

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

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

ALIGNED PROTESTANTS’
REPLY TO EXCEPTIONS

April 18, 2025

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TABLE OF CONTENTS

I.	Applicant’s Exceptions present familiar arguments that should be denied, again.	1
	A. When it granted Aligned Protestants’ hearing requests, the Commission determined that disputed issues of fact had been raised, warranting a contested case hearing and a PFD based on evidence presented during the contested case hearing.	3
	B. The ALJ’s PFD complies with applicable rules, including rules regarding the scope of the permit proceeding.	7
	i. Considerations of all factors relevant to compliance with 30 Tex. Admin. Code § 330.135 is consistent with the proper scope of a limited scope amendment under 30 Tex. Admin. Code § 305.62....	10
	ii. Issues of noise and odor are within the scope of considerations relevant to determining compliance with 30 Tex. Admin. Code § 330.135.	12
	C. The ALJ properly considered and weighed the evidence.	13
	i. The ALJ gave appropriate consideration to the Executive Director’s review.	13
	ii. Neither the CAPCOG conformance letter nor Caldwell County’s resolution warrant finding the requested hours justified.	14
	iii. The ALJ was well-justified in finding Aligned Protestants’ witnesses more credible than 130EP’s witnesses.	15
II.	The Executive Director’s Exceptions should be denied.	16
	A. Aligned Protestants bear no burden to demonstrate that the impacts of the proposed operating hours would require an enforcement action.	16

B.	All other issues in ED’s Exceptions have been addressed, above, in response to Applicant’s Exceptions.	17
III.	Conclusion	17

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**ALIGNED PROTESTANTS' REPLY TO EXCEPTIONS
TO THE PROPOSAL FOR DECISION**

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

Environmental Protection in the Interest of Caldwell County (“EPICC”), the King Family Trust, and aligned Protestants (collectively, “Aligned Protestants”) submit this Reply to the Exceptions to the Proposal for Decision (“PFD”) filed by the Applicant 130 Environmental Park, LLC (“Applicant” or “130EP”) and the TCEQ Executive Director (“ED”). For the reasons described below, Aligned Protestants maintain that the Administrative Law Judge’s (“ALJ”) PFD was correct, all Exceptions should be denied, and the Commission should adopt the ALJ’s PFD.

I. Applicant’s Exceptions present familiar arguments that should be denied, again.

130EP’s Exceptions present a variation of the same argument it has presented four times before: in (i) its Response to Hearing Requests, (ii) its Motion to limit the scope of this proceeding, (iii) its Motion for Summary Disposition; and (iv) its Closing Arguments. That is, 130EP insists that Aligned Protestants cannot rebut the prima facie demonstration, here, because extended operating hours—beyond those set out in TCEQ’s Rule 330.135—

are allowed by TCEQ's Rules. *See 130EP's Exceptions to the Proposal for Decision*, pp. 6-7 (arguing that Aligned Protestants cannot rebut 130EP's prima facie demonstration that expanding operating hours satisfies all applicable requirements).

130EP further argues that the Hearing on the Merits should have been limited to only the specific language included in its Application for a limited-scope amendment—language indicating the purported reason for the request to extend landfill operating hours beyond what is set out in TCEQ's Rules. Because 130EP's Application did not include any analysis or consideration of how the expanded operating hours might affect the surrounding community and because the ED did not request such information, 130EP argues that impacts to the surrounding community should not have been within the scope of the contested case hearing. Presumably, 130EP considers the only purpose of the contested case hearing to be to validate the ED's acceptance of 130EP's reasons for the requested extended operating hours.

But 130EP's argument, were it accepted, would lead to absurd results. It would mean that Aligned Protestants have no meaningful role in the contested case hearing process. The Commission rejected 130EP's argument when it granted Aligned Protestants' hearing requests. The ALJ rejected the argument as well. 130EP has presented nothing new to suggest that these earlier decisions were wrong.

A. When it granted Aligned Protestants’ hearing requests, the Commission determined that disputed issues of fact had been raised, warranting a contested case hearing and a PFD based on evidence presented during the contested case hearing.

