

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**AUSTIN OFFICE**  
**300 West 15th Street Suite 504**  
**Austin, Texas 78701**  
**Phone: (512) 475-4993**  
**Fax: (512) 322-2061**

DATE: 5/10/2017  
NUMBER OF PAGES INCLUDING THIS COVER SHEET: 19  
REGARDING: EXCEPTIONS LETTER (BY ALJ)  
DOCKET NUMBER: 582-15-2082

JUDGE CASEY BELL

<u>FAX TO:</u>	<u>FAX TO:</u>
ERIC MAGEE	(512) 480-0902
ERIC ALLMON	(512) 482-9346
MARISA PERALES	(512) 482-9346
ROBERT C. WILSON	(512) 692-2826
BRENT W. RYAN	(512) 327-6566
KAYLA MURRAY (TEXAS COMMISSION ON ENVIRONMENTAL QUALITY)	(512) 239-0606
TUCKER ROYALL (TEXAS COMMISSION ON ENVIRONMENTAL QUALITY)	(512) 239-5533
ANTHONY TATU (TEXAS COMMISSION ON ENVIRONMENTAL QUALITY)	(512) 239-0606
AARON TUCKER	VIA EMAIL
AARON VARGAS (TEXAS COMMISSION ON ENVIRONMENTAL QUALITY)	(512) 239-0606
BEN PESL	VIA REGULAR MAIL

xc: Docket Clerk, State Office of Administrative Hearings

NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT Michael Martinez(mma) (512) 475-4993

The information contained in this facsimile message is privileged and confidential information intended only for the use of the above-named recipient(s) or the individual or agent responsible to deliver it to the intended recipient. You are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, and return the original message to us at the address via the U.S. Postal Service. Thank you.

# State Office of Administrative Hearings



Lesli G. Ginn  
Chief Administrative Law Judge

May 10, 2017

Tucker Royall, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

**VIA FACSIMILE NO. 512/239-5533**

Re: SOAH Docket No. 582-15-2082; TCEQ Docket No. 2015-0069-MSW; In the Matter of the Application of 130 Environmental Park, LLC for Proposed Permit No. 2383.

Dear Mr. Royall:

On February 17, 2017, the Administrative Law Judges (ALJs) issued their Proposal for Decision (PFD) in this case. On March 10 and 14, 2017, the following parties filed exceptions to the PFD: 130 Environmental Park, LLC (130EP); Caldwell County (County); the Office of Public Interest Counsel (OPIC); the Executive Director (ED); and several individuals, TJFA, L.P., and Environmental Protection in the Interest of Caldwell County (collectively, Protestants). On March 23, 2017, 130EP, Protestants, and the County filed responses. Two parties to this proceeding, Ben Pesi and the Plum Creek Conservation District (District), did not file exceptions or responses.

As an initial matter, 130EP made references in its exceptions to facts not found in the evidentiary record in this case. Therefore, the ALJs will not consider, and recommend that the Commission not consider, the following: Attachments 1-4 to 130EP's exceptions; the statements regarding various landfill permits on pages 5-6 of its exceptions; the statements regarding the IESI Jacksboro Landfill and the NTMWD 121 Regional Disposal Facility on page 9 of its exceptions; the statements regarding other MSW facilities and their operating hours on pages 17-21 of its exceptions; and any other references that are outside the evidentiary record in this case.

SOAH Docket No. 582-15-2082  
TCEQ Docket No. 2015-0069-MSW  
Exceptions Letter  
Page 2

## 1. Application Deficiencies

All parties excepted to the ALJs' determination that 130EP's application for a permit to construct and operate a Type I municipal solid waste (MSW) landfill facility (Application) had three deficiencies, but that such deficiencies were sufficiently addressed in the hearing or through a special provision in the draft permit (Draft Permit). 130EP argued that its Application was not deficient. The ED acknowledged that the deficiencies were non-substantive. In contrast, OPIC, Protestants, and the County assert that the ALJs erred by not recommending that the Application be denied because of the deficiencies. The ALJs have reviewed the parties' exceptions and recommend that the Commission overrule all the exceptions on this issue.

Regarding the lack of a floodplain development permit, 130EP argues, for the first time, that such a permit from Caldwell County is not required because 30 Texas Administrative Code (TAC) § 330.63(c)(2)(D) only requires such a permit if an applicant proposes to construct a MSW management unit in a floodplain. However, in its responses to the parties' closing arguments, 130EP said just the opposite. 130EP argued that "[d]uring technical review of the application, it became apparent that the entrance road would be constructed across a floodplain in the portion of the property outside of the permit boundary, *requiring the Applicant to obtain a floodplain development permit.*"<sup>1</sup> In addition, Section 330.63(c)(2)(D) has no language limiting its applicability to only MSW management units as 130EP now suggests. As stated in the PFD, the Application did not include a floodplain development permit as required by 30 TAC § 330.63(c)(2)(D)(ii), but the Draft Permit contains a special provision to address this requirement, which the ALJs continue to find acceptable.<sup>2</sup>

Regarding the failure to include the District on the landowners list in the Application, 130EP argues that no such deficiency exists because the District is not a landowner, but is instead the owner of an easement. In addition, 130EP further argues, in reliance on 30 TAC § 330.59(c)(3)(B), that it was not required to include the District's easement on the landowners list because the rule provides that the source for the landowners list is the County's real property appraisal records, and the District's ownership of an easement is not shown in those records.

