

Bryan W. Shaw, Ph.D., P.E., *Chairman*  
Toby Baker, *Commissioner*  
Jon Niermann, *Commissioner*  
Richard A. Hyde, P.E., *Executive Director*



*Vic McWherter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

March 13, 2017

Bridget Bohac, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

**RE: 130 ENVIRONMENTAL PARK, LLC  
SOAH DOCKET NO. 582-15-2082  
TCEQ DOCKET NO. 2015-0069-MSW**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Exceptions to Proposal for Decision in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Aaron Tucker".

Aaron Tucker, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



**SOAH DOCKET NO. 582-15-2082  
TCEQ DOCKET NO. 2015-0069-MSW**

**APPLICATION BY 130  
ENVIRONMENTAL  
PARK, LLC FOR  
PROPOSED PERMIT  
NO. 2383**

§  
§  
§  
§  
§

**BEFORE THE  
STATE OFFICE  
OF  
ADMINISTRATIVE  
HEARINGS**

**OFFICE OF PUBLIC INTEREST COUNSEL'S EXCEPTIONS TO PROPOSAL  
FOR DECISION**

TO THE HONORABLE COMMISSIONERS:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files its Exceptions to the Administrative Law Judges' (ALJs) Proposal for Decision (PFD) filed on February 17, 2017 for the Application by 130 Environmental Park, LLC for a Municipal Solid Waste Permit in Travis County in the above-referenced docket.

**I. Introduction**

At the request of 130 Environmental Park, LLC this case was directly referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing. By rule, the issue at hearing in a direct referral is "whether the application complies with all statutory and regulatory requirements." 30 Tex. Admin. Code (TAC) § 55.210(b). Therefore, 130 Environmental Park, LLC bears the burden of proving "by a preponderance of the evidence" that its application complies with all applicable statutory and regulatory requirements. *See* 30 TAC § 80.17(a). OPIC finds that the Applicant did not meet this burden with respect to evidence of competency, compliance history, and land use compatibility. Additionally, OPIC found several issues with respect to the sufficiency of property rights, nuisance odors, the site operating plan, and the draft permit that would necessitate changes should the facility be approved.

## II. Evaluation of Proposed Landfill Site

### A. Sufficiency of Property Rights

OPIC supports the ALJs recommendation that the facility boundary be modified to include the entirety of the access road to satisfy the property rights requirement. The hearing documented that a portion of the access road is outside of the facility, but inside the property boundary. App Ex. 130EP-1, p. 063. This raises questions about the sufficiency of the property right and enforceability of rule provisions on site access roads. *See* 30 TAC § 330.157(a). The Applicant's witness and initial engineer of record, Mr. Kenneth Welch, agreed at the hearing that TCEQ would have clearer enforcement authority were the entirety of the access road included in the facility boundary. Transcript, Volume 2, pages 492-93. OPIC therefore supports the ALJs recommendation that the facility boundary be modified to include the entirety of the access road.

### B. Legal Authority, Evidence of Competency, and Compliance History

OPIC disagrees with ALJs regarding legal authority, evidence of competency, and compliance history. Before the Commission may issue a municipal solid waste permit a substantive review of compliance and competency must be completed. 30 TAC §§ 60.1, .3. The first step is a full disclosure in the application of all persons and sites subject to review. *See* 30 TAC §§ 281.5, 305.50, 330.59. Unfortunately, 130 Environmental Park LLC refused to comply with this basic requirement—preventing a full review—as well as provided false or misleading information to the Executive Director. Therefore the permit must be denied.

For a municipal solid waste permit not only are more persons subject to a compliance review than other types of permits, but the scope is broader. When the applicant is a corporation, the officers as well as the owner(s) of a majority of corporate stock are subject to review (“provided . . . such owner controls at least 20 percent of the permit holder or applicant and at least 20 percent

of another business which operates a solid waste management facility”). Tex. Health & Safety Code § 361.089(g); 30 TAC § 60.1(a), (b) (compliance history “applicable to all persons subject to the requirements of . . . Texas Health and Safety Code (THSC), Chapter[] 361.”). Additionally, compliance (or noncompliance) includes “evidence of a final determination of noncompliance with federal statutes or statutes *of any state* concerning solid waste.” Tex. Health & Safety Code § 361.084(c) (emphasis added). Ultimately, the Commission has broad authority to deny a permit based on the compliance record. *See* Tex. Health & Safety Code §§ 361.084, .089; 30 TAC §§ 50.117, 60.3, 305.66(f), (l).