130EP complains, yet again, that issues related to impacts of landfill operations on the surrounding community are not relevant to its request to amend its permit to extend operating hours. According to 130EP, because the ED did not request information regarding impacts to the surrounding community when reviewing 130EP’s Application, this issue should not have been considered during the contested case hearing. Furthermore, 130EP argues that Aligned Protestants *could not* rebut the prima facie demonstration that the draft permit complies with all legal and technical requirements—because the ED determined that the extended operating hours are acceptable, and so the draft permit does not violate any rule. *See 130EP’s Exceptions*, p. 7. But this is the same argument that 130EP has made on several occasions now. In any event, 130EP is mistaken.

When the Commission granted Aligned Protestants’ hearing requests and referred the Application to SOAH for a contested case hearing, the Commission acknowledged that disputed issues of fact had been raised by the hearing requestors—warranting a contested case hearing. Indeed, Section 5.556 of the Texas Water Code imposes the following limitation on the Commission with regard to its consideration of hearing requests: “The commission may not refer an issue to the State Office of Administrative Hearings for a hearing unless the commission determines that the issue: (1) involves a disputed question of fact; . . . and (3) is relevant and material to the decision on the application.” Tex. Water Code § 5.556(d).

Furthermore, Section 2003.047(e) of the Texas Government Code requires that when the Commission refers a matter to SOAH for a hearing, “the commission shall provide to the administrative law judge a list of disputed issues.” Tex. Gov’t Code § 2003.047(e). The list of issues submitted to SOAH by the Commission *must* contain either “(A) only factual questions or (B) mixed questions of fact and law.” *Id.* § 2003.043(e-1)(2).

TCEQ’s Rules are consistent with the above-cited statutes. If a hearing requestor satisfies the requirements for demonstrating they are an affected person, and if the hearing request raises “disputed issues of fact” that “are relevant and material to the Commission’s decision on the application,” then the Commission must grant the hearing request and refer the specified issues to SOAH for a hearing. *See* 30 Tex. Admin. Code § 55.211(b)(3)(A); *see also id.* § 55.211(c)(2)(A)(ii) (hearing request shall be granted if it raises disputed issues of fact or mixed questions of fact and law that are relevant to Commission’s decision on permit application). On the other hand, if a hearing requestor raises “only disputed issues of law or policy,” the Commission should “make a decision on the issues and act on the application” without a hearing. 30 Tex. Admin. Code § 55.211(b)(3)(B).

In this case, several written comments and hearing requests were submitted to the Commission opposing the pending permit amendment Application, based on the landfill operations’ impacts on the surrounding community.¹ In response, 130EP urged the

¹ *See, e.g., Applicant’s Motion to Clarify Scope and Motion in Limine*, Attachment 3 (copies of selected hearing requests); *see also* App. Ex. 16 (ED’s Response to Comments).

Commission to deny Aligned Protestants' hearing requests because they "do not present any issue appropriate for consideration in a contested case hearing."²

The ED, on the other hand, recommended granting several of the hearing requests. Contrary to the position that the ED now urges, the ED agreed that Aligned Protestants' hearing requests should be granted, based in part on the ED's identification of "issues of disputed questions of fact or mixed questions of law and fact, raised during the comment period, in the requests for a contested case hearing, and relevant to the decision on the application that could be referred to SOAH."³ More specifically, the ED recommended referral of the following disputed issue:

Whether 130 Environmental Park has presented a valid justification for expanding its site operations and its operating hours in accordance with 30 TAC § 330.135. (RTC no. 5). The issue involves a disputed question of mixed fact and law, was raised during the comment period, was not withdrawn, and is relevant and material to the issuance of the draft permit.⁴

The Commission disagreed with 130EP and granted Aligned Protestants' hearing requests. The issue referred was similar to the issue recommended by the ED: "Whether 130 Environmental Park has provided an adequate justification for expanding its facility hours beyond those established in 30 TAC § 330.135."

In sum, the Commission correctly determined that Aligned Protestants presented a disputed issue of fact that is relevant and material to the decision regarding 130EP's Application and referred it to SOAH—in accordance with the relevant statutes cited above. Had the Commission agreed with 130EP's argument—that its request to extend operating

² See *Aligned Protestants' Response to Applicant's Amended Motion for Summary Disposition*, Exhibit E, p. 21.

³ See *Aligned Protestants' Response to Applicant's Amended Motion for Summary Disposition*, Exhibit C, p. 13.

⁴ *Id.*, Ex. C, p. 16.

hours cannot be rebutted, once the ED determines the purported justification is adequate—then, the Commission could not have referred the Application to SOAH for a hearing. *See* 30 Tex. Admin. Code § 55.211(b)(3)(B) (if hearing request raises only issues of law or policy, Commission should act on application instead of referring for a hearing).