The ALJs recommend that the Commission overrule this exception because 30 TAC § 330.59(c)(3)(B) requires the landowners list to "*include all property owners within ¼ mile of the facility . . . .*"<sup>3</sup> An easement is clearly an interest in real property; therefore, the District is a property owner that should have been included on that list. Section 330.59(c)(3)(B) does not provide, as advocated by 130EP, that an applicant need only include those landowners found in the real property appraisal records. The rule provides: "Property and mineral interest owners' *names and mailing addresses* derived from the real property appraisal records as listed on the

---

<sup>1</sup> 130EP Response to Closings at 69 (emphasis added).

<sup>2</sup> PFD at 179-180.

<sup>3</sup> Emphasis added.

SOAH Docket No. 582-15-2082  
TCEQ Docket No. 2015-0069-MSW  
Exceptions Letter  
Page 3

date that the application is filed will comply with this paragraph.”<sup>4</sup> This allows an applicant to rely on the appraisal records for the names and mailing addresses without doing additional research in other deed records. In the ALJs’ opinion, the rule does not allow an applicant to ignore a known easement owner simply because the owner’s name and mailing address are not in the appraisal records. Nevertheless, the ALJs reiterate that this deficiency in the Application has little or no practical impact given that the easement was identified in another part of the Application<sup>5</sup> and the District was notified of the Application and fully participated in the hearing.

Regarding the lack of ED approval of 130EP’s soil boring plan, the ALJs addressed in the PFD the arguments made by the parties’ in their exceptions, and the ALJs will not repeat that analysis here. Accordingly, the ALJs recommend that the Commission overrule the exceptions based on the reasoning stated in the PFD and in this letter.

## **2. Sufficiency of Property Rights**

Protestants, the County, and OPIC excepted to the ALJs’ recommendation that 130EP has shown that it has sufficient rights in the property for which it seeks the permit at issue. Protestants claim that 130EP “repeatedly relies on structures, activities, installations beyond the facility boundary” to show compliance with the applicable rules, including the access road, drainage, and visual screening. According to Protestants, 130EP did not show it has rights in those areas outside the property conveyed to it by Cathy Moore Hunter. However, the preponderance of the evidence shows that if the permit is issued, 130EP will purchase all of the 1,229.076 acres owned by Ms. Hunter, which includes the entirety of the access road. Further, the only portion of the required facilities for 130EP’s proposed Type I MSW landfill (Landfill) that falls outside the permit boundary (Permit Boundary) is the access road, the entirety of which the ALJs continue to recommend be included within the Permit Boundary.

As for the remainder of the exceptions regarding the issue of sufficient property rights, the ALJs addressed in the PFD the arguments made by the parties’ in their exceptions, and the ALJs will not repeat their analysis here. Accordingly, the ALJs recommend that the Commission overrule those exceptions based on the reasoning stated in the PFD and in this letter.

## **3. Legal Authority, Evidence of Competency, and Compliance History**

OPIC and Protestants excepted to the ALJs’ findings that 130EP met the requirements regarding evidence of competency and compliance history. For the first time, OPIC claims that 30 TAC §§ 281.5 and 305.50(a)(2) required 130EP to disclose that it was a wholly-owned subsidiary of Green Group Holdings, LLC (GGH), that Ernest Kaufmann was GGH’s president,

---

<sup>4</sup> 30 TAC § 330.59(c)(3)(B) (emphasis added).

<sup>5</sup> 130EP-1 at 42, 48.

SOAH Docket No. 582-15-2082  
TCEQ Docket No. 2015-0069-MSW  
Exceptions Letter  
Page 4

and that nine other companies, according to Mr. Kaufmann, report up to GGH. However, 30 TAC § 281.5 only requires the verified legal status of the applicant, which 130EP provided.

Regarding 30 TAC § 305.50(a)(2), this rule requires listings of sites owned, operated, or controlled by an applicant in the State of Texas. For purposes of this requirement, the term “applicant” includes each officer and owner of a majority of the stock of the applicant, provided that the owner controls at least 20% of the applicant and at least 20% of another business which operates a solid waste management facility. Although there is evidence in the record that GGH is the sole owner of 130EP, there is no evidence in the record that GGH owned, operated, or controlled any solid waste management sites in the State of Texas at the time the Application was filed. Therefore, the Application complied with 30 TAC §§ 281.5 and 305.50(a)(2).

The remainder of OPIC’s exceptions and the exceptions made by Protestants to the ALJs’ findings regarding competency and compliance history were previously addressed by the ALJs in the PFD, and the ALJs will not repeat their analysis here. Accordingly, the ALJs recommend that the Commission overrule those exceptions based on the reasoning stated in the PFD and in this letter.

#### 4. Traffic Impact Analysis and Permit Boundary

All the parties filing exceptions took issue with the ALJs’ recommendation to extend the Permit Boundary to include the screening berm and the entire length of the access road from US 183 to the gatehouse of the proposed facility (Facility). 130EP and the ED argued that such a change to the Draft Permit would qualify as a major amendment, necessitating additional notice and proceedings. 130EP also asserted that Protestants’ true intent in arguing for an expansion of the Permit Boundary is to create an issue on appeal. Protestants claimed that the entire length of the access road must be included within the Permit Boundary because the TCEQ has generally eschewed regulating traffic issues beyond permit boundaries. OPIC supported the ALJs’ recommendation regarding the Permit Boundary.