The application submitted to the Executive Director represented that 130 Environmental Park, LLC was an independently owned and operated company with no history engaging in solid waste activities. The hearing made clear however that 130 Environmental Park, LLC is a wholly-owned subsidiary of Green Group Holdings, LLC, a waste management company that owns and operates nine facilities throughout the country. Protestants Ex. 11, pgs. 5-7. Additionally, Mr. Kaufmann, the president and sole officer of 130 Environmental Park, LLC was also the president of Green Group Holdings, LLC and affiliated with those nine subsidiaries. Protestants Exhibit 11, pgs. 5-6. The Applicant had a duty to disclose each of these companies and facilities so that the full compliance history of Mr. Ernest Kaufmann (officer of applicant) and Green Group Holding, LLC (owner that controls at least 20 percent of the permit holder or applicant and at least 20 percent of another business which operates a solid waste management facility) could be reviewed. *See* 30 TAC §§ 281.5, 305.50(a)(2), 330.59(e),(f). 130 Environmental Park, LLC’s failure to provide all the required information means that a complete compliance review of all required persons has still not been completed.

130 Environmental Park LLC failed to identify Green Group Holding, LLC and its sites

Chapters 281, 305, and 330 of TCEQ rules impose a number of disclosure obligations to identify precisely who is an “applicant” for a municipal solid waste permit. Under any one of these chapters, 130 Environmental Park LLC—which identified itself as a corporation on its core data form—was required to identify its parent company, Green Group Holding, LLC. *See* Applicant’s Ex. 130EP-1, p. 035. Finally, when asked directly by the Executive Director in a Notice of Deficiency, 130 Environmental Park LCC refused.

First, 30 TAC § 330.59(e) requires that “the owner and operator shall provide verification of their legal status as required by §281.5 of this title.” 30 TAC § 281.5 requires that applications for municipal solid waste permits “must include . . . the verified legal status of the applicant.” 30 TAC § 281.5(3) (emphasis added). As the Texas Health and Safety Code makes clear an “applicant” for a municipal solid waste permit “include[s] each member of a partnership or association and, with respect to a corporation, each officer and the owner or owners of a majority of the corporate stock, provided such partner or owner controls at least 20 percent of the permit holder or applicant and at least 20 percent of another business which operates a solid waste management facility.” Tex. Health & Safety Code § 361.089(g). Finally, applications for municipal solid waste permits are required to provide “any other information as the executive director or the commission may reasonably require.” TAC § 281.5(7). As the Executive Director and the Commission are required to determine the compliance history of an “applicant” as defined by Tex. Health & Safety Code § 361.089(g), 130 Environmental Park LLC—which identified itself as a corporation on its core data form—therefore had an obligation to provide this information. *See* Applicant’s Ex. 130EP-1, p. 035. Especially when asked directly by the Executive Director in a Notice of Deficiency to identify the owners of the legal entity, 130 Environmental Park, LCC.

Therefore, if any person owns more than 20 percent of 130 Environmental Park, LLC this information had to be disclosed.

Furthermore, the second provision of 30 TAC § 330.59(e) requires that “the owner or operator shall list all persons having over a 20% ownership in the proposed facility.” 30 TAC § 330.59(e). OPIC finds that ALJs’ interpretation of 30 TAC § 330.59(e) renders the second provision meaningless and redundant. TCEQ municipal solid waste rules already define an owner to include a “person that owns a facility or part of a facility.” 30 TAC § 330.3(102). Therefore, any person that directly owns a part of the facility is already an owner and would be required to provide verification of their legal status. The second provision doesn’t attempt to limit who is an owner, but rather identify persons who are not direct owners, but have a certain “ownership in the proposed facility.” The 20% number is clearly designed to provide information for the Executive Director to satisfy Tex. Health & Safety Code § 361.089. This is confirmed by the steps the Executive Director staff took during technical review of the application to determine if any person owned more than 20 percent of the legal entity, 130 Environmental Park, LLC. ED - Steve Odil – 3, pg. 2; *see also* ED - Steve Odil – 7, pg. 10. In a Notice of Deficiency (NOD) dated November 25, 2013, the Executive Director specifically asked the Applicant to “provide a list of all individuals that own more than 20% of the *corporation*.” *Id.* (emphasis added). The applicant simply responded that “[n]o other person or entity has over a 20 percent ownership of the proposed facility.” Protestants Exhibit 21, pg. 2.

Regardless of 30 TAC § 330.59(e), 130 Environmental Park, LLC also had an obligation under Section 305.50(a)(2) to identify Green Group Holding, LLC and its proposed Pintail Landfill, LLC facility. This section states that for “an application for a permit to store, process, or dispose of solid waste . . . [a]lso to be submitted are listings of sites owned, operated, or controlled

by the applicant in the State of Texas. For purposes of this section, the terms "permit holder" and "applicant" include each member of a partnership or association and, with respect to a corporation, each officer and the owner or owners of a majority of the corporate stock, provided such partner or owner controls at least 20% of the permit holder or applicant and at least 20% of another business which operates a solid waste management facility." 30 TAC § 305.50(a)(2).<sup>1</sup> Neither of these companies was identified in the application.

