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Texas Landfills: The Need for Administrative Reform of the Texas Commission on Environmental Quality's Permitting Process

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COMMENT

TEXAS LANDFILLS: THE NEED FOR ADMINISTRATIVE REFORM OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S PERMITTING PROCESS

WILLIAM TODD KELLER, JR.*

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I. INTRODUCTION

Historically, waste disposal facilities, better known as landfills, have not been a hot-button issue. They are not usually talking points for political candidates or other elected officials outside of the local realm. Excluding landfill owners and parties immediately affected, waste disposal facilities often go unnoticed. However, these landfills surround our homes, cities, and counties, and can harm our health, drinking water, property value, economy, and the environment if adequate procedures are not followed. These issues raise major problems because landfills do not only affect people, but also our precious and diminishing natural resources.

On the other hand, when properly permitted and operated, landfills help our society reduce, reuse, and recycle the millions of tons of waste produced annually.¹ Additionally, landfills provide thousands of jobs for Americans, positively impacting the economy.² For these reasons, landfills should not be abolished outright or shut down. Rather, this paper argues for a balanced

1. Tex. Comm'n on Envtl. Quality, *Municipal Solid Waste in Texas: A Year in Review, 2017 Data Summary and Analysis 25* (2018), https://www.tceq.texas.gov/assets/public/comm_exec/pubs/as/187-18.pdf [perma.cc/Z5YG-XWJW] [hereinafter MUNICIPAL SOLID WASTE IN TEXAS]. The summary states:

In 2017, approximately 35.31 million tons of waste was disposed of in Texas MSW landfills. Using the 2017 state population estimate of 28,304,596, the average disposal rate in Texas was 6.84 pounds per person per day, which is slightly above the 2016 rate of 6.83 pounds. During this period, the state's population increased 1.6%. Population data were obtained from the U.S. Census Bureau's *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2017*, available at www.census.gov/data/tables/2017/demo/popest/counties-total.html.

Id. at 15.

2. See Valerie Wigglesworth, *Turning Trash into Cash: Converting Landfill Gas to Renewable Natural Gas Creates New Revenue*, DALL. NEWS (Dec. 26, 2017, 11:20 AM), <https://www.dallasnews.com/news/collin-county/2017/12/26/turning-trash-cash-converting-landfill-gas-renewable-natural-gas-creates-new-revenue> [https://perma.cc/5PW2-CYB6] (“The plant converts landfill gas into renewable natural gas, which will be fed into a pipeline for use at vehicle fueling stations.”).

approach, which requires legislative and regulatory reform of the permitting and enforcement rules governing our current and future waste facilities.

As the Texas Supreme Court aptly stated, “[t]he right to acquire and maintain private property is among our most cherished liberties. As Locke explained, the value of private property lies not only in its objective utility, but also in any personal investment therein.”³

Nonetheless, because legislative and regulatory reform impacts property rights, it is important to note at the outset that “property rights are not inviolate.”⁴ That is, property rights are subject to the valid exercise of the police power, such as “when the exercise of those rights” pose “a danger to the health and safety of Texans and to our state’s precious natural resources.”⁵ As countless courts and scholars have noted, the difficulty is striking a just and sound balance between one’s right to use property while contemporaneously not infringing upon our neighbors’ rights or the public at large.⁶ One fundamental purpose of the law is to balance these

3. *City of Houston v. Carlson*, 451 S.W.3d 828, 830 (Tex. 2014) (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT 134 (Thomas I. Cook ed., Hafner Press 1947) (1689)).

4. JDA RESEARCH, THE GREAT DISCONNECT: A COMPARISON BETWEEN TCEQ’S PERMITTING PROCESS AND CONCERNS EXPRESSED BY ELECTED OFFICIALS AND THE PUBLIC 24, <https://www.scribd.com/document/387674929/The-Great-Disconnect> [hereinafter JDA RESEARCH] (“Legislators on both sides of the political spectrum agree that private property rights are not inviolate. This is keenly apparent when the exercise of those rights poses a danger to the health and safety of Texans and to our state’s precious natural resources.”).

5. *Id.*; *but see* U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”); TEX. CONST. art. I, § 17 (“No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . .”).

6. *See generally* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005) (reaffirming the three legal theories plaintiffs may bring “to challenge a government regulation as an uncompensated taking of private property”); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992) (acknowledging the need to balance property owners’ rights against the need for government compensation due to a taking); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (“The promotion of safety of persons and property is unquestionably at the core of the State’s police power, and virtually all state and local governments employ a uniform police force to aid in the accomplishment of that purpose.”); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“The general rule at least is, that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking.”); *Mugler v. Kansas*, 123 U.S. 623, 665 (1887) (upholding a Kentucky statute that prevented the defendant from using his property to manufacture liquor); *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977) (“The protection of one’s right to own property is said to be one of the most important purposes of government.”); Eli Combs et al., *When Does Regulation Work?*, YALE INSIGHTS (Feb. 6, 2014), <https://insights.som.yale.edu/insights/when-does-regulation-work> [<https://perma.cc/SVL2-PQWU>] (“Regulation is often a contentious issue, but most agree that some is necessary and too much is harmful. How do you find the sweet spot?”).

externalities.⁷ Our government regulations alert the public and industry of possible threats and harms that exist in society.⁸ Regulations benefit society by protecting our general welfare; however, regulations also come at the cost of burdening the industry with many regulatory hurdles.⁹ Moreover, “[a]dherence to regulations does not guarantee that the risk is removed or impute absolute immunity to industries operating within regulatory guidelines.”¹⁰ These externalities can increase the price of waste disposal for everyone.¹¹ In short, our actions in waste production and creating more

7. See Brian P. Simpson, *An Economic, Political, and Philosophical Analysis of Externalities*, REASONS PAPERS, Fall 2007, at 123, 129, https://reasonpapers.com/pdf/29/rp_29_8.pdf [<https://perma.cc/S5H7-RB9F>] (“For example, a negative externality is said to exist in the case of a downstream landowner’s land being contaminated by, say, fertilizer used by a farmer whose land is upstream. This is said to be the case because the cost imposed on the downstream landowner is not accounted for in the costs that the farmer incurs to grow his crops.”).

8. See Eugene “Trey” Moore III, Comment, *Take This Job and Shove It: The Pragmatic Philosophy of Johnny Paycheck and a Prayer For Strict Liability in Appalachia*, 20 SCHOLAR 261, 305 (2018) (“Government regulations identify mandated precautions and notify industries and citizens of the potential for risk and harm.”). See generally *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 309, 318–327 (2002) (determining whether a taking occurred by enacting two regulations); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 490 (1987) (discussing police power and “the important role that the nature of the state action plays in our takings analysis.”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (“We affirm the traditional rule that a permanent physical occupation of property is a taking.”); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124–125 (1978) (“[T]his Court has dismissed ‘taking’ challenges on the ground that, while the challenged governmental action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute ‘property’ for Fifth Amendment purposes.”); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (recognizing a zoning ordinance as constitutional because it was not arbitrary or unreasonable); *City of Houston v. Carlson*, 451 S.W.3d 828, 831 (Tex. 2014) (“The preservation of these property rights is ‘one of the most important purposes of government.’ But government has other obligations as well, including ensuring the safety and security of its citizenry.” (citation omitted) (quoting *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977))); *Kopplow Dev., Inc. v. City of San Antonio*, 399 S.W.3d 532, 535 (Tex. 2013) (“The Texas Constitution resolves the tension between private property rights and the government’s ability to take private property by requiring takings to be for public use, with the government paying the landowner just compensation.”); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998) (“As a general rule, the application of a general zoning law to a particular property constitutes a regulatory taking if the ordinance ‘does not substantially advance legitimate state interests’ or it denies an owner all ‘economically viable use of his land.’”).

9. See Moore III, *supra* note 8, at 276 (recognizing “the federal government introduced legislation that emphasized an important policy shift in America toward protecting the environment against business interests that externalized environmental costs on local communities and state governments.”).

10. Moore III, *supra* note 8, at 305–06.

11. See Simpson, *supra* note 7, at 126 (“If all of those who created a negative externality were required to pay for the cost they imposed on others and those who created a positive externality were

stringent regulations can lead to higher transactional costs overall.¹²

Current Texas regulations may appear to cover and protect many of the issues that arise with landfills. However, the state agency in charge of approving landfills and enforcing regulations has been criticized for its “alarmingly high” approval rate for proposed landfills—including those lacking the adequate safeguards prescribed by law. This high approval rate is due in part to a lack of sufficient technical personnel at the agency, a financial budget that must be kept, and competing interests between the industry and other affected parties.

Legislative reform would allow for a more efficient process for both the waste disposal industry and the public at large. Currently, landfill disputes can take a number of years to resolve, and can cost the industry, the citizens, and the government hundreds of thousands of dollars.¹³ Additional legislative and administrative guidance would provide predictability, allowing all parties more certainty regarding the appropriate places to develop landfills, while addressing important concerns on all sides of the issue.

This comment discusses some of the issues that arise with the processes behind applying for, constructing, and operating landfills in Texas. Part II of this comment briefly notes the history of landfills, how they have

paid for the benefits they bestowed upon others, it would lead to economic stagnation and even regression.”).

12. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1245 (1968).

13. See generally *Cox v. City of Dall.*, 256 F.3d 281 (5th Cir. 2001) (illustrating the many years and parties involved to resolve the dispute); *City of Laredo v. Laredo Merchs. Ass’n*, 550 S.W.3d 586 (Tex. 2018) (detailing costs of legal disputes can include “claims for attorney fees and [other significant] costs . . .”); *Citizens Against the Landfill in Hempstead v. Tex. Comm’n on Env’tl. Quality*, No. 03-14-00718-CV, 2016 WL 1566759, at *1 (Tex. App.—Austin April 13, 2016, no pet.) (mem. op.) (“Both CALH and the City of Hempstead filed motions to overturn the decision to issue the Registration, which were overruled by operation of law. CALH and the City of Hempstead then filed a suit for judicial review in Travis County District Court. After a hearing, the district court affirmed the Commission’s decision to issue the Registration and later denied CALH and the City’s joint motion for new trial. CALH and the City then perfected this appeal.”); *City of Jacksboro v. Two Bush Cmty. Action Grp.*, No. 03-10-00860-CV, 2012 WL 2509804, at *1 (Tex. App.—Austin June 28, 2012, pet. denied) (mem. op.) (emphasizing the time between the 2005 “appli[cation] to TCEQ for a permit to build a municipal solid-waste landfill” and the resolution of the dispute in 2012); *Heritage on San Gabriel Homeowners Ass’n v. Tex. Comm’n on Env’tl. Quality*, 393 S.W.3d 417, 422 (Tex. App.—Austin 2012, pet. denied) (demonstrating the burden Williamson County and landowners endured to resolve a dispute over an “appli[cation] to the TCEQ for a permit to expand [the] existing landfill . . .”); *Citizens Against Landfill Location v. Tex. Comm’n on Env’tl. Quality*, 169 S.W.3d 258, 262 (Tex. App.—Austin 2005, pet. denied) (“The issuance of the permit was hotly contested, and after several years of litigation, this Court affirmed the Commission’s order approving the permit.”).

developed over time, and the federal law promulgated to protect American citizens and our environment. Part III describes the Texas statutes that give the Texas Commission on Environmental Quality (TCEQ) its authority as a state agency. Part IV addresses some typical problems commonly found in connection with landfills, including flooding and difficulties with the application process itself. Part V discusses some recent case studies of controversial landfills. Part VI points to some potential regulatory and legislative suggestions to help reform the landfill permitting process.

