

**STATE OF SOUTH DAKOTA
OFFICE OF HEARING EXAMINERS**

DANR 24-001

CITY OF MADISON PERMIT
APPLICATION TO CONSTRUCT AND
OPERATE A SOLID WASTE RESTRICTED
USE FACILITY

POTTERS' POST-HEARING BRIEF

COME NOW Karen Potter, Mark Potter, and Donita Potter (“Potters” or “Petitioners”), through undersigned counsel, and hereby respectfully submits this Post-Hearing Brief.

INTRODUCTION

The saying goes that a picture is worth a thousand words. That saying could not be truer in this case. Below is an aerial photograph depicting the hilly, wet, visually striking landscape that City of Madison has identified as the proposed site for a landfill many miles from its city limits.



(Exhibit 254 at p.5)

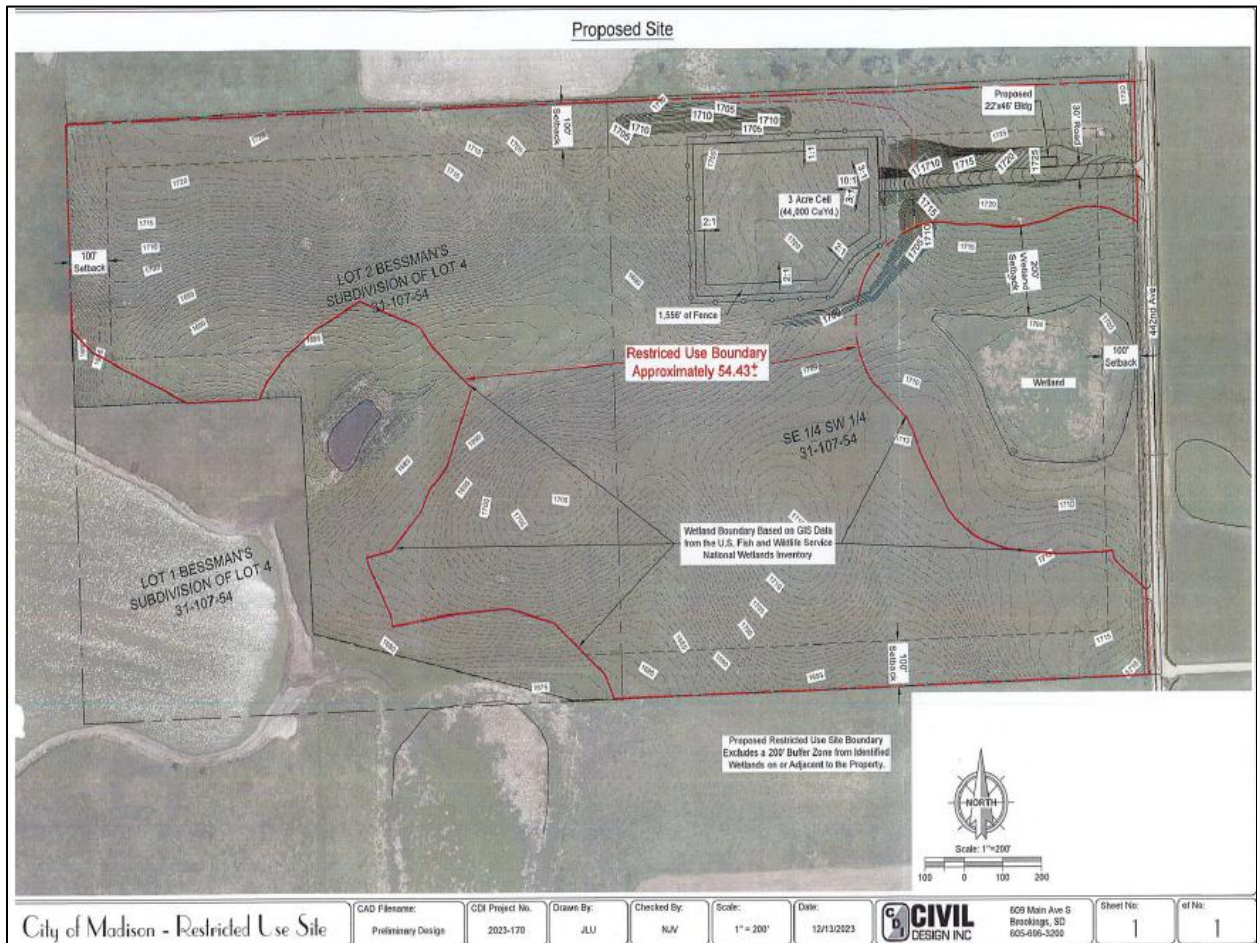
This matter involves City of Madison’s (“City”) application to the Department of Agriculture and Natural Resources (“DANR”) for a solid waste permit to construct and operate a new solid waste landfill site as far west outside City limits as possible, while technically remaining in Lake County, in the heart of one of North America’s most eco-sensitive areas—the Prairie Pothole Region. The region gets its name from the shallow wetlands that look like potholes. The Prairie Pothole Region is known for the wetlands, groundwater flow, and springs. It is also world renowned for its waterfowl and migratory bird habitat and flyway.

Below is a closer view of Schaefer Lake, as well as wetlands, floodplains, and water flows located upon the proposed site. Notably, the pond-like water feature shown below Schaefer Lake is one of the classic “prairie potholes” that scatter and interconnect throughout the countryside in the area.



(Exhibit 254 at p.6)

DANR's draft permit recommendation, prior to this contested case proceeding, included the below map from City depicting Schaefer Lake in the bottom left western edge of the property, the small body of water to the northeast of Schaefer Lake, wetlands to the southeast of Schaefer Lake, wetlands on the eastern edge of the property interconnecting underground with wetlands across the road, the hilly topography marked by contour lines, but neglects to identify floodplains that run through the middle of the property.



(Exhibit 103 at p. 11)

There is no hiding the water flow on and immediately around the proposed site. Petitioner Mark Potter testified at the hearing that the headwaters and specific area that marks the beginning of the Little Vermillion River, which itself feeds into the East Fork Vermillion River, has historical connotation to the Indian Trails and is referred to as “Waséoyuze.” Below is a picture taken immediately north of the proposed facility (on the left side of the picture), which shows water flow and drainage in multiple directions towards the bodies of water.



(Exhibit 254 at p. 9)

The headwaters of the Little Vermillion feed into the lakes at the top right side of the picture, including Silver Lake and Pedley Lake, and to the top left of the picture, Schaefer Lake.

Each of these pictures, as well as the drone videos (Exhibits 253, 1-6), tell more than a thousand words of any of these post-hearing briefs can possibly tell. These pictures demonstrate plainly that the proposed site poses serious threats to the environment in our State by allowing the dumping of known contaminants into a site that contains wetlands, surface water, shallow

groundwater, and extensive water flow that feeds into and interconnects to other wetlands, waters of the state, and the downstream watershed.

Under the first statute of SDCL Chapter 34A-6, which governs these solid waste proceedings, the Legislature recognized that “the disposal of large quantities of solid waste in this state will, in fact, impose additional burdens on the citizens of this state” and that, as a reason for promulgating the solid waste management laws, South Dakota needed “stringent standards for the proper collection and disposal of solid waste.” SDCL § 34A-6-1.1. To that end, “[t]he protection of the health, safety, and welfare of the citizens of this state and the protection of the environment require the safe and sanitary disposal of solid waste.” SDCL § 34A-6-1.2; Exhibit 262 at 1. These policies are expressly set forth to protect the health, safety, and welfare of the citizens by avoiding the pollution of the waters of our State such as those depicted below:



(Exhibit 254 at p. 7)

Petitioners are not opposed to landfills—or “restricted use sites” as they are referred to in this matter. Petitioners’ own expert, Lee Daigle, acknowledged the general importance of landfills for waste management and reduction. But the basic, threshold consideration for locating a landfill is ensuring the site is safe, suitable, and appropriate for the location and is otherwise in the interests of the public. In this instance, neither the facility nor the site is suitable for an ill-conceived, distant need, especially given the flawed and questionable circumstances in which consideration of this landfill has even made it to this point. Mrs. Schaefer reflected at the hearing with the following question: “Just because you can do it, should you do it?” After the hearing, it is clear that City cannot do it and should not do it. When the question involves the grave danger of potential environmental damage and contamination of our State’s natural resources, we cannot un-ring the bell once a proposed site is permitted.

At the hearing, City and DANR¹ failed to establish the two criterion City has the burden of proving: (1) that the facility will meet the requirement of SDCL §§ 34A-6-1.1 to 34A-6-1.38, and (2) is in the “public interest.” In fact, City and DANR scantily even try to make a case that the facility could be in the public interest. City and DANR failed to call a single citizen or a single resident from the City or area to speak about the public interest of the facility, they failed to call a single contractor who might possibly use the proposed facility, they failed to call the previous owner of the property (i.e., Wayne Bessman), they failed to call their own operator of the facility (i.e., Gary Gonyo), they failed to call their own City Administrator (i.e., Jameson Berreth), and they failed to call any of the City engineers involved in this matter (e.g., Ryan Hegg or Civil Design, Inc.). Moreover, Petitioners have shown that City has (1) misrepresented material facts

¹ Petitioners still maintain and do not waive their argument that DANR was not a proper party to the proceedings. *See* Motion for Reconsideration and Clarification of OHE’s Initial Actions Regarding the Foundational Construct of this Contested Action dated August 2, 2024, and __.

in its application and throughout the permitting process, (2) violated numerous environmental laws of the state, and (3) demonstrated a lack of character and competency to reliably carry out obligations imposed by SDCL §§ 34A-6-1.1 to 34A-6-1.38. City has repeatedly misrepresented to the public, its own commissioners, and even those in attendance at the hearing regarding its actions in seeking a permit in this matter.

City has also acted to change and amend the land deal City and statewide taxpayers have paid for, and attempted amendments to the permit application, contrary to a legal prohibition against application amendments after public notice of the underlying notice containing the secretary's recommendation. ARSD 74:27:08:19. City has shown that it is unqualified and untrustworthy in managing the proposed facility, especially one that is significantly impacted by the waters of our State.

Petitioners respectfully request that the Office of Hearing Examiners recommend the denial of City's permit application.

BACKGROUND

For decades, City leased land near Junius ("Junius Site") for the operation of a landfill used for the disposal of a variety of waste, including construction and demolition materials and so-called "restricted use" or authorized waste. HT 125:25-126:8; *see also* Ex. 222 (Klein Lease). Even though the existing facility still had many acres and potential decades left at the site, City Mayor Roy Lindsay ("Lindsay") claims that he began searching all of Lake County for a sizable parcel of real property that he could qualify and acquire for the City's siting, construction and operation of another landfill to bury and burn solid waste at another restricted use site. HT 84:23-85:5.

