

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



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 10, 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 Subject or Re line

RE: Application of 130 Environmental Park L.L.C. for Proposed MSW Permit No.
2383; TCEQ Docket No. 2015-0069-MSW; SOAH Docket No. 582-15-2082

Dear Ms. Bohac:

Please find attached The Executive Director's Exceptions to Proposal for Decision and Order for the above referenced case.

Sincerely,

A handwritten signature in black ink, appearing to read "Anthony Tatu".

Anthony Tatu, Staff Attorney
Environmental Law Division

cc: Mailing list

Enclosure

APPLICATION OF 130 § **BEFORE THE STATE OFFICE**
ENVIRONMENTAL PARK L.L.C. FOR § **OF**
PROPOSED MSW PERMIT NO. 2383 § **ADMINISTRATIVE HEARINGS**

**EXECUTIVE DIRECTOR'S EXCEPTIONS
TO PROPOSAL FOR DECISION AND ORDER**

To the Honorable Commissioners:

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) respectfully submits these exceptions to the Administrative Law Judges' (ALJs) Proposal for Decision (PFD) and Order in the above-referenced matter. The Executive Director responds to those issues where the ALJs have proposed changes to the draft permit or concluded that the Application is deficient.

I. Deficiencies Noted By The Administrative Law Judges

The ALJs note three deficiencies in the Application:

1. The Application failed to list the District's easement on the Hunter Tract, as required by 30 Texas Administrative Code (TAC) §§ 281.5(6) and 330.59.
2. 130EP did not obtain approval from the ED of its boring plan for the subsurface investigation of the Site prior to initiating work, as required by 30 TAC § 330.63(e)(4).
3. 130EP did not obtain a floodplain development permit from the County, as required by 30 TAC § 330.63(c)(2)(D)(ii).

The PFD explains why none of these deficiencies are substantive. The application filed by 130 Environmental Park discussed the District's easement and the District conceded that it had actual notice of the Application, was granted party status and participated throughout the duration of the contested case hearing.

With respect to the soil boring plan, evidence was presented that although the Executive Director did ask for additional information and clarification from the Applicant regarding the borings and the samples from the borings, the Executive Director did ultimately approve the boring plan and did not require the Applicant to redrill any borings.

The Executive Director addressed the floodplain development permit issue by including a special provision in the draft permit which states:

Before physical construction may commence, the permittee must provide the Executive Director with a floodplain development permit from the city, county, or other agency with jurisdiction over improvements authorized by this permit.

The ALJs found that addressing this type of issue through a special provision is a common practice and is a reasonable accommodation by the TCEQ which will not cause any environmental harm, given that no construction may commence without the Applicant obtaining the necessary approvals.

The Executive Director respectfully recommends that the Commission find that none of the deficiencies noted by the ALJs are a substantive deficiency which would justify denying the application.

II. Suggested Changes To The Draft Permit

Extending the Permit Boundary

The ALJs recommend extending the permit boundary to include the entire length of the access road from the entrance at 183 to the entrance of the facility at the permit boundary. The ALJs concluded that the Applicant met the TCEQ rule requirements relating to traffic and transportation, which require an applicant to provide data on the availability and adequacy of local roads and on the volume of vehicular traffic within one mile of the proposed facility, and to submit documentation of coordination with the Texas Department of Transportation (TXDOT). However the ALJs further note that the draft permit requires the Applicant to maintain the access road, which is on private property and the only authorized part of the facility located outside the permit boundary. That appears to be the basis for the Judge's recommendation that the permit boundary be extended to include the access road.

The Executive Director does not agree with this proposed change for three reasons. First, there is no rule requirement that an access road must be contained within the facility boundary. In fact TCEQ's MSW rules regarding access roads require that "onsite *and other access roadways* must be maintained in a clean and safe condition." (Emphasis added) 30 TAC § 330.153 (c).