II. THE HISTORY OF LANDFILLS

Landfills have become a necessary evil in the United States as our population continues to grow exponentially, and our waste per capita follows suit.¹⁴ With our ever-expanding population, the recurring need to properly dispose of various types of waste follows.¹⁵ Scientific research indicates that “landfills have existed for over 5,000 years.”¹⁶ There is “archaeological evidence” dating landfills back to as early as 3000 B.C., as well as a municipal landfill near the city of Athens around 2,500 years ago.¹⁷

During the 1920s, prior to the more recent development of landfills, “it was common for garbage, incinerator ash, and dirt to be used to fill in swamps near cities which allowed the contamination of

14. See U.S. ENVTL. PROT. AGENCY, ADVANCING SUSTAINABLE MATERIALS MANAGEMENT: 2015 FACT SHEET 5 (July 2018), https://www.epa.gov/sites/production/files/2018-07/documents/2015_smm_msw_factsheet_07242018_fnl_508_002.pdf [<https://perma.cc/4FA8-ZP9V>] (“Over the last few decades, the generation, recycling, composting, and combustion with energy recovery and landfilling of MSW have changed substantially. Solid waste generation peaked at 4.74 pounds per person per day in 2000. However, the rate of 4.48 pounds per person per day in 2015 is slightly higher than the 2014 rate, which was 4.45 pounds per person per day.”).

15. See Derek Thompson, *2.6 Trillion Pounds of Garbage: Where Does the World's Trash Go?*, ATLANTIC (June 7, 2012), <https://www.theatlantic.com/business/archive/2012/06/26-trillion-pounds-of-garbage-where-does-the-worlds-trash-go/258234/> [<https://perma.cc/EPM5-EQSM>] (“This year, the world will generate 2.6 trillion pounds of garbage—the weight of about 7,000 Empire State Buildings.”); *Global Waste on Pace to Triple by 2100*, WORLD BANK (Oct. 30, 2013), <http://www.worldbank.org/en/news/feature/2013/10/30/global-waste-on-pace-to-triple> [<https://perma.cc/SSB6-2EC8>] (stating “the growing global urban population will be producing three times as much waste as it does today. The level of waste carries serious consequences—physical and fiscal—for cities around the world.”).

16. *Landfills*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/environment/energy-government-and-defense-magazines/landfills> [<https://perma.cc/4QSP-9DMX>].

17. See *id.* (“A municipal landfill operated on the outskirts of Athens at least 2,500 years ago; residents were required to transport waste to the site, which was outside of the city gates, sparing the walled city from the stench of the open-air system.”).

groundwater.”¹⁸ One of the first attempts at a modern landfill took place in California around the year 1935.¹⁹ Essentially, garbage “was thrown into a hole in the ground that was periodically covered with dirt.”²⁰ For the next few decades, landfills mainly consisted of “excavating a hole or trench, filling the excavation with trash, and covering the trash with soil.”²¹

In 1965, Congress created the Solid Waste Disposal Act to tackle the issues of regulating and properly handling waste throughout the states.²² Subsequently, the Resource Conservation and Recovery Act (RCRA) was enacted in 1976.²³ The RCRA is the primary federal law regulating solid and hazardous waste disposal.²⁴ Specifically, Subtitle D of the Federal Resource Conservation and Recovery Act “banned open dumping of waste and set minimum federal criteria for the operation of municipal waste and industrial waste landfills.”²⁵ In 1991, the Environmental Protection Agency (EPA) “established new federal standards for municipal solid waste (MSW) landfills that updated location and operation standards and added design standards, groundwater monitoring requirements, closure and post-closure care requirements, and financial assurance requirements to ensure that there would always be adequate funding to maintain closed landfills.”²⁶

TCEQ’s website explains, “[i]n parallel with developments in the rest of the nation, and at the federal level, state natural-resource efforts broadened at mid-century to include the protection of air and water resources, and later to the regulation of generating hazardous and non-hazardous waste.”²⁷ In 1993, the Texas Legislature created the Texas Natural Resource

18. Elizabeth Ward, *Landfills a History*, GREEN RISKS (July 14, 2011), <http://greenrisks.blogspot.com/2011/07/landfills-history.html> [<https://perma.cc/B2TV-XGJ6>].

19. *Id.* (“In 1937, a landfill that opened in Fresno, California, first utilized compacting of waste and daily application of a covering layer of soil.”).

20. *Id.*

21. *Id.*

22. *Id.*

23. See 42 U.S.C. § 6901(a)(3) (2012) (“[T]hat the continuing concentration of our population in expanding metropolitan and other urban areas has presented these communities with serious financial, management, intergovernmental, and technical problems in the disposal of solid wastes resulting from the industrial, commercial, domestic, and other activities carried on in such areas.”).

24. See *id.* § 6902 (2012) (achieving objectives by “providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans . . .”); *id.* § 6907 (covering the solid waste management information and guidelines).

25. JDA RESEARCH, *supra* note 4, at 7.

26. Ward, *supra* note 18.

27. *History of the TCEQ and Its Predecessor Agencies*, TEX. COMM’N ON ENVTL. QUALITY, <https://www.tceq.texas.gov/agency/organization/tceqhistory.html> [[https://perma.cc/\[U6PF-9SXF\]](https://perma.cc/[U6PF-9SXF])].

Conservation Commission (TNRCC).²⁸ This “comprehensive environmental protection agency” continued until its name was changed “to the Texas Commission on Environmental Quality” by sunset legislation in 2001.²⁹

III. THE CONTEMPORARY LANDFILL PERMITTING PROCESS

A. *Statutory Authority*

The authority of TCEQ comes from Title 5 of the Texas Health and Safety Code³⁰ and Title 30 of the Texas Administrative Code (TAC).³¹ While the Health and Safety Code covers the broader context of solid waste disposal³², Chapter 330 of the TAC specifically provides many of the statutory requirements for applying, developing, operating, expanding, and closing a municipal solid waste facility.³³ Chapter 335 governs industrial solid waste and municipal hazardous waste.³⁴ Both “[i]ndustrial and municipal wastes may be classified as hazardous or nonhazardous.”³⁵

28. *See generally id.* (describing in immense detail, the creation and “gradual evolution from protecting the right of access to natural resources . . .”).

29. *See id.* (“In 2011, sunset legislation continued the TCEQ through 2023.”).

30. *See* TEX. HEALTH & SAFETY CODE ANN. § 361.001 (“This chapter may be cited as the Solid Waste Disposal Act.”).

31. *See* 30 TEX. ADMIN. CODE § 1.1 (Tex. Comm’n on Env’tl. Quality, Purpose of Rules) (“The purpose of the commission’s rules is to implement the powers and duties of the [Texas Commission on Environmental Quality] under the Texas Water Code, the Texas Health and Safety Code, and other laws, and to establish the general policies of the commission, and to set forth procedures to be followed in agency proceedings.”).

32. *See* TEX. HEALTH & SAFETY CODE § 361.002 (“It is this state’s policy and the purpose of this chapter to safeguard the health, welfare, and physical property of the people and to protect the environment by controlling the management of solid waste, including accounting for hazardous waste that is generated.”); *id.* § 363.002 (“It is this state’s policy to safeguard the health, general welfare, and physical property of the people and to protect the environment by encouraging the reduction in solid waste generation and the proper management of solid waste, including disposal and processing to extract usable materials or energy. Encouraging a cooperative effort among federal, state, and local governments and private enterprise, to accomplish the purposes of this chapter, will further that policy.”).

33. *See* 30 TEX. ADMIN. CODE § 330.1 (Tex. Comm’n on Env’tl. Quality, Purpose & Applicability) (“The regulations promulgated in this chapter cover aspects of municipal solid waste (MSW) management and air emissions from MSW landfills and transfer stations under the authority of the commission [TCEQ] and are based primarily on the stated purpose of Texas Health and Safety Code, Chapter 361 and Chapter 382.”).

34. *See id.* § 335.1 (Tex. Comm’n on Env’tl. Quality, Definitions) (setting forth additional definitions).

35. MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1, at 11.

However, because “MSW facilities may not accept regulated hazardous waste,” hazardous waste is generally beyond the scope of this paper.³⁶

B. *Classification of Municipal Solid Waste Facilities*

The Texas Administrative Code lays out all of the definitions and terminology applicable to environmental quality, including terms such as landfill,³⁷ municipal solid waste facility,³⁸ 100-year flood,³⁹ solid waste,⁴⁰ and so forth. Each fiscal year, TCEQ provides an extensive summary regarding data and information on registered landfills currently operating in Texas.⁴¹ The most recent report concludes that “[i]n 2017 there were 196 permitted MSW [(municipal solid waste)] landfills actively accepting and managing waste.”⁴²

Classifications and types of landfills depend on the “method of processing or disposal” used at a particular municipal solid waste facility.⁴³ The most common categories of landfills include a Type I, Type IV, and

36. *Id.*

37. 30 TEX. ADMIN. CODE § 330.3(75) (Tex. Comm’n on Env’tl. Quality, Definitions) (defining “landfill” as “[a] solid waste management unit where solid waste is placed in or on land and which is not a pile, a land treatment unit, a surface impoundment, an injection well, a salt dome formation, a salt bed formation, an underground mine, a cave, or a corrective action management unit.”).

38. *Id.* § 330.3(89) (defining a municipal solid waste facility as “[a]ll contiguous land, structures, other appurtenances, and improvements on the land used for processing, storing, or disposing of solid waste. A facility may be publicly or privately owned and may consist of several processing, storage, or disposal operational units, e.g., one or more landfills, surface impoundments, or combinations of them.”).

39. *Id.* § 330.3(1) (“100-year flood—A flood that has a 1.0% or greater chance of recurring in any given year or a flood of a magnitude equaled or exceeded once in 100 years on the average over a significantly long period.”).

40. *Id.* § 330.3(145) (“Solid waste—Garbage, rubbish, refuse, sludge from a wastewater treatment plant, water supply treatment plant, or air pollution control facility, and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities.”).

41. *See generally* MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1, at 1 (stating that “*Municipal Solid Waste in Texas: A Year in Review* is prepared by the Municipal Solid Waste (MSW) Permits Section of the Texas Commission on Environmental Quality (TCEQ). The summary includes data on the types and amounts of waste disposed and processed at the state’s permitted and registered MSW facilities.”).

42. *Id.* at 4.

43. *See* 30 TEX. ADMIN. CODE § 330.5 (Tex. Comm’n. on Env’tl. Quality, Classification of Municipal Solid Waste Facilities) (“The commission has classified all municipal solid waste (MSW) facilities according to the method of processing or disposal of MSW.”); *accord* MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1, at 3 (“MSW facilities in Texas are classified according to the method of processing or disposal (30 TAC § 330.5).”).

Arid-exempt (AE) landfill, accounting for approximately 97% of all active landfills, and roughly 99% of the total waste disposed of in Texas.⁴⁴

Of the various types of landfills classified by statute, a Type I landfill “is the standard landfill for the disposal of MSW.”⁴⁵ TCEQ’s annual summary of municipal solid waste management stated that “[i]n 2017, there were 97 Type I facilities, accounting for 49% of all active landfills, about 89% of the total waste disposed, and 94% of the total statewide remaining capacity.”⁴⁶

A Type IV landfill “only accepts brush, construction, or demolition waste, and other similar non-putrescible waste.”⁴⁷ According to TCEQ’s 2017 annual report, Type IV facilities accounted “for 12% of all active landfills, almost 10% of the total waste disposed, and 5% of the total statewide remaining capacity.”⁴⁸

Type I and Type IV landfills can also be permitted by Texas as “arid-exempt (AE) landfills” if they are in relatively dry areas.⁴⁹ Notably, AE landfills are “exempt from liner and groundwater requirements, but have limited acceptance rates.”⁵⁰ These landfills accounted for roughly “36% of all active landfills, 1% of the total waste disposed, and 1% of the total statewide remaining capacity” in 2017.⁵¹ Although there are various other

44. See MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1, at 3 (“This section provides a summary of MSW landfill types, activity, and capacity in 2017.”).

