Code section 330.135.
24. At the TCEQ open meeting, Chairman Jon Niermann noted that issues such as odor control, access roads, nuisance prevention, and land use compatibility may be relevant as rebuttal evidence on the issue of whether the extended hours are justified but do not stand as independent issues.
25. The Notice of Hearing was issued April 12, 2024, and mailed to the appropriate recipients under 30 Texas Administrative Code section 38.501(f)(3).
26. The Notice of Hearing was published in newspapers under the requirements of 30 Texas Administrative Code section 38.501(f)(2).

### **Procedural History**

27. On May 30, 2024, a preliminary hearing was convened via videoconference by SOAH ALJ DeAngelo. The following appeared and were admitted as parties: Applicant, 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 (collectively, Protestants), the ED, and the TCEQ Office of Public Interest Counsel (OPIC).
28. Jurisdiction was noted by ALJ DeAngelo, and the administrative record was admitted.

29. By agreement of the parties, with the approval of the ALJ, the deadline for issuance of the PFD was extended beyond 180 days from the preliminary hearing, until April 21, 2025.
30. No party requested that the ALJ consider, pursuant to Government Code section 2003.047(f) and 30 Texas Administrative Code section 80.4(c)(15), any issue beyond the one referred.
31. On January 14-15, 2025, ALJ DeAngelo convened a hearing on the merits.
32. At the merits hearing, Applicant was represented by attorney Brent W. Ryan. The ED was represented by attorneys Anthony Tatu and Caroline Catchings. OPIC was represented by attorneys Josiah Mercer and Pranjal Mehta. Protestants were represented by attorneys Marisa Perales and Eric Allmon.
33. The record closed after submission of replies to closing briefs on February 19, 2025.

### **Odors and Noise**

34. The Landfill's odor management plan 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.
35. The current Landfill operations have resulted in adverse impacts to the surrounding community.
36. Nearby residents experience odors and noise when the Landfill is in operation.
37. Nearby residents use the weekends to work outside, engaging in activities including farm chores, riding horses, watering plants, and hosting scout troops on their property.
38. If the waste acceptance and operating hours were extended, the negative impacts associated with the Landfill operations would be expected to intensify and extend into currently unaffected periods, such as early mornings, evenings, and weekends.

39. Ted Bowie, an odor inspector retained by Applicant, conducted an odor investigation at the Landfill by visiting the Landfill for a few hours over a period of two days, conducting a wind analysis, and reviewing the Landfill's site operating plan and TCEQ records of complaints about the Landfill. Mr. Bowie detected odor at only one location but found that 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. Mr. Bowie detected no odors outside the Landfill boundary.
40. Mr. Bowie did not offer an opinion regarding the requisite duration, frequency, and intensity of odors that would need to occur before he would agree that they are disruptive or otherwise problematic.
41. Since the Landfill's original permitting process began in 2013, TCEQ has received only one odor complaint regarding operations at the Landfill, in October 2023. TCEQ conducted an investigation but no notice of violation or notice of enforcement was issued.
42. The Landfill does not have any measures in place to control noise.
43. There are no noise limit requirements specifically applicable to the Landfill.
44. Jonathan Ferdinand, a vibration and noise specialist retained by Applicant, conducted a sound monitoring investigation at the Landfill based on 24-hour average sound levels on eight days in August of 2024. Mr. Ferdinand concluded that existing noise levels near the Landfill did not exceed the United States Environmental Protection Agency and Department of Housing and Urban Development noise guidance levels and would not interfere with conversation, sleeping, working, or recreating.
45. Mr. Ferdinand did not opine on potential consequences of the extended hours or whether additional sound would be acceptable.
46. The information Mr. Ferdinand gathered cannot be used to determine the particular amount of sound that would be produced during the extended hours.

47. TCEQ has received no complaints regarding noise associated with operation of the Landfill.
48. The lack of formal complaints to the Commission does not mean that the odors and noise are not significant issues for the nearby residents.
49. Applicant presented no credible evidence supporting its justification for the extended hours.
50. The ED did not consider the potential impacts of the extended hours to the communities surrounding the Landfill when preparing the Draft Permit.
51. The disruptive odors and noise experienced by the surrounding community are likely to increase if the Draft Permit is issued.
52. Landfill operations during the requested extended hours are likely to disturb people in the residential areas surrounding the Landfill.
53. Applicant's justification for the extended hours does not outweigh the potential negative impacts to the nearby community.

### **Transcription Costs**

54. Reporting and transcription of the hearing on the merits was warranted because the hearing lasted two days.
55. No evidence was presented as to the amount of the reporting and transcription costs.
56. Applicant and Protestants were the primary participants at the hearing; and they both benefited from the transcript and frequently cited to the transcript in their closing arguments, proposed findings of fact, and reply arguments.
57. There is no direct evidence concerning the respective financial abilities of Applicant and Protestants to pay the transcript cost. Applicant, however, as a business operating the Landfill, is more likely to have the ability to pay than Protestants, who are a non-profit and several individuals. Applicant has demonstrated more financial ability to pay the costs, because it retained experts and presented expert testimony.