Second, with respect to the issue of TCEQ's enforcement authority, there is no evidence in the record that the agency could not enforce the requirement that the access road be maintained in a clean and safe condition. To the contrary, Steve Odil testified on behalf of the Executive Director that the TCEQ could enforce the requirements in the draft permit, even if the access road is outside of the permit boundary.

Finally, changing the permit boundary could lead to notice issues which could be raised on appeal. TCEQ rules require that mailed notice be sent to each property owner located within a 1/4 mile of the facility and to all mineral ownership under the facility. Extending the facility boundary, even by a small distance, could result in claims that notice was defective for nearby property owners or residents. This is the same reason the Executive Director opposes extending the property boundary to include the entire screening berm.

The Executive Director concludes that the TCEQ maintains the ability to ensure the access road is maintained and asks that the Commission deny the ALJ's recommendation to extend the permit boundary.

Adjusting Operating Hours

The ALJs recommend that the proposed landfill be required to adhere to the operating hours found in 30 TAC § 330.135(a)—waste acceptance would be authorized from 7:00am to 7:00pm, Monday through Friday, and material transportation and heavy equipment would be prohibited from 5:00pm to 9:00am every day. Currently, the draft permit authorizes waste acceptance from 3:00am to 5:00pm, Monday through Friday, and from 5:00am to 12:00pm on Saturday. The operating hours, which include the use of heavy equipment are 24 hours per day, seven days a week.

Rule 30 TAC § 330.135(a) provides:

A site operating plan must specify the waste acceptance hours and the facility operating hours when materials will be transported on or off site, and the hours when heavy equipment may operate. The waste acceptance hours of a municipal solid waste facility may be any time between the hours of 7:00 a.m. and 7:00 p.m., Monday through Friday,

unless otherwise approved in the authorization for the facility. Waste acceptance hours within the 7:00 a.m. to 7:00 p.m. weekday span do not require other specific approval. Transportation of materials and heavy equipment operation must not be conducted between the hours of 9:00 p.m. to 5:00 a.m., unless otherwise approved in the authorization for the facility. Operating hours for other activities do not require specific approval.

The ALJs believe that although the rule does not explicitly require a showing of good cause to obtain approval of operating hours beyond those found in the rule, the TCEQ made it clear during rulemaking that an Applicant must provide a justification for operating hours exceeding the rule requirements which should involve consideration of potential impacts on nearby communities.

The Executive Director disagrees with the ALJs interpretation and interprets this rule to mean that an applicant can propose any hours without providing justification to exceed the hours designated in the rule, but that the Commission maintains the authority to restrict the proposed hours based on potential impacts on the community and the applicant's need for the proposed hours. Under the Executive Director's interpretation and practice, applicants have not been required to include justification their applications exceed the operating hours specified in the rule. If the Commission becomes aware of information during the permitting process that raises concerns related to the requested operating hours, it will then consider the potential impacts on surrounding communities in deciding whether to restrict the hours.

The Executive Director's interpretation is based on the TCEQ's 2004 and 2006 MSW rulemakings which included adopting amendments to 30 TAC § 330.118(a). In the 2004 rulemaking, the Commission received comments requesting a requirement "...that a variance from the operating hours designated in the rule should only be granted on a showing of good cause...." The Commission declined to make the change because adding a requirement to show good cause would not have added any objective criteria for making that determination. Alternatively, the Commission decided that it would continue to make these decisions on a case-by-case basis considering the potential impact on surrounding communities¹. In the 2006 rulemaking, the Commission again discussed this issue in the

¹ 29 Tex. Reg. 11070 (November 26, 2004) (Attachment A).

preamble responding to comments that the rule should specify the circumstances which justify operating 24 hours per day, seven days a week. The Commission replied that it "...needs to retain flexibility to continue authorizing operating hours on a case-by case basis considering the potential impacts on surrounding communities."² Considering the discussions in these preambles, the Executive Director interprets the rule to mean that an applicant can propose operating hours that exceed the rule, and that the Commission will generally approve those hours, unless the Commission becomes aware of information to justify restricting the proposed hours.