45. 30 TEX. ADMIN. CODE § 330.5(a)(1) (Tex. Comm’n. on Env’tl. Quality, Classification of Municipal Solid Waste Facilities); see also MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1, at 3 (“A Type I landfill is the standard landfill for MSW disposal in Texas.”).

46. MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1, at 3.

47. *Id.*; see also 30 TEX. ADMIN. CODE § 330.3(119) (Tex. Comm’n on Env’tl. Quality, Definitions) (“Putrescible waste—Organic wastes, such as garbage, wastewater treatment plant sludge, and grease trap waste, that are capable of being decomposed by microorganisms with sufficient rapidity as to cause odors or gases or are capable of providing food for or attracting birds, animals, and disease vectors.”); 30 TEX. ADMIN. CODE § 330.5(a)(2) (Tex. Comm’n on Env’tl. Quality, Classification of Municipal Solid Waste Facilities) (“A Type IV landfill may not accept putrescible wastes, conditionally exempt small-quantity generator waste, or household wastes.”).

48. MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1, at 3.

49. *Id.* (“Type I and Type IV landfills in relatively dry parts of the state may be permitted as arid-exempt (AE) landfills . . . but have limited waste acceptance rates.”); see also 30 TEX. ADMIN. CODE § 330.5(b) (Tex. Comm’n on Env’tl. Quality, Classification of Municipal Waste Facilities) (recognizing arid exemptions for Type I and Type IV landfills in dry parts of the state).

50. MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1, at 3; see also 30 TEX. ADMIN. CODE § 330.5(b) (Tex. Comm’n on Env’tl. Quality, Classification of Municipal Solid Waste Facilities) (listing the conditions that must be met to qualify for an exemption).

51. MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1, at 3; see also 30 TEX. ADMIN. CODE § 330.5(b) (Tex. Comm’n on Env’tl. Quality, Classification of Municipal Solid Waste Facilities) (discussing the necessary criteria for an arid exemption).

classifications for landfills, the specific types mentioned above account for the majority of the municipal solid waste facilities in Texas.⁵²

“Section 361.013(a) of the Texas Health and Safety Code requires TCEQ to charge a fee on all solid waste that is disposed of within” Texas.⁵³ MSW landfill operators charge this “disposal fee as part of the tipping fee they charge their customers.”⁵⁴ The fees are calculated “based on weight or volume, depending upon the type of waste and method of delivery to the facility.”⁵⁵

Texas has “24 Regional Planning Commissions, also known as Councils of Governments (COGs).”⁵⁶ Texas Health and Safety Code Section 363.0615 requires the COGs to follow municipal solid waste “management planning on a regional basis.”⁵⁷ The majority of “MSW facilities in Texas are owned by government entities such as cities and counties; the rest are owned by corporations and other types of privately held companies.”⁵⁸ Notably, the size of landfills has increased significantly from a “statewide average” of fifty acres “with an average height of 13 feet” in 1986, to an average of “246 acres with an average height of 86 feet” in 2017.⁵⁹ Growth in landfill size is likely attributable to Texas’s expanding population.

52. MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1, at 5; *see also* 30 TEX. ADMIN. CODE § 330.5 (Tex. Comm’n on Env’tl. Quality, Classification of Municipal Solid Waste Facilities) (“The commission has classified all municipal solid waste (MSW) facilities according to the method of processing or disposal of MWS.”).

53. MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1 at 8.

[T]he commission [TCEQ] shall charge a fee on all solid waste that is disposed of within this state. The fee is 94 cents per ton received for disposal at a municipal solid waste landfill if the solid waste is measured by weight. If the solid waste is measured by volume, the fee for compacted solid waste is 30 cents per cubic yard and the fee for uncompacted solid waste is 19 cents per cubic yard received for disposal at a municipal solid waste landfill.

TEX. HEALTH & SAFETY CODE ANN. § 361.013(a).

54. MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1, at 9.

55. *Id.*

56. *Id.* at 17.

57. *See* TEX. HEALTH & SAFETY CODE ANN. § 363.0615(a) (“A council of governments has primary responsibility for the regional planning process.”); *see also* MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1, at 17–18 (“In Texas, there are 24 Regional Planning Commissions . . . that are responsible . . . for MSW management planning on a regional basis[.]”).

58. MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1, at 9.

59. *Id.* at 22 (“Landfill height was calculated as the difference between the reported site permanent benchmark elevation and final cover elevation.”).

C. *Types of Waste*

Texas defines municipal solid waste as “[s]olid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste.”⁶⁰ Industrial solid waste is “[s]olid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operations.”⁶¹ Both “[i]ndustrial and municipal” solid waste “may be classified as hazardous⁶² or nonhazardous.”⁶³ “Nonhazardous industrial solid wastes are” further divided into three distinct classes.⁶⁴ A Class 1 waste includes industrial solid waste that “because of its concentration, or physical or chemical characteristics is toxic, corrosive, flammable, . . . or may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or disposed of”⁶⁵ Class 2 wastes are “[a]ny individual solid waste or combination of industrial solid waste that are not described as Hazardous, Class 1, or Class 3”⁶⁶ Waste falling under Class 3 is “[i]nert and essentially insoluble industrial solid waste, usually including, but not limited to, materials such as rock, brick, glass, dirt, and certain plastics and rubber”⁶⁷ TCEQ states that “[m]ost MSW facilities may accept Class 2 and Class 3 wastes.”⁶⁸ Because the landfill permitting process can

60. 30 TEX. ADMIN. CODE § 330.3(88) (Tex. Comm’n on Env’tl. Quality, Definitions) (defining municipal solid waste).

61. *Id.* § 330.3(66) (defining industrial solid waste).

62. *See id.* § 330.3(62) (defining “Hazardous Waste” as “[a]ny solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, 42 United States Code, §§ 6901 et seq., as amended.”); *see also id.* § 335.1(69) (“Hazardous industrial waste—Any industrial solid waste or combination of industrial solid wastes identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency in accordance with the Resource Conservation and Recovery Act of 1976, § 3001 (42 United States Code, § 6921).”).

63. MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1, at 11.

64. *See id.* at 11–12 (detailing the three-class division of nonhazardous industrial solid waste).

65. 30 TEX. ADMIN. CODE § 330.3(21) (2018) (Tex. Comm’n on Env’tl. Quality, Definitions) (defining Class 1 wastes).

66. *Id.* § 330.3(22) (defining Class 2 wastes).

67. *Id.* § 330.3(23) (defining Class 3 wastes).

68. MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1, at 12.

be rather convoluted, TCEQ occasionally provides documents to grasp the information better.⁶⁹

D. *Texas Landfill Permitting Process*

Section 330.53 of the Texas Administrative Code sets forth the pre-application procedural requirements for “potential permit owners or operators who desire to enter into agreements with affected persons and/or identify issues of local concern prior to submission of an application.”⁷⁰ After the pre-application review, there is a four-part process of the municipal solid waste facility application.⁷¹ The code provides, “[t]he owner or operator shall submit a complete application, containing Parts I–IV, before a hearing can be conducted on the technical design merits of the application.”⁷²

Part I of the application incorporates information required by various sections of the Texas Administrative Code.⁷³ This includes the proposed landfill facility location, maps, “property owner information,” “evidence of competency,” and application fees.⁷⁴ Part II requires the applicant to

69. *See generally* TEX. COMM’N ON ENVTL. QUALITY, GUIDELINES FOR THE CLASSIFICATION AND CODING OF INDUSTRIAL AND HAZARDOUS WASTES (2014), https://www.tceq.texas.gov/assets/public/comm_exec/pubs/rg/rg-022.pdf [<https://perma.cc/A48R-C44F>] (listing the notification requirements and forms needed to notify TCEQ about waste streams one generates and providing helpful information for the process); *see also* TEX. COMM’N ON ENVTL. QUALITY, SUBCHAPTER B: PERMIT AND REGISTRATION APPLICATION PROCEDURES 1, <https://www.tceq.texas.gov/assets/public/legal/rules/rules/pdflib/330b.pdf> [<https://perma.cc/EF5Y-8NT5>] (listing and explaining permit and registration application procedures).

70. 30 TEX. ADMIN. CODE § 330.53 (Tex. Comm’n on Env’tl. Quality, Pre-application Review); *see also id.* § 330.3(101) (Tex. Comm’n on Env’tl. Quality, Definitions) (defining operator as “[t]he person(s) responsible for operating the facility or part of a facility”); *id.* § 330.3(102) (“Owner—The person that owns a facility or part of a facility.”).

71. *See id.* § 330.59 (Tex. Comm’n on Env’tl. Quality, Contents of Part I of the Application); *id.* § 330.61 (Tex. Comm’n on Env’tl. Quality, Contents of Part II of the Application); *id.* § 330.63 (Tex. Comm’n on Env’tl. Quality, Contents of Part III of the Application); *id.* § 330.65 (Tex. Comm’n on Env’tl. Quality, Contents of Part IV of the Application).

72. *Id.* § 330.57(a) (Tex. Comm’n on Env’tl. Quality, Permit and Registration Applications for Municipal Solid Waste Facilities).

73. *See id.* § 330.57(c)(1) (“Part I of the application consists of the information required in § 281.5 of this title (relating to Application for Wastewater Discharge, Underground Injection, Municipal Solid Waste, Radioactive Material, Hazardous Waste, and Industrial Solid Waste Management Permits), § 305.45 of this title (relating to Contents of Application for Permit) and § 330.59 of this title (relating to Contents of Part I of the Application).”); *id.* § 330.59 (Tex. Comm’n on Env’tl. Quality, Contents of Part I of the Application) (“Part I of the application consists of information that is required regardless of the type of facility involved”).

74. *See id.* § 330.59 (listing all statutory requirements of Part I of the application).

describe “the existing conditions and character of the facility and surrounding area.”⁷⁵ This entails a detailed “waste acceptance plan,” a multitude of maps, plans for transportation, and geological and groundwater studies.⁷⁶ Additionally, “Parts I and II of a permit application must provide information relating to land-use compatibility under the provisions of Texas Health and Safety Code, § 361.069.”⁷⁷ Part III consists of “design information, detailed investigative reports, schematic design of the facility, and required plans.”⁷⁸ Lastly, Part IV of the application contains, among other requirements, “the site operating plan that shall discuss how the owner or operator plans to conduct daily operations at the facility.”⁷⁹

TCEQ produced a report summarizing the voluminous application review process, stating, “[a]ll MSW permit applications follow a standard review process that includes an administrative and technical review, two public notices with the potential for a public meeting, and an opportunity for a contested case hearing.”⁸⁰ Applying for a MSW facility typically costs hundreds of thousands of dollars and can take years to complete.⁸¹ In addition to purchasing the land, the applicant must prepare extensive field work and data “to ensure the application meets all the prescribed rules and that the landfill operation will not adversely impact human health and the

75. *Id.* § 330.57(c)(2) (Tex. Comm’n on Env’tl. Quality, Permit and Registration Applications for Municipal Solid Waste Facilities); *id.* § 330.61 (Tex. Comm’n on Env’tl. Quality, Contents of Part II of the Application).

76. *See id.* § 330.61 (listing the contents of Part II of the application for permit and registration).

77. *Id.* § 330.57(c)(2).