58. Applicant is the party seeking a benefit—a permit amendment for the Landfill.

## **II. CONCLUSIONS OF LAW**

1. TCEQ has jurisdiction over this matter. Tex. Water Code chs. 5, 26.
2. SOAH has jurisdiction to conduct a hearing and to prepare a proposal for decision in contested cases referred by the Commission under Texas Government Code section 2003.047.
3. Notice was provided in accordance with Texas Water Code sections 5.114 and 26.028; Texas Government Code sections 2001.051 and 2001.052; and 30 Texas Administrative Code sections 39.405 and 39.551.
4. The Application is subject to the requirements in Senate Bill 709, effective September 1, 2015. Tex. Gov't Code § 2003.047(i-1)-(i-3).
5. Applicant's filing of the administrative record 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. Tex. Gov't Code § 2003.047(i-1); 30 Tex. Admin. Code §§ 80.17(c)(1), .117(c)(1), .127(h).
6. Applicant has the burden of proof on the issue referred by the Commission. 30 Tex. Admin. Code § 80.17(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).
7. To rebut the prima facie demonstration established by the administrative record, a party must present evidence that: (1) relates to one of the referred issues; and (2) demonstrates, as compared to the administrative record, that one or more provisions in the Draft Permit violates a specifically applicable state or federal requirement. *See* Tex. Gov't Code § 2003.047(i-2); 30 Tex. Admin. Code §§ 80.17(c)(2), .117(c)(3).
8. Even if the prima facie demonstration established by the administrative record is rebutted, Applicant or the ED may present additional evidence to be considered in determining whether Applicant met its burden of proof.

*See* Tex. Gov't Code § 2003.047(i-3); 30 Tex. Admin. Code §§ 80.17(c)(3), .117(c)(3).

9. The standard of proof is by a preponderance of the evidence. *Granek v. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.).
10. TCEQ is authorized to manage the disposal of MSW and adopt rules to establish minimum standards of operation for facilities that dispose of MSW.
11. TCEQ operational standards for MSW landfill facilities require that waste acceptance hours may be any time between 7:00 a.m. and 7:00 p.m. Monday through Friday, and material transport and heavy equipment operation must not be conducted between 9:00 p.m. and 5:00 a.m. unless otherwise approved in the authorization for the facility. 30 Tex. Admin. Code § 330.135(a).
12. Applicants may request expansion of operating hours beyond those specified hours, through a limited-scope amendment. 30 Tex. Admin. Code § 305.62(j)(2)(B).
13. An application for any such amendment must describe the reason for the requested changes. Tex. Admin. Code § 305.62(b).
14. Evidence of adverse impacts on the surrounding community caused by Landfill operations is relevant to the issue of whether the Applicant has adequately justified its request for extended operating hours and may rebut the prima facie demonstration established by the filing of the administrative record.
15. Each request for alternative operating hours is evaluated on a case-by-case basis, considering the potential impact on surrounding communities. 31 Tex. Reg. 2565 (Mar. 24, 2006).
16. The Commission is justified in limiting landfills' operating hours by the need to protect communities from the potential impact, because operation outside of hours beyond those established in 30 Texas Administrative Code section 330.135 are more likely to disturb people in residential areas. 31 Tex. Reg. 2565 (Mar. 24, 2006).

17. Considering the potential impact on the surrounding community, Applicant has not provided an adequate justification for expanding its facility hours beyond those established in 30 Texas Administrative Code section 330.135.
18. No transcript costs may be assessed against the ED or OPIC because the TCEQ's rules prohibit the assessment of any cost to a statutory party who is precluded by law from appealing any ruling, decision, or other act of the Commission. 30 Tex. Admin. Code § 80.23(d)(2).
19. Applicant shall bear 100% of the reporting and transcription costs, after consideration of the following factors: the party who requested the transcript; the financial ability of the party to pay the costs; the extent to which the party participated in the hearing; the relative benefits to the various parties of having a transcript; the budgetary constraints of a state or federal administrative agency participating in the proceeding; and any other factor which is relevant to a just and reasonable assessment of the costs. 30 Tex. Admin. Code § 80.23(d)(1).

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. The application of 130 Environmental Park, LLC for a limited-scope amendment to MSW Permit No. 2383 is denied.
2. 130 Environmental Park, LLC must pay 100% of the reporting and transcription costs.
3. The Commission adopts the ED's Response to Public Comment in accordance with 30 Texas Administrative Code section 50.117. If there is any conflict between the Commission's Order and the ED's Responses to Public Comment, the Commission's Order prevails.
4. All other motions, request for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.



5. The effective date of this Order is the date the Order is final, as provided by Texas Government Code section 2001.144 and 30 Texas Administrative Code section 80.273.
6. TCEQ's Chief Clerk shall forward a copy of this Order to all parties.
7. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Brooke Paup, Chairman, For the Commission**