Once the Application was referred to SOAH, Aligned Protestants were tasked with presenting some evidence to rebut the prima facie demonstration established by the filing of the administrative record. *See* Tex. Gov’t Code § 2003.047 (i-2). The Commission advised the parties regarding how the prima facie demonstration may be rebutted: “Those concerns [issues such as odor control, nuisance prevention, and land use compatibility, which were raised in comments and hearing requests] may be relevant as rebuttal evidence on the issue of whether the extended hours are justified.”⁵

Aligned Protestants satisfied this burden; they presented evidence rebutting the prima facie demonstration by demonstrating that current landfill operations have resulted in disruptive impacts on the surrounding community. Aligned Protestants’ evidence demonstrated that 130EP has not presented an adequate justification for its request to extend its operating hours. Absent an adequate justification, the extended operating hours proposed in the draft permit fail to comply with TCEQ’s regulations.

Once Aligned Protestants rebutted the prima facie demonstration, 130EP bore the ultimate burden of proof regarding its permit Application and the draft permit. 130EP’s Closing Arguments are telling, in this regard. In its Closing Argument, *130EP neither cited*

⁵ *See Applicant’s Motion to Clarify Scope and Motion in Limine*, Attachment 2.

nor discussed any evidence in the record in support of its purported justification for its request to extend its operating hours. The ALJ's PFD nevertheless analyzed *all* evidence in the record—including evidence presented by 130EP—in reaching her recommendation, contrary to 130EP's arguments in its Exceptions. *See, e.g., 130EP's Exceptions*, p. 6 (“the PFD relies exclusively on [Aligned Protestants'] testimony in recommending denial of 130EP's permit application”).

This is consistent with what the Commission tasked SOAH and the ALJ to do: to resolve disputed issues of fact regarding 130EP's request to extend its operating hours. The ALJ applied the prima facie demonstration once the administrative record was offered into evidence; considered Aligned Protestants' evidence; and then, after determining that Aligned Protestants' evidence was adequate to rebut the prima facie demonstration, the ALJ weighed all evidence in the record, including the additional evidence offered by 130EP in support of its Application. The ALJ determined that 130EP's request to extend its landfill operating hours was not justified, and thus, did not comply with TCEQ Rule 330.135(a), and she included various underlying findings of fact, based on the evidence presented by all parties, in support of her recommendation. There was nothing erroneous about the scope of the proceedings, the parties' respective evidentiary burdens, the application of the relevant statutes and rules, or the PFD itself.

B. The ALJ's PFD complies with applicable rules, including rules regarding the scope of the permit proceeding.

130EP's Exceptions summarize the intended effects of TCEQ's Rules regarding limited-scope amendments and SB 709 provisions. According to 130EP, these two

provisions have resulted in: (1) significantly limiting the scope of applications, (2) increasing the importance of the Executive Director's role in the application review process, and (3) streamlining contested case hearings.

The first and third objectives, listed above, were implemented in this case. That is, 130EP's Application was significantly truncated. Little technical information was included in the Application. Instead, only information related to 130EP's request to increase operating hours was included in the Application.

Similarly, the contested case hearing regarding 130EP's Application was streamlined and efficient. The Hearing on the Merits concluded in less than two days. It might have concluded in one day, if all of 130EP's witnesses had been available to testify on the first day of the hearing.

The commencement of the Hearing on the Merits was delayed by several months, but this was a result of 130EP's failure to comply with the discovery rules and the ALJ's procedural schedule—not because of any failure to limit the scope of the proceeding.

One reason the hearing was so efficient is because the scope of the hearing was limited to the single issue referred by the Commission—contrary to 130EP's argument in its Exceptions. *See, e.g., Applicant's Exceptions to the Proposal for Decision*, p. 5 (wherein 130EP proclaims: "Remarkably, the PFD does not even mention the LSMA rule limitations on the scope of this proceeding."). Indeed, the PFD was careful in limiting the scope of the analysis to *only* the issue referred. Accordingly, the ALJ declined to address Aligned Protestants' argument that 130EP was not the proper Applicant or Permittee, because it was not an issue that had been referred by the Commission. *See* PFD, p. 7, n. 12.