130 Environmental Park LLC did not identify all of Mr. Kaufmann's affiliations.

OPIC finds that the Applicant did not satisfy the compliance and competency requirements because it failed to disclose all of its officers' affiliations, particularly Green Group Holdings, LLC and its subsidiaries, as required by 30 TAC 330.59(f)(4). The Applicant's failure to provide all the information required by Section 330.59(f) means that the Executive Director was unable to accurately determine the competency and compliance history of the Applicant, its officers, and parent company. According to the application, 130 Environmental Park, LLC has no prior experience operating solid waste sites. App Ex. 130EP-1, p. 049. This alone raises serious questions about the competency of the Applicant, but no rule prohibits a new company from entering the industry. Thus a thorough review of the Applicant's officers and their previous affiliations is necessary to show that there is evidence of competency to manage to a landfill.

The application states that Ernest Kaufmann is the president of 130 Environmental Park LLC and he signed the application attesting that the information was true and complete. Ex.

---

<sup>1</sup> OPIC acknowledges that the section title would seem to restrict this disclosure to only industrial solid waste and hazardous waste, but the plain language of section (a) and regulatory history indicates it applies more broadly. Section (a) states clearly that it applies to solid waste, not just industrial or hazardous waste. Furthermore, the disclosure requirement in subsection a(2) was originally added in 1991 to implement SB 1099, which defined an "applicant" for purposes of compliance history. *16 Tex. Reg. 6051, 6060* (Oct. 25, 1991). At that time, Section 305.50 was entitled "Additional Requirements for an Application for a Solid Waste Permit." Confuse arose in 1994, when requirements for hazardous waste were added and its title was changed to reflect this focus. *19 Tex. Reg. 3250* (April 29, 1994); *18 Tex. Reg. 8152* (November 9, 1993). Subsection (1), (2), and (3) applying broadly to solid waste however were not changed or removed as part of this rulemaking. *Id.*



130EP-1, p. 036. His biographical information was submitted in Section 6.1 of the application in support of 30 TAC § 330.59(f)(4). Ex. 130EP-1, p. 036. Section 330.59(f)(4) requires “[t]he names of the principals and supervisors of the owner's or operator's organization shall be provided, together with previous affiliations with other organizations engaged in solid waste activities.”

Unfortunately, Mr. Kaufmann’s deposition testimony made clear the Applicant failed to fully identify his affiliations with other organizations engaged in solid waste activities. Not only did the Applicant fail to disclose Mr. Kaufmann’s role with Green Group Holdings, LLC, but it failed to provide information on his affiliations with at least nine Green Group’s subsidiaries and solid waste sites. This information was necessary to demonstrate competency and compliance history. *See* 30 TAC § 330.59(f)(4). Mr. Kaufmann explained that at least nine waste management companies report up to the Green Group parent company. Protestants Ex. 11, pg. 61. These include Pintail Landfill, LLC, Big Sky, LLC, Badlands, LLC, Guam Environmental, LLC, Arrowhead Landfill, LLC, Wichita, LLC, Black Mallard, LLC, Mesa Landfill, LLC, and Wagon Mound Landfill, LLC. Protestants Ex. 11, pg. 7. None of these entities nor the solid waste sites that they manage were listed in the application as required by 30 TAC § 330.59(f). App Ex. 130EP-1, p. 049-050; *see also* Transcript, Volume 6, pg. 1240. Additionally, Mr. Kaufmann stated that he serves as the president and CEO of Green Group as well as the officer in numerous Green Group subsidiaries. Protestants Ex. 11, pgs. 5-7. None of Mr. Kaufmann’s affiliations to these organizations were listed in his biography as required by 30 TAC § 330.59(f)(4). App Ex. 130EP-1, p. 049-050.

*130 Environmental Park LLC provided false or misleading information to the ED*

Ultimately, OPIC finds that the failure to disclose the ownership role of Green Group Holdings, LLC as well as list subsequent information about that organization’s subsidiaries and

solid waste sites represents at a minimum a failure to satisfy the evidence of competency and compliance history requirements and at worst false or misleading statements to the Commission. During technical review of the application, the Executive Director directly asked the Applicant to identify the owners of 130 Environmental Park, LLC and the Applicant stated that no one owned more than 20 percent of the facility. The Applicant's response was both false and misleading. An applicant making "a false or misleading statement in connection with an original application" is grounds for denial by the Commission. Tex. Health & Safety Code § 361.089(e); *see also* 30 TAC § 330.57(d). The permit process requires an applicant to provide an accurate and honest accounting of their proposed project to the Commission, its officers, and its employees. The Applicant's failure to provide the Commission with honest information raises serious issues about why it chose to hide this information and its ability to be forthright in the future with the Commission.

