

BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

**IN THE MATTER OF
ISSUANCE OF FINAL PERMIT DECISION FOR ECO-VISTA, LLC
CLASS 4 LANDFILL**

PERMIT NO. 0290-S4-R2

Consolidated Docket No. 23-008-P

**MAYOR RUSSELL AND THE CITY OF TONTITOWN'S
BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

The record contains no APCEC Rule 22.203 local approval because Tontitown exercised its power to supersede any such preexisting approval. The Arkansas Supreme Court makes it clear Tontitown possesses the power to revoke previous actions:

We are bound to recognize the settled rule of law that *whatever a municipal government may do by a majority vote, it may undo by majority vote*, absent constitutional or statutory restrictions

City of Ward v. Ward Water and Sewer System, 280 Ark. 177, 179, 655 S.W.2d 454, 456 (1983) (emphasis added). Petitioners Mayor Angie Russell and the City of Tontitown (“Mayor Russell and the City”) request the Hearing Officer determine the Respondents, Department of Environmental Quality (“DEQ”) and Eco-Vista, LLC (the “Applicant”), fail to comply with APCEC Rule 22 requirements as to each issue below, including the fact APCEC Rule 22.203 approval does not exist, the agency fails to properly consider comments submitted, and fails to give proper public notice on multiple occasions. Each of these points is grounds for reversal.

II. STANDARD

Summary Judgment is appropriate if it is shown that “no genuine issues of material fact exist requiring litigation and that the moving party is entitled to judgment as a matter of law.”

Nelson v. Ark. Rural Med. Practice Loan & Scholarship Bd., 2011 Ark. 491, *8. Ark. R. Civ. P. 56 prescribes the same standard.

III. ARGUMENT

1. APCEC Rule 22.203(b): Lack of Municipal Approval Bars Expansion of the Landfill

APCEC Rule 22.203(b) requires “specific geographic site approval” when a “proposed solid waste facility is located within a municipality or county that has adopted restrictions on sites in conjunction with a comprehensive county-wide land use plan.” APEC Rule 22.203(a) states this requirement applies to the “expansion of the permitted acreage of landfills,” such as the permit modification at issue here. The Applicant purports to provide such approval in its pre-application materials, but that approval is revoked and superseded, thus no longer effective as the City of Tontitown withdrew any such approval in November of 2022, and January of 2023, via resolution. *See* Exhibit 1, Zweifel Depo, pages 048-049; Exhibit 2. Therefore, APCEC Rule 22.203 approval does not exist, thus barring landfill expansion.

The *City of Ward* case applies here. There, the City of Ward, Arkansas chose to abolish the Ward Water and Sewer System in the absence of any statutory or other defined mechanism for doing so. 280 Ark. at 178. In finding that the City of Ward may “may undo by majority vote” that which it also created by majority vote, the Arkansas Supreme Court noted it “is a firm rule that the power to make legislation includes the power to repeal.” *Id.* at 179. Under this line of cases, the power to supersede previous decisions is reserved to the City of Tontitown when, as here, there are no “constitutional or statutory restrictions” on repealing or revoking its previous decision. 280 Ark. at 179; *See also City of Pine Bluff v. S. States Police Benev. Ass'n, Inc.*, 373 Ark. 573, 579, 285 S.W.3d 217, 222 (2008) (“because the Pine Bluff City Council was free to establish its civil service commission by majority vote, it is free to abolish its civil service commission by majority vote as well.”); *City of Little Rock v. Chartwell Valley P'ship by Rodney D. Myers Corp.*, 299 Ark. 542, 545, 772 S.W.2d 616, 618 (1989) (“[W]hatever a municipal

government may do by majority vote, it may undo by majority vote, absent constitutional or statutory restrictions. In the instant case, we find no statutory restrictions to the Board changing its prior ordinances.”).

In this case, DEQ acknowledges that there is no constitutional or statutory restriction on the City of Tontitown’s power to rescind APCEC Rule 22.203 approval. Exhibit 1, Zweifel Depo, page 006-007; Exhibit 3, pg. 7. DEQ also concedes there is no temporal limit on when APCEC Rule 22.203 approval expires:

INTERROGATORY NO. 14: State any instances of temporal limits placed on local approvals ADEQ [sic] accepts pursuant to APCEC Reg.22.203(b).

ANSWER TO NO. 14: APC&EC Rule 22.203(b) does not contain any time limits.

INTERROGATORY NO. 15: State how long a local approval pursuant to APCEC Reg.22.203 is valid.

ANSWER TO NO. 15: APC&EC Rule 22.203 does not contain any time limits.

Exhibit 3, p. 6. Without restrictions to the contrary, it is the City’s prerogative to revoke any previous APCEC Rule 22.203 approval.

Were the Commission to adopt a rule prohibiting municipalities from revoking or repealing approval for a landfill, it would have absurd results. APCEC Rule 22.203 was never intended to create perpetual approval for landfills that, regardless of changed circumstances, must be allowed to forever hinder the possibility of developing an area for alternative uses, even when permitting or construction of the landfill is not actually moving forward. *See questioning at Exhibit 1, Zweifel Depo, page 006.* The cases cited above correctly and reasonably establish a rule of law—absent a clear and binding constitutional or statutory restriction barring such action, a municipality has the authority to reverse any decision it has the authority to make. Here, the

City of Tontitown has the authority to grant or deny Rule 22.203 approval, and there is no constitutional or statutory bar to its decision to revoke that approval, so the City's resolution repealing and revoking its approval for the landfill expansion is binding and prevents this project from moving forward.

By requiring local approval, Rule 22.203 gives community residents the final say on whether to allow a project like the landfill expansion at issue in this case. The people of Tontitown have spoken clearly and unequivocally by electing a new mayor and city board members who pledged to oppose the expansion. Exhibit 4. As representatives of the people of Tontitown, the City Board voted to revoke approval for the project. Allowing the project to move forward despite the City's vote to revoke and deny approval is not only contrary to law, see *City of Ward, supra*, it also undermines the purpose and intent of Rule 22.203, which is designed to empower local communities.

2. APCEC Rule 8.211(A)(2): DEQ Fails to Properly Respond to the Tontitown Resolution

In response to Mayor Russell's comment submitting the November of 2022, Tontitown resolution to the administrative record, DEQ simply states "DEQ acknowledges the subsequent city resolution withdrawing support." Exhibit 1, Zweifel Depo, page 050 (response to comments excerpt). DEQ has no guidance, memos, or other materials considering what documents constitute APCEC Rule 22.203 approval, how long such approvals last, or how a city may rescind approval. Exhibit 1, Zweifel Depo, page 006. In the absence of such guidance or memos DEQ is picking and choosing what it does and does not want to consider in its permit application review—specifically, without justification, it chooses to consider a now-revoked 2018 resolution over more recent and binding 2022 and 2023 resolutions from the same city government. DEQ

did nothing to consider, analyze, or otherwise determine the legal impact of the November 2022, resolution submitted during public comment:

<p>1 A Yes.</p> <p>2 Q Okay. Now, on the right side of this document,</p> <p>3 there is a statement here, could you please read the</p> <p>4 last sentence of the paragraph on the right column,</p> <p>5 beginning with "DEQ"?</p> <p>6 A (As read:) DEQ acknowledges the subsequent city</p> <p>7 resolution withdrawing support.</p> <p>8 Q In this context, what does "acknowledges" mean?</p> <p>9 A We received it.</p> <p>10 Q Did you conduct any analysis or further</p> <p>11 consideration of the resolution you received from</p> <p>12 Mayor Russell and the City of Tontitown?</p> <p>13 A We reviewed it for its content and included it in</p> <p>14 the record.</p> <p>15 Q Did you define any rationale or criteria against</p> <p>16 which you reviewed the city resolution?</p> <p>17 A I'm not sure I understand your question.</p> <p>18 Q Is there a standard available to you to review</p> <p>19 the impact of the city resolution on this permitting</p> <p>20 proceeding?</p> <p>21 A In the pre-application process, yes. In this</p> <p>22 process, no.</p> <p>23 Q Okay. So absent either statutory rule or other</p> <p>24 guidance, how did ADEQ rationally consider this</p> <p>25 resolution, the 2022 resolution submitted by</p> <p style="text-align: right;">Page 33</p>	<p>1 Mayor Russell?</p> <p>2 MR. HEISTER: Objection, form.</p> <p>3 A We reviewed the document as presented and</p> <p>4 included in the record and . . .</p> <p>5 Q So did your consideration of the document end at</p> <p>6 review?</p> <p>7 A Yes.</p> <p>8 Q Okay. I'd like make this Exhibit 3.</p> <p>9 (The document was marked for</p> <p>10 identification as Exhibit 3 and is</p> <p>11 attached.)</p> <p>12 BY MR. NOLAND:</p> <p>13 Q Okay. So I started to go down the road of how</p> <p>14 public comments are considered and we just looked at</p> <p>15 one in particular. Last follow-up question, do you</p> <p>16 know who wrote that specific language in Exhibit 3</p> <p>17 that we just reviewed regarding ADEQ acknowledges</p> <p>18 receipt of the resolution?</p> <p>19 A No, I don't know who wrote this.</p> <p>20 Q It could be anyone or a combination of these</p> <p>21 names that we've discussed today in the hierarchy of</p> <p>22 the permit review and development process?</p> <p>23 A I suppose it could.</p> <p>24 Q Okay. Let's back up and talk about the comments</p> <p>25 in a broader sense. What were the consistent concerns</p> <p style="text-align: right;">Page 34</p>
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Exhibit 1, Zweifel Depo, page 009-008 (highlighting added)

DEQ's cursory response simply acknowledging a key development in this permitting proceeding fails to comply with APCEC Rule 8.211(A)(2), which requires "a response to each issue raised in any public comments," and in the "case of any" "environmental standard," that response must include a "written explanation of the rationale." DEQ's statement that it acknowledges the presence of the resolution in the record is not a response to an issue raised, nor is it a written explanation of rationale for failing to analyze the impact of the resolution on the permitting process. Allowing this "acknowledgement" to satisfy the response requirement in

Rule 8.211(A)(2) would effectively gut the rule by allowing the agency to simply “acknowledge” a comment rather than analyze and respond to it.

Acknowledging the existence of relevant documentation of a local authority’s rejection of a landfill site is not a competent response. “To have an administrative action set aside on this basis, the party challenging the action must prove that there was a willful and unreasoning action, without consideration, and with disregard of the facts and circumstances of the case.”

Hester v. Arkansas Pro. Bail Bondsman Licensing Bd., 2011 Ark. App. 389, 8, 383 S.W.3d 925, 930. (Tontitown acknowledges this is an APA case, but states the principle is the same under the sister administrative procedure to APCEC Rule 8). DEQ’s failure to analyze the November 2022 and January 2023 Tontitown resolutions is the very definition of arbitrary and capricious. DEQ willfully chose to disregard the facts and circumstances of this permit proceeding by refusing to consider the impact of the Tontitown resolutions. DEQ’s “ignore the problem and it will go away” approach fails to satisfy the clear and binding requirements of Rule 8.211(A)(2). DEQ should not be allowed to shirk their duty to the public to analyze public comments and provide a meaningful response. “Acknowledging” a comment falls far short of the standard established in Rule 8.211(A)(2).

3. APCEC Rule 22.204: The Applicant and DEQ Fail to Consider Alternative Locations

APCEC Rule. 22.204(a) creates a rebuttable presumption “against permitting the construction or operation of any new landfill within twelve miles of any existing high-impact solid waste facility.” DEQ is confused as to the applicability of APCEC Rule 22.204 to this permit. In its discovery response, DEQ states that it doesn’t know if it is applying APCEC Rule 22.204:

ANSWER TO NO. 13: Without waiving said objection stated in the answer to Interrogatory No. 13, DEQ is not certain that APC&EC Rule 22.204 is applicable to the proposed landfill expansion. See Ark. Code Ann. § 8-6-1501 *et seq.* If compliance with 22.204 is required, DEQ believes one or more of the following documents may demonstrate compliance:

Exhibit 3, p. 6 (highlighting added). However, its 30(b)(6) representative states APCEC 22.204 is applicable. Exhibit 1, Zweifel Depo, page 007.

If DEQ is unclear regarding its APCEC Rule 22.204 responsibilities, and does not know if it is applying Rule 22.204, it is, by definition, acting in an arbitrary and capricious manner. There is no “rational basis” for making a legal determination without first analyzing, understanding, and determining the applicable legal rules that must govern the matter. A decision is arbitrary and capricious where, as here, it lacks a “rational basis” and relies “on a finding of fact based on *an erroneous view of the law.*” *Hamilton v. Arkansas Pollution Control & Ecology Comm'n*, 333 Ark. 370, 373, 969 S.W.2d 653, 655 (1998) (emphasis added). DEQ admits it is unclear on the applicability of APCEC Rule 22.204 but is still attempting to issue a permit that may or may not be governed by the rule. This is arbitrary and capricious.

If APCEC Rule 22.204 does apply, then there is no indication in the record that DEQ reviewed the permit application materials for compliance with APCEC Rule 22.204. DEQ identifies the 2018 resolution as the document complying with APCEC 22.204. Exhibit 1, Zweifel Depo, page 007. However, that resolution does not meet APCEC Rule 22.204 requirements, especially regarding the requirement to consider alternatives to the landfill expansion. *Id.* at 008 (“Q: Can you find anywhere in this document where an alternative location determination is made? A: I do not see that here”). An alternatives analysis is not in the record.