78. *Id.* § 330.57(c)(3); *see also id.* § 330.63(a) (Tex. Comm’n on Env’tl. Quality, Contents of Part III of the Application); (“This [site development] plan must include criteria that in the selection and design of a facility will provide for the safeguarding of the health, welfare, and physical property of the people and environment through consideration of geology, soil conditions, drainage, land use, zoning, adequacy of access roads and highways, and other considerations as the specific facility dictates.”).

79. *Id.* § 330.57(c)(3); *id.* § 330.65 (Tex. Comm’n on Env’tl. Quality, Contents of Part IV of the Application) (“This [site operating] plan will provide general operating procedures for facility management for day-to-day operations at the facility.”).

80. JDA RESEARCH, *supra* note 4, at 2.

81.

The agency [TCEQ] does not collect data on the applicant’s cost to prepare an MSW application, but conservatively speculates that the cost ranges from \$300,000 to \$400,000. Any field work required to document subsurface conditions (ex. geology, soil, groundwater, etc.) generally adds \$50,000 to \$300,000 to the overall cost, depending on site acreage and conditions. This cost does not include the purchase price of land or the cost of a contested case hearing, which vary dramatically from one application to another.

Id. at 26.

environment.”⁸² Amidst the application review process, TCEQ can send a Notice of Deficiency (NOD) “to the applicant informing them of issues and concerns with the application that is preventing agency staff from completing the review.”⁸³ Once a NOD has been sent, the applicant has thirty days or more to respond.⁸⁴ Notably, Texas does not have a “statutory limit for the number of NODs or the number of items in each NOD letter.”⁸⁵

Section 361.069 of the Texas Health and Safety Code allows an applicant to submit what is commonly referred to as a “bifurcated application,” requiring only Parts I and II of the application.⁸⁶ This bifurcated process applies only to land-use applications.⁸⁷ TCEQ will conduct a “full administrative and technical review of the bifurcated application, including two public notices and a potential contested case hearing⁸⁸, and makes a land-use compatibility determination.”⁸⁹ If the first half of the application is approved, the applicant may then prepare and submit “the technical portions of the application, Parts III and IV,” where TCEQ “conducts a full review of the entire application . . . and makes a final determination on the entire application.”⁹⁰

82. *Id.* at 2.

83. *Id.* at 26.

84. *Id.* (“The applicant has at least 30 days to respond to the NOD, and may request additional time to respond, if approved.”).

85. *Id.*

86. TEX. HEALTH & SAFETY CODE ANN. § 361.069 (“The commission in its discretion may, in processing a permit application, make a separate determination on the question of land use compatibility, and, if the site location is acceptable, may at another time consider other technical matters concerning the application.”).

87. *See id.* (“Determination of Land Use Compatibility”).

88. *See* Eric Allmon & David Frederick, *A Defense of the Contested Case Hearing Process for Texas Commission on Environmental Quality Environmental Permit Decisions*, 44 TEX. ENVTL. L.J. 175, 176 (2014).

The contested case hearing process reflects deeply held values of Texans who generally distrust the concentration of power in the hands of government and appreciate the value of providing a meaningful process for public participation in government decisions. Yet, in recent Legislative sessions, industry groups have made several attempts to eliminate or constrain the contested case hearing process available to affected persons in the processing of an individual environmental permit by the Texas Commission on Environmental Quality (TCEQ).

Id.

89. JDA RESEARCH, *supra* note 4, at 27.

90. *Id.*

IV. RISKS ASSOCIATED WITH TEXAS LANDFILLS

A. *Flood Hazards*

A recent study inquired into the permitting process and the concern of TCEQ's high approval rate of landfill permits since 2008.⁹¹ Within the report, TCEQ states that "[o]ut of 153 applications for new landfills and processing facilities received since 2008, four landfills and two processing facility applications were returned, and three processing facility applications were denied."⁹² That amounts to a 94% approval rate, which has led to sharp criticism of the agency by some.⁹³ As part of the research study, a public information request was sent to TCEQ, inquiring into copies of letters from state officials dating back to June 15, 2013.⁹⁴ The report concluded that there is a bipartisan concern by Texas legislators regarding the current landfill permitting process.⁹⁵ In the past five years, elected officials wrote letters to TCEQ discussing issues such as significant floods and weather changes that are impacting densely populated and flood-prone areas.⁹⁶ The majority of the representatives' letters came from counties in South Texas and the Gulf Coast, where their constituents are dealing with

91.

A study was designed to further explore the apparent disconnect between TCEQ's claim they 'ensure the application meets all prescribed rules and that the landfill operation will not adversely impact human health and the environment' and views expressed in letters from legislators to TCEQ, asserting the decisions they make are negatively impacting the health and safety of Texans and our environment.

Id. at 3.

92. *Id.* at 2.

93. *Id.* ("TCEQ even admits 'the agency is often portrayed as being too lenient on the industry.'").

94.

To determine the views of legislators about TCEQ actions regarding landfills and solid waste disposal, a public information request was submitted to TCEQ for copies of letters from elected officials to the agency since June 15, 2013. Even in this limited span of five years, TCEQ produced more than 600 pages of letters in response to the request.

Id. at 3.

95. *See id.* at 4 ("Demonstrating concerns about TCEQ's process is thus an objective shared by conservatives and liberals on both sides of the aisle.").

96. *See id.* at 5 ("Several legislators pointed to problems created by the intense and frequently changing weather patterns in this heavily populated and industrialized area of the state, including major flooding events like Hurricane Harvey.").

major flooding events, including Hurricane Harvey.⁹⁷ Much of the environmental concern stems from permitting landfills to operate in locations subject to flooding.⁹⁸ This concern led to several hearings by the House Committee on Environmental Regulation's Subcommittee on Air Quality and Municipal Landfills.⁹⁹ Texas House Speaker Joe Straus issued an interim charge to the subcommittee, to “[s]tudy the permitting, siting, and regulatory processes for solid waste landfills, including municipal solid waste landfills, and whether current rules, regulations, and notice requirements adequately ensure compliance and maximize participation from the public and stakeholders.”¹⁰⁰ The subcommittee listened to “testimony from TCEQ, waste disposal enterprises, environmental organizations, local elected officials, and other interested stakeholders on landfill issues, including the issuance of permits for municipal solid waste landfill facilities located in floodplains and flood-prone areas.”¹⁰¹

The chair of the subcommittee, State Representative Ed Thompson, discussed his primary concern that “TCEQ’s regulation, 30 T.A.C. §§ 330.61(h)(1) and 330.63(c)(2)(d)(ii), requires applicants to provide local floodplain development permits and other special permits in their TCEQ permit applications. On the contrary, local officials report that TCEQ is in fact approving permits before applicants receive the necessary local reviews and approvals.”¹⁰² The paramount issue appears to be, in light of recent hurricanes and floods, whether FEMA floodplain maps are still sufficiently

97. *See id.* at 4 (“It is also important to note that the legislators who wrote letters about landfills and waste disposal issues in the last five years together represent a total of 47 counties, located primarily in South Texas and along the Gulf Coast.”).

98. *See* Shannon Najmabadi, *After Harvey, Some South Texans More Wary Than Ever About Plan to Build Landfill Near Floodplain*, TEXAS TRIBUNE (Dec. 19, 2017) <https://www.texastribune.org/2017/12/19/after-harvey-some-south-texans-more-wary-ever-about-plan-build-landfill/> [<https://perma.cc/52TF-JVVB>] (“Nearly four months ago, Hurricane Harvey’s rainfall inundated ultra-polluted Superfund sites in and around Houston, triggering the leak of hazardous waste.”).

99. *See* JDA RESEARCH, *supra* note 4, at 5 (“Given the significant number of recent historic flooding events in the state, many legislators have begun to question the permitting in floodplains and flood-prone areas, including in House of Representatives hearings this interim.”).

100. *Id.*

101. *Id.*

102. Letter from Ed Thompson, Rep., State of Tex. H.R., Dist. 29, Brazoria County, to Stephanie Bergeron Perdue, Interim Exec. Dir., Tex. Comm’n on Envtl. Quality (May 15, 2018), [<https://perma.cc/EZ25-QZLT>].

accurate to adequately protect our citizens and the surrounding environment.¹⁰³

On September 5, 2018, the Senate Committee on Natural Resources and Economic Development met to discuss landfill issues.¹⁰⁴ Representatives from the waste industry, TCEQ, and landfill protesters were present to provide testimony about prevalent issues in the permit application process.¹⁰⁵ Earl Lott, Director of TCEQ's Waste Permits Division, noted the strides TCEQ has made in streamlining the application process.¹⁰⁶ He stated there are over "800 rule citations that an applicant has to address," showing the complexity of the process.¹⁰⁷ Regardless, it would appear that further studies into the permitting process and the effects of landfills should be conducted in order "to ensure the health and safety of Texans is protected[.]"¹⁰⁸

B. *Bifurcated Application, Notices of Deficiency, and Other Concerns*

1. Bifurcated Application

The Texas Administrative Code expressly restricts landfills from operating near certain locations such as airports¹⁰⁹, floodplains¹¹⁰,

103. *See id.* ("Hurricane Harvey raised serious questions about the reliability of FEMA floodplain maps. Members of this [Sub]committee [on Air Quality and Municipal Landfills] have expressed concerns about landfill permitting, particularly in floodplains or in flood-prone parts of our state.").

104. *Senate Committee on Natural Resources & Economic Development*, TEX. SENATE STREAMING VIDEO PLAYER (Sept. 5, 2018), http://tlesenate.granicus.com/MediaPlayer.php?clip_id=13539 [<https://perma.cc/Q24A-3LZP>].

105. *See id.* (demonstrating nearly eight hours of testimony from various representatives and protestors in front of the committee).

106. *See id.* (noting the devolvement of forms and checklists for applicants to use in assuring they have addressed specific rule citations and a newly implemented online application, which identifies exactly where an applicant has addressed a rule citation).

107. *Id.*

108. JDA RESEARCH, *supra* note 4, at 7.

109. *See* 30 TEX. ADMIN. CODE ANN. § 330.545(b) (Tex. Comm'n on Env'tl. Quality, Airport Safety) ("Owners or operators proposing to site new municipal solid waste landfill units and lateral expansions located within a six-mile radius of any small general service airport runway end used by turbojet or piston-type aircraft shall notify the affected airport and the Federal Aviation Administration.").

110. *See id.* § 330.547(a) (Tex. Comm'n on Env'tl. Quality, Floodplains) ("No solid waste disposal operations shall be permitted in areas that are located in a 100-year floodway as defined by the Federal Emergency Management Administration.").

endangered or threatened species¹¹¹, and coastal areas.¹¹² Additionally, the Texas Health and Safety Code provides that in order:

[t]o prohibit the processing or disposal of municipal or industrial solid waste in certain areas of a municipality or county, the governing body of the municipality or county must by ordinance or order specifically designate the area of the municipality or county, as appropriate, in which the disposal of municipal or industrial solid waste will not be prohibited.¹¹³

However, land-use compatibility issues are arising more frequently because of the bifurcated application process. TCEQ reported that:

[t]he goal of bifurcated applications was to save applicants the cost of preparing the technical portions of an application if there were potential issues with land-use compatibility. However, bifurcated applications, as seen with recent applications, are a resource intensive process because the agency must conduct two full reviews of the application, which includes multiple public notices and, when requested, public meetings and contested case hearings. In addition, the rule has inadvertently become a loophole that applicants have used to quickly prepare applications and “beat the clock” on local actions or ordinances that prohibit solid waste activities.¹¹⁴

Texas legislators and elected officials continue sending letters to TCEQ, expressing their environmental concerns regarding landfills.¹¹⁵ There are numerous concerns with the permitting process itself, including a lack of

111. *See id.* § 330.551(a) (Tex. Comm’n on Env’tl. Quality, Endangered or Threatened Species) (“A facility and the operation of a facility shall not result in the destruction or adverse modification of the critical habitat of endangered or threatened species, or cause or contribute to the taking of any endangered or threatened species.”).