As to this Application, the Executive Director is not aware of any evidence in the record to support the ALJ's finding to restrict the operating hours, other than a finding that there are residences within a short distance to portions of the facility. The Executive Director will consider any additional arguments citing to any evidence on this issue, but recommends retaining the operating hours in the draft permit.

III. Corrections

The Executive Director respectfully recommends that the following minor corrections be made to the PFD:

- On page 2 of the PFD, the cite to 30 TAC Section 330.63(4) should read 30 TAC Section 330.63(c)(4).
- On page 29 of the PFD, footnote 96 cites to 30 TAC Section 330.63(5) which should read 30 TAC Section 330.63(c)(5).
- On Page 2 of the proposed Order, finding of fact no. 8 states that the Application was declared administratively complete on September 27, 2014, which should read September 27, 2013.
- On page 6 of the proposed Order, finding of fact no. 56, the word "and" should be deleted.
- On page 9 of the proposed Order, finding of fact no. 153 refers to the groundwater modeling system. The Executive Director believes "groundwater monitoring system" was intended.

The Executive Director respectfully recommends that the following Findings of Fact and Conclusions of Law be deleted:

- On page 7 of the proposed Order, Findings of Fact nos. 69 and 70 should be

² 31 Tex. Reg. 2564-2565 (March 24, 2006) (Attachment B).

deleted, for reasons previously discussed above.

IV. Conclusion

The Executive Director agrees with the ALJ's conclusion that the Applicant has met the objective requirements of the TCEQ rules and agrees with the recommendation that the Commission should issue the Draft Permit. The Executive Director, however, disagrees with the modifications suggested by the ALJs for the reasons discussed above. Based on reviewing the Application and considering all of the evidence and arguments, the Executive Director concludes that all regulatory requirements for an MSW landfill have been met. Therefore, the Executive Director stands by the preliminary decision to issue the MSW permit.

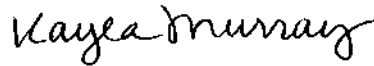
Respectfully submitted,

Texas Commission on Environmental Quality

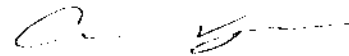
Richard A. Hyde, P.E.
Executive Director



Anthony Tatu, Staff Attorney
Environmental Law Division
State Bar No. 00792869
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
(512) 239-5778



Kayla Murray, Staff Attorney
Environmental Law Division
State Bar No. 24049282
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
(512) 239-3417
(512) 239-0606 (fax)



Aaron Vargas, Staff Attorney
Environmental Law Division
State Bar No. 24098540
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
(512) 239-3417
(512) 239-0606 (fax)

REPRESENTING THE EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2017, the Executive Director's Exceptions to Proposal For Decision, relating to the Application by 130 Environmental Park, LLC, for a New Type I Municipal Solid Waste Landfill Permit No. 2383, was served to all persons listed on the attached mailing list via hand delivery, electronic mail, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.



Anthony Tatu,
Staff Attorney, Environmental Law Division
State Bar No. 00792869

Mailing List
130 Environmental Park, LLC
TCEQ Docket No. 2015-0069-MSW
SOAH Docket No. 582-15-2082

Brent W. Ryan
McElroy, Sullivan, Miller, Weber &
Olmstead, L.L.P.
1201 Spyglass Drive, Suite 200
P.O. Box 12127
Austin, Texas 78711
Telephone: (512) 327-8111
Fax: (512) 327-6566
bryan@msmtx.com

Robert Wilson
Jackson, Sjoberg, McCarthy & Wilson,
LLP
711 West 7th Street
Austin, Texas 78701
Telephone: (512) 225-5595
Fax: (512) 225-5565
bwilson@jacksonsjoberg.com

Marisa Perales
Eric Allmon
Frederick, Perales, Allmon & Rockwell,
P.C.
707 Rio Grande, Suite 200
Austin, Texas 78701
Telephone: (512) 469-6000
Fax: (512) 482-9346
marisa@lf-lawfirm.com
eallmon@lf-lawfirm.com