Compliance with APCEC 22.204 is strict, as, it requires “definitive findings in conformance with this section” APCEC 22.204(c). The City of Tontitown is definitively against expansion:

15 Q And then, could you turn the page? There's an 16 attached resolution there. This is an excerpt from 17 the permitting materials that were published and then 18 provided by your counsel. 19 Would you read the resolution number at the top 20 there? 21 A (As read.) Resolution Number 2022-11-1017R. 22 Q And can you tell me, are you familiar with this 23 resolution? 24 A Yes, I am. 25 Q What is your understanding of it? Of its	1 purpose? 2 A The purpose is for the city to declare that they 3 are not supportive of the landfill. 4 Q Would you say this is a definitive statement 5 regarding the city's position on landfill expansion? 6 MR. ROBINETTE: Objection, calls for a 7 legal conclusion. 8 A It appears to give their indication that they've 9 changed their position.
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Exhibit 1, Zweifel Depo, page 008.

It is wholly arbitrary for DEQ to issue a permitting decision without understanding exactly what approval is required pursuant to its own regulations, or, alternatively, without failing to identify definitive findings pursuant to that regulation. Mayor Russell certainly did not make APCEC Rule 22.204 definitive findings in favor of the landfill, as she was not consulted in regards to APCEC Rule 22.204. Exhibit 4. APCEC Rule 22.204(a) findings are not present in the record, certainly not in a definitive statement required by APCEC Rule 22.204(c).

In Arkansas, appellate courts recognize that “administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts, to determine and analyze legal issues affecting their agencies,” but that deferential standard of review hinges on an expectation that the agencies will actually “determine and analyze legal issues affecting their agencies.” *Pine Bluff for Safe Disposal v. Arkansas Pollution Control & Ecology Comm'n*, 354 Ark. 563, 572, 127 S.W.3d 509, 516 (2003). When, as here, the agency fails to do that and instead admits to not knowing which rules govern its actions, but moves forward and takes action anyway, the agency’s action is arbitrary and capricious and should be reversed.

4. APCEC Rule 8.209(A)(1)

DEQ's discovery responses state it mailed notice of the public hearing on Friday, October 28, 2022. Exhibit 3, p. 9. This did not happen. Public notice did not go out until Monday, October 31, 2022, as shown on the envelope containing public notice sent to the Calcagni family. Exhibit 1, Zweifel Depo, page 058 (Calcagni envelope as exhibit to deposition). Those receiving public notice of the hearing did not receive it until after the hearing, as confirmed by Mr. Calcagni, Mayor Russell, and Donna Pianalto. Exhibits 4 and 5. Late, ineffective, public notice is no public notice at all.

Once the decision to hold a public hearing is made, APCEC Rule 8.209(A)(1) requires "notice of the date, time and place of the hearing by first class mail to the applicant, to all persons who have filed a timely written request for a public hearing [and] to all person who have submitted public comments on the record." This did not happen. DEQ did not meet its obligation under APCEC Rule 8.209(A)(1). Common sense dictates that, in order to be effective, notice must be given *before* the meeting occurs.

Arkansas courts have long recognized that invalid and ineffective notice is no notice at all. *See eg. Allen v. Bankston*, 33 Ark. 740 (1878) ("The statute manifestly requires the order to be published in more than one newspaper...It was not the notice required by the statute. It was without authority."); *City of Fort Smith v. O.K. Foods, Inc.*, 293 Ark. 379, 738 S.W.2d 96 (1987) (where "pre-enactment notice and a public hearing" and "post-enactment publication" are required, City must comply with those requirements to take a valid action.). DEQ must be made to give the public notice that its own rules require it to. Failure to provide required public notice cuts the public out of the proceedings APCEC Rule 8 states individual citizens have the right to participate in, which is not the purpose of APCEC Rule 8 or acceptable public policy.

5. Failure to Consider Comments

The record in this matter is full of comments regarding litter, odor, impacts to road use, and harm to water quality creating nuisance conditions. *See Response to Comments*, available at <https://www.adeg.state.ar.us/downloads/WebDatabases/SolidWaste/PermittedFacilities/GenDocs/83496.pdf>. Approximately twenty comments in August and November public comment periods mention litter and debris interfering with roads. *Id.* Similarly, dozens of comments raise concerns with dye which shows a hydrologic link between the site and Wildcat Creek.

APCEC Reg. 22.607(n) states that the “owner or operator shall operate the landfill in a manner to avoid creating a public nuisance or health hazard. The Division may require any additional information or action deemed necessary to assure an environmentally safe operation at the facility.” Litter, odor, impacts to roads, and harm to water quality are all classic public nuisances in Arkansas. *Osceola v. Haynie*, 147 Ark. 290 (1921) (interference with roads may be a public nuisance); *Martin v. Hornor*, 83 Ark. 330 (1907) (interference with road); *Ozark Poultry Products, Inc. v. Garman*, 251 Ark. 389 (1971) (water pollution as a public nuisance); *Carson v. Hercules Powder Co.*, 240 Ark. 887 (1966) (harm to surface water a public nuisance).

Despite its APCEC 22.607(n) duty not to permit a facility that constitutes a public nuisance, DEQ make no changes to the permitting conditions to prevent further public nuisances, as it declined to make any changes to the permit based on issues raised by the public. Exhibit 1, Zweifel Depo, page 010 (Q: Were there any changes made to the permit dated March 17, 2023, after considering public comment before the permit went final? A: No, I don't think there was.”). The record of comments demonstrates nuisance conditions exist. The permit modification does not address those conditions, and will only continue previous practices. This is a violation of APCEC Rule 22.607(n).

6. APCEC Rule 8.211(B)(1) and (C)

DEQ experienced the same problems with its notice of the final permitting decision as it did with notice of the public hearing. DEQ publicly stated both notices went out on a Friday, but both were actually mailed on a Monday. As confirmed by DEQ's 30(b)(6) witness, a card to Kenneth Lovett, and DEQ's mail services provider, DEQ may have signed the final permitting decision on Friday, March 17, 2023, but it did not actually mail the cards until Monday, March 20, 2023. Exhibit 1, Zweifel Depo, page 013-015, 054-057

Notice of a final permitting decision to those submitting a comment on the record "**shall** be placed in the mail on the **same date**" that DEQ serves the Applicant. APCEC Rule 8.211(C) (emphasis added). APCEC Rule 8.211(C) allows no latitude for DEQ to serve the applicant on a Friday, then Mayor Russell and the City of Tontitown on a Monday. Shall means shall. When interpreting law in Arkansas, the first rule of "construction is to apply a plain reading to the statute, construing it just as it reads, by giving the words their ordinary and usually accepted meaning in common language" *City of Ft. Smith v. Carter*, 372 Ark. 93, 95, 270 S.W.3d 822, 824 (2008). When the word "shall" is used in the statutory construction realm, it means the law requires "compliance with the statute unless such an interpretation would lead to an absurdity." *Loyd v. Knight*, 288 Ark. 474, 477, 706 S.W.2d 393, 395 (1986). "Shall" creates an unavoidable, mandatory obligation. See *Wash. v. Thompson*, 339 Ark. 417, 424-425 (1999).

DEQ had no choice but to serve Mayor Russell and the City the same day it served the applicant. It is not the prerogative of the agency to hold service for three days. Mayor Russell and the City refer the AHO to Order No. 3 in Docket No. 09-007-P, *In the Matter of Prairie County Land Farm*, as an example of this tribunal addressing the fact service is not complete until mailed. APCEC Rule. 8.211(B)(1) and (C) do not allow DEQ to issue late notice.

IV. CONCLUSION

DEQ's actions harm the public's interest in this permitting proceeding. Late notice cuts public commenters out of the process. Ignoring revocation of APCEC Rule 22.203 approval damages the citizens of Tontitown's say in their elected officials and the policies they choose. Failing to determine the applicability of APCEC Rule 22.204, or alternatively to secure those local determinations and approvals, further removes local decision making from this process. Removing individuals and local governments from the process is not the purpose of APCEC Rule 22. Receiving 242 comments in the initial public comment period, and dozens more at the public hearing, but making no changes to the draft permit tells the public their input is not meaningful to the permitting process. Mayor Russell and the City ask the Hearing Officer to reverse DEQ's permitting decision on each of the grounds discussed above.

Dated this 30th day of June, 2023.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I, Ross Noland, do hereby certify that a true and correct copy of this pleading was served upon the party listed below via email and by placing a copy of the same in the United State Mail, first class, pursuant to the Ark. R. Civ. P. 5 at the following addresses:

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Dated: June 30, 2023



Ross Noland

**BEFORE THE ARKANSAS POLLUTION CONTROL
& ECOLOGY COMMISSION**

IN THE MATTER OF:)
)
ECO-VISTA, LLC)
CLASS 4 LANDFILL)
)
PERMIT NO. 0290-S4-R2)

Docket No. 23-008-P

**BRIEF IN SUPPORT OF
INDIVIDUAL PETITIONERS'
MOTION FOR SUMMARY JUDGMENT**

The Individual Petitioners' ("Petitioners") Motion for Summary Judgment is focused on the irregularities concerning the Certificate of Need that Eco-Vista, LLC ("E-V"), the owner/operator of the Eco-Vista Landfill ("the Landfill") was required to obtain as a condition precedent to filing an application with the Arkansas Division of Environmental Quality ("DEQ") for a permit to expand the Landfill.

Petitioners claim that, based upon documents regarding the application for the permit by E-V, there is no genuine issue of material fact, and the Petitioners are entitled to a judgment as a matter of law on the following issues:

1. The Certificate of Need ("CON") dated June 13, 2018, obtained by E-V from the Boston Mountain Solid Waste District (The District) was not filed with an Application for Permit with the DEQ within six (6) months of the date of issuance of the CON, as mandated by the rules and regulations of

The District. The rules of The District provided no authority to extend the six (6) month effective date of the CON. The CON thus expired by the terms of such rules and regulations before it was filed with DEQ by E-V, and was ineffective.

2. On May 7, 2021, almost three years after the CON dated June 13, 2018, was issued by The District to E-V, E-V requested The District to amend the CON to allow for Alternative Design or Equivalency Demonstrations to be included in E-V's Permit Applications to DEQ. That amendment was void because:

(A) More than six (6) months had elapsed from the date of issuance of the CON by The District, and the CON expired by the terms of The District's rules and regulations;

(B) No notice of a proposal or intent to make such change was given to the public, nor was the public given an opportunity to comment on such change, as required by The District's regulations.

3. DEQ failed to give timely and proper notice of the November 2, 2022 public hearing on the proposed draft permit to the Individual Petitioners.

STATEMENT OF UNDISPUTED FACTS

1. Rule 22.205(a) of the Arkansas Pollution Control & Ecology Commission ("the Commission") provides in relevant part:

Rule 22.205- Certificate Of Need For Landfills and Transfer Stations

- (a) Applicability-All applicants for a new solid waste landfill permit, new transfer station permit; or for an expansion of the permitted capacity of an existing landfill, ... must obtain a certificate of need from the regional board with jurisdiction over the proposed site...

2. Rule 22.205(b) of the Arkansas Pollution Control & Ecology

Commission (“the Commission”) provides in relevant part:

(b)Petition Requirements – The petition to the regional board must be in accordance with procedures adopted by the board... .

3. Arkansas Code Ann. §8-6-706(a)(4) and (6), relative to the powers and duties of regional solid waste management boards, provide:

(a) The regional solid waste management boards have the following powers and duties:

(4) To issue or deny certificates of need to any applicant for a solid waste disposal facility permit within their districts;

(5) ...

(6) To adopt rules under the Arkansas Administrative Procedure Act, § 25-15-201 et seq., as are reasonably necessary to assure public notice and participation in *any findings or rulings of the regional solid waste management boards* and to administer the duties of the regional solid waste management boards; (Emphasis added)

4. Section 2.02 of the Rules and Regulations of The District DISTRICT provides:

§2.02 Notice of Proposed Action. Notice of the proposed new rule or regulation, modification or repeal of an existing rule or regulation shall be given to the public via publication in the following publications: The Morning News of Northwest Arkansas, The Madison County Record, and The Arkansas Democrat-Gazette (Northwest Edition).

(See, Appendix 2.6.3 to E-V Application for Permit Extension, filed July 7, 2021 (Boston Mountain Solid Waste District Rules, Regulations and Procedures).

5. Section 6.02(a) of the Rules and Regulations of The District provides:

(a) “Certificate of Need” means a certificate issued by the Board to any person proposing to obtain a permit for a solid waste facility.

(See, Appendix 2.6.3 to E-V Application for Permit Extension, filed July 7, 2021 (Boston Mountain Solid Waste District Rules, Regulations and Procedures).

6. Section 7.04 of the Rules and Regulations of The District provides:

Once The District has determined that an application for a Certificate of Need is complete, it will so notify the applicant and public notice of the review period in papers as described in Section 2.02. The review period will begin on the date the completeness determination is made is made to the applicant or the date of publication of notice of the review period, whichever is later. The review period will run for thirty (30) days. *During the review period, public comment will be taken.* (emphasis provided)

(See, Appendix 2.6.3 to E-V Application for Permit Extension, filed July 7, 2021 (Boston Mountain Solid Waste District Rules, Regulations and Procedures).

7. Section 7.05 of the Rules and Regulations of The District provides:

During the review period, The District will conduct a public hearing within the county where the proposed facility or modification is to be located.

(See, Appendix 2.6.3 to E-V Application for Permit Extension, filed July 7, 2021 (Boston Mountain Solid Waste District Rules, Regulations and Procedures).