By January 13, 2023, Wayne and Dawn Bessman ("Bessmans") and Mayor Lindsay, reached agreement on principal terms of what would become a Contract for Deed ("Bessman

Contract”), with City buying 73.04-acres from Bessmans for use as a landfill. Ex. 225; Exs. 223-243. City agreed to pay Bessmans the sum of \$547,800 in three annual installments for the purchase of the Property. Ex. 237. On April 18, 2023, Bessmans signed the Bessman Contract. Ex. 237. However, Lindsay and Berreth kept that development secret from the public they serve, as well as the City Commissioners themselves. Exs. 223-247. On July 10, 2023, Lindsay publicly revealed at a City Commissioners meeting that he had been conducting his own land search and purported environmental diligence, throughout Lake County, and not even his fellow Commissioners knew the extent of his alleged actions. *See* <https://www.youtube.com/watch?v=gnzzOURkiJw&t=2984s> (July 10, 2023 City Commission Meeting).

On or about July 17, 2023, a few days after the execution of the Bessman Contract, City mailed a letter to Petitioner Karen and Lindon “Pete” Potter providing notice that City was planning to file a solid waste permit application with DANR on or before August 1, 2023. Ex. 100. On or about August 2, 2023, City executed and submitted an “Individual Permit Application” to DANR for authorization to construct and operate a so-called solid waste “restricted use facility” on the Property. *Id.* The application stated that the proposed site would be located near Winfred, South Dakota, about 12 ½ miles to the west of City. Ex. 100. Besides Winfred and Lake County itself, the nearest municipalities are Miner County, immediately adjacent to the proposed site, and the City of Howard, approximately 7 miles further west. The application stated that the site would accept “Trees and untreated wood waste,” “Construction and demolition debris,” “Furniture, mattresses, and similar wastes,” “Wood ash,” and “Waste tire storage” – up to 4,999 tons annually. *Id.*

One month later, on September 11, 2023, City submitted a second “Individual Permit Application” for a solid waste facility on the Property. *See* City Answer to Potter Petition, at ¶ 4. On November 1, 2023, DANR representatives Nicholas Burke and Jim Wendte traveled to the site and performed a short inspection of the premises for less than an hour, and it was so apparent from the inspection that the site was impacted by the waters of our State that they advised City the application would be rejected unless they reduced the size of the proposed site. HT 209:7-16; 211:17-23. On December 14, 2023, City mailed a letter to DANR with a revised map to consider a reduced 54.43 acres of land and not the original 73.04 acres that is contemplated in the Bessman Contract (Ex. 100), and in City’s grant application for, and grant award of \$109,560 from the Solid Waste Management Program, as administered by the Board of Water and Natural Resources. Ex. 239.

Thereafter, at an unknown date, time, and place, DANR staff reached a tentative decision regarding City’s permit applications and was prepared to tentatively recommend to BME that City’s second application be conditionally permitted. Exs. 100, 205. Before doing so, DANR extended to City a two-week opportunity to review, consider, discuss and comment upon DANR’s draft. Ex. 205. DANR then attempted to provide public notice of a draft, tentative permit recommendation that allowed the burying, burning, or recycling of the following solid waste at the proposed Winfred site: construction and demolition debris, trees and untreated wood, waste tires, miscellaneous wastes such as carpets, chairs, couches, mattresses, linoleum, glass, and similar items, and ash. Ex. 102, 103. By its Type III categorization, City would be allowed to accept up to 4,999 annual tons of the above waste at the proposed Winfred site. *See id.*

In March of 2024, Potters and, separately, Petitioner Patricia Schaefer, timely filed Petitions for contested proceedings. *See* Petitions of Schaefer and Potters.² Potters filed their Petition on March 13, 2024. *See* Potters’ Petition (filed). Potters’ petition met all legal requirements and, explicitly, requested a prayer to “immediately notice and commence contested case proceedings.” *Id.* In their Petition, Potters urged proper, timely, and impartial administration of the contested proceedings and their legal rights were ignored. *See* Potters’ Petition.

From October 27 through October 30, 2025, the Office of Hearing Examiners, Chief Judge Catherine Williamson presiding, conducted a hearing. Mayor Roy Lindsay testified on behalf of City. Nicholas (“Nick”) Burke and Steven Kropp testified on behalf of DANR. Petitioners Karen Potter, Donita Potter, Mark Potter, and Patricia Schaefer testified in support of their respective Petitions, as well as landowner Jason Terwilliger, landowner Jim Casanova, former City of Madison Mayor Marshall Dennert, former City of Madison Commissioner Adam Shaw, Miner County Commissioner Alex Protsch, Environmental Scientist for the Surface Water Quality Program Shannon Minerich, Potters’ expert witness Lee Daigle, and adverse witnesses City Administrator Jameson Berreth, City Administrative Assistant Roxie Ebdrup, and DANR-WMP’s Jim Wendte.

The hearing was bookended by two procedural violations. At the very beginning of the hearing, DANR attempted to circumvent the expired County approval for the facility, which expiration was conceded on the record by City and DANR, by introducing an amendment to the proposed permit to require approval as a condition. HT 27:2-33:9. Then, at the end of the hearing, DANR attempted to modify its own published permit application, which again is prohibited by law, by excluding “the floodplain that is centered in the middle of the property.” HT 830:14-16;

² Patricia Schaefer filed her Petition on March 4, 2024. Potters filed their Petition on March 13, 2024.

HT 829:18-832:22. As DANR representative, Mr. Wendte, conceded: “I can assure you this is unusual. We have never taken this type of stance or tentatively recommended this kind of language for a permit like this, for a restricted use site, for a C&D site. This is unusual.” HT 833:18-21. While each of those two procedural flaws are fatal to granting the permit application, they are also emblematic and speak to the overall unsuitability of the proposed site and facility.

ANALYSIS

Petitioners incorporate by reference all their pleadings, filings, and all prior motions and related papers in support of its Post-Trial Brief.³

I. STANDARD AND BURDEN OF PROOF.

a. SDCL § 34-6-1.13.

The legal standard for this contested case proceeding is set forth in SDCL § 34A-6-1.13. Under that statute, there is first a two-part test that the City has the burden of proving: “[t]he board may issue a permit in a contested case on the basis of information in the application itself or on the basis of evidence received at a hearing, if any, on the matter only if the board finds that the facility will meet the requirements of §§ 34A-6-1.1 to 34A-6-1.38, inclusive, and is in the public interest.”⁴ In other words, City must show that the facility (1) will meet the requirements of §§ 34A-6-1.1 to 1.38, and (2) the facility is in the public interest.” City is incorrect in its Brief (at p.3) that Petitioners have the burden of making this showing. If City cannot make this showing, its permit must be denied because, per the statute, the Board may only issue a permit if those two parts of the test are satisfied.

³ Petitioners respectfully renew, reassert, and preserve all prior dispositive and non-dispositive motions, requests and prayers for relief, with related communications and filings thereto, as part of the official record herein.

⁴ DANR acknowledges (at p.8) City has the burden of proving this test. See DANR Brief at p. 8 (“The City of Madison, as the applicant, has the burden of proving that its Application complies with all requirements of statute and administrative rule and should be granted by the Board.”)

Even if City could show that the facility meets the legal requirements and is in the public interest, the Board may still deny the permit if Petitioners satisfy their burden of proving one of the five bases for denying a permit under SDCL § 34A-6-1.13. “The board may deny any permit in a contested case if it finds that the applicant, or any officer, director, or manager of the applicant . . . or other person conducting or managing the affairs of the applicant or of the proposed permitted premises in whole or part:

- (1) Has misrepresented a material fact in applying to the board for a permit;
- (2) Has been convicted of a felony or other crime involving moral turpitude;
- (3) Has violated the environmental laws of any state or of the United States;
- (4) Has had any permit revoked under the environmental laws of any state or the United states; or
- (5) Has otherwise demonstrated through previous actions the lack of character or competency to reliably carry out the obligations imposed by §§ 34A-6-1.1 to 34A-6-1.38.

“Whenever, under the provisions of this chapter, a person is required to find, demonstrate, show, or otherwise establish a fact, that fact must be established by a preponderance of the evidence.” ARSD § 74:09:01:16. “‘Preponderance of the evidence’ is defined as the ‘greater of weight of evidence.’” *Pieper v. Pieper*, 2013 S.D. 98, ¶ 22, 841 N.W.2d 781, 787.

b. Variance.

DANR has cited in its brief to a State variance contained in the solid waste regulations. To receive a variance, the owner or operator must demonstrate “that the facility location will not pose a hazard to human health or degrade the environment and will comply with other existing state, local, and federal requirements.” ARSD 74:27:11:09. To that end, the variance standard, which should not be used in this instance, does not provide DANR or the Board with unfettered discretion to grant variances to an applicant. Indeed, the burden is on applicant to first show that

the facility location will not pose a hazard to human health or degrade the environment and, second, that the variance will still comply with all other existing laws and requirements. At minimum, City needs to introduce evidence that the facility location will not pose a hazard to human health or degrade the environment, and it has failed to satisfy its burden of making that introducing such evidence. As shown below, the facility location does pose a hazard to human health and the degradation of the environment and does not satisfy all existing laws and regulations.

Moreover, to the extent City or DANR seeks a variance of any County rules or regulations, the applicable variance standard is contained within Lake County Ordinances Article I, Section 103 and Article II for the definition of “Conditional Use.”⁵ Neither City nor DANR have attempted to address that variance standard and, thus, any attempt to vary the County requirements are waived.

II. THE PERMIT APPLICATION FAILS PROCEDURALLY WITHOUT NEED TO CONSIDER SDCL § 34A-6-1.13.

City’s application fails as a matter of procedure before even reaching the contested case analysis set forth in SDCL § 34A-6-1.13. First, DANR has effectively withdrawn the recommendation that was published under SDCL 34A-6-1.14 by admitting that the published recommendation is flawed and should not be granted and attempting to introduce a new recommendation at the end of the hearing recognizing the 100-year floodplain that runs through the center of the proposed site (HT 829:18-832:22), which cannot be properly considered by the OHE or the Board. Second, under ARSD 74:27:08:19, City also cannot legally seek an amendment

⁵ As it applies to any Lake County rule, the Lake County Zoning Ordinance definition for variance must be followed. See Section 103 (“Wherever the requirements of this Ordinance are at variance with the requirements of any other lawfully adopted rules, Ordinances, ordinances, deed restrictions, or covenants, the most restrictive or that imposing the higher standards, shall govern.”). The Lake County definition for “variance” is provided for in Article II. Lake County requires that any variance must “not be contrary to the public interest and where, owing to conditions peculiar to the property and not the result of the actions of the applicant, a literal enforcement of the ordinance would result in unnecessary and undue hardship.”). Lake County’s variance is the most restrictive and higher standard, which applies to any variance, and Lake County has discretion over its own variances, not City or DANR.

of its own permit application to request the new recommendation by DANR. Third, valid county approval by Lake County, which City lacks, was required as part of its complete, certified and executed application prior to issuance of a permit pursuant to SDCL § 34A-6-103. Fourth, DANR failed to properly publish the Secretary’s recommendation pursuant to ARSD 74:27:08:16. Fifth, the contested case hearing was not conducted within 60 days of the last filed Petition.⁶

a. DANR Modified its Published Recommendation in Violation of SDCL § 34A-6-1.14.