Regarding the importance of the ED's role in the application review process, 130EP cites no legal authority indicating that the ED's role in reviewing applications has changed as a result of SB 709 or any revision to TCEQ's Rules. Here, the ED reviewed 130EP's Application to determine whether information required by the Rules was included in the Application, but the ED conducted no analysis to determine whether the justification offered by the Applicant was adequate for the requested operating hours, as Mr. Schnuriger admitted.⁶ Nor did staff consider or otherwise evaluate the potential impacts on the surrounding community of the requested, extended operating hours.⁷

This is consistent with how the ED reviewed 130EP's initial Application for a landfill permit. There, too, the ED reviewed 130EP's Application, including its request to operate the landfill 24 hours a day, 7 days a week, and issued a draft permit allowing 24/7 operating hours. Following a contested case hearing, the ALJs recommended that the permit be granted, but that the request for extended operating hours be denied.⁸ And so, the permit was issued, but the operating hours were limited to those specified in TCEQ's Rules.

130EP has offered no valid legal justification for departing from past permitting procedures—allowing an ALJ to decline the ED's recommended draft permit, based on evidence presented during a contested case hearing. If the evidence presented demonstrates

⁶ Tr. Vol. 1, p. 143:10-23; 147:6-19 (testimony of Schnuriger).

⁷ Tr. Vol. 1, p. 144:8-15 (testimony of Schnuriger).

⁸ See *Aligned Protestants' Response to Applicant's Amended Motion for Summary Disposition*, Ex. F (excerpt of PFD from hearing regarding 130EP's Application for a Landfill Permit).

a failure to comply with applicable rules, then, denial of the application is appropriate. Such is the case here.

i. Considerations of all factors relevant to compliance with 30 Tex. Admin. Code § 330.135 is consistent with the proper scope of a limited scope amendment under 30 Tex. Admin. Code § 305.62.

130EP devotes considerable space in its Exceptions to a discussion of Rule 305.62(j)(2)—the Rule regarding limited-scope permit amendments. According to 130EP, when this Rule was adopted in 2008, it superseded the substantive requirements of Rule 330.135—including the requirement that the Commission should consider impacts of landfill operations on the surrounding communities. *See* 31 Tex. Reg. 2565 (Mar. 24, 2006) (“The commission is justified in limiting operating hours by the need to protect communities from the potential impacts from landfills.”); *see also BFI Waste Sys. of N. Am., Inc. v. Martinez Env’t Grp.*, 93 S.W.3d 570, 575–76 (Tex. App.—Austin 2002, pet. denied) (agency interpretation of its rule becomes part of the rule itself). *But see 130EP’s Exceptions*, p. 10 (“The 2008 rulemaking superseded any inconsistent preamble language in the 2006 rulemaking....”). But there is no legal support for this argument. Had TCEQ intended to supersede its Rule 330.135 requirements, it would have explicitly said so.

Moreover, this argument simply makes no sense. In 130EP’s view, if an applicant applies for a new landfill permit that includes a request for extended operating hours beyond those in Rule 330.135, then any protesting party may challenge the request for extended operating hours, including with evidence related to nuisance conditions that may result from the proposed landfill’s extended operating hours. But if, as here, an applicant seeks to amend an existing permit to extend its operating hours, then, protesting parties

cannot present evidence related to impacts of the landfill operations on the surrounding community. This is an absurd interpretation of the Rules and is not supported by Rule 305.62(j) or Rule 330.135, or even SB 709.

Furthermore, there is no indication that the ED (in recommending granting the hearing requests), the Commission (in granting the hearing requests and referring the Application to SOAH), the Aligned Protestants, or the ALJ violated Rule 305.62 by allowing consideration of evidence regarding the impacts of landfill operations on the surrounding community. 130EP was not required to submit a land-use compatibility analysis in support of its Application. *But see 130EP's Exceptions*, p. 8 (discussing requirement for land use compatibility analysis). But when the surrounding community presented concerns—supported by evidence—of the landfill's impacts on their use and enjoyment of their property, this was a relevant and appropriate factor to be considered in determining whether the operating hours should be extended. 31 Tex. Reg. 2565 (Mar. 24, 2006) (TCEQ is tasked with considering each request for alternative operating hours “on a case-by-case basis, considering the potential impact on surrounding communities.”).