In its application, 130 Environmental Park, LLC stated that it is the sole owner and operator of the facility and that "no other person or entity has over a 20 percent ownership of the proposed facility." App. Ex. 130EP-1, p. 049. Additionally, the Applicant checked that 130 Environmental Park, LLC was independently owned and operated on question 21 of the core data form. App Ex. 130EP-1, p. 035. During technical review of the application, the Executive Director attempted to determine if this was true and if any person owned more than 20 percent of the legal entity, 130 Environmental Park, LLC. ED - Steve Odil – 3, pg. 2; *see also* ED - Steve Odil – 7, pg. 10. In a Notice of Deficiency (NOD) dated November 25, 2013, the Executive Director specifically asked the Applicant to "provide a list of all individuals that own more than 20% of the *corporation*." *Id.* (emphasis added). The applicant simply responded that "[n]o other person or entity has over a 20 percent ownership of the proposed facility." Protestants Exhibit 21, pg. 2. Applicant's second engineer of record, Kerry Maroney, testified he did nothing in response to the NOD to determine

who may own any portion of the legal entity 130 Environmental Park, LLC. Transcript, Volume 9, page 2074-75.

Contrary to the information represented in the application, App Ex. 130EP-1, pgs. 049-050, evidence presented at the hearing shows that 130 Environmental Park, LLC is a wholly-owned subsidiary of Green Group Holdings, LLC, a waste management company. *See* Texas Business Organization Code § 1.002(85) (subsidiary). In his deposition Mr. Kaufmann confirmed he is the president and sole officer of 130 Environmental Park LLC and admitted that Green Group Holdings, LLC owns 100 percent of 130 Environmental Park, LLC. Protestants Exhibit 11, pgs. 5-6. Because Green Group Holdings, LLC owns more than 20 percent of 130 Environmental Park, LLC and the Applicant failed to disclose this fact in the application, it failed to comply with 30 TAC §§ 281.5, 305.50, 330.59(e). Additionally, it provided false and misleading information in its application and to the Executive Director in its response to a NOD regarding the ownership of 130 Environmental Park, LLC. In this case, only through extensive discovery and the deposition of 130 Environmental Park LLC's president was evidence obtained that contradicted 130 Environmental Park LLC sworn declarations in its application.

The Texas Health and Safety Code is designed to protect the citizens of Texas from a person with a history of noncompliance, including one from out of state, from being granted a permit. That is why Texas Health and Safety Code instructs the Commission to investigate not just an applicant, but its officers and parent company. Tex. Health & Safety Code § 361.089. Additionally, it allows "evidence of a final determination of noncompliance with federal statutes or statutes of any state concerning solid waste" to be offered and admitted at a contested case hearing and instructs that "[t]he commission shall consider all evidence admitted, including compliance history, in determining whether to issue , amend, extend, or renew a permit." Tex.

Health & Safety Code § 361.084(c), (d). In order for this evidence to be offered and admitted for consideration to the Commission, Applicants must provide an honest accountant in their application and to the Executive Director. Unfortunately, this did not happen here.

N. Land Use Compatibility

“A primary concern is that the use of any land for a municipal solid waste facility not adversely impact human health or the environment.” 30 TAC § 330.61(h). Several features of the proposed location suggest that the proposed landfill is incompatible with existing uses and has the potential to adversely impact human health and the environment. First, the proposed facility would be located adjacent to the Site 21 Reservoir on Dry Creek and its significant floodplain. Second, the proposed facility would be located in close proximity to existing residences and in an area experiencing recent residential growth. These issues do not mean that the site does not have features that would be compatible with a municipal solid waste facility. For instance, the proposed facility will be located in an unincorporated area of Caldwell County, several miles north of Lockhart. App. Ex. 130EP-1, p. 147. Due to the location of the proposed facility no zoning requirements would apply. App. Ex. 130EP-1, p. 148. The area around the proposed facility is mostly rural with more than 90 percent of the land use within one mile being open and agricultural. App. Ex. 130EP-1, p. 148. There are no schools, day care centers, houses of worship, or cemeteries within one mile. App. Ex. 130EP-1, p. 150. Finally, the proposed site would be located along a major transportation corridor. Ultimately, OPIC finds that the site’s incompatibilities outweigh its benefits and that the proposed location increases the risk of a washout of waste and contamination of water resources as well as nuisance conditions.