Once DANR has made a recommendation regarding a solid waste permit and that recommendation has been published in a newspaper, DANR cannot make a new recommendation without starting the process over. Yet, that is precisely what DANR attempted to do at the end of the hearing. HT 829:18-832:22. DANR attempted to introduce new language to the proposed permit to require further “delineation” of the floodplains that are “centered in the middle of the property.” HT 830:13-17. Even Mr. Wendte conceded this was unusual and had never happened before: “I can assure you this is unusual. We have never taken this type of stance or tentatively recommended this kind of language for a permit like this, for a restricted use site, for a C&D site. This is unusual.” HT 833:18-21.

Under SDCL § 34A-6-1.14, the secretary for DANR is required to publish the permit recommendation in at least one official newspaper of the county in which the facility is located.

The board shall promulgate rules pursuant to chapter 1-26 to specify the procedure for permit issuance, amendment, suspension, revocation, and reinstatement. The rules shall address application form and contents; application completeness review; departmental investigation and evaluation of applications; **the form, content, and method and timing of publication** or other service of the notice of application and departmental recommendation; **intervention by interested parties**; scheduling and conduct of hearings; prehearing discovery; continuances; and other matters as necessary to effectuate the permitting process. The secretary may recommend approval, denial, or approval with such terms, conditions, or modifications as the

⁶ The fourth and fifth arguments were made in Potters’ motion for summary judgment. Potters’ renew their argument to the extent necessary for preservation of their arguments.

secretary deems necessary to comply with §§ 34A-6-1.1 to 34A-6-1.38, inclusive, and to protect the public interest. **A notice of application and the recommendation of the secretary shall be published in at least one official newspaper of the county in which the facility is located.** A hearing may be held only if a petition requesting a hearing is filed by the secretary, any member of the board, the applicant, or an interested person **within thirty days** after the publication of the notice and recommendation. If a petition for hearing is not timely filed, the recommendation of the secretary becomes the final decision on the application. If an uncontested recommendation is for approval or conditional approval of the application, the permit shall be issued by the secretary consistent with the secretary's recommendation.

Two things can happen after the secretary publishes the recommendation. Either the recommendation is uncontested and, in that instance, the recommendation becomes final, or the recommendation is contested and BME either issues or denies the permit after a contested case hearing. To be sure, “if no petition for contested case is timely filed, the recommendation of the secretary becomes the final determination on the application.” SDCL § 34A-6-1.13. “If an uncontested recommendation is for approval or conditional approval of the application, the permit shall be issued by the secretary consistent with the secretary’s recommendation.” *Id.* In other words, if the secretary recommends denying the permit, then that recommendation of denial becomes the final determination if uncontested; if the secretary recommends issuance of the permit, then the permit is issued without further review by BME if uncontested. If the recommendation is contested, “[t]he board may issue a permit in a contested case” or it “may deny any permit.” *Id.*

Importantly, neither SDCL § 34A-6-1.13 nor the constitution provides DANR or BME with the power or authorization to modify the terms and conditions of the permit after public notice and a public hearing. Such an action violates the law and the due process or equal protection considerations of our constitution. Under the law, if DANR’s recommendation is uncontested, the published recommendation becomes the final determination by law. *See* SDCL § 34A-6-1.13. If

the recommendation is contested, then two things can happen: BME can either—and only—issue or deny the permit recommendation. *Id.* Allowing DANR or BME to change the permit recommendation and modify the actual proposed permit after public notice of the same would defeat and circumvent the very need for public notice in the first place and defy all ordinary due process or equal protection considerations.

At the hearing, Potters highlighted and elicited overwhelming evidence that the proposed facility recommended and published by DANR would violate existing environmental law due to the presence of 100-year floodplains that were not accounted for in the site map for the landfill, as well as significant water flow, surface water, drainage, run on and off, and surrounding wetlands, flowing in all directions, including a substantial flow south and to the West. At the hearing when it became overwhelmingly evident that the facility would violate environmental laws and jeopardize the health, welfare, and safety of the public, DANR pivoted and attempted to modify the permit recommendation after the hearing had begun and, in fact, after both City and DANR had rested. HT 829:18-832:22. By doing so, and in legal effect, DANR abandoned its recommendation and otherwise withdrew its original, publicly noticed Secretary's recommendation in the Madison Daily Leader.⁷ DANR, which was found to be an indispensable and adverse party under these proceedings, is not lawfully authorized to make a new recommendation after the publication of the recommendation and certainly not during the contested case proceedings. Thus, the permit should be denied.

Potters anticipate City and DANR may advance an incorrect argument that SDCL § 34A-6-1.13 allows for new terms and conditions after a recommendation has been published. The first line of SDCL § 34A-6-1.13 reads: “The board or the secretary, after public notice and opportunity

⁷ Potters maintain that the original publishing of the Secretary's recommendation did not comport with the requirements of ARSD 74:27:08:16

for public hearing, may issue a permit with reasonable terms and conditions for installation, establishment, modification, operation, or abandonment of a solid waste facility.” This language does not allow further, retroactive, or other amendment, modification, change, or revision to the recommendation. Instead, and by its plain language, it states in simple terms that the board of secretary may issue a permit *with* reasonable terms and conditions. That is, a permit may be issued by the Secretary or the Board that contains reasonable terms and conditions—not that the board or the secretary may impose or create new terms. To be sure, the published recommendation was required to “specifically state all proposed terms and conditions.” ARSD 74:27:08:15. There are no do-overs during the contested case proceeding. As such, OHE should reject any arguments that allow DANR to modify the terms of the recommendation that was at issue in the contested case proceeding.

Even if the revised permit is allowed to be considered by OHE and the Board, it does not resolve the numerous issues with the proposed site discussed in the brief below that are not cured by DANR’s Hail Mary attempt at the end of the hearing to address the 100-year floodplains that have been known to DANR since prior to this contested case proceeding and prior to even publishing the draft recommendation. Nick Burke e-mailed Miner County Chairman for the Miner County Board of Commissioners on December 6, 2023, “We are aware of the presence of the 100-year floodplain within the boundaries of the proposed site.” Ex. 203. Likewise, Petitioners also highlighted in their sworn Petition executed March 13, 2024, that the proposed site was “within a 100-year floodplain.” Petition at ¶¶ 5, 21, 22, and 25. Even more, Petitioners explicitly testified in their verified Petition as to the significant “water flow from the east wetland to the westerly wetland.”

Finally, the introduction of amended permit conditions and secretary's recommendation at the conclusion of the contested hearing, long after the original recommendation was published, long after the contested case proceeding was commenced, long after discovery in the matter had been conducted, and after both City and DANR had rested violates the standard for procedural due process. "To establish a procedural due process violation, a plaintiff must demonstrate that he [or she] has a protected property or liberty interest at stake and that he [or she] was deprived of that interest without due process of law." *Id.* (quoting *Morris Fam., LLC ex rel. Morris v. S.D. Dep't of Transp.*, 2014 S.D. 97, ¶ 14, 857 N.W.2d 865, 870). Clearly, the standards for due process apply to a contested case proceeding before the Office of Hearing Examiners. *See Holborn v. Deuel Cnty. Bd. of Adjustment*, 2021 S.D. 6, ¶ 28, 955 N.W.2d 363, 376 ("We believe that the due process standard . . . applies to judicial officers as well as those who are making quasi-judicial administrative decisions."); *Consol. Edison Co. of New York v. Nat'l Labor Rel. Bd.*, 305 U.S. 197, 229-30 (1938) ("this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."). Ultimately, if the revised and untimely recommendation is considered, it will be in violation of Petitioners' due process rights.

b. Under ARSD 74:27:08:19, City Cannot Seek an Amendment of its Own Permit Application.

Similar to DANR's inability to modify or amend its recommendation after the recommendation has been publicly noticed, City is also prevented by law from modifying its application to seek any similar conditions to those that were recommended by DANR at the beginning or the end of the contested case proceeding. ARSD 74:27:08:19 provides, "The applicant may not change or amend a permit application after the publication of the notice

containing the secretary's recommendation on the application." Thus, City is also stuck with its original (now expired) application once the secretary has made a recommendation on the application and has public noticed said recommendation on the application. SDCL 34A-6-103. There exists no legal authority supportive of the DANR's or City's positions.

c. City does Not Have Valid County Approval Pursuant to SDCL § 34A-6-103.

City is required to have valid county approval *prior* to the issuance of a permit. SDCL § 34A-6-103 provides:

Any application to the Board of Minerals and Environment or the secretary for a new permit or first authorization to operate under a general permit for a facility for the transportation, storage, treatment, or disposal of solid waste or medical waste pursuant to this chapter shall include a resolution by the governing body of the county in which the facility is to be located approving the proposed facility. **Approval by the county within no more than twenty-four months before the issuance of the new permit or first authorization by the Board of Minerals and Environment or the secretary is a condition for the issuance of the permit or authorization.** Approval granted under this section may only be rescinded by the county before the new permit or first authorization is issued and only if a significant change in the size, purpose, or location of the proposed facility has occurred.

City obtained approval from Lake County on September 5, 2023.⁸ Ex. 100 at p. 10 (Resolution 2023-15). However, the city approval expired on its own terms on September 5, 2025, prior to the date of the contested case proceeding, and entirely consisted with the law of our State. *See id.*; *see also* HT 27:2-28:24. Prior to the resolution's expiration, City did nothing. Recognizing City's default and defective application, DANR attempted to circumvent the requirement by proposing a modification to the permit at the very beginning of the hearing.

Mr. Blair: Your Honor, in reviewing in our preparation for hearing, we noticed an issue with the draft permit. The issue is that there is a statute, 34A-6-103, it's in the red-lined version of the permit. It requires County approval as to the operation. And the City obtained Lake County approval but the statute requires that approval within 24 months of the permit being issued. We are outside that 24 months now. I believe it was September of '23 that the City obtained County approval.

⁸ Potters objected and argued against any approval by Lake County.

So in recognizing that issue, what the Department has done is created an amended draft permit that incorporates a condition that would require the City to go back to the County and obtain or renew that approval. The statute talks about the County – the statute talks about the County approval can only be not renewed or rescinded, fi you will, for changes such as siting or substantive changes in the proposed operation. That’s my paraphrase; I don’t have the working of the language exactly memorized.

So we incorporated this condition that ultimately the draft permit would go to the Board for the Board to impose that the City would have to go back and obtain that County approval before operating under the permit.