As an initial matter, 130EP excepted to the ALJs’ use of the term “access road” to refer to the “entrance road” that will run from US 183, across privately-owned property, to the gatehouse. The Application refers to this driveway as the “entrance road.”<sup>6</sup> However, 130EP used the terms “entrance road” and “access road” interchangeably in its response to the parties’ closing arguments.<sup>7</sup> In the ALJs’ opinion, this exception elevates form over substance. Regardless of whether the term “entrance road” or “access road” is used, the basis of the ALJs’ recommendation remains the same.

---

<sup>6</sup> 130EP-1 at 63, 124.

<sup>7</sup> Compare 130EP Response at 16 (“[s]pecific information on the *entrance road* that will be used for site access from US 183 to the Site . . .”), with 130EP Response at 18 (“[130EP] would not be able to change the *access road* to connect with FM-1185 . . .”) (emphasis added).

SOAH Docket No. 582-15-2082  
TCEQ Docket No. 2015-0069-MSW  
Exceptions Letter  
Page 5

The ALJs decline to change their recommendation regarding the extension of the Permit Boundary to encompass the entire length of the access road. Although no rule expressly requires the entire road be included within the Permit Boundary, no rule expressly prohibits it either. As stated in the PFD, a roughly mile-long stretch of the road necessary to access and operate the Facility will be located on private property outside of the Permit Boundary. Although 30 TAC § 330.67(b) requires an owner or operator to retain the right of entry to the Facility, 30 TAC § 330.153 sets out certain requirements for the entrance road, including the requirement that the road be an all-weather road and re-graded as necessary. If this road is outside the Permit Boundary on land privately-owned by someone other than the permittee, the ability to meet these operational requirements and the TCEQ's authority to enforce these provisions may be in question. However, the requirement to retain the right of entry as mandated by Section 330.153 could be met through the use of an easement or other mechanism that provides for the necessary maintenance and operation of the entrance road.

Regarding the screening berm, the ALJs are unaware of any operational requirements in the TCEQ's rules applicable to that structure. In addition, 130EP cannot eliminate the screening berm without amending the permit.<sup>8</sup> Therefore, including the entire screening berm within the Permit Boundary to ensure its proper construction and maintenance is less of a concern to the ALJs than is the inclusion of the entire length of the access road.

As to the major amendment issue, the ED and 130EP raised this argument for the first time in their exceptions, after the parties had litigated the issue of expanding the Permit Boundary throughout the hearing and in briefing and after the ALJs had issued the PFD. The ALJs recognize that a major amendment may be a consequence of their recommendation. However, this consequence does not change the underlying basis for the recommendation: the road to access the Facility will be on privately-owned property, and the Draft Permit includes no mechanism to ensure that a permittee will have the legal ability to properly maintain the access road.

As to the ALJs' conclusions regarding 130EP's traffic impact analysis, the ALJs addressed the parties' arguments in the PFD, and the ALJs will not repeat those arguments here. Accordingly, the ALJs recommend that the Commission overrule those exceptions based on the reasoning stated in the PFD and in this letter.

## 5. Geology and Soils

Protestants and 130EP excepted to the ALJs' rulings in this case regarding the destruction of the field logs and soil samples. Specifically, 130EP excepts to the references in the PFD that it destroyed the field logs and requests changes to the findings of fact (FOF) that it was the engineers at Biggs & Mathews Environmental (BME) who destroyed the field logs, not 130EP. In the ALJs' opinion, this exception elevates form over substance. As the Application makes

---

<sup>8</sup> ED-SO-8, Draft Permit at 9, Provision VII.A.

SOAH Docket No. 582-15-2082  
TCEQ Docket No. 2015-0069-MSW  
Exceptions Letter  
Page 6

clear, BME prepared the Application and was acting on behalf of 130EP.<sup>9</sup> Accordingly, the ALJs decline to make any changes to the PFD or recommend any modifications of the FOFs and conclusions of law (COL).

Regarding the remainder of Protestants' exceptions about the destruction of the field logs and soil samples, the ALJs addressed those arguments in the PFD and will not repeat that analysis. Accordingly, the ALJs recommend that the Commission overrule the parties' exceptions for the reasons stated in the PFD.

The County and Protestants also excepted to the ALJs' findings and conclusions regarding the geologic and soil conditions at the site for the Facility (Site), with Protestants' claiming that the ALJs failed to perform a rigorous analysis of 130EP's geology report. The ALJs addressed those arguments in the PFD and will not repeat that analysis here. Accordingly, the ALJs recommend that the Commission overrule the exceptions based on the reasoning in the PFD and this letter.

## **6. Hydrogeology and Groundwater Monitoring**

Protestants excepted to the ALJs' findings and conclusions regarding the information in the Application having met the requirements of 30 TAC chapter 330 regarding hydrogeology and groundwater monitoring. All of the arguments raised in these exceptions were addressed by the ALJs in the PFD, and the analysis will not be repeated here. Accordingly, the ALJs recommend that the Commission overrule those exceptions based on the reasoning in the PFD.