The main feature of the Hunter tract is the Site 21 Reservoir on Dry Creek owned by the Plum Creek Conservation District and its significant floodplain. App. Ex. 130EP-1, pgs. 118, 130,

131, 152. The proposed landfill would be adjacent to the reservoir and upstream of the high-hazard dam on Dry Creek. *Id.* Plum Creek Conservation District (PCCD) has an easement for the floodplain. PCCD Ex. 1.1; *see also* App. Ex. 130EP-1, pgs. 131. In order to avoid the 100-year floodplain of the reservoir and the PCCD easement, Applicant has proposed for the landfill to occupy the northern portion of the Hunter tract and be developed in an “amoeba-like” or “organic” shape. *See* App. Ex. 1, pg. 131. The proposed landfill would be just outside of the 100 year floodplain, ultimately satisfying the TCEQ floodplain rule, but providing little room for error in the event of a more significant storm event.

The potential for aquifer contamination is a serious concern. Protestants’ witnesses testified that the area regularly floods and that when flooding occurs the water backs up on to neighboring properties including into water wells. Protestants Ex. 1, pgs. 4-5; Protestants Ex. 2, pgs. 5-7. These water wells lie along a portion of the nearby Carrizo-Wilcox aquifer. Protestants Ex. 5-T. Significant rainfall events in the recent past have damaged property as well as threatened the safety of individuals. Following a flood in 2015, for instance, water running off from the Hunter tract caused a portion of FM1185 to washout. *Id.* at 7. Another flood stranded a group of boy scouts camping out on a nearby property. Protestants Ex. 1, pg. 9. The proximity of the facility to the floodplain and the reservoirs increases the likelihood for the washout of waste and contamination of water resources. Protestants are concerned that flooding would allow contaminated water and waste to enter their property. Protestants Ex. 2, pg. 7. Compounding the problems with the site, is that it is located upstream of a dam rated as high-hazard meaning that in the event of a dam failure the potential exists for downstream loss of life or property. PCCD Ex. 1.5.

Another potential source of conflict is the more than one hundred residences located within one mile of the proposed facility along with growth in the last few years. Residents near the

proposed facility would be subject to noise, odor, and dust generated by the landfill and its operations. In order to avoid the 100-year floodplain of the reservoir and the PCCD easement, Applicant has proposed for the landfill to occupy the northern portion of the Hunter tract. App. Ex. 130EP-1, p. 152. This location would result in the landfill being in close proximity to existing residences to the north located off of Homannville Trail. *Id.* Applicant's land use compatibility expert testified that the nearest resident is approximately 185 feet from the facility boundary and 345 feet from the landfill footprint. Transcript, Volume 1, page 39; *see also* App. Ex. 130EP-1, p. 150. Adding to the problem for the closest residents (those located north of the proposed facility) is that the wind predominately blows from the south. *See* App. Ex. 130EP-1, p. 118. This could exacerbate nuisance odors problems for them. Not only would many residences be very close to the proposed landfill, but the area within one mile around the facility has recently experienced robust growth. When the application was submitted 126 residences existed within one mile of the proposed facility. App. Ex. 130EP-1, p. 148. In 2015, the updated land use analysis showed that in those two years the number of residences within one mile had grown to 143. App. Ex. 130EP-1, p. 148. This is a growth of 17 residences over a two year period or approximately 13.5 percent. Transcript, Volume 1, pg. 115. This recent growth is greater than the 5 percent growth depicted in Applicant's land use analysis based on census information from 2000 to 2010. *See* App. Ex. 130EP-1, p. 153; Transcript, Volume 1, pgs. 113-116. While the Applicant provided information that the census block surrounding the proposed facility is growing at a lower rate than other communities in the greater Austin area, the Protestants' cross-examination revealed that the area immediately surrounding the facility was growing at a much faster rate than the Applicant's methodology indicated. *See id.* Additional evidence shows that growth is occurring to the east of the proposed facility near the Lytton Springs area. Protestants Ex. 3-D. This year the Lockhart

Independent School District opened a new elementary school approximately two and half miles from the proposed facility. Protestants Ex. 3, pg. 5.