Eric Magee
Allison, Bass & Magee, L.L.P.
402 West 12th Street
Austin, Texas 78701
Telephone: (512) 482-0701
Fax: (512) 480-0902
e.magee@allison-bass.com

Ben Pesl
P.O. Box 242
Dale, Texas 78616

Kayla Murray
TCEQ Environmental Law Division
P.O. Box 13087, MC-173
Austin, Texas 78711-3087
Telephone: (512) 239-0600
Fax: (512) 239-0606
kayla.murrayl@tceq.texas.gov

Aaron Vargas
TCEQ Environmental Law Division
P.O. Box 13087, MC-173
Austin, Texas 78711-3087
Telephone: (512) 239-0600
Fax: (512) 239-0606
aaron.vargas@tceq.texas.gov

Anthony Tatu
TCEQ Environmental Law Division
P.O. Box 13087, MC-173
Austin, Texas 78711-3087
Telephone: (512) 239-0600
Fax: (512) 239-0606
anthony.tatu@tceq.texas.gov

Aaron Tucker
TCEQ Office of Public Interest Counsel
P.O. Box 13087, MC-103
Austin, Texas 78711
Telephone: (512) 239-6363
Fax: (512) 239-6377
aaron.tucker@tceq.texas.gov

The Honorable Judge Casey A. Bell
The Honorable Judge Sharon Cloninger
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
Telephone: (512) 475-4993
Fax: (512) 475-4994

Docket Clerk
TCEQ Office of Chief Clerk
P.O. Box 13087, MC-105
Austin, Texas 78711-3087
Telephone: (512) 239-3300
Fax: (512) 239-3311

Attachment A

whether issuing a permit is incompatible with land use in the area. The adopted rule is a reasonable exercise of the commission's responsibility to protect the community around municipal solid waste facilities. No changes have been made in response to these comments.

In response to comments that restricting waste acceptance hours will result in more illegal disposal in unauthorized locations, the commission has not changed the rule. It is reasonable to have some limits on waste facility operating hours to protect communities in the area.

In regard to comments that additional reasons for granting alternative operating hours should be added and that periodic activities like liner construction or emergency response activities should not be restricted, the rules have been amended by adding subsection (c), related to disasters, emergencies, and other unforeseen circumstances that could result in the disruption of waste receipt. These additional provisions are expected to provide adequate mechanisms to manage the concerns expressed in these comments.

In regard to comments that the rule should be more restrictive of activities that have the potential to be a nuisance to neighbors, the commission has amended the rule to regulate the hours when materials may be transported on or off site and the hours when heavy equipment may operate. The amended rule provides reasonable restrictions for protecting neighbors from being affected by a facility.

In regard to documenting operations outside permitted operating hours, the rule has been changed by adding subsection (e), which requires the facility to record in the site operating record the dates and times when any alternate or additional operating hours are utilized.

In regard to comments that there should be a process that includes public input and a five-year review period as to authorized operating hours, the commission has not changed the rule. There is already an opportunity for public input in the permitting process, including the right to a hearing for a new permit or major amendment. The commission does not agree that a five-year review process is needed to reconsider authorized operating hours for a facility. The commission's authority to initiate a permit amendment and its enforcement authority can be used to remedy problems caused to a community related to excessive operating hours.

In regard to the comment that landfills should be required to abide by agreements made with neighborhood associations, the rule has not been changed. The provision in §330.111(b) that allows a facility to modify its permit to comply with these rules does not negate the limitation in §305.70(a) that restricts a facility's authority to change conditions in a permit that were incorporated in the permit as a result of negotiations between the applicant and interested persons. If the agreement with the neighborhood association is not incorporated in the permit, the commission does not have the authority to enforce the agreement.