112. *See id.* § 330.561 (Tex. Comm’n on Env’tl. Quality, Coastal Areas) (“A new landfill cell or an areal expansion of an existing landfill cell managing Class 1 industrial solid waste may not be located in areas described in § 335.584(b)(3) and (4) of this title (relating to Location Restrictions.”).

113. TEX. HEALTH & SAFETY CODE ANN. § 363.112(a).

114. JDA RESEARCH, *supra* note 4, at 27.

115. *See* Letter from John Whitmire, Sen., State of Tex. S., to Joanna Summerhays, Administrative Law Judge, (Oct. 7, 2013), [<https://perma.cc/EZ25-QZLT>] (“Citizens who, I believe, have no idea about the proposed plant or its potential impact regardless of whether the notice requirements were met or not Also, I firmly believe the release of discharge across my property and other landowners’ property is a taking of our land.”); Letter from Tony Dale, Rep., State of Tex. H.R., Dist. 136, to Stephanie Bergeron Perdue, Interim Exec. Dir., Tex. Comm’n on Env’tl. Quality, (May 30, 2018), [<https://perma.cc/EZ25-QZLT>] (“The Texas Commission on Environmental Quality has a critical role in protecting Texas citizens and property from toxic spills and other pollutants.”).

applicant vetting by TCEQ.¹¹⁶ This lack of vetting means that someone with little operating knowledge or an individual/business with a less than pristine record can obtain a permit and operate a landfill. Another issue is unscrupulous companies can apply and obtain a landfill permit, and then proceed to sell the company or hand off the landfill to another party. Critics also argue the application fee is far below an adequate amount, as the fee charged to the proposed landfill applicant is currently \$150.¹¹⁷ On the other hand, representatives from the industry indicate that increasing fees will force them to raise their prices as well.

2. Notices of Deficiency

As mentioned, “there is no statutory limit for the number of” Notices of Deficiency in a landfill permit application, “or the number of items” listed within a NOD.¹¹⁸ Another problem with the NOD’s for all parties is that there can be mere technical deficiencies in the application (such as incorrect pagination), or substantive deficiencies (possibly leaving out vital information or studies regarding the land).¹¹⁹ Regardless, the stigma of a NOD is strong, and legislators are not fond of them.¹²⁰ Sometimes it makes the applicant look worse off than they really are, and other times it underestimates the major substantive pitfalls in an application. Those in favor of capping the number of NOD’s allowed claim that, by providing

116. See Letter from Judith Zaffirini, Sen., State of Tex. S., Dist. 21, to Richard A. Hyde, Exec. Dir., Tex. Comm’n on Env’tl. Quality, (Jan. 26, 2018), [https://perma.cc/EZ25-QZLT] (“This lack of applicant review means that TCEQ allows landfill permits to be issued without first examining applicants’ business, financial, or criminal backgrounds; without knowing who actually will operate a landfill; and without knowing who will be responsible to authorities and the community in the event of a toxic disaster.”).

117. Compare 30 TEX. ADMIN. CODE § 330.59 (Tex. Comm’n on Env’tl Quality, Contents of Part I of the Application) (“In accordance with § 305.53 of this title (relating to Application Fee), the application fee for a permit, registration, amendment, modification, or temporary authorization is \$150.”), with JDA RESEARCH, *supra* note 4, at 23 (“Additionally, while permit application fees are minimal, TCEQ’s solid waste program is funded by fees the agency collects only after landfills have been constructed, providing a perverse incentive for the agency to issue permits.”).

118. JDA RESEARCH, *supra* note 4, at 26.

119. JDA RESEARCH, *supra* note 4, at 26 (“Up to 70% of the NODs items identified during the technical review are non-technical and inconsistent items that have no environmental impact on the design or operation of the facility.”).

120. See Letter from John Kuempel, Rep., State of Tex. H.R., Dist. 44, to Tex. Comm’n on Env’tl. Quality (May 16, 2017), [https://perma.cc/EZ25-QZLT] (“Post Oak’s Application received more notices of deficiency over this process than should have ever been allowed under the TCEQ rules, and the bedrock principles of fairness and due process.”).

extreme detail in the notices, TCEQ is practically writing the application for the applicant itself.¹²¹

Some critiques regarding landfills include: the potential for groundwater contamination¹²², odors produced by the landfills, varmints, decrease in air quality due to harmful landfill gas emission, increase in traffic, negative impact on wildlife, an increase in bird strikes on airplanes near landfills¹²³, decrease in property value, and drug smuggling.¹²⁴ Additionally, some hold a perception of a “revolving door”, in which those that were once employed at TCEQ then go out into the private sector to work for the waste industry.¹²⁵

Another significant problem is many, if not all, landfills inevitably leak. Leachate is a common toxin leaked into the groundwater.¹²⁶ Leachate is

121. JDA RESEARCH, *supra* note 4, at 23 (“Recently, TCEQ staff has spent an inordinate amount of time assisting with landfill permit applications, to the point where legislators have even argued TCEQ is in effect writing them.”).

122. See Letter from John Lujan, Rep., State of Tex. H.R., Dist. 118, to Bryan Shaw, Chairman, Tex. Comm’n on Env’t. Quality (Oct. 3, 2016), [https://perma.cc/EZ25-QZLT] (“Additionally, the proposed location sits atop the Carrizo-Wilcox Aquifer and could potentially contaminate this water source.”).

123. See *id.* (“Landfills, such as the one proposed by Post Oak, attract birds and can put our pilots in real danger. A recent incident at Sheppard [Air Force Base] in which a T-38C struck a bird, causing the pilot to eject, highlights just how real the threat is.”); Letter from Vicente Gonzalez, Rep., U.S. H.R., Dist. 15, to Tex. Comm’n on Env’t. Quality (Aug. 8, 2018), [https://perma.cc/EZ25-QZLT] (“By increasing the likelihood of bird strikes, the proposed Post Oak landfill could result in loss of life, impede training exercises and diminish our national defense capabilities.”).

124. See Eric Nicholson, *Mexican Drug Cartels Are Now Smuggling Drugs Across the Texas Border in Toxic Waste*, DALL. OBSERVER (Mar. 21, 2014, 1:00 PM), https://www.dallasobserver.com/news/mexican-drug-cartels-are-now-smuggling-drugs-across-the-texas-border-in-toxic-waste-7116617#more [https://perma.cc/Y5HT-294S] (stating “the cartels have perfected yet another ingenious method for sneaking narcotics past border agents: covering them with lots of hazardous industrial waste.”).

125. JDA RESEARCH, *supra* note 4, at 23 (“This perceived conflict of interest is only furthered by the ‘revolving door’ at the agency, whereby agency executives leave TCEQ only to work for the industry they were supposedly regulating. A particularly egregious example: when an executive director granted a permit over the objections of his own staff and left the agency for employment with the very company receiving that permit.”); see also CITIZENS AGAINST LAREDO LANDFILL! (CALL), *Dump Lobbyist Disciplined by Texas Ethics Commission; Receives “Slap on the Wrist”*, http://nolaredodump.com/dump-lobbyist-disciplined-by-texas-ethics-commission-receives-slap-on-the-wrist/ [https://perma.cc/K592-EQWG] (“However, Shankle somehow never registered as a lobbyist for Rancho Viejo in 2017 and 2018, and this summer was disciplined by the Texas Ethics Commission.”).

126. See *Texas Landfills are Leaking Toxins into Groundwater*, TEXAS CAMPAIGN FOR THE ENVIRONMENT (Feb. 20, 2017), https://www.texasenvironment.org/texas-landfills-leaking-toxins-groundwater-interactive-map/ [https://perma.cc/9KQB-XM32] (“Since over a third of active, monitored landfills are leaking in Texas, we should definitely not be throwing toxic household items into the landfill!”); John Michaelson, *At Least 40% of Active Texas Landfills are Leaking Toxins*, PUBLIC NEWS SERVICE (Dec. 17, 2013), https://www.publicnewsservice.org/2013-12-17/waste-reduction-

defined as “[a] liquid that has passed through or emerged from solid waste and contains soluble, suspended, or miscible materials removed from such waste.”¹²⁷

TCEQ’s 2017 summary report claims that the landfill capacity remaining “at the end of 2017 was 2.83 billion cubic yards.”¹²⁸ The summary added that “this volume would . . . serve for 55 years.”¹²⁹ Granted, the time frame and volume estimates are not evenly distributed amongst the entire state. However, it begs the question of whether necessity should be accounted for in determining the approval of proposed landfills.¹³⁰

V. CASE STUDIES OF TEXAS LANDFILLS

The following case studies exemplify the time, expense, and resources that are required to either develop or protest a landfill. Although the examples are non-exhaustive, they point out some of the difficulties of the permitting process. These landfills have been contentiously disputed and involve personnel from government officials, the waste industry, and the public.

A. *The Camelot Landfill Expansion*

City of Farmers Branch owns the Camelot landfill, and was initially permitted by Texas in 1979.¹³¹ The landfill “permit was granted prior to the adoption of” the RCRA.¹³² The “landfill began operating in 1980, and the permit was amended in 1981 to cover a total of 350 acres.”¹³³ Numerous studies were conducted, concluding there was contamination “coming from the landfill” into monitoring wells near the City of

recycling/at-least-40-of-active-texas-landfills-are-leaking-toxins/a36302-1 [https://perma.cc/Y79D-8PFG] (“The study finds that 40 percent of active landfills in the state that monitor their impact on groundwater are leaking toxins . . .”).

127. 30 TEX. ADMIN. CODE § 330.3(78) (2018) (Tex. Comm’n on Env’tl. Quality, Definitions).

128. MUNICIPAL SOLID WASTE IN TEXAS, *supra* note 1, at 16–17.

129. *Id.* at 16.

130. *See id.* (“The total remaining MSW landfill capacity in the state at the end of 2017 was 2.83 billion cubic yards. Based on reported compaction rates, this volume would hold 1.93 billion tons of waste and serve for 55 years.”).

131. *Camelot Landfill Timeline*, CITY OF LEWISVILLE, <https://www.cityoflewisville.com/about-us/city-departments/community-relations-tourism/news-and-information/camelot-landfill-timeline> [https://perma.cc/GX4G-MN6C]; *see also* JDA RESEARCH, *supra* note 4, at 7.

132. JDA RESEARCH, *supra* note 4, at 7; *see also Camelot Landfill Timeline*, *supra* note 131 (noting the Camelot Landfill became subject to the Resource Conservation and Recovery Act (RCRA) in 1996).

133. JDA RESEARCH, *supra* note 4, at 7; *see also Camelot Landfill Timeline*, *supra* note 131.

Lewisville.¹³⁴ Subsequently, in 2010, the contamination issue continued, and the “TCEQ approved a change in the groundwater monitoring system which reclassified those wells from monitoring wells to ‘observation wells,’ effectively removing them from the official compliance system.”¹³⁵ In 2012, the Camelot Landfill applied to expand their existing landfill “from 351 acres to 469 acres,” and increasing its “height to 725 feet above mean sea level.”¹³⁶ The “City of Lewisville filed a” federal lawsuit “seeking to block the proposed expansion based on a variety of environmental and procedural concerns, including the possibility of contamination escaping from the facility into the Trinity River and threatening the North Texas fresh water supply.”¹³⁷

Roughly two years later, the parties agreed to Camelot “constructing a slurry wall and building and operating a leachate removal system.”¹³⁸ This proposed expansion led to state representatives Jane Nelson and Ron Simmons filing several bills “that would specifically authorize TCEQ to receive and act on comments submitted by a host city when considering a permit request for a new or expanded landfill.”¹³⁹ State Senator Jane Nelson also sent a letter to TCEQ addressing her opposition to the expansion of the Camelot Landfill, and its potentially detrimental effects in relation to the “environmental, health and safety, and aesthetic qualities of our community.”¹⁴⁰ House Bill 281 (84-R) was passed in 2015.¹⁴¹ This bill limits “the expansion of Type I municipal solid waste landfills that are wholly located inside the boundaries of one municipality but owned by

134. See *Camelot Landfill Timeline*, *supra* note 131 (listing the amount of contaminants detected in Lewisville water wells).