So we would intend to offer that as an exhibit. I apologize, that was a late coming exhibit. It substantively otherwise doesn’t change the draft permit. There are some changes to the front page, recognizing that this is a permit that would be issued by the Board, not the Secretary, and some adjustments to the date and signature line because of that. And so we would like to offer that as an exhibit, and certainly lay testimony for that and the reasons for it. And there is also – I have also provided a clean copy.

And then ultimately it would be our request that you consider as part of the recommendation the amended draft permit when you make your proposed decision to the Board.

HT 27:2-28:10. To avoid any doubt, DANR specifically recognized that “the original Lake County approval effectively expired.”

1.11 Special Condition -- Statutory Reference SDCL 34A-6-103 – County Approval
SDCL 34A-6-103 requires county approval as a condition for the approval of a solid waste permit. The original Lake County approval for the restricted use site authorized by this solid waste permit was granted on September 5th, 2023. SDCL 34A-6-103 also states that county approval cannot occur more than 24 months before the issuance of a new solid waste permit. Therefore, the original Lake County approval effectively expired. The city of Madison is not authorized to implement any activity authorized by this solid waste permit until a second approval is obtained from Lake County. Lake County approval in the form of a resolution must be documented in writing to the DANR-WMP before the city of Madison can implement any activity authorized by this solid waste permit.

(DANR Post-Hearing Brief, Attachment A at p.3)

However, the fatal procedural flaw of DANR’s attempt to circumvent the expired County resolution is that SDCL § 34A-6-103 requires county approval be a condition prior to the issuance

of the permit.⁹ In that way, the condition for County approval cannot be a *condition* of the permit itself. Indeed, “[a]pproval by the county . . . is a condition for the *issuance* of the permit or authorization.” See SDCL § 34A-6-103. The Board’s regulations also confirm that this approval is a required precondition for granting any permit. ARSD 74:27:09:03 requires that any solid waste disposal permit application include “(l) Certification of compliance with local requirements, including planning and zoning, required by § 74:27:08:04” and “(m) Resolution of county approval as required by SDCL 34A-6-103.” Consequently, City and DANR cannot circumvent that rule by attempting to include the county approval as a condition of the permit. The permit cannot be granted period, with any conditions, unless City has approval from the City.

Because City lacks effective approval from County for the proposed facility, the permit must be denied as a matter of law because it does not satisfy all laws and regulations of our State.

d. DANR Failed to Properly Publish the Secretary’s Recommendation Pursuant to ARSD 74:27:08:16.

Potters renew their argument from their earlier summary judgment filing that City’s permit application be denied as a matter of law because DANR failed to publish proper notice of DANR’s permit recommendation pursuant to the strict requirements set forth in ARSD 74:27:08:16.

Under ARSD 74:27:08:16, the secretary of DANR is required to publish a notice of the secretary’s recommendation on the permit application in an official newspaper in the county where the site is to be located with specific, detailed information regarding the permit recommendation so that the public can be adequately put on notice. ARSD 74:27:08:16 provides:

Public notice of secretary’s recommendation. The secretary shall instruct an official newspaper in the county in which the facility is to be located to publish a notice of the secretary’s recommendation on the permit application, amendment, or renewal. The secretary shall mail the instructions to the newspaper at the same

⁹ SDCL § 34A-6-103 also requires county approval prior to “first authorization,” however this contested case proceeding involves the issuance a new permit and not first authorization. Thus, the authorization language is irrelevant to this proceeding.

time the recommendation is mailed to the applicant. The secretary shall publish the notice once. The notice shall include the name and address of the applicant; the location and nature of the facility; the type, source, and amount of waste to be handled by the facility; the secretary's recommendation on the permit application including explanations and any proposed permit conditions; and information on intervention procedures. It shall also state that the recommendation will be the final decision on the permit application if a petition for hearing is not filed within 30 days after the publication of the notice of recommendation.

This notice requirement is not optional. At the hearing, DANR introduced a public notice document purportedly circulated in the Madison Daily Leader. Exhibit 106. However, neither DANR nor City provided a copy of the actual public notice as it appeared in the Madison Daily Leader.

DANR failed to publish all the required disclosures under ARSD 74:27:08:16. Among the omissions, DANR failed to publish the Secretary's actual draft, tentative recommendation to City. The regulation does not require, mandate, or contemplate a paraphrased, editorialized or shaded version of the Secretary's draft, tentative recommendations. The attempted notice subjectively categorized conditions but did not include any of the five pages of conditions or explanations that were included in the secretary's tentative, draft recommendation. Regardless of how many conditions there were or how much publication space the notice would have required in the newspaper, the secretary was required to publish the secretary's recommendation. Additionally, the public notice also omitted required details such as failing to provide the address for the applicant as required under the rule and failing to provide the source and amount of waste to be handled by the facility.

For the above reasons, Petitioners respectfully request reconsideration of OHE's prior Order on this issue and request that City's permit be denied for failure to provide proper notice under ARSD 74:27:08:16.

e. **Failed Contested Hearing 60-Day Timing Requirements Mandates Denial of Permit.**

Potters renew their argument from their earlier summary judgment filing that City’s permit application be denied because the contested case proceeding was not noticed for hearing within the timeframes required by South Dakota law. Upon Potters’ filing of the Petition, the contested case proceeding was required to be immediately scheduled. *See* ARSD 74:27:08:18; *see also* Exhibit 211 (Potter Petition).

Under ARSD 74:27:08:18, “[t]he board shall schedule a hearing on the permit application upon receipt of a petition complying with the requirements of chapter 74:09:01.” Second, “[t]he hearing shall be held no later than 60 days after the receipt of the last timely petition unless a later hearing date is agreed to by all parties, or as ordered by the board.” *Id.* Neither happened.

Petitioners Schaefer and Potters served and filed Petitions on March 4, 2024, and March 13, 2024, respectively, contesting the secretary’s recommendation to grant the permit with conditions. Potters requested in their “Prayer for Relief” to “[i]mmediately notice and commence contested case proceedings,” “[o]rder and host a case management conference, and issue a Hearing Schedule,” and consider addressing up-front anticipated discovery needs, among other requests. The hearing period expired May 12, 2024, sixty days from when the Potters filed their Petition on March 13, 2024.

DANR mailed an untimely notice on June 17, 2024 (and thus received by Potters in the mail a few days later), advising BME “scheduled a case hearing in the above referenced matter to be held on Thursday, July 18, 2024.” *See* Notice of Contested Case Hearing. This notice did not constitute an “order from the board” regarding the scheduling of the hearing. In fact, there is no documentation or record of any order having occurred within 60 days of the last filed petition. To be sure, the date of the letter from *DANR* on July 18, 2024, was 126 days after the last filed petition.

Under the law, the contested hearing was to have been immediately scheduled, and timely notice should have been promptly served, thus allowing the parties sufficient time to engage in and conduct the hearing within the 60-day timeframe. Petitioners respectfully request reconsideration of OHE's prior Order on this issue and recommend the denial of City's permit application.

III. THE PERMIT APPLICATION FAILS UNDER SDCL § 34A-6-1.13.

This contested case proceeding is guided by SDCL § 34A-6-1.13, which sets forth the grounds for issuance of a solid waste permit and the separate grounds for denial. City has the burden of demonstrating that the permit should be issued. Petitioners' burden is to set forth any of the separate listed grounds for denial of the permit.

The operative statute, SDCL § 34A-6-1.13, provides:

The board or the secretary, after public notice and opportunity for public hearing, may issue a permit with reasonable terms and conditions for installation, establishment, modification, operation, or abandonment of a solid waste facility. After publication of the secretary's recommendation on a permit application as provided for under § 34A-6-1.14, if no petition for contested case is timely filed, the recommendation of the secretary becomes the final determination on the application. If an uncontested recommendation is for approval or conditional approval of the application, the permit shall be issued by the secretary consistent with the secretary's recommendation. The board may issue a permit in a contested case on the basis of information in the application itself or on the basis of evidence received at a hearing, if any, on the matter only if the board finds that the facility will meet the requirements of §§ 34A-6-1.1 to 34A-6-1.38, inclusive, and is in the public interest.

The board may deny any permit in a contested case if it finds that the applicant, or any officer, director, or manager of the applicant, or shareholder owning twenty percent or more of its capital stock, beneficial or otherwise, or other person conducting or managing the affairs of the applicant or of the proposed permitted premises in whole or part:

- (1) Has misrepresented a material fact in applying to the board for a permit;
- (2) Has been convicted of a felony or other crime involving moral turpitude;
- (3) Has violated the environmental laws of any state or the United States;

- (4) Has had any permit revoked under the environmental laws of any state or the United States; or
- (5) Has otherwise demonstrated through previous actions the lack of character or competency to reliably carry out the obligations imposed by §§ 34A-6-1.1 to 34A-6-1.38, inclusive.

For the purpose of this section, the conduct and reputation of any owner or proposed manager or operator may be imputed to the applicant.

SDCL § 34A-6-1.13.

a. City Failed to Satisfy its Burden of Demonstrating Issuance of Permit Under SDCL § 34A-6-1.13.

City had the burden at the hearing to demonstrate that the proposed restricted use site facility (1) complied with the requirements of §§ 34A-6-1.1 to 34A-6-1.38, inclusive, and (2) is in the public interest.

1. City Failed to Comply with Requirements of §§ 34A-6-1.1 to 34A-6-1.38

City failed to establish by a preponderance of the evidence that it complied with the requirements of SDCL §§ 34A-6-1.1.

First, City's application was incomplete, inaccurate, unsigned, and not certified. As conceded by DANR, City did not accurately set forth in its application (1) the existence of wetlands, (2) 100-year floodplains, and (3) surface waters in its application. *DANR Proposed FOF No. 12, 14, 16, 27*. Contrary to any assertion by City or DANR, these were not harmless errors. City's failure to identify the existence of wetlands, floodplains, and surface waters, which are plainly visible to the naked eye and are identified on the relevant maps that City should have reviewed as part of its due diligence, is a fundamental underpinning of this entire contested proceeding and highlights City's utter lack of due diligence and disregard for the safety, welfare, and health of the citizens of our State. It also highlights City's disregard for attempting to qualify and locate a site the environmental considerations and laws of our State. Below is a portion of the

application where City checked “no” for all of the questions relating to the location of the site and its proximity to water:

1.11	Is the site located:	Yes	No
	In a wetland, as defined in ARSD 74:27:07:01?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
	Within 200 feet of surface water (excluding wetlands) as defined by ARSD 74:51:01:01?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
	Within 1,000 feet of any occupied dwellings, without written permission from owner(s)?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
	Within 100 feet of a property boundary, without written permission from adjacent property owner(s)?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
	Within 1,000 feet of any private or public well which supplies drinking water for human consumption?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
	Where the depth to an aquifer, as defined by ARSD 74:54:02:01, is less than 10 feet?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
	Within a 100-year floodplain?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
	Where the primary subsurface material is sand or gravel as determined by the Unified Soil Classification System?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
	In an area that adversely affects wildlife, recreation, aesthetic value of an area, or any threatened or endangered species?	<input type="checkbox"/>	<input checked="" type="checkbox"/>

(Ex. 100 at p.5)

Second, City did not adhere to the policy set forth in SDCL § 34A-6-1.2 regarding solid waste management to reduce reliance upon land disposal of solid waste. In this instance, and as addressed in more detail in the brief below, City had an opportunity to stay at the existing landfill in Junius, which had more acres for new cells, and instead abandoned that site and applied for a new landfill in contravention and without consideration of the policy to reduce the reliance upon new landfills. Mr. Berreth testified that he could not recall if he ever knew about this policy. HT 751:17-18.