The rule has not been changed in regard to comments that a variance from the operating hours designated in the rule should only be granted on a showing of good cause, and that a 24-hour operation should not be authorized in a populated area. Adding a requirement to show good cause would not add any objective criteria for making a determination. The commission will continue to make these decisions on a case-by-case basis considering the potential impact on surrounding communities. The commission can consider whether a facility is located in a residential area,

downtown area, or rural area under existing rules. No changes have been made in response to these comments.

In regard to comments that the term "facility operating hours" is not used consistently throughout Subchapter F, the commission has checked for these inconsistencies and concludes that the use is consistent. No changes have been made in response to these comments.

In regard to the comment that changing the rule to allow the regional office to authorize emergency operating hours will be helpful, the rule has been changed to provide this authority.

§330.119. Site Sign.

Comment

RMR and WMTX commented that this section is unclear and suggested that the language be rewritten.

Response

The commission agrees to some extent with the comment that the section is not clear. The rule has been modified to state that the facility sign must be readable from the facility entrance.

Comment

PRPC commented that posting someone's phone number is begging for prank calls, and would not serve the public in rural West Texas, and suggested using 9-1-1 or other means. IESI commented that a facility should be able to post the number for a 24-hour call service that can reach an authorized company representative instead of the number for a specific individual.

Response

In regard to the comment that posting someone's phone number on the site sign is begging for prank calls, the commission notes that the facility phone number is generally available to the public in the telephone book. The phone number could be a mobile phone issued to an on-call person or a phone number of a 24-hour response center that is responsible for relaying calls. The importance of a timely response to an after-hours emergency exceeds the desire to avoid prank calls. No changes were made in response to these comments.

§330.120. Control of Windblown Solid Waste and Litter.

Comment

Many commenters indicated that daily pickup of waste throughout the site is unreasonable. Once a pick-up crew leaves an area, more waste can blow back in. One commenter requested clarification of the intention of the rule.

Response

The daily pickup of waste throughout the site is a means to limit the availability of waste to be blown off site. The requirement to pick up waste daily does not mean that at any one point in time all waste will be picked up, but rather that the picking up of the waste will be an ongoing activity each day of operation. In reality, the operator should pick up litter as necessary, regardless of the frequency required. On the other hand, if there is no windblown waste, it is not necessary to have a litter collection crew patrol the area on a daily basis. No changes were made in response to these comments.

Comment

Wichita Falls questioned why it is necessary to pick up waste in drainage structures.

Attachment B

alternative material daily cover, this rule could require an earthen material stockpile in addition to alternative material daily cover materials. Requiring facilities to be in a position to smother a fire within one hour is reasonable, and the rules also include a provision for the executive director to approve alternative methods of fire protection. The commission made no change in response to these comments.

Comment

Allied shared that it knows of no instances at landfill facilities within the state where working face fires could not be readily extinguished, usually by separating the area waste containing the fire, typically a single load that created the fire condition, and quickly pushing earthen material onto the burning area to extinguish the fire. The commenter offered that requiring that the entire working face be covered within one hour will likely require that each landfill acquire and maintain two or three times the number of scrapers and bulldozers than are typically needed for normal operations, just to meet this standard.

Response

As fire protection is a serious concern for MSW facilities, the commission is obligated to establish a simple scenario for which landfills must be prepared to respond. The commission has concluded that the reasonable potential exists, regardless of anecdotal evidence to the contrary, for a fire extending throughout the working face of the landfill. The commission believes that one hour to smother this scenario is a reasonable expectation. To date, site operating plan updates in response to the ongoing site operating plan call-in have not shown that it will generally be necessary for facilities to double or triple their equipment to comply with this provision. Please note that the current rule includes a provision for the executive director to approve alternative methods of fire protection. The commission made no change in response to these comments.

§330.133. Unloading of Waste.

Comment

HCPHES and TCE suggested that rules establishing the contents of the site operating plan should include procedures to prevent radioactive materials from entering or being disposed at an MSW facility, including response after detection, training, notification, recordkeeping, and reporting. These commenters suggested a need for definitions of radioactive materials.