8. Section 6.05(b) of the Rules and Regulations of The District provides:

6.05 Continuing Effect:

(a) N/A

(b) Upon receipt of a Certificate of Need, the applicant has six (6) months in which to file a permit application for a solid waste landfill permit with ADEQ. If a permit application is not filed within 6 months, the Certificate of Need shall expire. (emphasis added)

(See, Appendix 2.6.3 to E-V Application for Permit Extension, filed July 7, 2021 (Boston Mountain Solid Waste District Rules, Regulations and Procedures).

9. On January 22, 2018, Waste Management/Eco-Vista Landfill, LLC issued a Notice of Intent to Petition for a Certificate of Need with The District.

(See Page 2.2 of E-V application for permit extension filed July 7, 2021; **Exhibit No. 1** to the Appendix of Exhibits to this Motion, obtained from Appendix 2.6.3 to E-V Application for Permit Extension, filed July 7, 2021 (Boston Mountain Solid Waste District Rules, Regulations and Procedures)

10. On February 7, 2018, ADEQ (through Maria Matoski, Permit Engineer), issued a letter of that date to Robyn Reed, Director of The District, confirming that the E-V Landfill was applying for a Certificate of Need.

(See **Exhibit No. 2** to the Appendix of Exhibits to this Motion, obtained from Appendix 2.6.3 to E-V Application for Permit Extension, filed July 7, 2021 (Boston Mountain Solid Waste District Rules, Regulations and Procedures)

11. On June 13, 2018, The District issued a letter to ADEQ confirming that on May 10, The District Board of Directors had determined that E-V's petition for a Certificate of Need had been approved.

(See **Exhibit No. 3** to the Appendix of Exhibits to this Motion, obtained from Appendix 2.6.3 to E-V Application for Permit Extension, filed July 7, 2021 (Boston Mountain Solid Waste District Rules, Regulations and Procedures))

12. On August 16, 2018, The District issued a letter of that date to Eco-Vista Landfill, LLC, regarding a Certificate of Need Extension, citing District Rule 6.05(b) (see Statement of Fact No. 8, above), and stating that The District's Board of Directors had issued an extension of 24 months past the date of the pre-application submission.

(See **Exhibit No. 4** to the Appendix of Exhibits to this Motion, obtained from Appendix 2.6.3 to E-V Application for Permit Extension, filed July 7, 2021 (Boston Mountain Solid Waste District Rules, Regulations and Procedures))

13. On May 15, 2020, The District issued a letter of that date to Eco-Vista Landfill, LLC, regarding a Certificate of Need Extension, citing District Rule 6.05(b) (see Statement of Fact No. 8, above), and stating that The District's Board of Directors had issued an extension of the Certificate of Need to July 6, 2021.

(See **Exhibit No. 5** to the Appendix of Exhibits to this Motion, obtained from Appendix 2.6.3 to E-V Application for Permit Extension, filed July 7, 2021 (Boston Mountain Solid Waste District Rules, Regulations and Procedures))

14. On May 7, 2021, Waste Management/Eco-Vista Landfill, LLC issued a letter to The District requesting that The District allow alternate designs or

equivalency demonstrations to be included in the Permit Modification Application to be filed by Waste Management/Eco-Vista with DEQ.

(See **Exhibit No. 6** to the Appendix of Exhibits to this Motion, obtained from Appendix 2.6.3 to E-V Application for Permit Extension, filed July 7, 2021 (Boston Mountain Solid Waste District Rules, Regulations and Procedures)

15. On May 21, 2020, The District issued a letter of that date to Eco-Vista Landfill, LLC, approving the May 7, 2021, Waste Management/Eco-Vista Landfill, LLC requested that The District allow alternate designs or equivalency demonstrations to be included in the Permit Modification Application to be filed by Waste Management/Eco-Vista with DEQ.

(See **Exhibit No. 7** to the Appendix of Exhibits to this Motion, obtained from Appendix 2.6.3 to E-V Application for Permit Modification, July 7, 2021 (Boston Mountain Solid Waste District Rules, Regulations and Procedures)

16. Waste Management/Eco-Vista (acting through its contractor, FTN & Associates) electronically submitted to DEQ an Application for Permit Modification dated July 6, 2021, containing the Certificate of Need issued June 13, 2018. The Application for Permit Modification was file-stamped by DEQ on July 7, 2021.

(See Application for Permit Modification dated July 6, 2021 filed July 7, 2021)

17. There is no evidence in the record that public notice was published by The District of (i) the filing of the request by Waste Management/Eco-Vista for extension of the time to file the Certificate of Need with DEQ; (ii) of the request by Waste Management/Eco-Vista that The District allow alternate designs or equivalency demonstrations to be included in the Permit Modification Application to be filed by Waste Management/Eco-Vista with

DEQ; or (iii) nor that members of the public were provided an opportunity to submit comments on such requests to The District.

ARGUMENT

- (a) The Certificate of Need (“CON”) dated June 13, 2018, was not filed with an Application for Permit with the DEQ within six (6) months of the date of issuance of the CON.
- (b) The District had no authority to extend the six (6) month effective date of the CON.
- (c) The CON expired by the terms of such rules and regulations before it was filed with DEQ by E-V, and was ineffective.
- (d) Even if The District Board had authority to extend the CON, it was not filed with the Application at DEQ by July 6, 2021.

The chronology of events is important. Based upon the record that appears in DEQ’s computer permit files, that chronology is as follows:

January 22, 2018 - Waste Management/Eco-Vista Landfill, LLC issued a Notice of Intent to Petition for a Certificate of Need to The District. (Exhibit 1)

June 13, 2018 – The District issued a letter to ADEQ confirming that on May 10, The District Board of Directors had determined that E-V’s petition for a certificate of need had been approved. (Exhibit 3) Under Section 6.05(b) of the Rules and Regulations of The District, if a permit application is not filed within 6 months, the Certificate of Need shall expire. There are no provisions in those rules and regulations for an extension of the time within which the CON must be filed with DEQ. To the contrary, the word “shall” in Rule 6.05(b) compels the conclusion that no extensions are allowable.

August 16, 2018 – The District issued a letter to Eco-Vista regarding a Certificate of Need Extension, citing District Rule 6.05(b) (see Statement of Fact No. 8, above), and stating that The District’s Board of Directors had issued an extension of 24 months past the date of the pre-application submission. Again, Rule 6.05(b) does not allow for the action taken by The District.

May 15, 2020 – The District issued a letter to Eco-Vista Landfill, LLC, regarding another Certificate of Need Extension, again citing District Rule 6.05(b), and stating that The District’s Board of Directors had issued an extension of the Certificate of Need to July 6, 2021. However, no authority for an extension of a Certificate of Need exists in Rule 6.05(b).

July 7, 2021 - The Application for Permit Modification of Waste Management/ Eco-Vista is filed at DEQ.

It is clear from the undisputed facts and the chronology that the CON was not filed by E-V within six months of the date of issuance of the CON on July 6, 2018. Even if The District had authority to extend the time for filing the Application for Permit Modification (which included the CON) was not filed with DEQ until July 7, 2021 according to the file stamp of DEQ, which would also make the filing of the CON untimely.

D. DEQ Failed To Give Timely And Proper Notice Of The Public Hearing On The Proposed Permit

This issue is fully briefed in the Brief of the City of Tontitown and Mayor Angela Russell in support of their motion for summary judgment filed in Docket No. 23-009-P. To avoid undue repetition, the Individual Petitioners incorporate the

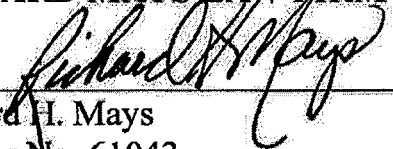
relevant portions of the Tontitown/Russell brief herein as though set forth herein word for word.

CONCLUSION

The Certificate of Need of E-V/Waste Management contained in their Application for Permit Extension filed July 7, 2021 was void on its face, thereby voiding the Permit Application. The Commission should declare the permit issued by DEQ to be void and of no effect and this matter remanded to DEQ for such further proceedings as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the date set forth below, he served a copy of the above and foregoing Brief in Support of Motion for Summary Judgment on the following counsel for ADEQ and Eco-Vista LLC by depositing a copy of the same in the U.S. Mail, first-class delivery, and by email:

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Dated: June 30, 2023.


Richard H. Mays

BEFORE THE ARKANSAS POLLUTION CONTROL & ECOLOGY COMMISSION

IN THE MATTER OF:)
)
ECO-VISTA, LLC)
CLASS 4 LANDFILL

CONSOLIDATED DOCKET NO. 23-008-P

Permit No. 0290-S4-R2

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Comes now the Arkansas Department of Energy and Environment, Division of Environmental Quality (DEQ), by and through its attorneys, Lisa M. Thompson and J. Mark Robinette Jr., and for its Brief in Support of Motion for Summary Judgment states the following:

I: **INTRODUCTION**

DEQ issued a final permitting decision on March 20, 2023, granting Eco-Vista, LLC's (Permittee) Class 4 Permit Modification to expand the Class 4 landfill by an additional 12.2 acres at its existing facility located in Tontitown, Washington County, Arkansas. See Order 4 in Docket 23-009-P. Mayor Angie Russell and the City of Tontitown (collectively, "the City"), submitted on April 17, 2023, a Request for Hearing and Adjudicatory Review on the permitting decision, docketed as 23-009-P. Individual Petitioners Nina Brown, Brandt Burress, Jacqui Calcagni, Mark Calcagni, Mikaila Calcagni, Dale and Theresa Cleveland, David and Renee Etchison, Fern Etchison, Jacob Etchison, Daryle "Russ" Greene, Greg and Darlene Humphries, Kenneth Lovette, Danielle and Heston McFatridge, Glen Odglen, Marty and Karen Phillips, Donna Pianalto, Angela Russell, and Kelly and Kim Young (collectively, "Citizen Petitioners") submitted on April 14, 2023, a Request for Adjudicatory Hearing and Commission Review, docketed as 23-008-P. DEQ files this Brief and accompanying Motion for Summary Judgment, incorporated by reference, pursuant to Arkansas Rules of Civil Procedure Rule 56, on the grounds that no genuine issue of

material fact exists to be heard regarding the City's and Citizen Petitioners' allegations cited in their respective Requests for Hearing.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law." *Meadors v. Still*, 344 Ark. 307, 313, 40 S.W.3d 294, 299 (2001). The Arkansas Supreme Court no longer refers to summary judgment as a "drastic remedy," but simply as a tool that promotes efficiency. *Laird v. Shelmut*, 348 Ark. 632, 641, 74 S.W.3d 206,211 (2002). Summary judgment is properly granted if reasonable men would reach the same conclusion from the undisputed facts. *George v. Jefferson Hosp. Ass'n, Inc.*, 337 Ark. 206, 210-211, 987 S.W.2d 710, 712 (1999).

Once the moving party has demonstrated an entitlement to summary judgment, the non-moving party must "meet proof with proof and demonstrate the existence of a material issue of fact." *Meadors*, 344 Ark. At 314, 40 S.W.3d at 299. If the non-moving party is unable to meet that burden, the case should be disposed of by summary judgment rather than exposing the litigants to unnecessary delay and expense. *Joey Brown Interest, Inc. v. Merchants Nat'l Bank*, 284 Ark. 418, 423, 683 S.W.2d 601, 604 (1985).

III. STATEMENT OF FACTS

DEQ originally permitted this Class 4 landfill on April 16, 1997, pursuant to the Arkansas Solid Waste Management Act, Ark. Code Ann. § 8-6-201 *et seq.* and Arkansas Pollution Control and Ecology Commission (APC&EC) Rule No. 22. On July 6, 2021, DEQ received Eco-Vista, LLC's application for permit modification to allow for a lateral expansion of an additional 12.2 acres.

Public notice detailing DEQ's draft proposed decision to issue Permit 0290-S4-R2 was published in the Arkansas Democrat Gazette, Northwest edition on August 5, 2022, with the public comment period ending September 6, 2022. (See attached public notice of the draft proposed permit decision incorporated herein and attached as Exhibit 1.) Notice of a public meeting and public hearing on the draft permit was published in the Arkansas Democrat Gazette, Northwest edition on October 13, 2022. (A copy of this notice is attached hereto and incorporated herein as Exhibit 2.) A public meeting and public hearing was held on November 2, 2022, and the public comment period was extended during the hearing until midnight on November 4, 2022. DEQ received numerous public comments on the Class 4 landfill expansion draft permit modification.

Pursuant to Order 4 of Docket 23-009-P, the issuance date of the permit was March 20, 2023. On April 14, 2023, Citizen Petitioners submitted a Request for Adjudicatory Hearing and Commission Review. On April 17, 2023, the City submitted a Request for Hearing and Adjudicatory Review.

After initiation of the procedural schedule in the separate docketed matters, DEQ filed Motions to Dismiss each of the Requests for Hearing on May 9, 2023. A preliminary hearing was held for both dockets on May 10, 2023. The City and the Citizen Petitioners each filed Responses to DEQ's Motions to Dismiss. The Administrative Law Judge (ALJ) issued separate Orders No. 4 in each docket on June 6, 2023. The ALJ found the City's Request for Hearing to be timely, granted DEQ's Motions to Dismiss relating to the issues raised by Citizen Petitioners involving the certificate of need (CON), and dismissed Brandt Buress from the Citizen Petitioners' permit appeal for lack of standing.

The ALJ consolidated the dockets for both the City's and the Citizen Petitioners' Requests for Hearing into single docket 23-008-P on June 19, 2023. DEQ asserts that the permit record,

which includes the final permitting decision and public comments, along with APC&EC Rule No. 22 and the Requests for Hearing, and all Motions and Responses filed in this matter, establish that there are no genuine issues of material fact to be litigated.