Third, City cannot operate the restricted use site without being in violation of ARSD 74:27:11:03, which states that “[f]acilities shall not be located within the boundaries of a 100-year floodplain.” DANR conceded at the hearing that the permit that it recommended by publication allows for facilities to be located within the 100-year floodplain.

Fourth, City would not be compliant with “all applicable state, federal, and local laws and ordinances” if it was issued a permit because it does not have active and valid authorization from the County. See DANR Post-Hearing Brief, Attachment A at p.3 (conceding that County authorization has expired).

Fifth, City constructed and altered a site without a permit in violation of SDCL § 34A-6-1.4. Specifically, City engaged in trenching, tilling, separating the land, using heavy equipment, and planting thousands of trees at the proposed site as part of its construction of the same. HT 775:11-777:20.

Sixth, City completely failed and disregarded the legal obligation to perform soil borings as required by regulations promulgated under SDCL § 34A-6-1.6. ARSD 74:27:12:04 (“The applicant shall locate soil borings to best represent geologic conditions at the site.”). Mayor Lindsay acknowledged that the Bessmans authorized City to take soil samples as early as 2022. Ex. 223 (“He said we can do soil samples if we need to determine if it is compatible for an RUS.”).

From: Roy Lindsay <roy.lindsay@cityofmadisonsd.com>
Sent: Monday, October 24, 2022 4:07 PM
To: Jameson Berreth <jameson.berreth@cityofmadisonsd.com>
Subject: Re: Possible Restricted Use site
I just talked to Wayne. Yes he is interested in selling it. He would want to do it on a Contract for Deed to spread out his Capital gains taxes. He said we can do soil samples if we need to determine if it is compatible for an RUS. He said he was going to start out with an asking price that is high (\$8500) per acre and let us come back with our figures. He said he hasn't said anything to his tenant about not having it to rent next year. I told him we probably wouldn't be doing anything with it to change anything for at least another year so that isn't a problem. I told him I would talk with you and the commission and get back to him.

(Ex. 223)

Yet, Mr. Burke on behalf of DANR testified that no soil samples or borings were taken at the site. HT 329: 4-15. Not only is the failure to take any soil samples or borings fatal to the application, but it emphasizes the lack of due diligence to determine the suitability for the proposed site. Even Mayor Lindsay, who was City’s only witness at the hearing, testified that the failure to conduct soil borings was an “oversight”:

Attorney Scott: [W]hy wouldn’t the City do borings?

Mayor Lindsay: Oversight.

Attorney Scott: What does that mean?

Mayor Lindsay: That means at that point in time we just did not do them.

Attorney Scott: Two years ago? What do you mean you don't do them?

Mayor Lindsay: I said we didn't do them.

Attorney Scott: Why?

Mayor Lindsay: I don't have an answer for you.

Attorney Scott: Who would?

Mayor Lindsay: I can't answer that, either.

HT 125:13-24.

2. *The Facility is Not in the Public Interest*

In addition to having the burden to show that it could meet all the requirements of SDCL §§ 34A-6-1.1 to -1.38, which it did not do, City also had the burden to demonstrate that the landfill is in the “public interest.” City failed to meet its burden at the hearing. In fact, City did not even attempt to introduce evidence that the landfill is in the public interest.

i. Public Interest Standard.

The phrase “public interest” is not defined in SDCL Chapter § 34A-6. However, the phrase has been addressed by the South Dakota Supreme Court in *Matter of SDDS, Inc.*, 472 N.W.2d 502 (S.D. 1991). Neither City nor DANR cite to this case in their briefs. In *SDDS*, the Board generically determined that “[g]ranting the Permit is in the public interest.” *Id.* at 512. The Supreme Court found that this generic finding was “not detailed enough to enable a reviewing court to determine the grounds on which the decision was made” and, therefore, remanded the decision to the Board for more detailed findings. *Id.* In a concurring opinion, Justice Henderson remarked that the question of whether the facility is in the public interest “must be based on a deep, piercing, reflective analysis which is based upon all of the testimony and, in my opinion, an

environmental impact study.” *Id.* at 516. Moreover, Justice Henderson observed that the scope of “[p]ublic interest is not susceptible of precise definition.” *Id.* (quoting *In re Application of Bermensolo*, 352 P.2d 240, 242 (Idaho 1960)). Public interest also must be based upon all the citizens of South Dakota as the term public interest “does not mean anything so narrow as the interests of the particular locality, which may be affected by the matters in question.” *Id.* (quoting *State ex rel. Glenn v. Crocket*, 206 P. 816, 817 (Okl. 1922)).

To this end, DANR’s narrow interpretation of public interest in its Brief (at pp. 13-15) is problematic for multiple reasons. For starters, DANR’s interpretation is not consistent with the broad view of public interest set forth in *SDDS*. Moreover, DANR’s interpretation that any evidence regarding applicant’s conduct (in this context, transparency) in informing its own citizens (i.e., the public) about the potential landfill is irrelevant to the issue of public interest is an illogical and self-contradictory position. In fact, DANR’s own witness, Mr. Kropp, testified that character and reputation evidence are important considerations. HT 339:19-25. Indeed, SDCL § 34A-6-1.13 specifically states that grounds for denial of a permit can be based on whether the applicant “[h]as otherwise demonstrated through previous actions the lack of character . . . to reliably carry out the obligations imposed by §§ 34A-6-1.1 to 34A-6-1.18.” Thus, DANR is required in the investigatory stage, and the Board is required in the contested case proceeding review stage to consider any previous actions by the applicant that may go toward lack of character. Certainly, evidence that demonstrates that City was deceitful and lacked candor to its own citizens about the alleged need for this landfill goes straight toward the issue of public interest, especially when DANR have claimed (at p. 14) there “is a need within the community” for this facility.

ii. City Failed to Introduce Evidence of Public Interest.

Now, to the question of whether City satisfied its burden of demonstrating public interest, City failed to introduce sufficient evidence at the hearing that the landfill is in the public interest. City called one witness at the hearing: Mayor Roy Lindsay. HT 39-67 (direct examination). Mayor Lindsay is not an engineer, he is not an environmental scientist, he does not have an education in solid waste, he does not manage the day-to-day operations of the restricted use site, and he does not directly manage the financial affairs of the restricted use site. His testimony was not sufficient in demonstrating whether there was public interest in the restricted use site, whether there was a need for the landfill that satisfied the policy objections of SDCL § 34A-6-1.2, and whether the site would be operated in a manner that was consistent with the environmental protections in our State.

Notably, City did not call Gary Gonyo, who is the supervisor of the restricted use site. HT 46:21-24. Mr. Gonyo oversees managing the restricted use site and would have first-hand knowledge and information regarding the operation and any supposed alleged need for the same. City did not call Roxie Ebdrup,¹⁰ who Mayor Lindsay said, “has always been a part of the operation of the restricted use site and all the paperwork that goes with it.” HT 72:12-14. Ms. Ebdrup would have knowledge regarding the finances and administration of the restricted use site and who assisted with completing the application. HT 73:4-24. City did not call City Administrator Jameson Berreth,¹¹ who was a central witness working directly and closely with Mayor Lindsay regarding the new restricted use site. In fact, Mr. Berreth was conspicuously out of state for a conference during the contested hearing and had to be subpoenaed to compel his attendance later in the hearing. HT 35:11-37:21. City also did not call its own engineers, including Ryan Hegg, any of the third-party engineers at Civil Design, Inc. who prepared the one-page site map

¹⁰ Petitioners called Roxie Ebdrup adversely later at the hearing.

¹¹ Petitioners called Jameson Berreth adversely later in the hearing.

attached to the recommend permit, or any expert witness regarding the need or viability of the restricted use site. City also did not call either of the Bessmans, who owned the restricted use site and were familiar with the land, the drainage, the topography, the performance of the land, and, importantly, who signed the application to DANR.

Importantly City did not call a single individual from the general public regarding a supposed desire to have the landfill constructed. Mayor Lindsay testified that contractors and citizens allegedly ask about the restricted use site, but City did not ensure that any such witness testify at the hearing and introduce competent, reliable, and non-hearsay testimony regarding any desire for the restricted use site. Consequently, City did not elicit any testimony or introduce any evidence at the hearing that demonstrated an actual interest from the public in the landfill. In cross-examination of Mr. Lindsay, he could only reference the cost at the Junius site (which, in reality, was profitable for the City!), as a reason for moving to an entirely new location. HT 132:13-21.

iii. DANR did not Introduce Evidence of Public Interest.

DANR's attempt to make up for City's shortcomings at the hearing were also not sufficient. DANR called its own staff representatives Nicholas Burke and Steve Kropp. Mr. Burke was the lead Environmental Scientist who handled the permit application and conducted the technical and completeness review. HT: 201-11. Mr. Burke had never handled a restricted use site application before this one and only visited the proposed facility location one time for about 30-45 minutes. HT 200:16-24; HT 262:3-7. Neither Mr. Burke nor Mr. Kropp provided sufficient testimony regarding the public interest of the facility. *See generally* HT 154-353; *see also* DANR's Witness List. In fact, Mr. Kropp specifically testified that "public interest" was not something he considered as part of his review. HT 340:1-8.

iv. Petitioners Introduced Evidence that Facility is Not in the Public Interest.

Petitioners, on the other hand, elicited testimony and introduced evidence rebutting any alleged public interest with operating a facility at the proposed site.