135. JDA RESEARCH, *supra* note 4, at 7.

136. See *Camelot Landfill Timeline*, *supra* note 131 (creating “an increase of 202 feet over the . . . permitted maximum height.”).

137. *Id.*

138. JDA RESEARCH, *supra* note 4, at 23; see also *Camelot Landfill Timeline*, *supra* note 131.

139. *Camelot Landfill Timeline*, *supra* note 131; See also *Senate Passes Legislation Aimed To Halt Expansion Of Camelot Landfill*, RON SIMMONS FOR TEXAS (May 2, 2015), <http://www.ronsimmmons.com/2015/05/02/senate-passes-legislation-aimed-to-halt-expansion-of-camelot-landfill/> [perma.cc/RU94-5ATJ] (discussing the bill that would “allow the City of Lewisville to have a say” prior to its approval); TEX. H.B. 1284, 84th Leg., R.S. (2015); TEX. S.B. 879, 84th Leg., R.S. (2015); TEX. S.B. 878, 84th Leg., R.S. (2015).

140. Letter from Jane Nelson, Sen., State of Tex. S., to Dr. Bryan Shaw, Texas Comm’n on Envtl. Quality, (June 25, 2013), in JDA RESEARCH, *supra* note 4, at 41 (stating her concern about the Camelot landfill’s effect on her community).

141. TEX. H.B. 281, 84th Leg., R.S. (2015).

another municipality.”¹⁴² It also “prohibits TCEQ from approving a permit application that seeks to expand the area or capacity of such landfills unless the governing body of the municipality in which the landfill is located first approves the issuance, amendment, or renewal of the permit.”¹⁴³ Lastly, the bill “requires [the] TCEQ to provide members of the legislature who represent the district hosting the landfill an opportunity to comment on the application and to consider those comments in evaluating the application.”¹⁴⁴

Despite its controversy, TCEQ finally approved the expansion of the Camelot Landfill in October of 2017.¹⁴⁵

B. *Beneficial Land Management of San Antonio*

In December 2000, Jess Mayfield, the “owner of Beneficial Land Management of San Antonio was denied an application” by TCEQ’s predecessor (TRNCC) “to spread treated human waste,” or sludge, at Arenosa Creek Ranch . . . in Victoria County.¹⁴⁶ This sludge-spreading process is commonly known as “beneficial land use, which allows sludge from sewer plants and other sources to be applied to the land as fertilizer in an effort to keep the material from filling up landfills.”¹⁴⁷ Mayfield “reapplied for the permit in 2001.”¹⁴⁸ TCEQ “deemed the application technically complete” in 2004.¹⁴⁹ Subsequently, “more than 500 Victoria County residents signed a petition to try to stop Mayfield from applying sludge to his land near Arenosa Creek.”¹⁵⁰ The County Commissioners Court “passed a resolution objecting to the site.”¹⁵¹ In 2006, TCEQ “sent the application to a contested case hearing.”¹⁵² The “administrative law

142. JDA RESEARCH, *supra* note 4, at 9.

143. *Id.*

144. *Id.*

145. *Id.* (“The permit approval was touted as a ‘great victory for Farmers Branch,’ celebrating the TCEQ decision that would allow them to continue sending trash to Lewisville for another three or four decades, even though the City of Lewisville didn’t want it.”).

146. *Id.*

147. *Id.* at 9–10.

148. *Id.* at 10.

149. *Id.*

150. Sara Sneath *Waste Site Could Get Permit Without a Stink*, VICTORIA ADVOCATE (Aug. 8, 2015), https://www.victoriaadvocate.com/news/business/waste-site-could-get-permit-without-a-stink/article_b8f39a8c-a2b3-5b61-89bb-55e95b6d7e19.html [<https://perma.cc/AH6L-6ZTW>].

151. *Id.*

152. JDA RESEARCH, *supra* note 4, at 10.

judge ruled in favor of Beneficial Land Management,” and TCEQ “granted the permit in 2007.”¹⁵³

In 2011, Mayfield sought a permit renewal application, requesting “an ‘experimental use authorization,’ seeking an even more controversial addition of grit and grease trap waste to the permit, on the condition that he could prove doing so was beneficial to the soil.”¹⁵⁴ Thereafter, the owner began “mixing waste from restaurants and car washes into the municipal waste he dumps on his land.”¹⁵⁵ However, a representative of the Texas Liquid Processors Association stated that Texas law “requires grit and grease trap waste to be disposed at a landfill or composting site with an impermeable liner[.]”¹⁵⁶

In September 2015, Texas Governor Greg Abbott sent a report to TCEQ “from an individual who had visited the site of the spraying,” discussing the “nauseating” odors coming from the land.¹⁵⁷ To continue its sludge spreading process, “Beneficial Land Management had to renew its permit with TCEQ” in 2015.¹⁵⁸ After public backlash, Mayfield “requested a contested case hearing to add back the grease and grit trap waste to his permit, while Victoria County requested a contested case hearing to keep it out of the permit.”¹⁵⁹ State Senator Lois Kolkhorst also sent a letter to TCEQ opposing the permit renewal.¹⁶⁰

A preliminary hearing “was held in September 2016.”¹⁶¹ However, Victoria County alleged “that TCEQ needed to clarify its rules regarding

153. *Id.*

154. *Id.*

155. Sneath, *supra* note 150.

156. *Id.*

157. JDA RESEARCH, *supra* note 4, at 10 (“It [the land where sewage sludge was applied] was unsettling. Emissions coming from the soil had a sickening chemical smell. When land is freshly applied, the emission from the site is nauseating.”).

158. *Id.*; see also Jessica Priest, *Fight Against Dumping Sludge Reaches Capitol*, VICTORIA ADVOCATE (Apr. 24, 2017), https://www.victoriaadvocate.com/news/business/fight-against-dumping-sludge-reaches-capitol/article_0c82a4cc-4c4b-576d-a362-816614d04661.html [https://perma.cc/2UDN-JN W8] (demonstrating how businessman, Jess Mayfield, intends “to protest the Texas Commission Environmental Quality’s denial of a permit to continue” his waste practices).

159. JDA RESEARCH, *supra* note 4, at 11.

160. Letter from Lois W. Kolkhorst, Sen., State of Tex. S., Dist. 18, to Comm’r Niermann, (Jan. 19, 2016), in JDA RESEARCH, *supra* note 4, at 11 (“This project poses an unacceptable risk to the health and safety of area residents and risks contaminating local water supplies. Additionally, the project directly contravenes the spirit of the Commission’s own rules.”).

161. JDA RESEARCH, *supra* note 4, at 11; see also Laura Garcia, *Date Set for Sludge Case Hearing*, VICTORIA ADVOCATE (Sept. 28, 2016), <https://www.victoriaadvocate.com/news/business/date-set->

whether the rules allowed Mayfield to mix grease and grit trap waste with sewage sludge and apply it to his land.”¹⁶² The judge agreed and certified “the county’s questions . . . to be asked” to TCEQ during another “preliminary hearing on May 10, 2017.”¹⁶³ TCEQ decided its rules did not allow the sludge spreading, but “it would be permissible if the grease and grit trap waste first entered a wastewater treatment plant and was treated with sewage sludge before being applied to the land.”¹⁶⁴ Mayfield responded to the decision, stating “[g]rease cannot enter a wastewater treatment plant because it will upset it[.]”¹⁶⁵

Throughout this process, several state representatives filed bills trying to combat the “experimental practice.”¹⁶⁶ However, the bills died because they missed the “deadline to be read . . . on the House floor[.]”¹⁶⁷ Beneficial Land Management eventually decided it wanted to settle with Victoria County.¹⁶⁸ Finally, in January 2018, a settlement was approved that prohibited the company “from dumping grease and grit trap waste from restaurants, lube shops, and car washes onto land.”¹⁶⁹ County Judge Ben Zeller noted, “[i]t’s a big win for Victoria County—for our water supply, for the environment, for our citizens[.]”¹⁷⁰

C. *The Post Oak Landfill*

Post Oak Clean Green Landfill (“Post Oak”) is another example of some of the recurring problems with the landfill permitting process. The primary issues with the Post Oak landfill include potentially contaminated drinking water, bird strike hazards for aircraft, and the bifurcated application.¹⁷¹ Post Oak submitted Parts I and II of a proposed Type I municipal solid

for-sludge-case-hearing/article_e9a45413-2c27-53d8-b731-aeb2f97e89d3.html
[https://perma.cc/G5Z9-QCDG].

162. JDA RESEARCH, *supra* note 4, at 11.

163. *Id.* at 1–12.

164. Priest, *supra* note 158.

165. *Id.*

166. JDA RESEARCH, *supra* note 4, at 12.

167. *See* Priest, *supra* note 158 (“Also, State Rep. Geanie Morrison’s bill to outlaw what Mayfield is doing missed the midnight deadline May 11 to be read a second or third time on the House floor, along with hundreds of other bills.”).

168. JDA RESEARCH, *supra* note 4 at 12.

169. *Id.*

170. Marina Riker, *County Expects End to Sewage Sludge Fight*, VICTORIA ADVOCATE (Sept. 11, 2017), https://www.victoriaadvocate.com/news/business/county-expects-end-to-sewage-sludge-fight/article_ba04252e-0a2c-56d8-a071-40492f8f7ce8.html [https://perma.cc/EM6B-SFET].

171. JDA RESEARCH, *supra* note 4, at 13.

waste landfill in 2011, as a “bifurcated application” described above.¹⁷² The location of this “proposed landfill was to be located on the outcrop area and recharge zone of the Carrizo-Wilcox Aquifer,” in Guadalupe County.¹⁷³ This aquifer “is the primary, if not sole, drinking water source for Schertz and Seguin and also supplies water for other neighboring communities.”¹⁷⁴ The applicant, Post Oak Clean Green Inc., allegedly “had no prior experience in waste management design or operations[.]”¹⁷⁵ Approval of the application would “authorize a permitted area encompassing 1,003 acres, including 331 acres for the waste disposal area; and a waste disposal unit reaching a maximum permitted height 692 feet above mean sea level[.]”¹⁷⁶

TCEQ deemed the application “administratively complete,” and then issued several notices of deficiencies (NOD), and also requested “a revised permit application.”¹⁷⁷ A total of three NOD’s were sent to Post Oak and the applicant subsequently responded with a revised application.¹⁷⁸ TCEQ found the “application technically complete and issued” a preliminary decision in 2013 in favor of Post Oak.¹⁷⁹ Several state senators and other parties opposed the proposed landfill, writing to TCEQ.¹⁸⁰

172. *Id.* at 12.

173. *Id.* at 13; *see also* Bob Thaxton, *Commissioners Vote to Oppose Landfill*, THE SEGUIN GAZETTE (June 26, 2012) (describing the location of the Carrizo-Wilcox Aquifer in Guadalupe County).