IV. APPLICATION OF FACTS AND LAW

The separate allegations of the City and the Citizen Petitioners will be distinguished as appropriate in this brief as the docket of both permit appeals is now consolidated.

A. The City's reliance on APC&EC Rule 22.203 as requiring "Municipal Approval" is misplaced.

The City's first argument challenging the decision to issue Permit 0290-S4-R2 is that "Municipal approval does not exist here," citing APC&EC Rule 22.203(b). The City's Amended Request for Hearing at pg. 3. The City's reliance on Rule 22.203(b) is misplaced.

APC&EC Rule 22.203(b) states:

Conformance with County-Wide Plans – If the proposed solid waste facility site is located within a municipality or county that has adopted restrictions on sites *in conjunction with a comprehensive county-wide land use plan*, specific geographic site approval from the government(s) of jurisdiction shall be obtained by the applicant for submission to the Division *with the pre-application*. (emphasis added).

There is no evidence in the permit record that the City of Tontitown "has adopted restrictions on sites in conjunction with a comprehensive county-wide land use plan." Tontitown does have a comprehensive city-wide land use plan, which is very transparent and easily accessible via the City's website. The "local authority approval of site selection" in Rule 22.203 has to do with geographic site selection and zoning. This is a pre-application procedure.

The pre-application packet, prepared by FTN Associates for Eco-Vista on July 6, 2018, included all of the local approval correspondence from the various state and federal agencies including the US Army Corps of Engineers, the Arkansas Natural Heritage Commission, and the Arkansas Department of Health among others. The pre-application packet considered whether the selected site was in “conformance with airport safety, floodplain, wetlands, separation distances and location restrictions, and protective of endangered species, historic archaeology, and flora and fauna.” Eco-Vista Landfill Pre-Application at pg. 10. (See Exhibit 3, which is incorporated herein.)

Specifically, the pre-application recites the following regarding APC&EC Rule 22.203:

On July 3, 2018, the Tontitown City Council voted unanimously in favor of the location of the proposed expansion of the Eco-Vista Class 1 and Class 4 Landfills. The Resolution is included as Appendix B.6.

In addition to the Resolution, the City Council approved the agreement to repair/widen Klenc and Dowell Roads, which is the landfill access road from Highway 412 to Arbor Acres Road. Eco-Vista Landfill, the City of Tontitown (City) and Washington County will partner to widen and overlay the access road. The letter signed by Eco-Vista is included as Appendix B.7. Once the letter is signed by the City, it will be forwarded to ADEQ.

The BMSWMD [Boston Mountain Solid Waste Management District] does not have any requirements for notifying local governments. All Class 1 cities within the district are represented on the BMSWMD Board and are, therefore, already aware of the proposed expansion given that the District has approved the Certificate of Need.

Based on several meetings with the City planning staff, the Eco-Vista Landfill does not conflict with the City’s current land use plan. However, as described in the City Resolution, the City is in the process of updating its Future Land Use Plan, and when completed, the Eco-Vista Landfill will likely be rezoned to a proposed ‘Exclusive Use’ category. Eco-Vista Landfill is working with the City and will update the zoning for the landfill, as needed, once the City finalizes its updated land use plans. Correspondence from the City related to land use requirements is included as Appendix B.8.

Eco-Vista Landfill Pre-Application at pg. 16. (See Exhibit 4, which is incorporated herein.)

DEQ reviewed this information included in the Eco-Vista's 456-page pre-application packet. There is nothing indicating any non-compliance with Rule 22.203.

The City's argument is focused on Rule 22.203(b), but that provision is inapplicable as there is no showing that Tontitown has "adopted restrictions on sites in conjunction with a comprehensive county-wide land use plan" in the permitting record. The City argues that "Tontitown enforces Title XV of its land use code, as well as working to comply with the Tontitown Recharge Zone plan. Washington County, Arkansas utilizes a series of interim and final land use plans through Washington County Planning Ordinances, specifically Chapter 11, as well as accompanying zoning rules and procedures. Each of these plans constitute an APC&EC Reg.22.203(b) comprehensive plan requiring local approval of a landfill expansion." The City's Amended Request for Hearing at pg. 3. DEQ disagrees with this assertion.

Article 1 of Chapter 11- Public Works of the Washington County Code of Ordinances deals with Solid Waste Collection/Disposal as contemplated in Ark. Code Ann. § 8-6-212, not part of a county-wide land use plan as described in Rule 22.203(b). While Tontitown has a comprehensive area-wide zoning plan, there is no showing of a "comprehensive county-wide land use plan" for Washington County, and thus no municipality-adopted restrictions in conjunction with such a plan. By its plain language, Rule 22.203(b) does not apply here. Regarding such a municipality "that has not adopted restrictions on site in conjunction with a county-wide comprehensive land use plan," Rule 22.203(f) actually states the following:

Notification of Local and Regional Authorities- If the proposed site is located in a municipality or county that has not adopted restrictions on site in conjunction with a county-wide comprehensive land use plan or in a solid waste management district that has not adopted site restrictions, the applicant shall notify the municipality and county of jurisdiction over the proposed site and the solid waste management board by certified mail prior to submission of the pre-application. *Except as may be required in Reg.22.204 and Reg.22.205 for landfills, no specific*

geographic site approval by the local government entity or regional solid waste management board is required.
(emphasis added)

Local authority approval pursuant to APC&EC Rule 22.203 was not required in this instance as Tontitown has not “adopted restrictions on sites in conjunction with a comprehensive county-wide land use plan...” Even so, Eco-Vista did receive pre-application site approval from Tontitown as evidenced in Resolution No. 2018-07-797-R (See Exhibit 5, which is incorporated herein) and Ordinance No. 2020-10-900 (See Exhibit 6, which is incorporated herein) contained in the pre-application packet.

Furthermore, Tontitown adopted standards for the location of the Eco-Vista Landfill as demonstrated by Tontitown Ordinance 2021-05-946, which amends zoning regulations and specifies “Exclusive Use Landfill” as permitted in the Tontitown City Council Chapter 153-083.00. (A copy of Ordinance 2021-05-946 is incorporated herein and attached as Exhibit 7.)

The City has not repealed its zoning plan or its multiple ordinances and resolutions regarding city zoning to specifically permit the exclusive use for Eco-Vista’s landfill. Copies of the following documents are incorporated herein and attached as exhibits to this brief that document zoning and site approval by the City:

Exhibit 8	City of Tontitown Ordinance No. 2021-1-909- January 5, 2021
Exhibit 9	City of Tontitown Ordinance No. 2021-10-965- October 5, 2021

Ark. Code Ann. § 8-6-209(a)(4) provides “any and all such standards adopted by a municipality or county must be consistent with, in accordance with, and not more restrictive than said federal, state, and regional laws, rules, regulations, and orders. Any and all such municipalities or county ordinances, resolutions, order, or standards contrary to this section shall be null, void,

and repealed.” The City further argues that by its resolutions passed in November 2022 and January 2023, Tontitown effectively “withdrew” municipal approval, and therefore DEQ did not comply with Rule 22.203 in issuing the final permitting decision. As noted above, Rule 22.203 was not applicable by its own plain language, but even when it is applicable, it places conditions on the pre-application process. The permittee satisfied pre-application requirements, including submission of an approved certificate of need (CON) from the Boston Mountain Regional Solid Waste Management District and additional evidence of approval from the municipality for the landfill and its expansion. There was no appeal of the CON regarding site approval with the process in Ark. Code Ann. § 8-6-706 and reflected in APC&EC Rule 22.206. Resolutions No. 2022-11-1017R (Exhibit 10, incorporated herein) and No. 2023-01-1027R (Exhibit 11, incorporated herein) expressing the City’s “withdrawal” are not consistent with Arkansas state law or APC&EC Rule No. 22. Neither contain any provisions related to a municipality’s subsequent attempt at rescission made well after the permit application is in process. Likewise, there are no provisions in statute or rule that require the permitting process to cease, require that the permit application be denied, or that prohibit the issuance of the permit by DEQ under such circumstances. The City’s argument that APC&EC Rule 22.203(b) was not met is an invalid attempt to circumvent the applicable pre-application site selection processes (and CON appeals per Ark. Code Ann. § 8-6-706(c)) and improperly raise them in the context of a permit appeal. As noted above, this is a misreading and misapplication of Rule 22.203. The permittee’s pre-application submission demonstrated conformance with the applicable requirements of statute and rule. There is no issue of material fact left to be litigated regarding application of Rule 22.203. DEQ is entitled to summary judgment as a matter of law on this issue.

B. DEQ did sufficiently respond to comments regarding the November 2022 and January 2023 Tontitown Resolutions pursuant to APC&EC Rule 8.211(A)(2).

The City's second argument asserts that DEQ failed to comply with APC&EC Rule 8.211(A)(2) because DEQ did not determine the "impact of the resolution on the permitting process, or acknowledge the specific role local government entities have in approving expansion of solid waste disposal facilities." The City's Amended Request for Hearing at pg. 4. Despite the City's assertions to the contrary, DEQ's response to comments referencing Tontitown's Resolution required no "legal analysis" as part of the final permitting decision.

The City claims that DEQ responded to Mayor Russell's comment and "simply states DEQ acknowledges the subsequent city resolution withdrawing support." *Id.* DEQ's response was more than a sentence. DEQ responded to the Mayor's lengthy comment, regarding years of complaints about landfill operation, odors, city growth, and the November 2022 Resolution with the following:

Class IV landfills do not accept putrescible waste and odor is mitigated through weekly cover. In the fifty site visits to Eco-Vista in the last two years, DEQ has not noted any violations of the Class IV landfill. DEQ received a CON and host community approval with the pre-application and application. DEQ acknowledges the subsequent city resolution withdrawing support.

Response to Comments Page 57 of 125.

(DEQ's Response to Comments, Page 57 attached as Exhibit 12 and incorporated herein.) DEQ's responses indicated that DEQ had received the resolution and was aware of it. Again, on page 74 of DEQ's Response to Comments, DEQ addresses the Mayor's public comment regarding the resolution, stating "DEQ is aware of the resolution passed by Tontitown City Council." (DEQ's Response to Comments, Page 74 attached as Exhibit 13 and incorporated herein.). Both the November 2022 Resolution No. 2022-11-1017R and the January 2023 Resolution No. 2023-01-

1027R recount a history of Tontitown's ordinances and resolutions regarding the Eco-Vista Landfill, list complaints and issues regarding operation of the landfill, "withdraw the City's support" for the landfill expansion, and ask for the permit to be denied. DEQ's response to comments addressed information regarding landfill operations, inspections, and compliance by the permittee. The City's Resolution "withdrawing support" does not require a technical response or a response showing any type of scientific basis or engineering practices. As noted above, there is no statutory process in Arkansas law or rule addressing whether or how a municipality can "withdraw" approval during the pending application process after it has been explicitly granted by the municipality and by the regional solid waste management district during the pre-application process. The City can demonstrate no basis that DEQ's refusal to speculate on any possible legal effect of the City's Resolution, in the absence of applicable statutory law, violated Rule 8.211(A)(2)'s requirement to respond to comments as part of the final permitting decision. No issue of material fact exists for this argument to be litigated. DEQ is entitled to summary judgment as a matter of law on this issue.

C. DEQ properly followed Arkansas law when processing Eco-Vista's permit modification application; DEQ's permitting decision does not violate APC&EC Rule 22.204; It is not DEQ's role to consider alternative locations; Ark. Code Ann. § 8-6-1504 applies here because the City of Tontitown receives incentives through host fees and infrastructure.

Both the City and Citizen Petitioners argue that DEQ's permitting decision violates Rule 22.204. The City's third argument in its Amended Request for Hearing is that "Despite requests to consider alternative locations in the comments, ADEQ fails to do so, violating APC&EC 22.204 and meaningful compliance with APC&EC Reg.8.211(A)(2)" and that "the record is devoid of APC&EC Reg.22.204 analysis." The City's Amended Request for Hearing at pg. 5. Citizen

Petitioners' first argument in their Request for Hearing is that "The governing body of the City of Tontitown has not officially approved EVL's proposed increased landfill acreage or an application for increased landfill capacity." Citizen Petitioners' Request for Hearing at pg. 4. Citizen Petitioners further allege the following:

The resolution by the City of Tontitown in July 2018 referred to in Sec. 2.0 of [Eco-Vista]'s Application is not an unconditional approval of the proposed expansion, and the 2020 Ordinance rezoning approximately 417.1 acres of [Eco-Vista] property to an exclusive use-landfill zoning classification is also not an unconditional approval of the proposed expansion. The City of Tontitown has not provided a definitive acceptance of the proposed expansion by formal resolution in satisfaction of Rule 22.204(c).

Citizen Petitioners' Request for Hearing pages 4 and 5.

DEQ disagrees.

Both the City's and Citizen Petitioners' arguments are misplaced and misconstrue the provisions and applicability of the statutes addressing host community approval of High Impact Solid Waste Management Facilities (HISWMF). Ark. Code Ann. § 8-6-1501 *et seq.* governs the siting of HISWMF. The intent of the General Assembly regarding HISWMF is stated clearly in Ark. Code Ann. § 8-6-1501, which recognizes the essential need for solid waste disposal facilities to serve the citizens of the state, acknowledges the burdens that solid waste disposal facilities can have on communities, and seeks to prevent a proliferation and concentration of such facilities in lower-income or minority communities. Ark. Code Ann. § 8-6-1502(3)(A) defines HISWMF as "any solid waste landfill." *Id.* Excluded from this definition are "[s]olid waste landfills which have applications pending for either increased or new acreage or provisions for additional services or increased capacity." Ark. Code Ann. § 8-6-1502(3)(B)(iv).