First, the proposed facility is simply not suitable for a landfill. Petitioners retained experts Lee Daigle and Mark Torresani out of Cornerstone Environmental Group, LLC, who produced a report regarding the viability of the site. Ex. 262. Mr. Daigle testified at the hearing. HT 783-828. In accordance with Mr. Daigle opined that the original proposed facility did not include any buffer around the obvious wetlands that were identified. Ex. 262; HT 802:7-15. DANR attempted to remedy the issue by submitted a CAD drawing that included red-lined boundaries for a reduced lot of 54.43 acres resulting in a 200' setback from the wetlands. Ex. 262. However, the actual extends of the wetland need to be identified through a Wetland Delineation process prior to permitting, design, and development of a proposed solid waste management facility. *Id.*; HT 811:20-812:7 (noting that a Wetland Delineation is a best practice, regardless of whether it is required by law). Given the significant presence of wetlands on and near the proposed site, Mr. Daigle recommended that professional field work be performed, which did not happen. Ex. 262. In addition, Mr. Daigle noted that the 100-year floodplains were not updated from publicly available sources. *Id.*

In fact, DANR agreed with the presence of wetlands and 100-year floodplains and has attempted to remedy the failure by City and DANR to note the existence of such floodplains throughout the proposed site. HT 833:5-834:6. Procedurally, it's too late for City or DANR to make such a change to the proposed permit as noted above. Regardless, such a revision does not alleviate the myriad of other problems, lack of due diligence, and overall unsuitability of the proposed facility.

Mr. Daigle further opined that geotechnical and hydrogeologic investigation should have been performed on the site and region to understand the potential impacts to the groundwater from the facility's operation. Ex. 262 at p.2. There was no site-specific model to understand the velocity and direction that potential contamination and groundwater is flowing, the evaluation of potential impacts is unknown and represents a tremendous risk. *Id.* Mr. Daigle noted that "City's past history of operational performance indicates that prohibited wastes and other findings of non-compliance at City's Junius RUS is concerning, exacerbating the potential for contamination of groundwater and the surrounding environment." *Id.* Mr. Daigle's professional opinion was "that past indicators of non-compliance and operational deficiencies must be taken into consideration and made part of any future permitting application process by the same operator." *Id.*

Mr. Daigle further noted that "a complete and professional design, including individual phases of construction, should have been developed." *Id.* He pointed out that there is no discussion of stormwater management, including stormwater flow paths, time of concentrations, and holding volumes. *Id.*

Second, the proposed facility is not in the public interest because it lacked proper due diligence and investigation. The evidence at the hearing established that neither City nor DANR performed sufficient investigation or due diligence to allow for the facility to be permitted. Neither DANR nor City performed any borings to determine the existence and depth of groundwater. HT 210: 1-13. Mr. Burke and Mr. Wendte visited the site one time on November 1, 2023, but did not perform any soil borings and took no measurements. HT 209:7-16; 211:17-23. Mr. Burke testified that he could not recall how long he was at the property but estimated it was less than an hour. HT 262:1-7. Mr. Kropp, who testified that a visual inspection is an important part of the review process, never visited the property at any point, including as of the time of the hearing. HT 329:1-

331:5. Mr. Kropp testified at the hearing that DANR's own Exhibit 109, which was a FEMA National Flood Hazard Map, showed the existence of 100-year floodplains that were present on the site. HT 335:3-24. Mr. Kropp also testified that the presence of bodies of water and impact on drainage may be relevant to public interest depending on how it is defined. HT 336:17-25. While Mr. Kropp may have been purposefully evasive of defining public interest for DANR, it is obvious that the presence of wetlands and bodies of water near or around a potential hazardous landfill is a matter of public interest for those locally and in the State. Mr. Kropp stated in an e-mail: "So yeah, they really need to stay away from any wetland area." Ex. 260 at p.1. To be sure, the Board has promulgated a regulation that states that "[f]acilities shall not be located within the boundaries of a 100-year floodplain." ARSD 74:27:11:03.

Mr. Kropp also acknowledged the concern that "[i]f the upper 10 ft of the subsurface is sand, they can't dispose of any materials that contain petroleum (like asphaltic concrete or shingles)." Ex. 260 at p. 2. Asphaltic concrete and shingles are exactly the kind of construction materials that would be disposed of at the proposed facility. This further highlights the significant concern that no borings were ever performed at the proposed facility.

Third, the proposed facility is not in the public interest due to the presence of wetlands water flow, surface waters, 100-year floodplains, water springs, and overall water drainage. Petitioners Karen Potter, Mark Potter, Donita Potter, and Patricia Schaefer testified about the abundance of water at the site and the surrounding area, their experiences with flooding, especially during wet years, the groundwater in the area, the springs, and water flow in all directions rather than just to the south and west. Donita Potter testified that the water "goes both ways" and that while "[i]t probably does go to Schaefer Lake, . . . a whole does go the other way too." HT 668:2-10.

Mark Potter testified at length about the headwaters for the Little Vermillion (HT 534:1-17), the negative impact on drainage (HT 539:555:6), and the washouts on the unpaved roads, especially with heavy trucks and equipment (HT 601:16-21). Mr. Potter testified that “everybody believes all the water runs west, which is very correct and true with most of it, but there’s still water that runs this way as you can see here and here,” which Mr. Potter was referencing water drainage shown going north in Slide 9 of Exhibit 254. HT 542:22-543:25. Mr. Potter also referenced Schaefer Lake and how the water drains to the north and east toward the small body of water to the northeast of Schaefer Lake. HT 545: 7-17.



(Exhibit 254 at p. 13)

Mr. Potter also testified about the spring water that is in the area, including Mr. Wettlaufer’s area immediately north of the proposed facility. HT 542:14-21. Describing this land, Mr. Potter testified with reference to Slide 9 of Exhibit 254: “This is about a 30-foot drop right here from this side, Mr. Wettlaufer’s to our side. There’s a culvert right here. This affects – we have – from

north to south right here, we have 320 acres of grazeable useable land. This, all this what you see, everything you see here coming out of these trees, and this here Mr. Wettlaufer fails to farm pretty much every year. This stays wet. Our cattle down here, 30-foot drop, the culvert is 30 – Mr. Casanova could probably testify – 20 to 30 feet deep right here. The culvert comes out of – out of this. All year long it runs.” HT 543: 11-25.

Below is a picture depicting where water runs all year long.



(Exhibit 254 at p. 9)

Below is a picture (Ex. 254 at p.14) of the land to the east of the proposed facility, which is owned by Petitioner Potters, and which shows the 20-30 foot drop off described by Mr. Potter.



(Ex. 254 at p.14)

Mr. Casanova also testified about his experience with the shallow water table. HT 484: 2-8 (“I just don’t know how you can put a landfill where you’ve got a water table that shallow in the wet years.”).

Mr. Jason Terwilliger, who is a farmer near the site, testified about his personal observations of the water drainage based upon his observations over decades. He testified that some water drains to the west and then ends up in the Little Vermillion. HT 421:9-17. He testified that his drainage concern was heightened because people are known to just dump their stuff off at the road and then leave. HT 423:4-8.

In fact, neighboring county Miner County also objected to the proposed fac, which should be given significant weight in this proceeding. The Chairman for the Miner County Commission, Alex Protsch, testified about his concerns for location of the proposed site. HT: 697-712. Mr. Protsch e-mailed Nick Burke, Steve Kropp, and Ron Duvall and expressed Miner County’s concerns that “this property is within a 100-year floodplain and adjacent to the neighbors

underground well” and that Miner County opposes the proposed site. Ex. 203. Mr. Burke responded and stated that City is under no obligation to notify Miner County, despite the property being located at the boundary line between Lake County and Miner County. *Id.* A few months later on March 11, 2024, Mr. Protsch invited Mr. Burke “to please examine/inspect the proposed site.” Ex. 259. While perhaps Miner County was not required to receive notice, DANR was overly dismissive of Miner County’s interest in the location of the property. As Justice Henderson noted, public interest includes more than just the locality, but the entire State, and by that logic, most certainly the neighboring county. *SDDS, Inc.*, 472 N.W.2d at 516. DANR’s Environmental Scientist, Mr. Burke, testified with respect to whether “public interest” was served by disregarding Miner’s County concerns, he testified: “So my understanding was that there was no specific water labeled from Miner County that I know of from the maps that were submitted. I know of the lake southwest of the property that I believe is owned by Ms. Schaefer. In regards to notifying Miner County, under the application process Miner County was not required to be notified in this process.” HT 223:11-21.

Fourth, the proposed site is not in the public interest due to adversely affecting wildlife and recreation. Jim Casanova, a local property owner in the area, testified about the adverse impact to hunting, including waterfowl. HT 486:1-487:12. Mr. Daigle echoed Mr. Casanova’s remarks that the area is “world-renowned” for hunting and sporting, which is a resource not only to the City but also the State. HT 813:1-15. Karen Potter testified about the concerns for loss of habitat, including the geese that travel to the land on the flyway. HT 453:12-454:1. Mr. Potter testified that the waters are “full of fish.” HT 622:4-623:15. He testified that there is “[c]rappie, bluegill, sunfish, rough fish of couse” and that they are “[n]atural and come across in the last few years with the wet

years, because I believe people have fished Silver Lake here for pan-fishing over the years[.]” HT 623:2-15.

Fifth, the proposed site is not in the public interest because it impacts the health and safety of the State. Polluting the waters of the State will have an impact on the health and safety on not only the local community and neighboring landowners, but also those affected downstream in the State and region. The South Dakota Legislature expressly recognized that “liability can be significant” without proper collection and disposal of solid waste. One need not look any further than all of the health issues involved with PFAS. HT 659:7-25 (Donita Potter: “Knowing the City’s history, I’m concerned about them taking products that they shouldn’t. I’m really concerned about the PFAS that you read so much about, the forever chemicals that will never disintegrate.”). Petitioner Ms. Schaefer also testified about the negative impact of the proposed site on her renowned cattle and Belgian draft horses by polluting the grounds to which they graze and drink water. HT 670-687. Ms. Schaefer testified that “of course my major, major concern is water and water contamination, because this is where they’re accessing water coming down that hill.” HT 677:17-23. Karen Potter testified about the health impacts on their bred heifers. HT 454:2-14 (“When a piece of livestock or a head of livestock sees a plastic bag or a piece of paper in that grass, the first thing they think of is going to lick it. Now, if a heifer got that down her throat, you know where she’d be. She’d be gone.”).

Sixth, Petitioners introduced evidence regarding the lack of appropriate road infrastructure for the proposed site. *See* HT: 679:22-682:12 (Patricia Schefer: “Another concern of course is the road that goes along . . . it’s a gravel road.”); HT 475:12-23 (Jim Casanova: “In the wet years, it’s awfully spongy. . . . that’s one of the worst County roads in Lake County for keeping up. It’s soft.”); HT 601:116-22 (Mark Potter: “the road gets washed out there on real bad years, which

we've had over the last however long I've been alive, but it's several times."); HT 541:1-12 (Mark Potter: "That's why we have problems with the whole road because it can't be maintained."); HT 636:10-23 (Donita Potter: "It's ridgy. It's not a very good road to travel on."). Put simply, the unpaved gravel road was not constructed to withstand the heavy equipment and vehicles that would be primarily used to dispose of construction waste at the proposed site. Even City's own City Administrator, Mr. Berreth, also acknowledged that the Winfred site was "for miles, maybe five" miles further away than the Junius site, and that the Junius site had paved roads whereas the Winfred site did not. HT 745:24-746:17. Mr. Berreth acknowledged that was a "disadvantage." HT 746:16-17.