## **7. General Facility Design**

Protestants excepted to the ALJs' findings and conclusions regarding the information in the Application having met the requirements of 30 TAC chapter 330 regarding the slab and subsurface supports for the storage and processing components at the Facility. All of the arguments raised in these exceptions were addressed by the ALJs in the PFD, and the analysis will not be repeated here. Accordingly, the ALJs recommend that the Commission overrule those exceptions based on the reasoning in the PFD.

## **8. Waste Management Design**

Protestants excepted to the ALJs' findings and conclusions regarding the slope stability analysis performed by 130EP's consultants, specifically Gregory Adams, P.E., from BME. Protestants contend that Mr. Adams's testimony regarding his modeling, including his assumptions and the inputs, was conclusory and not competent evidence. To the contrary, the evidence showed that Mr. Adams has extensive professional experience in performing these

---

<sup>9</sup> 130EP Ex. 1 at 40, 78.

SOAH Docket No. 582-15-2082  
TCEQ Docket No. 2015-0069-MSW  
Exceptions Letter  
Page 7

types of slope stability analyses and that he had rational and logical bases and justifications for his decisions regarding the modeling. Therefore, the ALJs recommend that the Commission overrule Protestants' exceptions to the ALJs' reliance on Mr. Adams's testimony concerning the slope stability analysis.

The remainder of the arguments made by Protestants in their exceptions to the ALJs' findings and conclusions regarding the waste management unit design was previously addressed by the ALJs in the PFD, and the ALJs will not repeat their analysis here. Accordingly, the ALJs recommend that the Commission overrule these exceptions based on the reasoning stated in the PFD and in this letter.

## **9. Landfill Gas Monitoring**

Protestants excepted to the ALJs' findings and conclusions regarding the landfill gas management plan (LGMP) included by 130EP in the Application. Specifically, Protestants contend the LGMP failed to meet the requirements of 30 TAC § 330.371(g)(2) by failing to include timelines for installation of the proposed landfill gas monitoring system. However, the LGMP includes an installation schedule for the landfill gas monitoring probes to be installed.<sup>10</sup> Further, the LGMP calls for installation of extraction wells as needed to control landfill gas and meet regulatory requirements as the Landfill develops. Inclusion of this information in the LGMP meets the rule's requirement for a timeline for installation of the system, and the ALJ's recommend the Commission overrule this exception.

The remainder of the arguments made by Protestants in their exceptions to the ALJs' findings and conclusions regarding the LGMP was previously addressed by the ALJs in the PFD, and the ALJs will not repeat their analysis here. Accordingly, the ALJs recommend that the Commission overrule these exceptions based on the reasoning stated in the PFD and in this letter.

## **10. Wetlands**

Protestants complained about the ALJs' findings and conclusions regarding 130EP's wetlands determination. Protestants alleged that 130EP failed to consider state-jurisdictional wetlands in its wetlands determination. The Protestants also asserted that the ALJs misinterpreted 30 TAC § 330.61(m)(2) and discussed the history of Section 330.61(m) and how the ALJs should have interpreted the language in Section 330.61(m)(2).

The ALJs are not persuaded that they misapplied 30 TAC § 330.61(m)(2). The plain language of this subsection indicates that "[f]or purposes of this subsection," the wetlands demonstration can be made through evidence of a US Army Corps of Engineering permit. In addition, 130EP's wetlands determination indicated both jurisdictional and non-jurisdictional

---

<sup>10</sup> 130EP-5 at 13.



SOAH Docket No. 582-15-2082  
TCEQ Docket No. 2015-0069-MSW  
Exceptions Letter  
Page 8

wetlands, and 130EP's Russell Marusak credibly established that the federal and state definitions of wetlands are very similar, if not identical, in application.<sup>11</sup> Based on the reasoning in the PFD and in this letter, the ALJs recommend that the Commission overrule Protestants' exceptions on the wetlands issue.

## 11. Surface Water Drainage and Floodplains

The County and Protestants excepted to the ALJs' findings and conclusions regarding 130EP's satisfaction of TCEQ rules regarding surface drainage and floodplains. In its exceptions, the County primarily repeated its arguments regarding those issues, and the ALJs will not repeat their analysis of the County's evidence set forth in the PFD.

Protestants asserted that the ALJs rejected the Commission's policy that an applicant must evaluate surface water drainage pattern impacts at the Permit Boundary. However, this assertion misstates the findings in the PFD. As clearly stated, the ALJs determined that, considering the changes in volume at CP7 and CP8 individually, there was no adverse alteration of surface water drainage at the Permit Boundary.<sup>12</sup>

Regarding the floodplain, Protestants asserted that the ALJs erred in determining that the Site 21 Dam was the major factor in determining the size of the floodplain at the Site. Protestants acknowledged that, at least on the southern and eastern sides of the Landfill, "[i]t is true that the influence of the Site 21 Reservoir is evident throughout the eastern and southern areas of the property, where the height of the floodplain is consistently at 519 feet msl, shortly [sic] above the 517 foot msl elevation of the emergency spillway."<sup>13</sup> However, Protestants contend that it is the western side of the Landfill that is at 535 feet above msl and beyond the influence of the Site 21 Dam.