Ark. Code Ann. § 8-6-1503 prevents DEQ from processing permits "subject to § 8-6-1504 until the affected local and regional authorities have issued definitive findings regarding the criteria

set out in § 8-6-1504.” Section 1504 creates a rebuttable presumption against permitting the construction or operation of any HISWMF within twelve (12) miles of any existing HISWMF. *Id.* at § 8-6-1504(a). This presumption may be overcome if there is either no other suitable site within the regional solid waste district for a landfill, or incentives have prompted the host community to accept the siting of the HISWMF. *Id.* at (b) (1-2).

In the matter at hand, no host community approval was required because there is no existing HISWMF within the 12-mile boundary of the site. In Ark. Code Ann. § 8-6-1502 a HISWMF is “any landfill” but the presumption in Ark. Code Ann. § 8-6-1504 applies only to “existing” HISWMFs. Other than the Eco-Vista Landfill, there is no “existing” HISWMF within 12 miles of Eco Vista. (The Fulton landfill in Springdale is within 12 miles of Eco Vista, but it is a closed landfill.) Because there is no existing HISWMF within the 12-mile boundary, the Ark. Code Ann. § 8-6-1504 presumption should not apply.

Host community approval is not required because the opening of a new landfill cell within a single solid waste management facility is expressly exempt by statute. The statute clearly contemplates that all landfills “which have applications pending for either increased or new acreage” are exempt from being HISWMFs. Ark. Code Ann. § 8-6-1502(3)(B)(iv). Allowing a host community a new presumption under Ark. Code Ann. § 8-6-1504 each and every time an existing landfill requires a permit for a new cell within an already sited solid waste management facility seems contrary to the plain language of the statute. The General Assembly has recognized that a “solid waste management facility” (SWMF) is “all contiguous land and structures, other appurtenances, and improvements on the land used for storage, collection, transportation, processing, treatment, or disposal of solid waste.” Ark. Code Ann. § 8-6-901(10(A)). It is not the individually permitted landfill cells that make a “landfill” under Ark. Code Ann. § 8-6-1501 *et*

seq. Rather, it is the SWMF as a whole that constitutes the “landfill” contemplated by the statute. Thus, where an existing facility seeks to expand upon its contiguous facility acreage, it is not a separate or new HISWMF. If it were the intent of the General Assembly to require host community approval of each and every new landfill cell, there would be significant disincentive for any investment, public or private, in a project that could be jeopardized by a host community’s potential revocation each time a permittee requires a permit modification. Clearly, the General Assembly’s plain language intended the exemption of landfills “which have applications pending for either increased or new acreage,” such as Eco-Vista, be excluded from repeated host community approvals until the SWMF as a whole is either closed by the operator or fully developed to its geographic limit.

Regardless of whether or not host community approval was required or the facility was exempt, Tontitown gave its approval to the siting of the landfill by its Resolution 73 dated September 1, 1997. (See Exhibit 14.) In this resolution, the City “agrees that payment of the reasonable host fee provides a reciprocal benefit for any likely burden caused by and overcomes any siting presumption of Sunray Services, Inc.”¹ *Id.* The accompanying host community agreement specifically references the Class 4 landfill—the landfill permitted in this proceeding. Nonetheless, the facility as a whole and its contiguous acreage was the object of the agreement. Notably, Tontitown received an increase in its prices per ton under the hosting agreement under Resolution 2017-06-640R passed on June 8, 2017. (See Exhibit 15.)

The City’s recent resolutions, by their own language, did not revoke host community approval. The City argues that its Resolution 2022-11-1017R of November 2, 2022, and Resolution 2023-01-1027R of January 3, 2023, revoke all previous approvals of the siting of the

¹ Sunray Services was acquired by U.S. Waste Inc. which became Waste Management. There is privity under the 1997 agreement and the City.

Eco Vista Landfill. In the January 2023 resolution, the City Council finds that it “desires to withdraw their support of the Landfill expansion” and that it is made known that “[i]t is the express desire of the Tontitown City Council... that the final approval of the Landfill expansion be denied.” To accomplish the desire that final approval be denied, the City authorized the Mayor to “bring this resolution to the attention of the regulatory authorities.”

Neither of the resolutions revoked any of the previous resolutions authorizing the landfill, including the ones granting the valuable zoning classification. Most importantly, the City remained completely silent in its resolutions regarding the original hosting resolution of 1997, the host community agreement, the fees collected thereunder, the zoning granted to Waste Management, the other previous resolutions approving the site, and the subsequent amendment of the host community agreement. State law provides that “[a]ll laws, ordinances, resolutions, or orders, lawfully passed and adopted by the city or town council, not inconsistent with the Constitution or laws of this state, shall be, remain, and continue in force until altered or repealed.” Ark. Code Ann. § 14-55-401. Nothing in the resolutions of November 2022 and January 2023 indicate an intent to repeal the existing resolutions. At best, the recent resolutions express a desire that the Mayor voice the city council’s disapproval of the permit via the notice and comment process. The City has neither repealed prior resolutions and ordinances nor refused the host fee payments under the host community agreement and the MOU between the City and Eco-Vista, LLC. (See MOU as Exhibit 16 incorporated herein.) The MOU contains not only road improvements but also “regardless of whether [Eco-Vista] receives a permit to expand the Landfill, [Eco-Vista] agrees, at its expense, to do each of the following: plant all Visual Screening Trees...; install perimeter fencing along the current boundary of the Russell family property that adjoins the [Eco-Vista] property...; [and] construct a tire wash as [Eco-Vista] proposed in the Plan.” MOU at pg. 3 and pgs. 5-6. In the

absence of an express repeal of all previous resolutions and ordinances along with the removal of all benefits to the City, host community approval exists both expressly and impliedly under Ark. Code Ann. § 8-6-1504(b)(2)(A) and (B).

The City's "withdrawal" Resolutions notwithstanding, DEQ did not err by continuing to process the permit application or by issuing a final permit decision. DEQ accepted Eco-Vista's application for permit modification at a time when host community approval clearly existed. Ark. Code Ann. § 8-6-1504(b)(2) states that there is no presumption against a HISWMF if "incentives have prompted the host community to accept the siting" of the HISWMF, and these incentives may include "[r]easonable host fees not to exceed the prevailing state average." In its 1997 resolution, the City clearly approved the siting of the landfill and provided the host fee payment "overcomes any siting presumption." (See Exhibit 14.) Obviously, the City and Waste Management's predecessor had § 8-6-1504 in mind. On July 5, 2018, Tontitown passed Resolution 2018-07-797-R declaring that the City "sets forth its approval of the geographic location of the landfill." (See Exhibit 5.) DEQ accepted the application of Waste Management on July 6, 2018 and began processing it. As of that date, there was no ordinance or resolution disapproving of the landfill. To the contrary, there was a resolution expressly and definitively contradicting the presumption found in Ark. Code Ann. § 8-6-1504 and a second resolution, enacted the day before the application, also approving the landfill. (See Exhibits 14 and 5, respectively.) There being no impediment to DEQ accepting the application, once DEQ accepted the application under these resolutions, the application became a "pending" application under Ark. Code Ann. § 8-6-1502(b)(2)(iv) and fell into an exclusion of the definition of a HISWMF. Under the most charitable interpretation of the statutes in favor of Tontitown, DEQ did not violate the law by continuing to

process Waste Management's permit. No issues of material fact exist in regards to APC&EC Rule 22.204. Summary judgment regarding this matter should be found in favor of DEQ.

D. DEQ complied with APC&EC Rule 8.209(A)(1)

The City's fourth argument asserts that DEQ mailed the notice of a public hearing to the interested parties too late for them to receive notice. APC&EC Rule 8.209 is discretionary and states:

(A) If the Department decides to hold a public hearing on an application for a permit or on a draft permitting decision, the Department shall schedule the hearing and:

(1) Give notice of the date, time and place of the hearing by first class mail to the Applicant, to all persons who have filed a timely written request for a public hearing to all persons who have submitted public comments on the record, and to all persons who have requested advance notice of the public hearing...

DEQ placed the notice of the date, time, and place of the public hearing in first class mail on the afternoon of October 28, 2022, for the November 2, 2022 public hearing thus complying with APC&EC Rule 8.209(A)(1). (See attached Affidavit of Kacy Murillo, marked as Exhibit 17, and incorporated herein.) DEQ also published notice of the public hearing in the Northwest Arkansas Democrat Gazette on October 13, 2022. The date, place, and location and time of the public hearing was noted in the publication. (A copy of the newspaper notice is incorporated herein and attached as Exhibit 2.) The public meeting and public hearing were well-attended and many attendees made public comments. At that public hearing, the Hearing Officer further extended the public comment period to allow submission of written comments until midnight on November 4, 2022.

DEQ complied with Arkansas law and rules regarding mailing the public notice; therefore, no issue of material fact exists regarding this matter.

E. DEQ adequately responded to public comments pursuant to APC&EC Rule 8.211 (A)(2).

i. Responses to Public Comments about Odor

The City and Citizen Petitioners both argue that DEQ did not adequately respond to comments about odor complaints. Citizen Petitioners allege that the permit does not address issues that are raised by Citizen Petitioners' public comments. Citizen Petitioners' Request for Hearing at pg. 8. Citizen Petitioners' public comments included concerns about the "air contamination in the form of putrescent odors and sickening odors making people sick and causing death to birds and vegetation..." *Id.* The City and Citizen Petitioners allege that DEQ fails to respond to comments regarding fires onsite, odors, and gaseous smells causing headaches and dizziness near the site. The City's Amended Request for Hearing at pg. 7; Citizen Petitioners' Request for Hearing at pg. 8-9.

Site Specific Condition #4 in the permit addresses what kind of waste can be disposed of in the Class 4 landfill, and provides:

This permit is for the disposal of bulky inert, non-putrescible Class 4 solid waste as defined by APC&EC Rule No. 22. This waste includes non-compostable wood waste such as tree trunks, stumps, demolition and construction debris, shredded or processed tires as defined by APC&EC Rule No. 36, Rules of Administrative Procedures for the Waste Tire Program, and furniture and other inert wastes that the Division may approve for disposal. Appliances may be disposed provided polychlorinated biphenyls (PCBs) and chlorofluorocarbons (CFCs) are removed from the appliance prior to disposal in accordance with applicable state and federal regulations. Hazardous and/or toxic waste materials, liquid or semi-liquid waste, household wastes of any kind, putrescible waste, paper waste including bulk cardboard and "Special Materials" as these terms may be used by APC&EC Rule No. 22 are not authorized for acceptance and disposal at the facility. Cardboard mixed with construction and demolition waste may be disposed in the landfill.

Site Specific Condition #5 of Permit 0290-S4-R2 states the following:

At a minimum, a weekly cover of six (6) inches of compacted soil shall be applied to all exposed waste or on a regular schedule authorized by the Division. Cover material shall be applied on a more frequent basis if necessary to provide for the control of leachate, blowing litter, disease vectors, fires, odors, scavenging, or to prevent harm to human health or the environment. An intermediate cover of sufficient quantity but not less than twelve (12) inches of soil cover (including six (6) inches of daily cover) shall be applied over disposed waste in any area that is not to receive an additional application of waste or final cover within one hundred eighty (180) days in accordance with Section 22.609(b) of APC&EC Rule No. 22.

These specific conditions, regarding types of allowed waste and requirements of cover are the technical standards and practices for litter control, odor, and vectors. Specific Condition #13 includes monitoring parameters for leachate. The Class 4 permit also has a leachate collection system. These are permit controls for waste escaping the site and for controlling odors. DEQ does not regulate odor but does regulate cover maintenance to control odors from landfills.

DEQ considered the complaints in public comments received. For example, one commenter, Tammy Graham commented by stating "we are not gullible enough to believe anyone will be checking the trucks' loads to assure only "bricks" or scrap lumber is being hauled in." DEQ responded with the following: "DEQ inspects Eco Vista quarterly and in response to each complaint to determine that only permissible wastes are placed in the landfill. The landfill performs random load checks and checks the load once it is placed at the working face." Response to comments at page. 73. (A copy of this comment is attached hereto as Exhibit 18 and incorporated herein.)

Mayor Russell also commented by saying "There has been gassy vapors and admitting from the landfill causing many residents to have dizzy nauseous and headaches and other symptoms... It's happened to me. I'm not talking about the sour trash smell, the leachate smell, or the burning rubber smell. I'm talking about a toxic vapor that's making people sick." DEQ

responded to this comment with the following “Class IV landfills do not accept putrescible waste and odor is mitigated through weekly cover. In the fifty site visits to Eco-Vista in the last two years, DEQ has not noted any violations of the Class IV landfill...” (See Exhibit 12.) DEQ reviewed, considered, and responded to all public comments received. Many of the public comments received by DEQ provided no technical or scientific basis to alter the permit conditions for the Class 4 landfill.

Odor is a nuisance. The Class 4 landfill permit addresses nuisance avoidance pursuant to APC&EC Rule 22.607(n) and requires that the “owner or operator shall operate the landfill in a manner to avoid creating a public nuisance or public health hazard. The Department may require any additional information or action deemed necessary to assure an environmentally safe operation of the facility.” DEQ implements Arkansas’s environment laws and the APC&EC’s rules against offenders who violate the laws and rules.