Seventh, the proposed site is not in the public interest due to negative impact on the aesthetic value of the area. The drone videos marked as Exhibit 253 and the pictures marked as Exhibit 254 showcase the aesthetic beauty of the region. In particular, Video 4 of Exhibit 253 flies over the proposed site and toward Schaefer Lake providing a perfect example of the innate aesthetic quality of the land that will be tarnished by the placement of a landfill. Karen Potter testified: "If you stand on this side of the property and look west, you couldn't get a more gorgeous view and to be out there living." HT 427: 1-9; *see also* Ex. 254 at p. 4 (referenced picture). Donita Potter also testified about the negative impact on the aesthetic value of the area. HT 660:4-661:16. Aesthetic value is a required consideration in the application to DANR. Ex. 100 at p. 5 ("1.11 Is the site located: . . . In an area that adversely affects wildlife, recreation, aesthetic value of an area, or any threatened or endangered species."). Petitioner Ms. Patricia Schaefer testified about aesthetics of the beautiful Prairie Pothole Region. HT 670-687.

Eighth, the proposed site is not in the public interest because of the non-transparent manner in which it provided information to the general public and its own Commissioners about the efforts

and reason for locating a new proposed site. Exs. 223-244. Former City Commissioner Shaw, who voted at the City Commission meeting against the proposed site, testified at the hearing regarding his objection to the proposed site. He testified that City lacked transparency in the process and that he was against the location of the proposed site. HT 593:18-594:3, 596: 1-23. Former mayor Marshall Dennert testified that the current administration “could be a little more transparent in what they’re wanting to do,” which echoed the concerns also voiced by Commission Adam Shaw and others as part of the process for applying for the proposed permit. HT 509: 8-20; Ex. 236 (e-mail from Commissioner Shaw regarding lack of transparency).

Ninth, Petitioners introduced evidence that there was no need or reason to relocate from the Junius site. The Junius site was the location of the previous restricted use site for decades and, as Mr. Berreth testified, there was still capacity for many more years. City officials Ms. Ebdrup and Mr. Berreth both testified that the Junius site was profitable even though there was no requirement that the restricted use site be profitable. HT 374:12-20; 755:17-19. Mayor Lindsay and Mr. Berreth misrepresented the financial situation to the public and the City Commission and withheld the actual financial numbers of the site and, in so doing, then recommend that there was a need to relocate the site to the Bessman property. Exs. 222-244. Yet, Mr. Berreth testified that there were two supposed reasons for relocating the restricted use site, location and money, and he conceded that the new site was a disadvantage regarding location and also conceded that the Junius site was profitable where it was. HT 746:1-17; 755:17-19. Mr. Berreth also conceded that it was “not an advantage” to have water and wetlands located on the property. HT 778:21-779:2.

SDCL § 34A-6-1.2 specifically created a solid waste management hierarchy in descending order of preference as follows:

- (1) Volume reduction at the source.

- (2) Recycling and reuse.
- (3) Use for energy production, if appropriate.
- (4) Disposal in landfills or combustion for volume reduction.

Creating a *new* landfill is the last possible option in the stated goals of the State of South Dakota in protecting the health, safety, and welfare of the citizens of the State. *See id.* It is thus the foremost policy and matter of public interest to reduce the need for landfills wherever possible. Yet, in this instance, City has violated this specific policy by unnecessarily and avoidably seeking to create a new landfill site when it already had an existing site with more capacity, and when there could be numerous other locations that are more suitable for disposal in landfills. Mr. Berreth acknowledged: “It’s possible there is other land out there that would work. There is a lot of land.” HT 758:22-23. Mr. Berreth, who was instrumental in the process for moving this proposal forward, testified that he could not recall if he was aware of this policy. HT 751:17-19.

b. The Permit Should be Denied Under SDCL § 34A-6-1.13.

Petitioners submit that the Board should deny the permit under items (1), (3), and (5) of SDCL § 34A-6-1.13. Petitioners do not seek denial of the permit under items (2) and (4).

1. *Applicant misrepresented material facts in applying to the board for a permit*

DANR concedes that City misrepresented material facts in the Application by incorrectly answering questions concerning the site’s proximity to surface waters, floodplains, and wetlands. Ex. 100 at p.5; HT 161. DANR observed that City misrepresented that the proposed site was not in a wetland. *DANR Proposed FOF No. 12*. There are wetlands near both the western and eastern portions of the proposed site and within the original proposed permit boundary. HT 166, 290-91; Exs 107 & 108. DANR also observed that City also misrepresented that the site is not located within 200 feet of surface water. *DANR Proposed FOF No. 14*; Ex. 100 at p.5; HT 161.

Furthermore, DANR observed that City misrepresented that the proposed site is not within a 100-year floodplain. *DANR Proposed FOF No. 16*; Ex. 100 at p. 5; HT 161; 166-67; 294-98; Exs. 107, 109, 110. Floodplain zones exist on the east, west, and south-west of the proposed site and extends through the central area of the property that DANR recommended be permitted. HT 335; Exs. 109-110. City also misrepresented in the application by marking “no” concerning the siting criteria related to the existence of floodplains, wetlands, and proximity to surface water. *DANR Proposed FOF No. 27*, Ex. 100 at p.5; HT 161.

DANR argues in its Brief (at pp. 15-16) that City’s misrepresentations were not “intentional.” However, SDCL § 34A-6-1.13 does not require a finding of intentionality or even negligent misrepresentation. Instead, it merely requires that any misrepresentation of a material fact occurred. To be sure, item (1) of SDCL § 34A-6-1.13 states: “Has misrepresented a material fact in applying to the board for a permit.” The term “misrepresentation” is not defined in SDCL Chapter § 34A-6. When there is no statutory definition, the South Dakota Supreme Court has relied upon the definition provided in Black’s Law Dictionary:

Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact. An incorrect or false representation. That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists.

(6th ed. 1990). Misrepresentation simply means an incorrect, untrue, or false representation. It does not require any finding of intent upon the applicant.

Even so, the evidence at the hearing shows that City was at least negligent, if not willfully negligent, in its completion of the application. City did not conduct any meaningful investigation of the proposed site to determine if the land contained wetlands, 100-year floodplains, or was located near surface waters. A mere observation of the property would show that the property was

near surface waters, that it contained wetlands, and that it had water drainage that ran directly through the middle of the proposed site.

2. *Applicant has violated the environmental laws of South Dakota*

The permit should also be denied because City has violated the environmental laws of South Dakota, including laws relating to solid waste and this specific application for a restricted use site. Contrary to DANR's argument in its Brief, there is no requirement in SDCL § 34A-6-1.13 that there be a court order of a notice of violation by the secretary of an environmental law. It is enough that the violation should have occurred. DANR's repeated failure throughout these contested proceedings to accurately cite the plain language of the controlling authority (i.e., SDCL § 34A-6-1.13) is troubling and should be rejected.

Petitioners have introduced inspection reports from DANR that shows a pattern of violating the environmental laws of South Dakota. The 2022 inspection report found that "very little soil cover was observed" in contravention to Section 3.06 of the Individual Permit." Ex. 255 at p. 3. Two years later, DANR again found that "very little cover soil was observed on the burial area" in contravention of the permit. Ex. 256 at p.8. Expert Lee Daigle testified that "when DANR does an inspection, typically these are not a surprise, shock inspection." HT 803:22-24. Mr. Daigle testified that in the 2024 inspection report there was trash and garbage and material that is not qualified for Type III in the burial area. *Id.* at 804:4-8. Mr. Wendte testified that he spoke with Ms. Ebdrup and expressed disappointment in the acceptance of unauthorized waste and soil cover and that it would not shine a very bright light on Madison's ability to operate a compliant site. HT 403:4-23.

In 2019, DANR observed two remnants of burn piles that were smoldering at the time of inspection, which consisted of brick, metal ducting, a stove top, plywood, particleboard, painted

wood, tar paper, electrical wires, which are materials that are not permitted to be open burned. *See* Ex. A (2019 Inspection Report).¹² The report advised that open burning unauthorized waste materials is a violation of the solid waste permit and our state’s air quality rules. Thus, in 2024, 2022, and 2019, City was operating a non-compliant and at times “unacceptable” restricted use site. This has been an issue going on long before the last seven years. In 1997, DANR (formerly DENR) found that “unacceptable waste materials were being accepted and berm to control drainage from the composting area had not been constructed[.]” Ex. B (1997 Inspection Report).

City does not have a good track record in its operation of restricted use sites. This should raise significant alarm for OHE and the Board in its review of the permit given the fact that the proposed site is surrounded by surface waters and contains wetlands and 100-year floodplains. The proposed site is not suitable for even the most compliant municipality, let alone a municipality who has a history of allowing unauthorized waste and unauthorized burning of materials at its restricted use sites.

Additionally, City has violated environmental and solid waste laws with its unauthorized construction of the proposed site that is at issue in this proceeding. SDCL § 34A-6-1.4 provides that “[n]o person may construct, alter, or operate a solid waste disposal site without a permit. City does not yet have a permit to construct and operate the proposed site. Nevertheless, City has already engaged in trenching, tilling, separating the land, using heavy equipment, and planting thousands of trees at the proposed site as part of its construction of the same. HT 775:11-777:20. While the planting of trees and creating a shelter belt may perhaps be perceived as harmless, the

¹² Under SDCL § 19-19-201, Petitioners request that OHE take judicial notice of the 2019 and 1997 inspection reports. Judicial notice may be taken of any fact that is “not subject to reasonable dispute because it is generally known within the trial court’s territorial jurisdiction” and “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” *Id.* The OHE “may take judicial notice at any stage of the proceeding.” *Id.* Here, the inspection report is from DANR to the City, which is documentation subject to public inspection within OHE’s territorial jurisdiction and whose accuracy cannot reasonably be questioned. Moreover, other inspection reports were also introduced at the hearing without objection.

specific issue is the pattern of disregard for the laws and regulations of the State of South Dakota. City is required to wait until it receives the permit before it engages in *any* construction of the proposed site. SDCL § 34A-6-1.4.

3. *Applicant has otherwise demonstrated through previous actions the lack of character or competency to reliably carry out the obligations imposed by §§ 34A-6-1.1 to 34A-6-1.38*

Even if OHE determines that the inspection reports do not constitute violations of environmental laws, City has demonstrated through previous actions the lack of character or competency to reliably carry out the obligations imposed upon them.