P. Site Operating Plan

3. Operating Hours

OPIC agrees with the ALJs' recommendation that the Applicant's site waste acceptance and operating hours should conform to the standard hours in TCEQ rules. OPIC recommends amending Applicant's operating plan so that the waste acceptance and operating hours conform to the standard hours in TCEQ rules. Section 330.135 of the TAC provides that waste acceptance hours should be between 7:00am and 7:00pm, Monday through Friday. 30 TAC § 330.135(a). The rules further provide that transportation of materials and operation of heavy equipment must not be conducted between the hours of 9:00pm and 5:00am. *Id.* The Applicant has requested and the Executive Director has authorized in the draft permit site operating hours of 24 hours a day, 7 days a week. Applicant's Ex. 130EP-5, p. 139. These site operations include construction, earthmoving, monitoring, transportation of construction materials, heavy equipment operation, and other non-waste acceptance operations. *Id.* The draft permit also authorizes waste acceptance hours from 3:00am to 5:00pm, Monday through Friday, and from 5:00am to 12:00pm on Saturday. *Id.* at p. 138.

Municipal solid waste landfills inherently generate noise, odor, and dust conditions. In the hearing on the merits for the permit in question, engineers for both the Executive Director and Applicant testified to the potential for problematic noise resulting from the proposed landfill's operations. Transcript, Volume 8, pg. 1954; Transcript, Volume 9, pg. 2085. Limiting the operating hours of the landfill will help mitigate these conditions. OPIC finds that the Applicant has provided no evidence that would justify granting expanded hours of acceptance or operations.

In fact, Applicant's witness testified that noise and light from heavy equipment operations at night could be incompatible with residents who live near the property. Transcript, Volume 6, p. 1217.

In a hearing regarding a similar MSW permit, the ALJ proposed that, "to be more compatible with existing land uses, particularly the nearby residences, waste should be accepted and operations conducted as specified in the Commission's rules." *Post Oak Clean Green, Inc.*, Docket No. 582-15-2498 (2016). In a different hearing regarding a MSW permit amendment, the ALJ recognized the Commission's determination that waste acceptance from 7:00am to 7:00pm on weekdays should be the norm. *Waste Mgmt. of Tex., Inc.*, Docket No. 582-08-2186 (2009). The ALJs in both of these hearings proposed amending the facility's hours to reflect the hours provided in the rule, citing a lack of evidence justifying the need for extended hours. *See Post Oak Clean Green, Inc.*, Docket No. 582-15-2498 (2016); *Waste Mgmt. of Tex., Inc.*, Docket No. 582-08-2186 (2009). The ALJs' proposals from both of these hearings support the position that if a MSW permit applicant wishes to deviate from the norm for operation and waste acceptance hours, they need to provide evidence showing why such deviation is necessary. 130 Environmental Park, LLC's permit application does not contain evidence explaining the necessity of deviating from the operating hours provided for in the rule. OPIC therefore supports the ALJs' recommendation to amend 130 Environmental Park, LLC's site waste acceptance and operating hours to those provided for in 30 TAC § 330.135(a).

#### 4. Alternative Daily Cover, Windblown Waste, and Vector Control and Scavenging

OPIC recommends that the Site Operating Plan be amended to prohibit the use of alternative daily cover. At present the Site Operating Plan states that the proposed facility anticipates the use of alternative daily cover. App. Ex. 130EP-5, p. 148. OPIC finds this to be problematic for both nuisance odor and vector control. In particular, the use of alternative daily



cover, such as a tarp, would not be as effective as daily cover at mitigating nuisance odors. Odor control is especially important given the proximity of the proposed landfill to northern residences. Second, alternative daily cover would not provide an effective vector control. Several witnesses testified to the feral hog problem in Caldwell County generally and in particular near the proposed facility. Transcript, Volume 6, pgs. 1330-31. When feral hogs are in search of food they will rut and can do extensive damage to a property. *Id.* A municipal solid waste landfill has the potential to attract feral hogs to the facility especially if the waste is not properly managed. Daily cover would help with vector control by reducing odors and providing a more substantial barrier to feral hogs.

Q. Odor

OPIC supports the ALJs' recommendation to require the facility to operate according to the standard TCEQ hours, but believes additional protections are necessary. OPIC finds that odor is likely to be an issue should the proposed facility be approved. The landfill's proposed location on the north side of the Hunter tract means that the landfill would be in close proximity to existing residents living off of Homannville Trail. *Id.* Applicant's land use compatibility expert testified that the nearest resident is approximately 185 feet from the facility boundary and 345 feet from the landfill footprint. Volume 1, page 39; *see also* App. Ex. 130EP-1, p. 150. Adding to the problem for the closest residences (those located north of the proposed facility) is that the wind predominately blows from the south likely carrying odors from the landfill towards them. *See* App. Ex. 130EP-1, p. 118. Not only would the proposed landfill be in close proximity, but the proposed facility has three features that would exacerbate nuisance odor conditions. First, the original site operating plan proposes operations 24 hours a day, seven days week. Second, the vegetated screening berm is partially outside of the facility boundary and the draft permit does not require

construction prior to acceptance of waste. Finally, the site operating plan anticipates the use of alternative daily cover. App. Ex. 130EP-5, p. 148. OPIC finds all of these features problematic. In order to address nuisance odors concerns from the Protestants, OPIC recommends that facility boundary be modified to encompass the vegetated screening berm and that a permit condition be added to ensure construction prior to acceptance of waste. Finally, OPIC recommends a permit condition prohibiting alternative daily cover since it can exacerbate odor issues.