APC&EC Rule No. 22 deals minimally with air quality concerns. APC&EC Rule 22.612 states that owners and operators must not violate the State Implementation Plan (SIP) and prohibits open burning, except for some burning of agricultural wastes, and deals briefly with fire safety via periodic application of cover material or other techniques to prevent fire hazards. Any other air concerns of the City and Citizen Petitioners regarding emissions at Eco-Vista are covered in Eco Vista’s Title V air permit and not in the Class 4 landfill permit.

ii. Responses to Public Comments about Litter Control

Class 4 landfills only accept bulky wastes. The public comments from the City and Citizen Petitioners seem to be focused on the Class 1 landfill because they mention blowing

trash, litter, and road conditions. No nexus with the Class 4 landfill with the blowing trash, litter, or road conditions has been definitely shown by the City or Citizen Petitioners.

APC&EC Rule 22.607 lays out general operating requirements for Class 4 Landfills. APC&EC Rule 22.607(g) states the following: "Litter Control- If weekly cover does not control on and off site litter, other methods may be required, such as, but not limited to, litter fences and litter crews and the application of more frequent cover."

The City alleges in their comments and in their Amended Request for Hearing, that DEQ does not address the litter concern or impose additional permit requirements to address litter control. The City further states that DEQ did not effectively respond to comments regarding litter concerns. Citizen Petitioners also allege that the permit does not address issues that are raised by Citizen Petitioners' public comments. Citizen Petitioners' Request for Hearing at pg. 8. Citizen Petitioners' public comments included concerns about the spread of debris from the landfill to adjoining properties, consistent tracking of mud and dirt from the landfills onto the adjoining roads, and the spillage of nails and other objects onto the highways causing flat tires, cracked windshields, and other vehicular damage; and in increase in vectors." *Id.*

As noted above, Site Specific Condition #4 of Permit 0290-S4-R2 regulates that types of waste that can be accepted in the Class 4 landfill. Class 4 wastes are bulky and do not blow, like household trash or garbage. Class 4 wastes are not subject to decay like rotting food. Hazardous waste is not accepted at the Class 4 landfill. Specific Condition #4 states clearly the types of wastes accepted. Comments regarding blowing garbage and putrescible wastes are not relevant to the Class 4 landfill. The acceptance of anything other than bulky wastes at the Class 4 landfill would be a violation of Arkansas laws and rules. There is no record of noncompliance or violations due to unacceptable wastes being accepted at the Eco-Vista Class 4 landfill.

iii. Responses to Public Comments about Water Pollution

The City alleges in its Request for Hearing that “monitoring and clay liners will not prevent surface and groundwater pollution in the presence of a direct groundwater connection to Wildcat Creek” and that “ADEQ imposes no additional permit requirements (other than surface water monitoring, which is not preventative) to protect human health and Wildcat Creek despite clear evidence of a connection between Wildcat Creek and the site.” The City’s Amended Request for Hearing at pg. 8. Citizen Petitioners allege that DEQ did not address comments related to “contamination of surface waters from leakage of the landfill.” Citizen Petitioners’ Request for Hearing at pg. 8.

Specific Condition #14 requires groundwater monitoring following the requirements of Chapter 12 of APC&EC Rule 22. DEQ is requiring the groundwater monitoring as allowed in APC&EC Rule 22.1201(a) and Rule 22.621(e). The details of the monitoring system will be incorporated within the Class 1 permit for the facility. The Class 4 and Class 1 landfills are adjacent to each other and wells could theoretically be monitoring both the Class 4 and Class 1 landfills given the uncertainty of the groundwater flow paths at the facility.

Specific Condition #15 requires sampling of the location where dye was documented to be discharging in a February 22, 2022 complaint, just north of the intersection of County Road 31 (Harmon Road) and County Road 863 (Clear Water Road). The dye injected into a pit in the Class 4 expansion area on February 16, 2022, discharged to a spring and creek approximately 1.1 miles to the northwest of the facility. This newly discovered preferential flow path between the Class 4 expansion area and the spring and creek means that this discharge location needs to be monitored by the facility. However, there are other sources of potential impact to the spring and creek other than the landfill facility, therefore sampling results for this location will be for informational

purposes and will not be subject to Chapter 12, APC&EC Rule No. 22. If concentrations within the spring indicate impacts, additional investigations may be required by the landfill facility to determine if it is a source of the impacts.

Specific Condition #16 requires the installation of four additional monitoring wells in identified gaps in the monitoring system near the Class 4 landfill. The additional wells are required based on data obtained during the recent dye trace investigation and nature and extent investigation at the facility.

DEQ is actively monitoring the surface and groundwater at the site for human health and safety concerns. There is more than just surface water monitoring taking place at the Class 4 landfill.

DEQ complied with Arkansas law and rules. The permit contains conditions to address issues raised by public commenters, and DEQ's responses to comments reference the technical requirements in the permit and applicable rules; therefore, no issue of material fact exists regarding this matter, and DEQ is entitled to summary judgment.

H. The City's Final Argument in its Amended Request for Hearing, Regarding Service Under Rule 8.211(B)(1) and (C), is Without Merit.

The City's final argument in its Amended Request for Hearing is that DEQ violated Rule 8.211(C). This argument is without merit.

The ALJ's Order No. 4 in docket no. 23-009-P, after review of the facts and exhibits, found that "the date of issuance and the effective date of the final permitting decision in this case is March 20, 2023, the day the Arkansas Mailing Service delivered the Notice of Permitting Decision to the U.S. Postal Service." While DEQ's unanticipated problems with its contracted mail service were

significant enough to allow the City to survive a Motion to Dismiss for timeliness, they do not provide a basis to challenge the permit decision. There being no question of fact in light of Order No. 4, DEQ is entitled to summary judgement on this issue.

V. CONCLUSION

The facts discussed above are undisputed. Based on the Class 4 landfill permit record, Arkansas law, and APC&EC Rule No. 22, DEQ asserts that there is no genuine issue of material fact relating to the allegations ascribed by the City and Petitioners in their Requests for Hearing. Therefore, DEQ further asserts that issuance of summary judgment against the City and Citizen Petitioners on all issues described above is proper, and moves the Administrative Law Judge to issue a summary judgment at the Commission's earliest convenience.

Respectfully submitted,

Arkansas Department of Energy &
Environment,
Division of Environmental Quality

By:



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CERTIFICATE OF SERVICE

I, Lisa M. Thompson, do hereby certify that a true and correct copy of this pleading was served upon the parties listed below via email pursuant to the Arkansas Rules of Civil Procedure Rule 5 at the email address listed below on the 30th day of June, 2023.

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BEFORE THE ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION

IN THE MATTER OF:)
)
) Consolidated Docket No: 23-008-P
FINAL PERMIT DECISION FOR)
ECO-VISTA, LLC, CLASS 4 LANDFILL)
PERMIT NO. 0290-S4-R2)

MOTION FOR SUMMARY JUDGMENT

Permittee Eco-Vista, LLC (“Eco-Vista”) moves for summary judgment as to the requests for hearing filed in the above-captioned consolidated docket, and in support of this motion states:

1. On March 17, 2023, the Arkansas Department of Energy and Environment, Division of Environmental Quality (“DEQ”) issued its Final Permit Decision for Eco-Vista, LLC, Class 4 Landfill, Permit No. 0290-S4-R2 (the “Class 4 Permit”).

2. Pending before the Commission are a Request for Adjudicatory Hearing and Commission Review filed by various individual petitioners in Docket No: 23-008-P on April 14, 2023, and an Amended Request for Hearing and Adjudicatory Review filed by Mayor Angie Russell and the City of Tontitown in Consolidated Docket No: 23-008-P on June 23, 2023.

3. Eco-Vista moves the Commission for summary judgment with respect to Petitioners’ requests for hearing because there are no genuine issues of material fact and petitioners are not entitled to a hearing in this matter.

4. The following exhibits are being submitted with this motion and are incorporated by reference:

- a. Exhibit A is correspondence from DEQ to Eco-Vista (Dec. 9, 2008);
- b. Exhibit B is Tontitown Resolution No. 73 (Sept. 1, 1997);

- c. Exhibit C is Tontitown Resolution 2017-06-640R (June 6, 2017);
- d. Exhibit D is City of Tontitown Resolution No. 2018-07-797R (July 3, 2018);
- e. Exhibit E comprises excerpts from a Pre-Application Submittal Eco-Vista Class 4 Landfill, Permit No 0290-S4-R1, AFIN 72-00144;
- f. Exhibit F is City of Tontitown Ordinance No. 2020-10-900 (Oct. 6, 2020);
- g. Exhibit G comprises excerpts from a Permit Modification Application for Expansion of the Eco-Vista, LLC, Class 4 Landfill, Permit No. 0290-S4-R1, AFIN: 72-00144;
- h. Exhibit H is City of Tontitown Ordinance No. 2021-10-965 (Oct. 5, 2021);
- i. Exhibit I is an Affidavit of David Conrad and the associated Appendix 1 (Minutes of the Tontitown Planning Commission, August 31, 2021), Appendix 2 (Approved Large Scale Development Application); and Appendix 3 (Memorandum of Understanding (Dec. 28, 2021));
- j. Exhibit J is email correspondence between Courtney Tannehill-McNair, Justin Eichmann, and Ruth Muelker (Sept. 7–10, 2021);
- k. Exhibit K comprises excerpts from DRAFT Regulation 22 Markup (Aug. 2004);
- l. Exhibit L is City of Tontitown Resolution No. 2022-11-1017R (Nov. 2, 2022);
- m. Exhibit M is City of Tontitown Resolution No. 2023-01-1027R (Jan. 3, 2023);
- n. Exhibit N comprises excerpts from the Final Permit Decision for Eco-Vista, LLC, Class 4 Landfill, Permit No. 0290-S4-R2; and
- o. Exhibit O is Mayor Angie Russell and the City of Tontitown’s Responses to ADEQ’s Requests for Admission.

5. A brief in support of this motion is being filed with this motion and is incorporated by reference.

WHEREFORE, for the reasons stated above, Eco-Vista respectfully requests that its motion for summary judgment be granted and moves for all other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sarah Keith-Bolden, hereby certify that a copy of the foregoing has been served by first-class regular mail and email to the following parties of record this 30th day of June 2023.

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BEFORE THE ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION

IN THE MATTER OF:)
)
) Consolidated Docket No: 23-008-P
FINAL PERMIT DECISION FOR)
ECO-VISTA, LLC, CLASS 4 LANDFILL)
PERMIT NO. 0290-S4-R2)

BRIEF IN SUPPORT OF ECO-VISTA, LLC'S
MOTION FOR SUMMARY JUDGMENT

Permittee Eco-Vista, LLC (“Eco-Vista”) moves for summary judgment as to the requests for hearing filed in the above-captioned consolidated docket, and in support of this motion states:

UNDISPUTED FACTUAL BACKGROUND

Eco-Vista owns Eco-Vista Landfill in Tontitown, Arkansas (the “City”). This region of Arkansas has generally experienced higher than average growth rates for several decades, resulting in population sprawl towards the landfill, while simultaneously imposing pressure on the landfill to accept more solid waste resulting from rapid development in the region.

Eco-Vista’s Class 4 landfill operation was permitted by DEQ with an effective date of April 16, 1997. *See* Ex. A, DEQ to Eco-Vista (Dec. 9, 2008) at p. 2. On September 1, 1997, Tontitown enacted Resolution No. 73, asserting that the City was a “Host Community” for purposes of Ark. Code Ann. § 8-6-1502(1)(A)(3). *See* Ex. B, City of Tontitown Resolution No. 73 (Sept. 1, 1997). Tontitown attached to Resolution No. 73 a contract (the “1997 Host Agreement”) with Eco-Vista's predecessor (Sunray Services, Inc.), in which Tontitown agreed to accept incentives to approve the siting of Eco-Vista’s Class 1 and Class 4 operations. *Id.* This included the landfill operator making a payment to Tontitown of a “host fee” of fifty cents per ton for all wastes received at the facility. *Id.* The parties contracted that the 1997 Host Agreement would “be in effect for the life

of the Facility and shall terminate upon closure of the Facility” and that “[t]his Agreement may be amended, modified or supplemented only by mutual written consent of the parties hereto.” *Id.* at p. 2 of 2.

The 1997 Host Agreement went unmodified until 2017, when Tontitown and Eco-Vista enacted the “First Amendment to Host Community Agreement” in Resolution No. 2017-06-640R. *See* Ex. C, City of Tontitown Resolution No. 2017-06-640R (June 6, 2017). This amendment increased the host fee to fifty-five cents (\$0.55) per ton for waste received at the facility. *Id.* It did not modify any other terms of the 1997 Host Agreement, including the siting approval. Eco-Vista continues to pay the City the host fee outlined in the 1997 Host Agreement, as amended in 2017. *See* Ex. B, Tontitown Resolution No. 73; Ex. C, Tontitown Resolution No. 2017-06-640R.

By 2018, Eco-Vista recognized that additional Class 4 disposal capacity was needed to enable Eco-Vista to continue to support regional development. On July 3, 2018, Tontitown passed Resolution No. 2018-07-797R (the “2018 Acceptance of Location”), which was titled in part “A Resolution by the City of Tontitown to Accept the Location of the Proposed Expansion of the Class 1 and Class 4 Landfill” and approved the geographic location of the landfill subject to the issuance of a large-scale development plan and with appropriate zoning for the landfill that addressed local impacts from the landfill. *See* Ex. D, City of Tontitown Resolution No. 2018-07-797R (July 3, 2018). The 2018 Acceptance of Location did not purport to modify any terms of the 1997 Host Agreement, which could be modified only by “mutual written consent.” *See* Ex. B, Tontitown Resolution No. 73, p. 2 of 2.