First, the previous inspection reports of the Junius site reveal that Petitioners lack the competency to reliably carry out the obligations imposed by §§ 34A-6-1.1 to 34A-6-1.38, especially as it would relate to land that includes significant wetlands, floodplains, water flow, and drainage. Ex. 255; Ex. 256, Ex. A; Ex. B. City has allowed unauthorized materials, unauthorized burning, and have failed to follow the requirements imposed upon them. *See id.* Mr. Potter testified that “over my time back in the day, you could drive in [to the Junius site] and put whatever you wanted to there” because “[t]here was nobody around.” HT 556:4-7. Mr. Potter further testified that you could drive by the site and “there might be 40 mattresses laying out in the filed” or that the trees were “plump full of garbage, Sunshine grocery bags.” HT 556:11-20. Mr. Potter testified that the grocery bags looked “like cotton balls” in the trees. HT 556:21-22. Ms. Schaefer likewise testified that at the Junius site, “plastic blows everywhere.” HT 683:10-14. Ms. Schaefer observed that the “pieces of wood, whether it be your rafters or the wood that’s going in the side or the siding or the shingles or the whatever is wrapped in plastic” and “that’s blowing all over because, with the wind, it’s – it’s absolutely – you can’t imagine how strong the wind blows out there when we’ve got the 25-, 30-, 40-mile-an-hour wind.” HT 683:15-25. City should not be

trusted to reliably carry out the serious obligations imposed by our state laws that are there to protect the health, safety, and welfare of our citizens.

Second, City's previous actions show that it lacks the character to carry out the legal obligations. On the last day of the hearing, Board member Mr. Rhett Miller asked Jameson Berreth: "Who do you work for?" HT 781:23. Mr. Berreth responded, "I work for the Mayor and the City Commission, so all five of them. I have the luxury of having five bosses, yeah." Mr. Miller followed up: "Do you also work for the citizens of Madison?" Mr. Berreth responded: "I view myself as working for the elected officials." HT 781:23-782:9. Then, perhaps catching himself in what the answer ought to be, Mr. Berreth adds: "I think everybody who is in public service has to also be working for the citizens." *Id.* It could not be more obvious that the citizens of Madison have been an afterthought—if not dismissed entirely.

To be sure, the evidence at the hearing highlighted City's dishonesty towards its own citizens, the City Commissioners, and even DANR, as to the Junius site and the alleged reason for seeking a new site location. At the contested hearing, Mayor Lindsay testified that the reason for abandoning and not seeking a new lease at the existing location at Junius, where it had been for decades, was because of the cost. HT 132:13-21; *see also* HT 734:10-735:3; Ex. 222 (Klein Lease). City Administrator, Mr. Berreth, said the same, noting that the two most important factors were cost and location. Because the location was further away and did not have paved roads at the Winfred site, Mr. Berreth recognized that location was a disadvantage for the Winfred site and, thus, cost was the only reason. HT 745:24-746:17.

Yet, the evidence at the hearing revealed that City was being dishonest about the actual cost of the Junius site. On January 13, 2023, in a memorandum to the City Commission and the people of Madison, Mr. Berreth stated that "[t]he existing cell is three acres with approximately

15 acres still available at the site if the City secured a new lease.” Ex. 226. Mr. Berreth acknowledged that City had customarily been able to secure a new lease for the Junius site. The January 13, 2023 memorandum advised that “[a]lternatively, the City could explore options to state a RUS at a new location” and that “[t]his may be advantageous depending on location and price.” *Id.* (emphasis added). At the City Commission hearing, the City was directed to “explore the cost of staying with the current Restricted Use Site.”

Motion by Commissioner Shaw, seconded by Commissioner Dybdahl to explore the cost of staying with the current Restricted Use Site. Motion carried.

Exhibit 227.¹³

The financial records of City, which were not shared in City or DANR’s cases-in-chief, but rather had to be shown by Petitioners, revealed that the Junius site was profitable. There is no requirement or even expectation that a service such as a landfill be profitable. HT 512: 25-513:1. Former Mayor Marshall Dennert acknowledged that the Junius site was profitable and testified that he believed “that money was helping to pay shortfalls of the City.” HT 512:11-24. The financial records discovered by Petitioners in the contested case proceeding showed that the Junius site was very profitable over the term of the Klein Lease at the Junius site. City representative Roxie Ebdrup testified that she created a spreadsheet that showed the income and costs for the Junius site. HT 370:5-10. In the spreadsheet, it showed that the *net profit* from 2017 through 2022 during the most recent version of the Klein Lease was as follows:

2017: \$29,689.31
2018: \$17,583.66
2019: \$46,331.44
2020: \$42,780.83
2021: \$51,794.48
2022: \$105,224.10

¹³ Mr. Berreth testified that City was also directed to explore alternative sites. However, the meeting minutes only reflected exploring the cost of the existing site. Ex. 227.

Ex. 250.

Even with annual rent of \$25,000 for the Junius site, the restricted use site was quite profitable for City. City could have afforded to spend more on rent and it is not unreasonable to expect rent prices to increase over time. Despite the cost being the alleged “primary factor” (HT: 745:12-13), Mr. Berreth testified that City never offered a new lease price to the Kleins nor did it ultimately solicit a new lease price from the Kleins either to continue leasing after the expiration of the Klein Lease. HT: 739:18-22 (“We never offered a price, either.”). Mr. Berreth testified that they could have offered \$30,000 and remained profitable, but they never even attempted to make that offer. HT 758:7-17. Worst yet, though, City possessed this specific financial information requested by the City Commission via public vote and chose not to provide any of it to the City Commission or to the general public. HT 744:23-745:2.

Attorney Heber: Do you know if this document was shared with the City Commission or the public?

Mr. Berreth: I don’t think so.

Attorney Heber: It wasn’t, was it?

Mr. Berreth: Not to my knowledge.

HT: 754:24-755:3.

Eventually, Mr. Berreth reluctantly testified on the last day of the hearing—after having made himself unavailable for the hearing and having to be subpoenaed to force his attendance—that the Junius site was, in fact, profitable:

Attorney Heber: It was profitable, was it not?

Mr. Berreth: In certain years.

Attorney Heber: All of the years, 2017 to 2022?

Mr. Berreth: In the years that you are calling out there was more revenue than expenses per this spreadsheet.

HT: 754:24-755:3; HT 746:18-20 (noting that cost was the “primary factor”).

This information was directly relevant to the City Commission’s review and what was requested by them in order to make an informed decision. Yet, City made no attempt to advise its City Commissioners or the general public that the Junius site was profitable and they also made no attempt to negotiate a new lease with the owners of the Junius site. The evidence at the hearing showed that this is because Mayor Lindsay had already struck a deal with the Bessmans to acquire their land prior to even the first City Commission meeting on the subject (i.e., January 17, 2023). Exs. 223-247. On January 13, 2023, Mayor Lindsay sent an e-mail to Mr. Berreth and the City Attorney that he spoke with Bessman and “settled on \$7500/acre (\$547,800 lowest he said he would go) for 73.04 acres.” Ex. 223. Mayor Lindsay and Mr. Berreth had already made their minds up with moving to a new site despite misrepresenting to the City Commission that it would be considering the costs of staying at Junius. Ex. 227. To be sure, on the morning of January 18, 2023, at 8:33AM, which was the day after the City Commission meeting, City’s Attorney prepared and e-mailed Mayor Lindsay and Mr. Berreth a draft Contract for Deed at 8:33AM the next morning on January 18, 2023. Ex. 228. On January 26, 2023, Mayor Lindsay e-mailed City Attorney and requested Bessmans’ signatures to the Contract for Deed:

“David, I would like to get the Bessman’s signatures on the Contract for Deed before we have it in front of the Commission again.”

Exs. 229, 230.

City scheduled a follow-up City Commission meeting for July 10, 2023, to discuss the restricted use site. Prior to the meeting on July 6, 2023, Mr. Berreth e-mailed City Attorney and

expressed concern about letting the public know that the acquisition of the Bessman land was already a “done deal”:

“I’d like to use an unsigned copy for the agenda packet. We’ve already had questions from neighboring property owners on the transparency of this process which I’ve fielded just fine, but I don’t want to give the impression that its already a done deal and has been since they signed in April.”

Ex. 240. To cap off the ruse on the public, Mr. Berreth testified under oath that he deleted the “sensitive dates” in the signed Bessman Contract and produced a sanitized, unsigned version of the same contract for deed, thereby withholding information from the City Commissioners and the public. HT: 765:7-10; Exs. 242, 243. In other words, Mr. Berreth intentionally withheld the truth from the City Commissioners and the public out of fear, arrogance, and disregard for the public.

At the hearing, former Commissioner Shaw reviewed Mr. Berreth’s sanitized contract for deed for the first time and his reaction showed that he was stunned at what had occurred. He testified that this act went right “back to lack of transparency” and that, in his view, showed that Mr. Berreth was intentionally trying to mislead the public. HT 596:1-14. Former Mayor Marshall Dennert echoed those concerns about transparency, openness, integrity, from the current Madison administration. HT 502-514.

It does not stop there.

City has also been dishonest with DANR regarding the substantial grant it received from the Solid Waste Management Program. On June 29, 2023, City received a grant of \$109,560, which represented 20% of the cost of the alleged “Total Project Cost” of \$547,800. Ex. 239. In the Agreement, it states that “Grantee will submit all changes would alter the purpose, scope, or the functional layout of the Project to the State for approval and no such changes or modifications may be made without such prior approval in writing.” *Id.* at p.2. Further, City agreed that “any

payments found by the State of South Dakota to have been overpaid will be funded or credited in full to the State.” *Id.* at p.1.

When City revised its permit application to approximately 54 acres, City did not seek to notify the SWMP or otherwise seek to refund any of the grant award due to overpayment. HT: 766:21-767:3; HT 767:21-768:9; Ex. 239. In an evasive exchange with Mr. Berreth at the hearing, Mr. Berreth feigned ignorance of any recollection that City received grant of taxpayer’s money for the project, let alone a grant of \$109,560. *Id.* Juxtaposed with the representation by Mr. Berreth that cost was the *primary* factor for moving, it is simply stunning that Mr. Berreth would suggest that he could not remember if public funds had been received for the project, especially when he had been deposed on the exact same topic of grant money only months earlier. HT 772:23-773:2. Perhaps the reason for the feigned ignorance is that City has failed to report to the SWMP that the project size was modified and reduced and that, as a result, it was overpaid a significant sum of taxpayer dollars that it should not have received.

In light of the above conduct and misrepresentations, as well as the additional misrepresentations, violations, character, and competency evidence addressed elsewhere in the brief and at the hearing, it is clear from the record that City is not reliable to manage the proposed facility.

CONCLUSION

Petitioners Potters respectfully request that the OHE issue an Order, Findings of Fact, and Conclusions of Law recommending the denial of the permit.

Dated this April 20, 2026.

/s/ Jonathan A. Heber

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CERTIFICATE OF SERVICE

I, Jonathan A. Heber, do hereby certify that on this April 20, 2026, the foregoing was submitted via electronic mail upon the following to be filed in the above-captioned matter:

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Further, the undersigned certifies that a true and correct copy of the above referenced document was served via electronic mail upon the following:

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