130EP's own arguments in its Exceptions support this approach. 130EP acknowledges that when Rule 305.62(j) was amended in 2008, the intent was to “*retain an opportunity for contested case hearing.*” *130EP's Exceptions*, p. 9 (citing 32 Tex. Reg. 8681, 8688 (Nov. 30, 2007)) (emphasis added). A contested case hearing is only appropriate when disputed issues of fact are raised—such as here. 130EP also acknowledges that in providing examples of permit changes that may “have little or no impact on the surrounding community,” the Commission did *not* include among its list of

examples a request to extend operating hours. This suggests that the Commission was aware that a limited scope permit amendment seeking to extend operating hours is not among the types of permit changes that is unlikely to impact the surrounding community. In other words, back in 2006, the Commission recognized that extended operating hours could impact the surrounding community, *see* 31 Tex. Reg. 2565, and in 2008, the Commission remained cognizant of this possibility, thus maintaining an opportunity for a contested case hearing when a request to extend operating hours is submitted.

In short, Rule 305.62(j) did not supersede or authorize amend Rule 330.65.

ii. Issues of noise and odor are within the scope of considerations relevant to determining compliance with 30 Tex. Admin. Code § 330.135.

130EP argues that when the Commission referred the Application to SOAH for a hearing and recognized that issues such as odor and noise may be relevant as rebuttal evidence, the Commission did not and could not expand the scope of the hearing process. *130EP's Exceptions*, p. 11. No party disputes this. The scope of the hearing was not expanded beyond the issue referred; it was limited to 130EP's request to extend its operating hours and the impacts on the surrounding community that may result from extended operating hours.

In other words, the issue presented is NOT whether more robust odor control and noise abatement measures should be implemented and added to 130EP's permit conditions. Those options were not available to Aligned Protestants in this proceeding (though the evidence suggests that such measures would benefit the surrounding community). Rather, the impacts on the surrounding community of the noise and odor emanating from the

landfill are relevant to whether the request to extend operating hours is justified—*i.e.*, whether extending landfill operating hours will exacerbate the existing adverse impacts on the surrounding community. The scope of the hearing was not inappropriately expanded here. The evidence presented was consistent with the scope of Rule 305.62(j), Rule 330.135, and with the Commission’s decision to refer 130EP’s Application for a contested case hearing, allowing Aligned Protestants to present evidence rebutting 130EP’s purported justification for its request to extend operating hours and rebutting any determination that expanding the operating hours is consistent with Rule 330.135.

C. The ALJ properly considered and weighed the evidence.

i. The ALJ gave appropriate consideration to the Executive Director’s review.

Applicant errs in asserting that the ALJ failed to comply with the applicable evidentiary presumption established in Senate Bill 709, now embodied at Texas Government Code § 2003.047(i-1) and (i-2). Senator Frasier’s statement of intent, set forth in the bill analysis for SB 709, plainly explained that the bill, “establishes that the *starting place* for a contested case hearing is a presumption that a draft permit issued by the TCEQ meets all legal and technical requirements and is protective of public health and the environment.”⁹ Applicant seeks to treat the evidentiary presumption as dictating where the analysis must *end*, rather than where the analysis must *start*.

The ALJ properly started the evidentiary analysis by acknowledging that the Administrative Record resulted in a *prima facie* demonstration that all applicable

⁹ S. Comm. On Nat. Res. & Econ. Ev’p, Tex. C.S.S.B. 709, 84th Leg., R.S. (2015)(emphasis added)

requirements have been satisfied. The ALJ then considered Aligned Protestants' undisputed evidence of nearby residences, and persuasive evidence that use and enjoyment of these properties was already impacted by odors and noise from the landfill.¹⁰ Upon finding that this evidence raised valid concerns and rebutted the prima facie demonstration, the ALJ turned to an examination of all the evidence in the record, including Applicant's additional or supplemental evidence.¹¹ The unconvincing nature of 130EP's additional evidence—130EP's failure to meet what was always its burden of proof—resulted in the ALJ's finding that the preponderance of the evidence shows that the Landfill's current negative impacts upon the community will be exacerbated if the operating hours are extended, and that 130EP did not show an adequate justification for expanded hours in light of these negative impacts.

This application of the prima facie presumption—whereby the ALJ assumed the expanded operating hours to be justified until Aligned Protestants demonstrated that the increased hours would result in unjustified community impacts in violation of the showing required by 30 Tex. Admin. Code § 330.135, is fully consistent with the prima facie presumption established by SB 709.

ii. Neither the CAPCOG conformance letter nor Caldwell County's resolution warrant finding the requested hours justified.