The ALJs discussed the impact of the Site 21 Dam on the size of the 100-year floodplain in the context of 130EP's lack of consideration of future development on the floodplain. The ALJs determined that the TCEQ did not require an applicant to consider such future development in its floodplain analysis.<sup>14</sup> Therefore, even if the Site 21 Dam does not impact the size of the floodplain on the western side of the Landfill as alleged by Protestants, this allegation does not change the ALJs' conclusion that 130EP was not required to incorporate future upstream development into its modeling of the floodplain. The ALJs found that 130EP used proper inputs in its modeling, and the ALJs decline to change this finding based on Protestants' exceptions.

---

<sup>11</sup> 130EP Marusak-1 at 6-7.

<sup>12</sup> PFD at 144-145; PO at FOF No. 263.

<sup>13</sup> Protestants Exceptions at 101.

<sup>14</sup> PFD at 157-158.

SOAH Docket No. 582-15-2082  
TCEQ Docket No. 2015-0069-MSW  
Exceptions Letter  
Page 9

In addition to those issues discussed here, Protestants reiterated the arguments made in their post-hearing briefs. The ALJs have addressed these arguments in the PFD and will not restate that analysis here. Accordingly, based on the reasoning in the PFD and this letter, the ALJs recommend that the Commission overrule these exceptions regarding surface water drainage and floodplains.

## 12. Land-Use Compatibility

130EP excepted to the ALJs' "concern" regarding the compatibility of the Facility with the Site 21 Reservoir and argued that it has met all requirements regarding compatibility. 130EP also argued that the ALJs erred in concluding that the County's Solid Waste Disposal Ordinance (Disposal Ordinance) was a zoning ordinance that 30 TAC § 330.61(h) requires an applicant to consider. Protestants and the County excepted to the ALJs not requiring 130EP to establish whether the Disposal Ordinance applies to the Facility.

130EP argued that in the *Hallco* case cited in the PFD, the Texas Supreme Court held that a similar county ordinance adopted under Texas Health and Safety Code § 364.012 was not a zoning ordinance. In this case, the County adopted the Disposal Ordinance pursuant to Texas Health and Safety Code §§ 363.112 and 364.012. In *Hallco*, the Court stated that "[w]hile Texas counties generally enjoy fairly limited zoning authority, [Texas Health and Safety Code § 364.012] allows a county to prohibit municipal or industrial solid-waste disposal that presents a threat to the public health, safety, and welfare, so long as the county designates an area in which disposal is permissible."<sup>15</sup> However, as 130EP notes, the Court later stated in the opinion that the county ordinance at issue in that case was "no zoning ordinance" when determining whether res judicata barred the plaintiff's takings claim.<sup>16</sup>

The term "zoning" is not defined in 30 TAC chapter 330, but a "zoning regulation is a recognized tool of community planning" which allows a local government, usually a municipality, to restrict the use of private property.<sup>17</sup> The ALJs recognize that the *Hallco* opinion creates some ambiguity as to whether the Disposal Ordinance is a zoning ordinance. However, the ALJs interpret 30 TAC § 330.61(h) to require an applicant for an MSW landfill permit to analyze "zoning in the vicinity," and this section requires 130EP to consider the Disposal Ordinance because it is a land-use restriction imposed on the use of private property. Therefore, the ALJs recommend that the Commission overrule 130EP's exception on this issue.

Furthermore, as Protestants pointed out, the burden was on 130EP to consider the County's ordinance in its land-use analysis. The evidence shows that the Disposal Ordinance prohibits solid waste disposal in the vicinity of the Facility. But the County's ordinance is just

---

<sup>15</sup> *Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50, 53 (Tex. 2006) (emphasis added).

<sup>16</sup> *Hallco*, 221 S.W.3d at 60.

<sup>17</sup> See generally, *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 792 (Tex. 1982).

SOAH Docket No. 582-15-2082  
TCEQ Docket No. 2015-0069-MSW  
Exceptions Letter  
Page 10

one factor to consider; it is not determinative of whether the Facility is compatible with surrounding land uses. In the ALJs' opinion, considering all the factors in 30 TAC § 330.61(h), including the Disposal Ordinance, 130EP has met its burden to show that the Facility is generally compatible with the land uses on and surrounding the Site and should not adversely impact human health or the environment.

Protestants also took issue with the ALJs' conclusion that the Disposal Ordinance did not prohibit the issuance of the permit to 130EP because it did not have "a landfill permit application" on file with the TCEQ at the time the Disposal Ordinance was adopted. The County also claimed that 130EP did not have an application on file until it submitted Parts III and IV, and therefore the Disposal Ordinance prohibits 130EP from constructing and operating the Facility.

The ALJs disagree with the County's and Protestants' exceptions. On September 4, 2013, 130EP filed Parts I and II of the Application. Three months later, on December 9, 2013, the County adopted the Disposal Ordinance. Section 330.57(a) of the TCEQ's rules provides:

The application for a municipal solid waste facility is divided into Parts I - IV. Parts I - IV of the application shall be required before the application is declared administratively complete in accordance with Chapter 281 of this title (relating to Applications Processing). The owner or operator shall submit a complete application, containing Parts I - IV, before a hearing can be conducted on the technical design merits of the application. An owner or operator applying for a permit may request a land-use only determination. If the executive director determines that a land-use only determination is appropriate, the owner or operator shall submit a partial application consisting of Parts I and II of the application. The executive director may process a partial permit application to the extent necessary to determine land-use compatibility alone. If the facility is determined to be acceptable on the basis of land use, the executive director will consider technical matters related to the permit application at a later time. When this procedure is followed, an opportunity for a public hearing will be offered for each determination in accordance with § 39.419 of this title (relating to Notice of Application and Preliminary Decision). A complete application, consisting of Parts I - IV of the application, shall be submitted based upon the results of the land-use only public hearing.<sup>18</sup>

Although Parts I and II may only address land-use compatibility issues, the plain language of Section 330.57(a) indicates that these two parts constitute "a partial application" for a permit for an MSW facility. Texas Health and Safety Code §§ 363.112(c)(1) and 364.012(e)(1) provide that a county may not prohibit the disposal of solid waste in an area for which an "application" is

---

<sup>18</sup> 30 TAC § 330.57(a).