S. Screening

OPIC supports the ALJs' recommendation to modify the facility boundary to encompass all of the visual screening berm. TCEQ rules allow for the condition of a screening berm. 30 TAC § 330.175. Given the closeness of the proposed landfill to nearby residents located north-northwest of the facility, OPIC believe that it would be appropriate to require the Applicant to fully construct a screening berm should the proposed facility be approved. *See* App Ex. 130EP-1, p. 123. The landfill's proposed location on the north side of the Hunter tract means that the facility will be in close proximity to existing residents living off of Homannville Trail. *Id.* Applicant's land use compatibility expert testified that the nearest resident is approximately 185 feet from the facility boundary and 345 feet from the landfill footprint. Transcript, Volume 1, page 39; *see also* App. Ex. 130EP-1, p. 150. Although the application contains a screening berm in its facility screening plan, the application lacks detailed information about the height and it appears to be outside the facility boundary. App Ex. 130EP-1, p. 143. Several of applicant's witnesses testified to the beneficial effects of a screening berm. Screening berms lessen the visual impact of the facility on nearby residents. Transcript, Volume 1, pg. 44. Screening berms dampen the noise from the facility's operations. Finally, screening berms may mitigate some of the nuisance odor problems. Transcript, Volume 4, pg. 1002. OPIC finds sufficient support for the permit to require the owner

or operator to provide an appropriately-sized and vegetated screening berm.

Additionally, OPIC believes that the rules and principles of permit enforceability require that the visual screening berm be contained entirely inside the facility boundary. The applicant's proposed facility screening plans shows that part of the proposed screening berm and most of the undisturbed wooded areas would be outside of the facility boundary. App Ex. 130EP-1, p. 143. TCEQ rules provide for "visual screening of deposited waste materials *at* a municipal solid waste facility." 30 TAC § 339.175 (emphasis added). This means that the visual screening must occur inside the facility. The definition of a municipal solid waste facility includes "[a]ll contiguous land, structures, other appurtenances, and improvements on the land used for processing, storing, or disposing of solid waste." 30 TAC § 339.175. For these reasons, OPIC recommends that the facility boundary be modified to encompass all contiguous land, structures, other appurtenances, and improvements used for visual screening.

#### W. Changes to Draft Permit

In its current form OPIC finds issues with the protectiveness and enforceability of the draft permit. OPIC therefore supports the ALJs' recommendations to the draft permit with some additional conditions.

First, a portion of the access road is outside of the facility boundary. App. Ex. 130EP-1, p. 063. This raises questions about the enforceability of the permit and rule provisions on site access roads. *See* 30 TAC 330.157(a). The Applicant's witness, Mr. Welch, agreed at the hearing that TCEQ would have clearer enforcement authority were the entirety of the access road be included in the facility boundary. Transcript, Volume 2, pgs. 492-93. OPIC therefore supports the ALJs' recommendation that the facility boundary be modified to include the entirety of the access road from US 183 to the proposed landfill.

Second, OPIC finds the plans in the application for the visual screen berm lacking in detail and enforceability. OPIC therefore recommends that facility boundary be modified to encompass all of the visual screening berm and that a permit condition be added to ensure construction prior to acceptance of waste. OPIC believes the enforceability of the draft permit requires that the proposed visual screening berm be contained entirely inside the facility boundary. The applicant's proposed facility screening plans shows that part of the proposed screening berm and most of the undisturbed wooded areas would be outside of the facility boundary. App Ex. 130EP-1, p. 143. TCEQ rules provide for "visual screening of deposited waste materials *at* a municipal solid waste facility." 30 TAC § 339.175 (emphasis added). This means that the visual screening must occur inside facility. The definition of a municipal solid waste facility includes "[a]ll contiguous land, structures, other appurtenances, and improvements on the land used for processing, storing, or disposing of solid waste." 30 TAC § 339.175. In order to adequately ensure construction of a sufficient screening berm, OPIC recommends that facility boundary be modified to encompass all of the visual screening berm and that a permit condition be added to ensure construction prior to acceptance of waste.