On July 6, 2018, Eco-Vista submitted a “Pre-Application Submittal Eco-Vista Class 4 Landfill, Permit No 0290-S4-R1, AFIN 72-00144” (the “Class 4 Pre-Application”) to the Arkansas Department of Environmental Quality. Ex. E, Class 4 Pre-Application. The Class 4 Pre-

Application included a copy of the 2018 Acceptance of Location, which “set forth [Tontitown’s] approval of the geographic location of the Landfill.” *Id.* at p. 2-8 & App. B.6; Ex. O, Mayor Angie Russell and the City of Tontitown’s Responses to ADEQ’s Requests for Admission, at Response No. 1 (admitting Mayor Russell and the City of Tontitown’s understanding of the passage of Resolution No. 2018-07-797-R).

In October 2020, Tontitown followed up on the 2018 Resolution by rezoning the 417.1 acres owned by Eco-Vista to EU-L (Exclusive Use Landfill). *See* Ex. F, City of Tontitown Ordinance No. 2020-10-900 (Oct. 6, 2020) (the “Rezoning Ordinance”). The Rezoning Ordinance was included in the “Permit Modification Application for Expansion of the Eco-Vista, LLC, Class 4 Landfill,” Permit No. 0290-S4-R1, AFIN: 72-00144 (the “Class 4 Permit Modification Application”) that Eco-Vista submitted to the Division of Environmental Quality (“DEQ”) on July 6, 2021. *See* Ex. G, Class 4 Permit Modification Application, at 2-1 & App. C. That ordinance is codified in City of Tontitown Ordinance § 153.086, which confirms it was last modified in October 2021, when the City corrected a typographical error in the Rezoning Ordinance. *See* Ex. H, City of Tontitown Ordinance No. 2021-10-965 (Oct. 5, 2021). The EU-L designation, authorizing Eco-Vista to operate its landfill pursuant to the zoning requirements, remains in effect unmodified since October 5, 2021.

The City Planning Commission approved the Large Scale Development application submitted by Eco-Vista on August 31, 2021 (the “LSD Approval”). Ex. I, Conrad Aff. at ¶7; Ex. I, App. 1, Planning Commission Minutes (Aug. 31, 2021) & App. 2, Large Scale Development Application. The City of Tontitown Planning Office submitted a report at that meeting explaining that the request was “for an expansion to the existing Eco Vista landfill property.” Ex. I, App. 2, Large Scale Development Application, at p. 3-1. It contained a summary of actions Eco-Vista

would implement, including street improvements, landscaping, and fencing. *Id.* at p. 3-4. It also required Eco-Vista to contribute \$100,000 to Tontitown every four years for 16 years to assist Tontitown with road maintenance. *Id.* at p. 3-5.

The City Attorney for Tontitown, Justin Eichmann, confirmed to Eco-Vista by email dated September 9, 2021, that “[w]ith the earlier resolution, the rezoning action and now the approval of the LSD [Large Scale Development Plan], I do not see where any further resolutions of the city would be required.” *See* Ex. J, Tannehill-McNair to Muelker (Sept. 10, 2021). The City’s planner, Courtney Tannehill-McNeil, followed up by email the next day agreeing with Mr. Eichmann’s opinion. *Id.*; *see also* Ex. I, Conrad Aff. at ¶12.

Eco-Vista and Tontitown executed a Memorandum of Understanding on December 28, 2021 (“2021 MOU”), agreeing that “the City has requested that [Eco-Vista] undertake various measures to maintain and/or improve the areas surrounding the Landfill” and formalizing the requirements described as part of the LSD Approval earlier that year. *See* Ex. I, App. 3, Memorandum of Understanding. Eco-Vista has already invested more than \$1.3M in fulfilling obligations under the MOU. *See* Ex. I, Conrad Aff. at ¶9.

On November 3, 2022, more than four years after the 2018 Acceptance of Location was passed, Tontitown enacted Resolution No. 2022-11-1017R (the “2022 Expression of Intent”), titled in part “A Resolution Expressing the Intent of the Tontitown City Council” and stating Tontitown’s intent, “to the extent possible,” to see the final approval of the landfill expansion be denied. *See* Ex. L, City of Tontitown Resolution No. 2022-11-1017R (Nov. 2, 2022). The 2022 Expression of Intent did not state that the 1997 Host Agreement was being unilaterally abandoned, nor did it identify anything unlawful in the 2018 Acceptance of Location, purport to affect the LSD Approval, or purport to make any zoning adjustments or alter City of Tontitown Ordinance §

153.086. Tontitown passed a second expression of intent on January 3, 2023, in Resolution No. 2023-01-1027R, that was substantially the same as the prior expression of intent. *See* Ex. M, City of Tontitown Resolution No. 2023-01-1027R (Jan. 3, 2023).

The Class 4 Permit Modification Application was therefore the result of a multi-year process that cost Eco-Vista over \$490,000. Ex. I, Conrad Aff. at ¶11. On March 17, 2023, DEQ issued its Final Permit Decision for Eco-Vista, LLC, Class 4 Landfill, Permit No. 0290-S4-R2 (the “Class 4 Permit”). *See* Ex. N, Class 4 Permit. The Class 4 Permit that DEQ issued authorizes the disposal of bulky, inert, non-putrescible solid waste as defined by Commission Rule 22. *Id.* at Site Specific Conditions, ¶4. It requires implementation of a detailed Operating Plan (Doc Id. 80453) and requires Eco-Vista to comply with all the operating requirements of Rule 22. *Id.* at ¶9. It also includes a response to the public comments that DEQ received on the Class 4 Permit Modification Application. *Id.* at Resp. to Public Comments.

LEGAL STANDARD

Because there is no Commission Regulation that directly addresses a motion for summary judgment, the Arkansas Rules of Civil Procedure apply. *See* Rule No. 8.611; *see also in re Bella Vista Village Property Owners Association*, Docket No. 19-004-MISC, Order No. 3 (Feb. 3, 2020), pp. 2–3. Summary judgment is appropriate when there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. Ark. R. Civ. P. 56. Here, the undisputed facts demonstrate that DEQ properly issued the Class 4 Permit, and the petitioners’ are not entitled to a hearing.

DISCUSSION

1. The Undisputed Facts Demonstrate That Eco-Vista's Class 4 Pre-Application Satisfied All Approval Requirements.

A. DEQ Complied With Any Obligations Imposed By Rule 22.203. (City of Tontitown's Amended Request for Hearing)

Rule 22.203 provides that where, as here, a solid waste facility site is located in a municipality with a comprehensive land-use plan, "specific geographic site approval from the government(s) of jurisdiction shall be obtained by the applicant for submission to the Department with the pre-application." Here, on July 6, 2018, when the Class 4 Pre-Application was submitted, 417.1 acres of Eco-Vista's property was zoned residential or agricultural. *See* Ex. F, City of Tontitown Ordinance No. 2020-10-900. Eco-Vista's Class 4 Pre-Application, however, included the 2018 Resolution, which was adopted by the City of Tontitown on July 3, 2018, and "set forth [Tontitown's] approval of the geographic location of the Landfill." *See* Ex. E, Class 4 Pre-Application, at pp. 2-8 & App. B.6; Ex. O, City's Resp. to DEQ's Req. for Admission at Response No. 1 (admitting Mayor Russell and the City of Tontitown's understanding of the passage of Resolution No. 2018-07-797-R).

Rule 22.203 does not dictate the precise nature of the "specific geographic site approval" needed. Tontitown provided its approval in the 2018 Acceptance of Location. *See* Ex. D, Tontitown Resolution 2018-07-797R. The name of that resolution plainly states its purpose was to accept the location of the landfill. *Id.* There can be no dispute about this because similar statements were made by the City in the LSD Approval. *See* Ex. I, App. 1, Planning Commission Minutes (Aug. 31, 2021) & App. 2, Large Scale Development Application. Tontitown's zoning ordinance modification in 2020 and the 2021 MOU reflect the same. *See* Ex. F, Tontitown Ordinance No. 2020-10-900 & Ex. I, App. 3, MOU. DEQ therefore had overwhelming evidence

before it that Tontitown had provided specific geographic site approval. *See in re City of Jonesboro, Class 4 Landfill*, Consolidated Docket No. 03-001-P, Order No. 9 (June 22, 2004) at p. 28 (finding that a city’s action in rezoning a site from residential to “Industrial Limited Use Overlay for Public Class 4IV Landfill” was sufficient to comply with Rule 22.204(b)).

The City nonetheless argues that the Permit does not have the approval required by Regulation 22.203 because, in November 2022, after Eco-Vista and DEQ had spent more than four years working through the application process, Tontitown’s 2022 Expression of Intent withdrew the City’s support for the expansion permit. *See* Tontitown’s Am. Req. for Hearing at ¶¶20-25. As a threshold matter, on its face it does not. *See* Ex. L, 2022 Expression of Intent. The 2022 Expression of Intent is, by its own terms, just an expression of the City Council’s desire that the Permit be denied. *Id.* It does not say that specific geographic site approval is withdrawn, nor could it. *Id.*

Tontitown cannot point to any law or rule that entitled it to withdraw such an approval once granted. Even if it did, nowhere does the 2022 Expression of Intent purport to revoke the LSD Approval or change the landfill’s zoning rights and obligations.¹

Tontitown certainly cannot point to any law or rule that required—or allowed—DEQ to revisit a geographic site approval a full four years after such approval was provided as part of Eco-Vista’s Class 4 Pre-Application. The 2022 Expression of Intent had no legal impact on the DEQ’s permitting process, and the City is not entitled to a hearing on this claim.

Indeed, Rule 22.203 specifically ties geographic site approval to the pre-application phase of the permitting process. The approval in question “shall be obtained by the applicant for

¹ Since the property remains zoned EU-L, the question of whether the City could constitutionally or otherwise rezone the property to preclude its current use is not at issue here.

submission to the Division with the pre-application.” Rule 22.203(b). The undisputed evidence establishes that this requirement was satisfied, and that is all the rule requires.

There is a good reason why this requirement applies to the very beginning of the permitting process. It prevents an applicant from undergoing a costly application process if there is no approval at the pre-application phase. After Tontitown adopted the 2018 Acceptance of Location, DEQ and Eco-Vista relied on Tontitown’s approval of the site location and invested significant time and resources over the course of several years in the application process and plans for the eventual expansion of Eco-Vista Landfill, including the following:

- Eco-Vista worked with Tontitown to develop appropriate zoning regulations for the Exclusive Use Landfill designation. As a result of these efforts, in October 2020, Tontitown adopted the Rezoning Ordinance and rezoned Eco-Vista Landfill as “Exclusive Use Landfill.” *See* Ex. F, Rezoning Ordinance.
- Eco-Vista worked with Tontitown on its Large-Scale Development application, which was unanimously approved by the Tontitown Planning Commission in August 2021. *Ex. I, Conrad Aff. at ¶¶6–7, App. 1, & App. 2.*
- In connection with the Large Scale Development application, the City and Eco-Vista entered into a Memorandum of Understanding (the “MOU”), under which Eco-Vista agreed to pay the city at least \$400,000, make road improvements, and undertake other obligations to benefit the City. *See* Ex. I, App. 3, MOU. Some of Eco-Vista’s obligations are contingent on its Class 1 and Class 4 expansion permits becoming final and non-appealable. *Id.* Others, however, were not. *Id.* at pp. 5-6. Eco-Vista has already invested more than \$1.3M in fulfilling obligations under the MOU, including planting 396 trees, constructing

a tire wash and associated paving for trucks at the landfill, installing fencing, designing and constructing leachate pretreatment facilities and grading and seeding setbacks and adjacent property lines. *See* Ex. I, Conrad Aff. at ¶9.

- Eco-Vista has expended more than \$490,000 on the expansion permitting process. Ex. I, Conrad Aff. at ¶11.

In short, Regulation 22.203 ties local approval to the start of the permitting process for good reason: Any other rule would allow a local government to revoke its approval after DEQ and the permittee have invested years of work and hundreds of thousands of dollars in the permitting process, as DEQ and Eco-Vista did here in reliance on the 2018 Resolution. Nothing in Regulation 22 or otherwise allowed Tontitown to withdraw the resolution four years after Eco-Vista submitted its Class 4 Pre-Application, nor do equitable principles allow Tontitown to contest the expansion permit after allowing Eco-Vista to rely on the 2018 Resolution for more than four years. *See, e.g., McCann v. Cross*, 2022 Ark. App. 179, at 9–10, 646 S.W3d 116, 122–23 (explaining the equitable defenses of laches, estoppel, and waiver).

Unable to point to any law or regulation that allowed Tontitown to reverse course four years into the permitting process, the City also argues that DEQ violated Regulation 8.211(A)(2) by not explaining its “rationale for failing to analyze the impact of the resolution on the permitting process.” Tontitown’s Am. Req. for Hearing at ¶¶25-31. Regulation 8.211, however, only requires DEQ to provide a “written explanation of the rationale for [a] proposal” in the case of a “discharge limit, emission limit, environmental standard, analytical method or monitoring requirement.” Reg. 8.211(A)(2). In other cases, Regulation 8.211 requires only that a final decision “include a response to each issue raised in any public comments.” DEQ responded to a public comment

regarding the 2022 Resolution by acknowledging the resolution, and nothing in Regulation 8 or otherwise requires more.