SOAH Docket No. 582-15-2082  
TCEQ Docket No. 2015-0069-MSW  
Exceptions Letter  
Page 11

pending before the TCEQ. However, the statutes do not require that a complete application be on file and pending. Without legal authority that these Texas Health and Safety Code provisions require a complete application to be on file, the ALJs cannot agree with Protestants and the County that 130EP did not have an “application” on file with the TCEQ at the time the County adopted the Disposal Ordinance.

Protestants and the County also asserted that, although the ALJs had concerns regarding siting a landfill upstream of a flood-retarding structure, the ALJs erroneously concluded that 130EP sufficiently addressed the effect the Facility would have on the Site 21 Reservoir. OPIC further argued that, in its opinion, the evidence in this case demonstrates that the Facility’s incompatibilities outweigh its benefits. In the PFD, the ALJs addressed these arguments made by Protestants, OPIC, and the County regarding the land-use compatibility analysis, and the ALJs will not repeat that analysis here. The ALJs recommend that the Commission overrule the exceptions regarding the land-use compatibility analysis for the reasons stated in the PFD and in this letter.

### 13. Site Operating Plan

130EP and the ED excepted to the ALJs’ recommendation that the TCEQ’s standard operating hours found in 30 TAC § 330.135(a) should apply to the Facility. Both the ED and 130EP assert that 30 TAC § 330.135(a) had not previously been interpreted by the Commission to require an applicant to provide any justification for operating hours that exceed those set out in the rule. Although the ALJs did not find that justification was necessary, they did determine that, based on a reasonable reading of the rule in light of a previous Commission order in *Waste Management, Inc.*,<sup>19</sup> 130EP had the burden to show that hours beyond those set forth in the rule are appropriate. The rule states what a facility’s waste acceptance hours “may be” and dictates that material transport and operation of heavy equipment “must not be conducted” during certain hours. Both of these hourly limitations apply “unless otherwise approved in the authorization for the facility.” In the Commission’s final order in *Waste Management, Inc.*, which was a direct referral like this case, the Commission found that the applicant in that case bore the burden of proving that its operating hours, which were outside those set forth in the rule as standard, were appropriate. Therefore, although the Commission expressly declined to add a good-cause requirement to the rule for expanding the standard operating hours, it has interpreted the rule to require an applicant to make some showing that operating hours beyond the standard hours in the rule are appropriate. Accordingly, the ALJs recommend that the Commission overrule the ED’s and 130EP’s exceptions on this issue.

Protestants excepted to the ALJs’ finding that the Site Operating Plan complied with 30 TAC § 330.153 because the TCEQ does not have jurisdiction to enforce the requirements in the rule regarding access roads or roadways that are not included within the Permit Boundary.

---

<sup>19</sup> *An Order Granting the Application of Waste Management of Texas, Inc. for Type I MSW Permit No. 249D* TCEQ Docket No. 2006-0612-MSW, Order at FOF 210 (Mar. 15, 2010).

SOAH Docket No. 582-15-2082  
TCEQ Docket No. 2015-0069-MSW  
Exceptions Letter  
Page 12

However, as previously mentioned, the ALJs recommend the entire access road be included within the Permit Boundary for the reasons set forth in the PFD and as outlined in Section 4 of this letter, above. Therefore, it is unnecessary for the ALJs to determine the extent of the TCEQ's enforcement authority.

The remainder of the arguments made by Protestants in their exceptions to the ALJs' findings and conclusions regarding the Site Operating Plan was previously addressed by the ALJs in the PFD, and the ALJs will not repeat their analysis here. Accordingly, the ALJs recommend that the Commission overrule these exceptions based on the reasoning stated in the PFD and this letter.

#### 14. Odor

Protestants claimed in their exceptions that the ALJs failed to consider all the TCEQ's rules applicable to odor. They asserted that the PFD only focused on 30 TAC § 330.149 and failed to determine whether 130EP complied with 30 TAC §§ 330.63, 330.245(k), and 330.543(b). The ALJs would first note that, in their post-hearing briefing, both 130EP and Protestants focused only on whether the Odor Management Plan in the Application complied with Section 330.149. In addition, the ALJs find that neither Section 330.63(a) nor Section 330.245 impose any application requirements to address odor control beyond those set forth in Section § 330.149. Section 330.245 contains performance standards that prohibit 130EP from allowing nuisance odors to leave the Permit Boundary. If 130EP does not meet these requirements, enforcement actions could be taken to ensure such compliance. Protestants further cited to 30 TAC § 330.63(b)(2)(C)<sup>20</sup> in excepting that the PFD failed to address whether the Application included odor control measures. However, the Application did include odor control measures for each storage, separation, processing, and disposal unit at the Facility, as required by 30 TAC § 330.63(b)(2)(C).<sup>21</sup>

Protestants further excepted to testimony from 130EP's witness Martha O'Brien as arbitrary, incompetent, irrelevant, unreliable, conclusory, and based on faulty factual assumptions. However, Protestants did not object to Ms. O'Brien's testimony as it was offered at the hearing, and the ALJs found her testimony to be credible and reliable based on her training, education, and experience. Moreover, the ALJs' finding that the Application met the requirements of 30 TAC § 330.149 did not depend on Ms. O'Brien's testimony.