Finally, OPIC finds additional protections are necessary to address noise and nuisance odors concerns from the Protestants. The landfill's proposed location on the north side of the Hunter tract means that the landfill would be in close proximity to existing residents living off of Homannville Trail. *Id.* Applicant's land use compatibility expert testified that the nearest resident is approximately 185 feet from the facility boundary and 345 feet from the landfill footprint. Volume 1, page 39; *see also* App. Ex. 130EP-1, p. 150. In the hearing on the merits for the permit in question, engineers for both the Executive Director and Applicant testified to the potential for problematic noise resulting from the proposed landfill's operations. Transcript, Volume 8, pg.

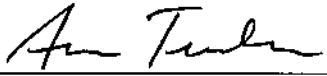
1954; Transcript, Volume 9, pg. 2085. Limiting the operating hours of the landfill will help mitigate these conditions. OPIC supports the ALJs' recommendation to require the facility to operate according to the standard TCEQ hours, but believes additional protections for nuisance odor are necessary should the facility be approved. Odor is likely to be a problem for residences closest to the landfill (those located north of the proposed facility) because the wind predominately blows from the south carrying odors from the landfill towards them. *See* App. Ex. 130EP-1, p. 118. In order to address nuisance odors concerns from the Protestants, OPIC recommends a permit condition prohibiting alternative daily cover since it can exacerbate odor issues.

### **III. Conclusion**

The Applicant bears the burden of proving that its application complies with all applicable statutory and regulatory requirements. OPIC finds that the Applicant did not meet this burden with respect to evidence of competency, compliance history, and land use compatibility. Most notably OPIC finds that the Applicant provided either false or misleading information about the facility's ownership to the Executive Director during technical review. For this reason as well as its failure to satisfy the burden of proof on those issues, OPIC respectfully recommends the application be denied.

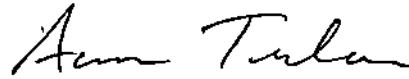
Respectfully submitted,

Vic McWherter  
Public Interest Counsel

By:   
Aaron B. Tucker  
Assistant Public Interest Counsel  
State Bar No. 24088553  
P.O. Box 13087 MC103  
Austin, TX 78711  
(512) 239-6823 PHONE  
(512) 239-6377 FAX

**Certificate of Service**

I hereby certify that on March 13, 2017, the foregoing document was filed with SOAH, the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.



Aaron B. Tucker





**MAILING LIST**  
**130 ENVIRONMENTAL PARK, LLC**  
**SOAH DOCKET NO. 582-15-2082**  
**TCEQ DOCKET NO. 2015-0069-MSW**

The Honorable Kerry Qualtrough  
The Honorable Casey A. Bell  
Administrative Law Judges  
State Office of Administrative  
Hearings  
PO Box 13025  
Austin, Texas 78711-3025  
Tel: 512/475-4993 Fax: 512/322-2061

Brent W Ryan  
McElroy, Sullivan, Miller, Weber &  
Olmstead, LLP  
1201 Spyglass Drive, Suite 200  
P.O. Box 12127  
Austin, Texas 78711  
Tel: 512/327-8111 Fax: 512/327-6566  
[bryan@msmtx.com](mailto:bryan@msmtx.com)  
*Representing: 130 Environmental  
Park, LLC*

Eric Allmon  
Marisa Perales  
Frederick, Perales, Allmon &  
Rockwell, P.C.  
1206 San Antonio St.  
Austin, Texas 78701  
512/469-6000 FAX 512/482-9346  
[eallmon@lf-lawfirm.com](mailto:eallmon@lf-lawfirm.com)  
[marisa@lf-lawfirm.com](mailto:marisa@lf-lawfirm.com)  
*Representing: TJFA L.P., EPICC,  
Aligned Protestants*

Robert Wilson  
McCarthy & McCarthy, LLP  
1122 Colorado, Suite 2399  
Austin, Texas 78701  
512/904-2310 FAX 512/692-2826  
[bob@ermlawfirm.com](mailto:bob@ermlawfirm.com)  
*Representing: Plum Creek  
Conservation District*

Eric Magee  
Allison, Bass & Magee, L.L.P.  
402 W. 12th Street  
Austjn, Tx 78701  
Tel: 512/482-0701 Fax: 512/480-0902  
[e.magee@allison-bass.com](mailto:e.magee@allison-bass.com)  
*Representing: Caldwell County*

Ben Pesl  
PO Box 242  
Dale, Texas 78616

Anthony Tatu  
Kayla Murray  
Aaron Vargas  
TCEQ Environmental Law Division,  
MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-0600 Fax: 512/239-0606

Brian Christian  
TCEQ Environmental Assistance  
Division, MC-108  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-3100 Fax: 512/239-5678

Bridget Bohac  
Texas Commission on  
Environmental Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-3300 Fax: 512/239-3311