B. The Undisputed Facts Show That DEQ Complied With Any Obligations Imposed By Rule 22.204. (City of Tontitown’s Amended Request for Hearing and Individual Petitioners’ Request for Adjudicatory Hearing)

The City and Petitioners both assert that DEQ failed to comply with Rule 22.204. Tontitown’s Am. Req. for Hearing at ¶¶32-39; Individual’s Req. for Hearing at ¶¶13-15. This regulation implements Arkansas Code Annotated § 8-6-1501 et seq. (the “Siting Statute”), which seeks to combat “[n]ational trends [that] indicate a tendency to concentrate high impact solid waste disposal facilities in lower-income or minority communities.” Ark. Code Ann. § 8-6-1501(b). The Siting Statute creates “a rebuttable presumption against permitting the construction or operation of any high impact solid waste management facility . . . within twelve (12) miles of any existing high impact solid waste management facility.” Ark. Code Ann. § 8-6-1504(a)(1); *see also* Reg. 22.204(a) (“In accordance with A.C.A. § 8-6-1501 et seq., a rebuttable presumption exists against permitting the construction or operation of any new landfill within twelve miles of any existing high-impact solid waste facility.”). Here, however, the petitioners have not explained how the Siting Statute applies to an expansion permit for an existing landfill or even pointed to another facility within twelve miles of Eco-Vista Landfill. Indeed, Rule 22.204 was amended in 2005 to conform to the Siting Statute and clarify that the rule does not apply to the expansion of permitted capacity at an existing landfill. *See* Reg. 22.205 (Apr. 6, 1995) (suggesting that the rebuttable presumption laid out in Ark. Code Ann. §§ 8-6-1501 *et seq.* applies to “the construction or operation of any new landfill within twelve miles of any existing high-impact solid waste facility, *or permitting an expansion of the permitted landfill capacity of an existing landfill*”) (emphasis added); Ex. K, Excerpts from DRAFT Regulation 22 Markup (Aug. 2004), at p. 2-6 (deleting

clause regarding the expansion of permitted capacity); Reg. 22.204 (Jan. 28, 2005) (no longer including language regarding expansion of permitted capacity); Rule 22.204 (also not including language regarding expansion of permitted capacity). Petitioners are not, therefore, entitled to a hearing on this claim.

Moreover, even if Regulation 22.204 applied, the statutory presumption may be overcome if it is shown that no other suitable site is available for the facility or that incentives have prompted the host community to accept the facility. Ark. Code Ann. § 8-6-1504(a)(2). Where a facility is subject to the rebuttable presumption, DEQ ensures that local authorities have made definitive findings regarding the statutory criteria before it begins processing a pre-application for increased landfill acreage. Ark. Code Ann. § 8-6-1503; *see also* Regulation 22.204(c) (tying the statutory findings to the pre-application). Here, Eco-Vista's Class 4 Pre-Application and Class 4 Permit Modification Application both included a copy of the 2018 Resolution. That resolution definitively stated that "the City of Tontitown hereby sets forth its approval of the geographic location of the Landfill" and included incentives that supported Tontitown's decision to approve the permit expansion, including:

- "appropriate development and growth within the City of Tontitown, including the appropriate location of a landfill operation;"
- "appropriate infrastructure, including roads, required to serve the Landfill;" and
- "appropriate infrastructure, including but not limited to roads, and other related impacts to the surrounding community, which are required to serve the Landfill."

See Ex. E, Pre-Application, at App. B.6; Ex. I, Class 4 Permit Modification Application, at App. C; *see also in re City of Jonesboro, Class 4 Landfill*, Consolidated Docket No. 03-001-P, Order No. 9 (June 22, 2004), p. 21-22 (concluding that a city's resolution stated an incentive under Ark.

Code Ann. § 8-6-1504(b)(2)(B) where it indicated that there would be no threat of pollution due to the disposal of Class 4 materials in a proposed landfill). In addition, long before the current expansion, the City issued definitive findings that complied with Rule 22.204 when it adopted Resolution No. 73 and an associated Host Community Agreement and agreed to host what is now Eco-Vista Landfill in exchange for a host fee. *See* Ex. B, Tontitown Resolution No. 73.²

The individual petitioners also assert that, even though the 2018 Resolution was “a formal resolution of [Tontitown’s] governing body, “it did not reflect ‘definitive’ acceptance of landfill siting because it referred to a large-scale development permit and zoning designation. Individual Pets.’ Req. for Hearing at ¶¶13–15. Regulation 22.204, however, requires definitive findings, not definitive acceptance. And, at any rate, the 2018 Resolution reflected unambiguous acceptance of the landfill siting, and both the zoning designation and large-scale development permit referenced in the 2018 Resolution were completed in due course. *See* Ex. F, Rezoning Ordinance; Ex. I, Conrad Aff., App. 1 & App. 2. The individual petitioners’ assertion that additional City approval was required after these steps were completed is not supported by any law or regulation. It is also contradicted by the statements of Tontitown’s City Attorney and planner. *See* Ex. J, Eichmann and McNair to Muelker; Ex. I, Conrad Aff. at ¶12 (explaining McNair’s positions with the City).

2. There Is No Evidence To Support The Conclusion That The City Was Prejudiced By Any Failure To Give Notice. (City of Tontitown’s Amended Request for Hearing)

The decision of an administrative agency may be reversed because of an agency’s failure to follow proper procedures only “if the substantial rights of the petitioner” are “prejudiced [by the] unlawful procedure.” Ark. Code Ann. § 25–15–212(h)(3); *see also* *City of Benton v. Ark. Soil*

² To the extent the City asserts that DEQ also had an obligation to consider alternative locations, Eco-Vista notes that Rule 22.204 does not require this where the host community has accepted the siting of the facility. *See* Rule 22.204(a)(2).

and Water Conservation Com'n, 345 Ark. 249, 254–55, 45 S.W.3d 805, 809 (2001); *in re Eco-Friendly Material, LLC*, Consolidated Docket No. 23-001-P, Order No. 6 (June 16, 2023) (concluding that, where a failure to follow procedure did not substantially prejudice petitioners' ability to file a request for hearing, there was no basis to “justify the extra taxpayer expense of starting the permitting process anew”). Here, although DEQ was not required to hold a public hearing on the expansion application, it chose to do so. The City argues that DEQ's notice of the public hearing was not mailed in time to constitute appropriate notice under Regulation 8.209(A)(1). Tontitown's Am. Req. for Hearing at ¶¶40-43. It is undisputed, however, that both Mayor Russell and City Councilor Tim Burress attended the public hearing and made comments. *See* Class 4 Permit at pp. 57–60 and 62–66 of 125. Mayor Russell also submitted numerous written comments regarding the expansion. *Id.* at pp. 8–9, 74–76. There is, therefore, no evidence to support the conclusion that the City's rights were prejudiced by any late notice of the public hearing, and the City is not entitled to a hearing on this claim. *See, e.g., City of Benton*, 345 Ark. at 258, 45 S.W.3d at 811 (holding “appellants were not prejudiced by . . . inadequate notice of [a] hearing” where they had a different opportunity to be heard).

The City also argues that it “is possible” that DEQ served Eco-Vista with its permitting decision by mail on March 17, 2023, but did not serve those submitting public comments until March 20, 2023. Tontitown's Am. Req. for Hearing at ¶¶58-61. The City does not and cannot, however, point to any evidence that it was prejudiced by the “possibility” that there was discrepancy in the mailing dates. This is fatal to its claim of a procedural violation, and the City is not entitled to a hearing. Indeed, depriving Eco-Vista of its interest in the Class IV Permit based on a harmless procedural error would violate its right to substantive due process. *Johnson v. Encompass Ins. Co.*, 355 Ark. 1, 6, 130 S.W.3d 553, 556 (2003) (“Substantive due process requires

that legislation be rationally related to achieving a legitimate governmental purpose. Further, a statute protects a person’s right to substantive due process if it advances a compelling state interest, and it is the least restrictive method available to carry out that interest.”) (citations omitted).

3. The Undisputed Facts Demonstrate that DEQ Adequately Addressed All Public Comments. (City of Tontitown’s Amended Request for Hearing and Individual Petitioners’ Request for Adjudicatory Hearing)

The individual petitioners also argue that they raised issues regarding the landfill in their public comments that, were “to a degree, operational” but also “worthy of being addressed in the permit renewal process.” Ind. Pets.’ Req. for Hearing at ¶29; *see also id.* at ¶¶28-33. The City makes a similar argument that DEQ failed to adequately address certain issues raised in the public comments. The record, however, shows that, when DEQ issued the Class 4 Permit, it responded to each public comment. *See* Ex. N, Class 4 Permit. It also imposed permit conditions on the landfill that address the concerns raised by the petitioners. *See id.*

SUMMARY OF DEQ RESPONSES & PERMIT CONDITIONS

Comment Type	Sample DEQ Response	Permit Conditions
Air contamination/smell (Ind. Pets.’ Req. for Hearing at ¶28(a)–(b)) (Tontitown’s Am. Req. for Hearing at ¶¶44, 46, 48–49)	“Class IV landfills do not accept putrescible waste and odor is mitigated through weekly cover. In the fifty site visits to Eco-Vista in the last two years, DEQ has not noted any violations of the Class IV landfill.” Ex. N at Resp. to Comments, p. 57 of 125.	Condition 4 – limitation on type of waste Condition 5 – cover requirement

<p>Surface water contamination/insufficiency of clay liner</p> <p>(Ind. Pets.’ Req. for Hearing at ¶28(c))</p> <p>(Tontitown’s Am. Req. for Hearing at ¶¶50–57)</p>	<p>“DEQ requires monitoring of groundwater, and now will require monitoring of the only surface water off-site where multiple dye trace studies have indicated a connection to the groundwater at the landfill site. Modern landfill designs and management practices prevent leachate from entering the groundwater and surface water. The Class 4 permit requires surface water controls as well as leachate collection. This will help ensure no impacts will be made to water resources.” Ex. N at Resp. to Comments, p. 82 of 125.</p> <p>“Regulations only require compacted clay liners for Class 4 landfills due to the type of waste allowed for disposal. The dye did show up in Little Wildcat Creek, however there will be monitoring of the creek.” Ex. N at Resp. to Comments, p. 79 of 125.</p>	<p>Condition 1 – referring to approved permitted plans, including leachate collection</p> <p>Condition 5 – cover to control leachate</p> <p>Condition 6 – lateral expansion requires review of storm water collection system.</p> <p>Condition 8 – bottom liner</p> <p>Condition 10 – cover for leachate control after final elevation obtained</p>
<p>Litter</p> <p>(Ind. Pets.’ Req. for Hearing at ¶28(d))</p> <p>(Tontitown’s Am. Req. for Hearing at ¶¶44-45)</p>	<p>“The facility is required to have litter fencing and litter crews as needed in response to these problems. The other component of litter control is weekly cover for a Class 4; DEQ has not found any violations with weekly cover. When litter is found to be an issue, it should be reported to WM immediately.” Ex. N at Resp. to Comments, p. 118–19 of 125.</p>	<p>Condition 5 – cover requirement</p>

<p>Mud/dirt on roads</p> <p>(Ind. Pets.’ Req. for Hearing at ¶28(e))</p>	<p>“Eco-Vista has wash down areas for the trash trucks leaving the landfill.” Ex. N at Resp. to Comments, p. 9 of 125.</p>	<p>N/A (<i>see</i> Ex. I, App. 3, MOU)</p>
<p>Nails and debris on roads</p> <p>(Ind. Pets.’ Req. for Hearing at ¶28(f))</p>	<p>“Road hazards are not within the scope of the solid waste permit issued to this facility. Should haulers be observed improperly transporting waste, please contact the Boston Mountain Regional Solid Waste Management District and report these occurrences.” Ex. N at Resp. to Comments, p. 6 of 125.</p>	<p>N/A</p>
<p>Vectors</p> <p>(Ind. Pets.’ Req. for Hearing at ¶28(g))</p>	<p>“The Eco-Vista Class 4 landfill is not allowed to accept any waste that could attract birds.” Ex. N at Resp. to Comments, p. 81 of 125.</p>	<p>Condition 4 – limitation on waste accepted</p>
<p>Fires</p> <p>(Tontitown’s Am. Req. for Hearing at ¶38)</p>	<p>“There are documented instances of arson at the Class 4 landfill.” Ex. N at Resp. to Comments, p. 79 of 125.</p> <p>“Since the minimum design criteria have been met, DEQ does not have grounds to deny the permit.” Ex. N at Resp. to Comments, p. 106 of 125.</p>	<p>Condition 5 – cover requirement</p>
<p>Failure to consider alternative locations</p> <p>(Tontitown’s Am. Req. for Hearing at ¶37)</p>	<p>“Siting criteria requires stability analysis of the formation at the location of the proposed landfill. These criteria include considerations for compaction of the subsurface underneath the landfill. Eco-Vista performed and passed the required stability analysis. The landfill meets all regulatory siting and location criteria.” Ex. N at Resp. to Comments, p. 3 of 125.</p>	<p>N/A</p>

In short, DEQ, responded to all public comments and imposed appropriate conditions on the Class 4 Permit. The petitioners have not pointed to any law or regulation that required more, and they are not entitled to a hearing on these issues.

CONCLUSION

There is no factual basis for the petitioners' claims, and there is no issue that requires a hearing. Eco-Vista's motion should be granted, and the hearing set for August 15-16 should be cancelled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sarah Keith-Bolden, hereby certify that a copy of the foregoing has been served by first-class regular mail and email to the following parties of record this 30th day of June 2023.

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