174. JDA RESEARCH, *supra* note 4, at 13; *see also* Thaxton, *supra* note 173 (claiming the risk of contamination from the proposed landfill poses a great risk to “public health, safety, and welfare for downstream users by polluting the drinking water supply”).

175. JDA RESEARCH, *supra* note 4, at 12.

176. *Id.* at 13; TEX. COMM’N ON ENVTL. QUALITY, MUN. SOLID WASTE MGMT. FACILITY PERMIT NO. 2378, at 3 (Oct. 23, 2018).

177. JDA RESEARCH, *supra* note 4, at 13; TEX. COMM’N ON ENVTL. QUALITY, POST OAK MUN. SOLID WASTE LANDFILL PERMIT MODIFICATION—FIRST NOTICE OF DEFICIENCY (NOD) (Feb. 27, 2012); TEX. COMM’N ON ENVTL. QUALITY, POST OAK MUN. SOLID WASTE LANDFILL PERMIT MODIFICATION—SECOND NOTICE OF DEFICIENCY (NOD) (May 31, 2012); TEX. COMM’N ON ENVTL. QUALITY, POST OAK MUN. SOLID WASTE LANDFILL PERMIT APPLICATION—THIRD NOTICE OF DEFICIENCY (NOD) (Sept. 4, 2012).

178. JDA RESEARCH, *supra* note 4, at 13.

179. *Id.*; TEX. COMM’N ON ENVTL. QUALITY, LAND USE COMPATIBILITY DETERMINATION APPLICATION NO. 2378 (Apr. 4, 2013).

180. *See* Letter from Donna Campbell, Sen., State of Tex. S., Dist. 25, to Dr. Bryan Shaw, Chairman, Tex. Comm’n on Env’tl. Quality, (July 2, 2013), *in* JDA RESEARCH, *supra* note 4, at 144 (“I am always in favor of private property rights except when a significant danger is posed to public safety by the exercise of those rights. In this instance, I believe that to be the case. I would fully support a landfill in a safe area and appreciate the fact that our area is in need of this vital service.”); Letter from John Kuempel, Rep., State of Tex. H.R. Dist. 44, to Texas Commission on Environmental Quality (June 17, 2013), *in* JDA RESEARCH, *supra* note 4, at 147 (“It is also my understanding that

In October 2013, the applicant “submitted Parts III and IV of the application,” with opposition expressing concerns to TCEQ again. TCEQ issued another three NODs, “reflecting a cumulative total of 385 deficiencies, to which Post Oak submitted four responses.”¹⁸¹ Post Oak representatives met with TCEQ staff numerous times for assistance with their application, causing concern because it “reflects an incredible investment of time and resources from the agency and, thereby, a significant expenditure of taxpayer resources to identify and attempt to cure the sheer volume of deficiencies.”¹⁸² In addition, several public meetings were held to address the proposed landfill.¹⁸³ However, despite approximately seven years of strong debate over the landfill’s approval, TCEQ granted the landfill permit in October 2018.¹⁸⁴

D. *Rancho Viejo Waste Management Proposed Landfill*

Another landfill application was submitted in 2011, by “Rancho Viejo Waste Management LLC, (RVWM).”¹⁸⁵ The company used the bifurcated application process to file a Type I municipal solid waste facility application near Laredo, known as the “Pescadito Environmental Resource Center.”¹⁸⁶ This proposed landfill intends to bring in “223,316,800 cubic yards of waste.”¹⁸⁷ The facility would also accept “waste from Mexico by rail.”¹⁸⁸ Allegedly, the applicant did not mention in the application that it only owned 50% of the surface of part of the land to be developed, as ANB Cattle Company (ANB) was a shareholder who did not consent to that particular

TCEQ rules impose a 75-day limit to address application deficiencies. Post Oak Clean Green was given a number of opportunities to complete their application and address its numerous deficiencies; resulting in a total of 15 months to complete the land-use compatibility portion. That is nearly 390 days more than TCEQ rules allow.”)

181. JDA RESEARCH, *supra* note 4, at 15.

182. *Id.*

183. *See* TEX. COMM’N ON ENVTL. QUALITY, NOTICE OF PUB. MEETING FOR MUN. SOLID WASTE PERMIT: PROPOSED PERMIT NO. 2378 (Jan. 21, 2014) (“A public meeting will be held and will consist of two parts, an Informational Discussion Period and a Formal Comment Period.”).

184. TEX. COMM’N ON ENVTL. QUALITY, MUN. SOLID WASTE MGMT. FACILITY PERMIT NO. 2378, at 3 (Oct. 23, 2018).

185. JDA RESEARCH, *supra* note 4, at 18.

186. *See About the Future Pescadito Environmental Resource Center (PERC) Facility*, PESCADITO ENVIRONMENTAL RESOURCE CENTER, <https://pescaditoerc.com> [<https://perma.cc/5UUN-ND7R>] (providing general information about the proposed landfill to be developed near Laredo, Texas).

187. JDA RESEARCH, *supra* note 4, at 18.

188. *Id.*

use of the land.¹⁸⁹ The interested parties have litigated this issue for years. ANB requested a contested case hearing, and TCEQ referred the issue to the State Office of Administrative Hearings (SOAH).¹⁹⁰ ANB also sued RVWM in district court, claiming that the proposed landfill could not be built on their land.¹⁹¹ RVWM filed a counterclaim, alleging that the land could be used for a landfill.¹⁹² SOAH remanded the case to TCEQ “and dismissed the contested case proceeding.”¹⁹³ TCEQ held three public meetings regarding this landfill, beginning in February 2013.¹⁹⁴

RVWM revised its application, changing the acreage and boundaries of the proposed landfill site.¹⁹⁵ The landfill boundary included several easements owned by other corporations, which were not disclosed in the application.¹⁹⁶ In March 2015, RVWM applied for Parts III and IV of the landfill.¹⁹⁷ Despite “significant opposition” by “citizens, local government officials, and state legislators, TCEQ . . . confirm[ed] that the application was technically complete and provid[ed] a draft permit.”¹⁹⁸ “[T]he Webb County Commissioners Court unanimously passed a resolution to oppose the proposed landfill.”¹⁹⁹ The City of Laredo voted in opposition of the landfill, causing RVWM to sue the city.²⁰⁰

189. *Id.*

190. *Central Registry of Mun. Solid Waste Disposal Permit 2374*, TEX. COMM’N ON ENVTL. QUALITY, https://www15.tceq.texas.gov/crpub/index.cfm?fuseaction=iwr.itemdetail&addn_id=118427322011108&re_id=780418762011108 [<https://perma.cc/X76D-MP4Z>].

191. JDA RESEARCH, *supra* note 4, at 18.

192. *Id.*

193. *Id.* at 19.

194. *Central Registry of Mun. Solid Waste Disposal Permit 2374*, TEX. COMM’N ON ENVTL. QUALITY, https://www15.tceq.texas.gov/crpub/index.cfm?fuseaction=iwr.itemdetail&addn_id=118427322011108&re_id=780418762011108 [<https://perma.cc/X76D-MP4Z>].

195. JDA RESEARCH, *supra* note 4, at 19.

196. *Id.*

197. *Id.* at 15.

198. *Id.* at 19; *see also* CITIZENS AGAINST LAREDO LANDFILL! (CALL), *supra* note 125 (“Despite the efforts of thousands of concerned citizens and glaring deficiencies, someone at the Texas Commission on Environmental Quality declared the application for the proposed Pescadito dump technically complete and directly referred the application to the State Office of Administrative Hearings (SOAH) for a contested case hearing without allowing the TCEQ Commissioners to rule on it.”); Julia Wallace, *Landfill Granted Preliminary Go-ahead Outside Laredo*, LAREDO MORNING TIMES (Dec. 31, 1969), <https://www.lmtonline.com/news/crime/article/Landfill-granted-a-draft-permit-12563867.php?ipid=artem> [<https://perma.cc/2HRX-JGJY>] (“Almost seven years after its initial application was submitted to build a landfill outside Laredo, on Jan. 26, Rancho Viejo Waste Management received the preliminary go-ahead from the Texas Commission on Environmental Quality.”).

199. JDA RESEARCH, *supra* note 4, at 19.

200. *Id.*

During the second public meeting in August 2016, TCEQ revoked its “prior technically complete determination.”²⁰¹ Subsequently, TCEQ issued a NOD to RVWM containing “five specific deficiencies.”²⁰² The deficiencies included:

(1) the lack of documentation that all applicable local floodplain development permits had been obtained with TCEQ’s rules; (2) the lack of documentation to confirm that RVWM has control over the pipeline easements or documentation from the easement holders acknowledging that they will agree to move the easements; and (3) lack of documentation to address RVWM’s ability to use of the co-owned property between the north and south landfill units outside the permit boundary for construction of flood control, drainage, and other landfill structures and appurtenances.²⁰³

Thereafter, “RVWM filed a lawsuit against Webb County and its floodplain administrator personally, for allegedly interfering with the permitting process and blocking its ability to construct the landfill.”²⁰⁴ In November 2016, RVWM responded to TCEQ’s NOD, but did not provide adequate documentation.²⁰⁵ Later that month, RVWM dropped its lawsuit.²⁰⁶ Both of the corporations holding easements informed TCEQ “that no agreements with RVWM were in place regarding the pipeline easements.”²⁰⁷

Several concerns were expressed in letters sent to TCEQ by State Senator Judith Zaffirini, specifically stating that “[b]ecause the agency’s municipal solid waste program is funded by fees paid by the industry TCEQ regulates, it also is critical to avoid any perceived conflict of interest or preferential treatment.”²⁰⁸ Senator Zaffirini sent a letter to TCEQ addressing “her

201. *Id.*; see also Christopher Hooks, *Trash Talk*, TEXAS MONTHLY (Sept. 21, 2016), <https://www.texasmonthly.com/articles/battle-over-laredo-landfill/> [<https://perma.cc/AV85-2AVX>] (“The scion of one of Laredo’s first families wants to build a mammoth landfill on his ranch. But the opposition is fierce and vocal—and backed by none other than his uncle and his cousin.”).

202. JDA RESEARCH, *supra* note 4, at 19.

203. *Id.*

204. *Id.* at 20.

205. *Id.*

206. *Id.*

207. *Id.*

208. Letter from Judith Zaffirini, Sen., State of Tex. S., Dist. 21, to Chance Goodin, Manager, Municipal Solid Waste Permits Section, Tex. Comm’n on Env’tl. Quality, (July 13, 2017), in JDA RESEARCH, *supra* note 4, at 20, 224-25; see also Julia Wallace, *Zaffirini’s Request to Halt Pescadito Landfill Project Prompts Criticism*, LAREDO MORNING TIMES (May 17, 2018), <https://www.lmtonline.com/local/article/Zaffirini-s-request-to-halt-Pescadito-landfill-12918712.php> [<https://perma.cc/8H32->

concerns about TCEQ's failure to follow its own rules and referencing an opinion by then-Attorney General Greg Abbott[.]”²⁰⁹ She quoted Abbott's 2005 opinion, which stated “TCEQ is a creature of statute with no inherent authority . . . Moreover, the commission is directed by statute to follow its own rules. Where an agency fails to follow the clear, unambiguous language of its own regulation, its action is arbitrary and capricious.”²¹⁰

In another letter, dated January 26, 2018, Senator Zaffirini added that the RVWM proposed landfill sits “within a 100-year floodplain,” and her concern that “TCEQ does not conduct background checks of applicants for landfill permits”²¹¹ The Senator continued,

TCEQ does not require landfill applicants to identify their operators before permits are approved. This lack of applicant review means that TCEQ allows landfill permits to be issued without first examining applicants' business, financial, or criminal backgrounds; without knowing who actually will operate a landfill; and without knowing who will be responsible to authorities and the community in the event of a toxic disaster.²¹²

Thereafter, TCEQ issued a draft permit to RVWM.²¹³ TCEQ held its third public meeting for the proposed landfill in May 2018.²¹⁴ More letters were sent to TCEQ, including by State Representative Tony Dale, “a member of the House Environmental Regulation Committee[.]”²¹⁵ TCEQ again referred the landfill application to SOAH for a contested case hearing.²¹⁶ In July 2018, “a preliminary hearing was held” regarding the

H89B] (“So far they [TCEQ] have received 9,644 comments regarding this project over its long application process.”).