Response

Under existing Chapter 336 rules, no person may dispose of radioactive material unless that person has a license from the TCEQ under Chapter 336 or an exemption from the DSHS. Material that has been exempted from licensing requirements by the DSHS is not subject to the TCEQ's licensing requirements for radioactive material disposal under Chapter 336. The DSHS considers exemptions under 25 TAC §289.201(c). Certain materials emitting radiation and exempted by the DSHS may be disposed at an MSW facility as if the material were not radioactive. Under §305.52, an application which involves the disposal of a waste containing radioactive materials must be accompanied by a letter or other instrument from the TCEQ, DSHS, or other appropriate authority stating either that the applicant, or the person delivering the waste containing radioactive materials for disposal by the applicant, has a license from the TCEQ, DSHS, or any other appropriate authority; or that the applicant or person served by the applicant does not need such a license. The rules

have been revised in response to these comments by adding new §330.15(e)(9) to include radioactive materials, as defined in Chapter 336, as being prohibited from disposal in MSW facilities except as authorized in Chapter 336 or as subject to an exemption of the DSHS. Section 330.127 requires site operating plans to include procedures to detect and prevent disposal of prohibited wastes. The procedures must include: random inspections of incoming loads; inspection records; training landfill staff to recognize prohibited waste; and remediation provisions. Listing radioactive material as a prohibited waste provides adequate protection posed by the risk of disposing of this material in MSW facilities. A cross-reference has been added to Chapter 336 for the definition of radioactive material in response to comments.

Comment

HCPHES suggested that "unloading area" needs to be defined to clarify the requirements of §330.133(a). The commenter noted that, according to the preamble to the 2004 Revision, "unloading area" is a broad definition that includes working face, but the third sentence in §330.133(b) refers only to the working face staff.

Allied observed that proposed §330.133(b) would require working face staff to have authority and responsibility to reject unauthorized loads, have unauthorized material removed, and assess surcharges and that such duties and responsibilities are inappropriate for working face staff and better reserved for site management personnel.

Response

The commission agrees that applicable staff should have authority and responsibility to reject loads if unauthorized waste is identified. This may include, but may not be limited to, gate staff and personnel performing load inspections. To address these comments, "working face staff" in §330.133(b) is replaced with "staff involved with unloading or inspection of waste." The term "unloading areas" is now defined in the rules in response to these comments.

Comment

HCPHES noted that §330.133(c) clearly states that unloading of prohibited wastes at a facility must not be allowed, but then states that any prohibited waste must be returned immediately or otherwise properly managed by the landfill. The commenter indicated that clear procedures need to be provided in the rules in the event that the generator leaves and the landfill is left with the prohibited waste.

Response

Prohibited wastes may not be unloaded at an MSW facility; however, the commission recognizes that there will be occasions when prohibited waste is not discovered until after it is unloaded, and potentially not until after the delivery vehicle leaves the facility. For this reason, §330.133(c) requires that the site operating plan include procedures for management of prohibited waste in the event that this occurs. These procedures are expected to be site-specific and event-specific, so it is appropriate to leave some level of discretion for facilities to develop site operating plan provisions and to deal with specific incidents. No changes were made in response to these comments.

§330.135. Facility Waste Acceptance and Operating Hours.

Comment

HCPHES indicated that §330.135(a) should specify under what circumstances authorizations will be granted for facilities to operate 24 hours per day.

Response

The commission believes that it needs to retain flexibility to continue authorizing operating hours on a case-by-case basis considering the potential impact on surrounding communities. No changes were made in response to these comments.

Comment

TDS and WMTX indicated that the definition and associated operational limitations of "operating hours" in §330.3(100) and §330.135 present an unworkable limitation on the operators of MSW landfills. WMTX added that conducting construction activities and waste acceptance and disposal activities at the same time crowds the facility with heavy equipment and increases the potential for collisions and injuries and that facilities will have to devote personnel and equipment to construction activities that would otherwise be involved in waste acceptance and disposal activities.