Finally, Protestants contended that the Odor Management Plan fails to comply with 30 TAC § 330.149 because it does not address the issue of feral hogs. The evidence at the hearing did not establish that feral hogs would be a source of odor at the Facility. However, the ALJs found that the provisions set forth in the Site Operating Plan for containing disease vectors,

---

<sup>20</sup> Although Protestants cited to 30 TAC § 330.63(a)(2)(C) on page 118 of their exceptions, the ALJs presume that Protestants intended to cite to Section 330.63(b)(2)(C).

<sup>21</sup> See 130EP-2 at 27-33.

SOAH Docket No. 582-15-2082  
 TCEQ Docket No. 2015-0069-MSW  
 Exceptions Letter  
 Page 13

including feral hogs, were sufficient to comply with the applicable rules governing the Site Operating Plan.

The remainder of the arguments made by Protestants in their exceptions to the ALJs' findings and conclusions regarding odors was previously addressed by the ALJs in the PFD, and the ALJs will not repeat their analysis here. Accordingly, the ALJs recommend that the Commission overrule these exceptions based on the reasoning stated in the PFD and this letter.

### 15. Water Supply

The County argued that 130EP failed to meet the TCEQ's requirements regarding water supply and fire protection. The ALJs addressed the County's argument in the PFD and will not repeat that analysis here. Accordingly, the ALJs recommend that the Commission overrule the County's exceptions based on the reasoning in the PFD.

### 16. Buffer Zones and Screening

Protestants asserted in their exceptions that 130EP has not met the buffer zone requirements in 30 TAC § 330.543(b). Protestants argued that the ALJs only analyzed the buffer zone from the Landfill footprint to the Permit Boundary. However, according to Protestants, 30 TAC § 330.543(b)(2)(A) requires a buffer zone not only from disposal activities at the Facility, but from processing activities as well. No party responded to Protestants' exception on this issue.

For new Type I MSW landfills such as the Facility, "the owner or operator shall establish and maintain a 125-foot buffer zone."<sup>22</sup> This rule does not specify whether the buffer zone should extend from the disposal area of the Landfill or also from the waste processing facilities as alleged by Protestants. However, even assuming Protestants' interpretation of 30 TAC § 330.543(b) is correct, the evidence indicates to the ALJs that 130EP provided for sufficient buffer zones, not only from the Landfill footprint, but also from the waste processing facilities, as follows:

Maintenance Building	174-foot buffer zone
Transfer Station	232-foot buffer zone
Truck Wheel Wash	600-foot buffer zone
Citizens' Convenience Center	267-foot buffer zone
Scalehouse and Scales	332-foot buffer zone <sup>23</sup>

<sup>22</sup> 30 TAC § 330.543(b)(2)(A).

<sup>23</sup> 130EP-1 at 131.

SOAH Docket No. 582-15-2082  
TCEQ Docket No. 2015-0069-MSW  
Exceptions Letter  
Page 14

Regarding Protestants' other buffer zone exceptions, the ALJs addressed those in the PFD and will not restate that analysis here. Accordingly, the ALJs recommend that the Commission overrule the exceptions regarding the buffer zone based on the reasoning in the PFD and this letter.

#### **17. Transcription Costs**

The County excepted to the ALJs' recommendation that it bear 25% of the transcription costs. The County contended that it is being penalized for participating in the hearing and bringing up reasonable concerns, such as the Facility's impact on the Site 21 Reservoir. Likewise, Protestants argued that it expended significant resources to address the alleged spoliation of evidence and to respond to 130EP's revision to the Application during the hearing process. Both parties asserted that 130EP alone should bear the cost of the transcript. 130EP did not except to the ALJs' analysis regarding the allocation of costs, nor did it respond to the County's and Protestants' exceptions.

The ALJs are unpersuaded by the arguments made by Protestants and the County and decline to change their recommendation regarding the allocation of transcription costs. The ALJs applied the factors set out in 30 TAC § 80.23(d) and recommend that the Commission overrule these exceptions.

#### **18. 130EP's Exceptions**

In addition to the exceptions already addressed, 130EP suggested changes to individual FOFs and COLs, beginning on page 24 of its exceptions and listed as (a.) through (jj.). The ALJs recommend the Commission sustain 130EP's exceptions and amend the Proposed Order as set out in 130EP's exceptions (a.), (k.), and (ii).

For 130EP's exception (gg.) on page 29 of its exceptions, the ALJs recommend that COL No. 53 be amended to refer to compliance with 30 TAC §§ 330.457 through 330.465, as suggested by 130EP. However, the ALJs do not recommend the deletion of the opening clause regarding the lack of ED approval of the soil boring plan and the omission of the floodplain development permit.