209. JDA RESEARCH, *supra* note 4, at 21.

210. Letter from Judith Zaffirini, Sen., State of Tex. S., Dist. 21, to Richard A. Hyde, Exec. Dir., Tex. Comm'n on Env'tl. Quality, (Nov. 14, 2017), *in* JDA RESEARCH, *supra* note 4, at 21, 226–27 (quoting Tex. Att'y Gen. Op. No. GA-0290 (2005) at 5–6).

211. Letter from Judith Zaffirini, Sen., State of Tex. S., Dist. 21, to Richard A. Hyde, Exec. Dir., Tex. Comm'n on Env'tl. Quality (Jan. 26, 2018), *in* JDA RESEARCH, *supra* note 4, at 21, 228–29.

212. *Id.*

213. JDA RESEARCH, *supra* note 4, at 21.

214. *Id.*

215. Letter from Tony Dale, Rep., State of Tex. H.R., Dist. 136, to Stephanie Bergeron Perdue, Interim Exec. Dir., Texas Comm'n on Env'tl. Quality (May 30, 2018), *in* JDA RESEARCH, *supra* note 4, at 22, 35–36, (“The Environmental Regulation Committee recently heard testimony that TCEQ has approved a toxic landfill [RVWM] for Mexican and out-of-state waste inside of a Texas floodplain. We also heard concerns raised by county officials that TCEQ is approving landfill applications before the required local reviews and permits are granted.”).

216. JDA RESEARCH, *supra* note 4, at 22.

matter, and “[t]he parties are currently embroiled in discovery for these proceedings.”²¹⁷ The protesters requested SOAH “for an abatement of proceedings until FEMA makes a floodplain determination.”²¹⁸ SOAH’s determination is still pending.²¹⁹

VI. POSSIBLE SOLUTIONS BENEFITTING ALL PARTIES INVOLVED IN LANDFILLS

Like most complex problems, it is far easier to criticize, condemn, and complain than it is to find actual, meaningful solutions to the problem. Those fighting for administrative landfill reform have several propositions in mind to present to their lawmakers, including fixing the Notice of Deficiency process currently in place, no longer allowing a bifurcated application by landfill applicants, and removing provision 305.66(g)(1) from the Texas Administrative Code. Although it may be obvious, one of the biggest ways that waste management can change is by reducing, reusing, and recycling.

It is implausible to assume that significant reform will occur in the matter of one legislative session. However, many state senators and other state representatives have expressed their concerns with the status quo of landfills. Furthermore, there is likely not one single answer to making the landfill permitting process better for all. Nonetheless, recognizing some flaws in the system is a big step towards actually implementing change. More active citizen participation and awareness will generate wiser results. It is neither effective nor appropriate to simply criticize the industry, government, or others involved in the landfill process. TCEQ is already making strides to improve and enhance the entire permitting process, such as optional pre-application meetings with the applicant.²²⁰ Although landfills are typically seen as the neighbor nobody wants to have, there are many benefits that landfills and the industry can offer to help ameliorate our current waste dilemma. Landfills can be a great source for recycling and

217. JDA RESEARCH, *supra* note 4, at 23.

218. *Id.*

219. *Id.*

220. TEX. COMM’N ON ENVTL. QUALITY, COMM’R’S WORK SESSION – DISCUSSION OF THE MUNICIPAL SOLID WASTE PERMITTING PROGRAM 2 (Nov. 1, 2018) (“Optional pre-application meetings provide an opportunity to establish program requirements and expectations, prior to application preparation, and results in higher-quality applications.”).

reusing items that can help our environment.²²¹

Notices of Deficiency serve a useful purpose, as they allow the applicant to address any application problems. However, one possible method of reform would allow a distinction between technical or minor deficiencies and serious gaps or errors in an application. Another proposal could include limiting the number of NODs allowed in an application, essentially drawing a line in the sand. Senator Lois Kolkhorst filed a bill that read TCEQ “shall deny a permit application the commission finds to be incomplete or inaccurate during technical review if the commission returned a previous version of the application to the applicant during technical review because the previous version was incomplete or inaccurate[.]”²²² Therefore, various organizations and constituents are pushing for Senator Kolkhorst to refile her bill this upcoming legislative session.

TCEQ states that the bifurcated process was intended to make the application process easier for applicants.²²³ However, the agency concedes that bifurcation has often required far more personnel and resources because they have to review the application twice, which can double the time of the application process.²²⁴ Arguments have been made that removing the bifurcated application will not only reduce the expense involved, but will also prohibit proposed landfill operators from applying for Parts I and II of the application before a municipality or county can prohibit the landfill location by ordinance.²²⁵ This would stop applicants

221. See Creede Newton, *Texas City with World's First Eco-friendly Landfill*, AL-JAZEERA (Sept. 16, 2016), <https://www.aljazeera.com/indepth/features/2016/08/texas-city-world-eco-friendly-landfill-160816094911055.html> [<https://perma.cc/9EMD-JDD8>] (“Denton’s landfill is special: It is the first in the world to employ a new technique for dealing with city waste that will combine established eco-friendly measures with ‘mining.’”); Jenny Webster Jurica, *Texas Disposal Systems is Changing the Reputation of Landfills*, TEXAS HILL COUNTRY (Sept. 14, 2017), <https://texashillcountry.com/texas-disposal-systems-changing-landfills/> [<https://perma.cc/E863-FYRX>] (“There’s no doubt about it: Texas Disposal Systems is changing the reputation of landfills. Utilizing programs that recycle and upcycle items that would normally be buried in the landfill, the TDS is the only landfill endorsed by the Sierra Club. Their goal . . . is to be stewards of the land and to give back to the community at every turn.”).

222. TEX. S.B. 551, 85th Leg., R.S. (2017).

223. JDA RESEARCH, *supra* note 4, at 12 (“This is an example of what TCEQ calls a bifurcated application, in which the applicant first seeks only a land use compatibility determination.”).

224. *Senate Committee on Natural Resources & Economic Development*, *supra* note 104.

225. See TEX. HEALTH & SAFETY CODE ANN. § 363.112(a) (requiring the governing body to specifically designate the area of the municipality or county in which the disposal of solid waste will not be permitted, in order to prohibit the processing or disposal of waste in certain areas).

from “beating the clock” on landfill permits to bypass local ordinances.²²⁶

Because there is no requirement that a potential purchaser be notified of a nearby landfill, some suggest that such notification should be implemented. This notification would allow those that have no problem with landfills to purchase the land as they please (and thus not contest any subsequent landfill expansions), while limiting the unfortunate situation where one unwittingly moves near a landfill.

Affected parties have also considered the idea of removing section 305.66(g) of the Texas Administrative Code. They argue that this provision is essentially a major loophole practically prohibiting landfill permits from ever being suspended. The language of the provision reads, in part, “[b]efore denying, suspending, or revoking a permit under this section, the commission must find: (1) that a violation or violations are significant and that the permit holder or applicant has not made a substantial attempt to correct the violations”²²⁷ The words “significant” and “substantial” are vague and perhaps the legislators used those words intentionally. Regardless, this statute makes it extremely difficult to temporarily stop a landfill owner or operator from continuing with their courses of action that have deleterious effects on the people and the environment.

From a national rather than statewide perspective, another suggestion is to implement new laws in the United States modeled after laws of other developed countries.²²⁸ The argument is that “the United States can combat its environmentally detrimental and costly waste problem by

226. See Letter from Tony Dale, Rep., State of Tex. H.R. Dist. 136, to Stephanie Bergeron Perdue, Interim Exec. Dir., Tex. Comm’n on Env’tl. Quality (May 30, 2018), in JDA RESEARCH, *supra* note 4, at 35–36 (“What is TCEQ’s policy on issuing landfill permits to applicants who have not yet obtained necessary local or special permits? . . . TCEQ rules require an applicant to obtain local floodplain development permits before TCEQ can declare an application technically complete Are those rules always followed?”).

227. 30 TEX. ADMIN. CODE ANN. § 305.66(g)(1) (2018) (Tex. Comm’n on Env’tl. Quality, Permit Denial, Suspension, and Revocation).

228. See Emilio Lamanna, *Note, The Wealth in Waste: America’s Ability to Enter the Waste to Energy Market by Embracing European Landfill Diversion, Waste Framework, and Renewable Energy Laws and Waste to Energy Initiatives*, 25 CARDOZO J. INT’L & COMP. L. 347, 349 (2017) (“Unlike the US, the European Union and its member states took a global leadership position in the battle for environmentally sound, sustainable waste management programs by incorporating landfill diversion laws, renewable energy requirements, and waste to energy (WtE) initiatives into their legal frameworks. . . . This discrepancy between Europe and the United States is due to the European Union’s strict legal Directives on waste management, sustainability, renewable energy resources, and a variety of national European green laws that foster the development of WtE programs.”).

adopting, within the bounds of the American Constitution, landfill diversion, waste disposal, and renewable energy laws and objectives similar to those instituted by the successful European Union Directives.”²²⁹ This is a much larger and far-reaching goal, but again it points to the need for landfill reform in America.

VII. CONCLUSION

Landfills have existed for centuries. Understandably, individuals located near them experience their negative effects and wish for their extinction. At times, landfills contaminate our groundwater, pollute our environment, decrease our property value, and endanger wildlife species. Conversely, landfills produce thousands of jobs, boost our economy, and help solve our nation’s expansive waste problem.²³⁰ In short, landfills remain a necessity in modern society. From a law and economics standpoint, they provide far more positive externalities than negative ones. With that being said, there is still plenty of room for progress to foster a cleaner, safer, and more efficient way to handle our waste.

Lawmakers must seek to strike a proper balance to allow for the development of municipal solid waste facilities while recognizing property rights from all viewpoints. Regardless of the current landfill permitting process, there are proactive steps individuals and communities can take to reduce our waste production. The more we reduce, reuse, and recycle our amounts of waste, the more we can help preserve and restore our beautiful Texas land. Reaching out to your legislators and sharing your concerns with them will encourage them to draft bills to help solve the challenges faced with permitting landfills. Eliminating the bifurcated application, limiting or reforming the NOD process, and holding any parties at fault accountable can create a positive impact on the landfill process.

The case studies surveyed above exemplify the complex procedures behind developing or contesting a landfill, and the time and expense involved. Given TCEQ’s high approval rate for municipal solid waste facilities, the public’s strong sentiments against landfills, and the perceived flaws within the permitting process itself, these indicators evince a need for

229. *Id.* at 350.

230. *MSW Management Market in U.S. to Reach \$25 Billion by 2024*, RECYCLING PRODUCT NEWS (Nov. 19, 2018), <https://www.recyclingproductnews.com/article/29517/msw-management-market-in-us-to-reach-25-billion-by-2024> [<https://perma.cc/6R2W-Z7TP>] (“The U.S. Municipal Solid Waste Management Market is set to grow from its current market value of more than \$17 billion to over \$25 billion by 2024 . . .”).

reform in the way Texas allows owners and corporations to develop landfills. Ideally, TCEQ, the public, and the waste industry can collaboratively produce wiser outcomes, even if there are some growing pains along the way.