Response

The existing rules for operating hours have not been changed. The rules specify reasonable hours for landfill operations and include authority for the commission to approve operating hours in excess of those stated in the rules. The commission believes that with proper planning, the performance of construction activities and waste acceptance and disposal activities may be accomplished during operating hours. The commission further anticipates that facilities will be staffed and equipped sufficiently to address all activities that are part of landfill operations. The commission is justified in limiting operating hours by the need to protect communities from the potential impacts from landfills. Landfill operations outside the stated hours are more likely to disturb people in residential areas. The commission made no changes in response to these comments.

Comment

TDS noted that, in accordance with §330.135(b) and §330.229(b), operating hours may be extended on up to five occasions per year with the approval of the executive director but it is not clear whether these approvals must be obtained in advance.

Response

The rule indicates that the executive director may approve up to five days for alternative operating hours. This approval must be received before an applicant can use the alternative operating hours. To avoid the need for prior approval for each easily foreseen special occasion, special purpose event, holiday, or other special occurrences each year, these days should be specified in the site operating plan, and approval of the site operating plan acts as approval for the alternative operating hours. The site operating plan should avoid specific dates, but rather refer to the event or occasion, such as "the day after Thanksgiving" or "the day after the Colton Bowl." The commission made no changes in response to these comments.

Comment

TDS suggested that the change in §330.135(b) from "alternate" operating hours to "alternative" operating hours is a mistake and most likely occurred as a result of implementing a global

change to ensure that "alternative liner" replaced "alternate liner" throughout the proposed rules.

Response

"Alternative" and "alternate" are, for some usages, synonymous; however, the majority of definitions for "alternate" include some implication of first one, then the other in succession, as in "meetings are held on alternate Tuesdays." Definitions for "alternative" generally imply a choice different from the usual or conventional. The commission believes that "alternative" is the preferable choice and no changes were made in response to these comments.

Comment

TDS and WMTX noted in §330.135(c) that regional office staff may allow alternative operating hours to address disasters, emergency situations, or other unforeseen circumstances that could result in disruption of solid waste services in the area but that regional office staff may not always be available to authorize the use of heavy equipment to deal with emergencies such as fire, flooding, and berm breach.

Response

The commission notes that during Hurricane Rita the existing system was in place and adequately addressed the issues faced. With respect to emergencies at MSW facilities, the commission wishes to clearly state that emergency response takes precedence over operating hours. Should an emergency situation occur, heavy equipment may be employed to reduce the potential effects to human health and the environment. Emergencies include, but are not limited to, fire, flood, breach, and release of contaminated water or other material. Activities that are part of ongoing operations, including, but not limited to, application of cover, cell construction, and soil stockpiling, do not qualify as emergencies and, where heavy machinery is required, are not allowed outside of operating hours. Regional staff should be contacted for ongoing situations, such as extended periods of inclement weather, that create conditions that may require receipt of waste outside of waste acceptance hours or the operation of heavy equipment outside of operating hours, where failure to do so could result in the disruption of waste management services in the area. The commission feels that landfill personnel should be capable of identifying these situations during normal business hours. No changes were made in response to these comments.

§330.141. Easements and Buffer Zones.

Comment

WMTX commented that there are inconsistencies in the provisions regarding buffer zones in: §330.3(19), which provides that a buffer zone is adjacent to the facility boundary and so may be located inside or outside the boundary of the facility; §330.141(b), which states that the buffer must be maintained between solid waste processing and disposal activities and the boundary of the facility as determined by §330.543; and §330.543(b)(2), which requires that the buffer zone be on property owned or controlled by the landfill owner or operator. WMTX suggested that these definitions should be harmonized to clarify whether buffer zones must fall within the facility boundary.

Response

The commission agrees that these rules are not sufficiently consistent to avoid potential misinterpretations. The commission intends for buffer zones to fall within and adjacent to the facility boundary on property owned or controlled by the owner or op-