The ALJs recommend that the Commission overrule the remainder of 130EP's exceptions listed on pages 24-30 of its exceptions.

#### **19. Executive Director's Exceptions**

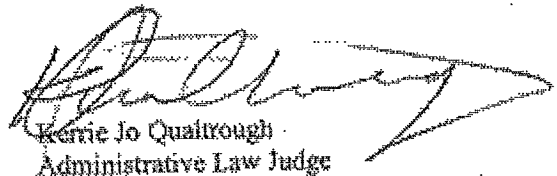
Beginning on page 5 of his exceptions, the ED recommended several corrections, and the ALJs agree that the Commission should make the ED's recommended changes to FOF Nos. 8,

SOAH Docket No. 582-15-2082  
TCEQ Docket No. 2015-0069-MSW  
Exceptions Letter  
Page 15

56, and 153 in the Proposed Order. However, the ALJs do not recommend the deletion of FOF Nos. 69 and 70, regarding the operating hours.

In addition, the ALJs acknowledge that the ED's corrections to two citations in the PFD are correct. The ALJs should have cited to 30 TAC § 330.63(e)(4) on page 2 of the PFD and to 30 TAC § 330.63(e)(5) in footnote 96.

Sincerely,



Kerrie Jo Quailtrough  
Administrative Law Judge

Sincerely,



Casey A. Bell  
Administrative Law Judge

KJQ/CAB/hra  
cc: Mailing List



**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**AUSTIN OFFICE**  
**300 West 15th Street Suite 504**  
**Austin, Texas 78701**  
**Phone: (512) 475-4993**  
**Fax: (512) 322-2061**

**SERVICE LIST**

**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** 130 ENVIRONMENTAL PARK LLC  
**SOAH DOCKET NUMBER:** 582-15-2082  
**REFERRING AGENCY CASE:** 2015-0069-MSW

---

**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE**  
**ALJ CASEY BELL**

---

**REPRESENTATIVE / ADDRESS**

**PARTIES**

ERIC ALLMON  
ATTORNEY  
FREDERICK, PERALES, ALLMON & ROCKWELL, P.C.  
1206 SAN ANTONIO STREET  
AUSTIN, TX 78701  
(512) 469-6000 (PH)  
(512) 482-9346 (FAX)  
eallmon@lf-lawfirm.com

TJFA, L.P.

EPICC

ALIGNED PROTESTANTS

---

ANTHONY TATU  
STAFF ATTORNEY  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
ENVIRONMENTAL LAW DIVISION  
MC-173 P.O. BOX 13087  
AUSTIN, TX 78711-3087  
(512) 239-5778 (PH)  
(512) 239-0606 (FAX)  
atatu@tceq.state.tx.us

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

---

BRENT W. RYAN  
MCELROY, SULLIVAN, MILLER, WEBER & OLMSTEAD,  
L.L.P.  
1201 SPYGLASS DRIVE, SUITE 200 P.O. BOX 12127  
AUSTIN, TX 78711  
(512) 327-8111 (PH)  
(512) 327-6566 (FAX)  
bryan@msmtx.com

130 ENVIRONMENTAL PARK, LLC

---

KAYLA MURRAY  
STAFF ATTORNEY  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
ENVIRONMENTAL LAW DIVISION  
P.O. BOX 13087  
AUSTIN, TX 78711-3087  
(512) 239-4761 (PH)  
(512) 239-0606 (FAX)  
kayla.murray@tceq.texas.gov

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

---

ROBERT C. WILSON  
MCCARTHY & MCCARTHY, LLP  
WESTGATE TOWER  
1122 COLORADO ST, SUITE 2399  
AUSTIN, TX 78701  
(512) 904-2314 (PH)  
(512) 692-2826 (FAX)  
bob@ermlawfirm.com

PLUM CREEK CONSERVATION DISTRICT

---

AARON TUCKER  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
OFFICE OF PUBLIC INTEREST COUNSEL  
MC 103 P.O. BOX 13087  
AUSTIN, TX 78711-3087  
(512) 239-6823 (PH)  
(512) 239-6377 (FAX)  
aaron.tucker@tceq.texas.gov

TCEQ PUBLIC INTEREST COUNSEL

MARISA PERALES  
FREDERICK, PERALES, ALLMON & ROCKWELL, P.C.  
1206 SAN ANTONIO STREET  
AUSTIN, TX 78701  
(512) 469-6000 (PH)  
(512) 482-9346 (FAX)  
marisa@lf-lawfirm.com

EPICC

TJFA, L.P.

ALIGNED PROTESTANTS

---

TUCKER ROYALL  
GENERAL COUNSEL  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
P.O. BOX 13087  
AUSTIN, TX 78711-3087

(512) 239-5533 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

---

ERIC MAGEE  
ALLISON, BASS & MAGEE, L.L.P.  
402 W. 12TH STREET  
AUSTIN, TX 78701  
(512) 482-0701 (PH)  
(512) 480-0902 (FAX)  
e.magee@allison-bass.com

CALDWELL COUNTY

---

BEN PESL  
P.O. BOX 242  
DALE, TX 78616

BEN PESL

---

AARON VARGAS  
STAFF ATTORNEY  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
MC 173 P.O. BOX 13087  
AUSTIN, TX 78711-3087  
(512) 239-0673 (PH)  
(512) 239-0606 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

---

---