Despite the fact that 130EP made no mention in its Closing Arguments of either the Capitol Area Council of Governments (CAPCOG) conformance letter nor Caldwell

¹⁰ Proposal for Decision, at p. 31.

¹¹ *Id.*

County's resolutions relating to the landfill, 130EP now claims that these documents, alone, warrant reversing the ALJ's careful consideration of the evidence.

But, the generalities set forth in the conformance letter from CAPCOG and resolutions adopted by Caldwell County cannot compensate for the lack of specificity in 130EP's evidence. The ALJ properly faulted 130EP for the general, conclusory nature of the claimed justifications lacking any grounding in specific evidence such as traffic data or numbers of vehicles entering the landfill at particular times of the day.¹² The CAPCOG letter and the County Resolutions merely contain the same generalities, simply in a different package.¹³ These documents fail to add any supporting data for 130EP's claims. Such conclusory information is not competent evidence of a material fact. *See City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009) (expert's conclusory opinion lacking supporting data was not competent evidence capable of supporting a judgment) (citing *Coastal Transp. Co, Inc.. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004)). Thus, as to 130EP's claims that expanded operating hours are necessary, neither of these documents are evidence that could support reversal of the ALJ's recommendation of denial.

iii. The ALJ was well-justified in finding Aligned Protestants' witnesses more credible than 130EP's witnesses.

130EP complains that the ALJ found Aligned Protestants' witnesses more credible than 130EP's witnesses. Assessing credibility of witnesses is a key role of the ALJ, and that job was performed well in this case.

¹² PFD at p. 32.

¹³ Applicant's Exh. 7.

Aligned Protestants' witnesses spoke credibly from first-hand experience residing in close proximity to the landfill for many years. On the other hand, 130EP's odor expert spent two days visiting the landfill facility in order to develop his opinions in support of 130EP's Application. In assessing the impacts of exposure to the landfill, the ALJ was well-justified in giving more weight to witnesses who had spent the most time exposed to the impacts of the landfill.

Notably, 130EP's noise expert Jonathan Ferdinand only provided monitoring reflecting particular operating conditions during a total of six days when the landfill was in operation.¹⁴ Mr. Ferdinand agreed that the time of the expansion would be of special interest for the amendment Application.¹⁵ Yet, he solely provided 24-hour sound intensity averages in his report, and made no determination of the sound intensity during the particular hours involved in the expansion.¹⁶ Mr. Ferdinand had no opinion as to whether the additional sound resulting from the expansion would be acceptable.¹⁷ Such testimony in no respect warrants rejection of the first-hand observations by the impacted community.

II. The Executive Director's Exceptions should be denied.

A. Aligned Protestants bear no burden to demonstrate that the impacts of the proposed operating hours would require an enforcement action.

The Executive Director asserts that "[t]he ALJ was persuaded by the Protestants[]" testimony that noise and/or odor at the facility are at levels that violate the law[,]”¹⁸ and

¹⁴ Tr. Vol. 2, 19:8-14.

¹⁵ Tr. Vol.

¹⁶ Tr. Vol. 2, 20:1-5.

¹⁷ Tr. Vol. 2, 17: 3-5.

¹⁸ ED Exceptions at p. 6.

seems to imply that the ALJ's recommendation of denial is premised upon a finding that the 130EP's compliance history is unacceptable.¹⁹

While Aligned Protestants do not concede that the facility is operating in compliance with applicable odor and noise requirements, questions of enforcement are not at issue in this matter. The analysis required by 30 Tex. Admin. Code § 330.135 is one by which the impacts of the operation of a facility are weighed in light of the facility's asserted justification for expanded operating hours. It is the *permitted* impacts of the facility that are at issue. In this case, the impact of the permitted operations has been demonstrated to be significant, and the harmful consequences of expanding those impacts has been demonstrated to outweigh any claimed justification offered by 130EP for the requested expansion in operating hours.

B. All other issues in ED's Exceptions have been addressed, above, in response to Applicant's Exceptions.

All other arguments presented by the ED are duplicative of arguments made by 130EP and have been addressed above.

III. Conclusion

For the reasons set forth above, Aligned Protestants respectfully request that the Commission deny the Application and assess all transcript costs against 130 Environmental Park, LLC.

Respectfully submitted,

/s/ Marisa Perales
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¹⁹ *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that, on April 18, 2025, a true and correct copy of the foregoing document was served upon the following counsel of record via electronic service.

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