

BEFORE THE ARKANSAS POLLUTION CONTROL  
AND ECOLOGY COMMISSION

IN THE MATTER OF: )  
)  
) Docket No: 23-009-P  
FINAL PERMIT DECISION FOR )  
ECO-VISTA, LLC, CLASS 4 LANDFILL )  
PERMIT NO. 0290-S4-R2 )

**REPLY IN SUPPORT OF MOTION TO DISMISS**

Permittee Eco-Vista, LLC, (“Eco-Vista”) moved to dismiss the request for hearing filed by Mayor Angie Russell and the City of Tontitown, the “City,” in the above-captioned docket arguing the City’s appeal was not timely. The City responded that Eco-Vista failed to meet its burden of proof and that, in any event, the City’s appeal was timely due to when its notice was postmarked and because other jurisdictions do not require filing on Sunday. None of this is correct.

**I. ECO-VISTA MET ITS BURDEN**

Eco-Vista argued in its Motion to Dismiss that the City did not “file a Request for Hearing within thirty (30) calendar days after the date of issuance of the Director’s final decision, as provided in Reg. 8.211(B)(1).” APCEC Rule 8.603(B)(2) (emphasis added). The City responded that Eco-Vista did not meet its burden of proof as to when Eco-Vista and the City were served. Mayor Angie Russell and the City of Tontitown’s Response to Motion to Dismiss at 1-2 (“City’s Response”). The City’s opposition fails because it disregards the City’s own allegations, it ignores evidence key to its own appeal, and it misconstrues Eco-Vista’s own evidence in support of its motion.

The City alleged in its Request for Hearing that “[p]ursuant to APCEC Regulation No. 8, Reg. 8.211(B)(1) and Reg. 8.603(C)(1)(b), the date of the final permitting decision appealed from

is March 17, 2023.” City’s Request for Hearing and Adjudicatory Review, ¶ 5. There was thus no dispute over March 17, 2023, being the relevant date for purposes of this appeal per Arkansas Pollution Control & Ecology Commission (“APCEC”) Rule 8.211(B)(1) until after DEQ filed its motion to dismiss. Eco-Vista is not at fault for taking the City’s allegations at face value.

The City cannot avoid the fact that the only evidence Eco-Vista needs with respect to service is on the face of Permit No. 0290-S4-R1 (“Permit”) that the City appeals. Eco-Vista’s final Permit has, in the Department of Energy and Environment Division of Environmental Quality’s (“DEQ’s”) file (Doc. 83496),<sup>1</sup> a certificate of service that states:

#### CERTIFICATE OF SERVICE

I, *Kenn Blum*, hereby certify that a copy of this permit has been mailed by first-class mail to David Conrad at 100 Two Pine Drive, North Little Rock, AR, 72117, on or before this 17<sup>th</sup> day of March, 2023.

Per APCEC Rule 8.211(B)(1), the Permit’s “date of issuance” is the day the notice was “placed in the mail” and was therefore March 17, 2023, according to the certificate of service. To the extent the City now disavows its allegations in its own Request for Rehearing, Eco-Vista need only direct the APCEC to the Permit to ascertain the “date of issuance,” so the City’s argument that Eco-Vista has a burden that has not been met is wrong.

Eco-Vista’s Exhibit 1 to its Brief in Support of Motion to Dismiss (“Eco-Vista’s Exhibit 1”) establishes the same point in a different manner. It is a second certification from DEQ confirming that the “Director has issued a final permitting decision” for Eco-Vista and DEQ “issued” the notices of its decision on March 17, 2023. DEQ’s second certification that the

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<sup>1</sup> [https://www.adeg.state.ar.us/sw/permits/p\\_facil\\_report.aspx?PermitNumber=0290-S4-R2](https://www.adeg.state.ar.us/sw/permits/p_facil_report.aspx?PermitNumber=0290-S4-R2) (last visited June 3, 2023). For the ALJ’s convenience, the final “Permit” is excerpted and attached hereto as Exhibit A.

Director “has issued” the Permit as of March 17, 2023, necessarily means the Permit had been mailed per APCEC Rule 8.211(B)(1) or it would not have been “issued.” It further states that notices of the Permit decision were mailed March 17, 2023, and per APCEC Rule 8.211(C), the notices are to be mailed the same day as the Permit. The City never alleged anything to the contrary in its Request for Rehearing, so Eco-Vista cannot be faulted for not refuting the plain evidence.

Per APCEC Rule 8.603(B)(2), the City had thirty calendar days from the “date of issuance” to file its appeal and thirty calendar days from March 17, 2023, is April 16, 2023. The City’s appeal was filed April 17, 2023. Again, this is evident from the City’s own request for hearing, the Permit itself, and Eco-Vista’s Exhibit 1, so to the extent Eco-Vista had any burden establishing this date, it was met.

## **II. THE CITY’S APPEAL MUST BE DISMISSED AS UNTIMELY**

The City’s remaining arguments fall into two categories. The first is that the date of issuance was not really March 17, 2023, because perhaps the City’s notice was placed in the mail on March 20, 2023, City’s Response at 2-3, and the second is that the APCEC’s rule from *In the Matter of Elemental Environmental Solutions, LLC*, Docket No. 20-004-P, Order No. 8, that a request for hearing must be filed on the weekend if that is when the deadline falls is out-of-step with other state agencies and jurisdictions. City’s Response at 3-9.

### **A. The Date of Issuance Was March 17, 2023**

With respect to the date of issuance, the City’s reliance on when the notice to Mr. Kenneth Lovett was postmarked is immaterial. APCEC Rule 8.211(2)(B) requires only that “notice is placed in the mail.” The City’s opposition ignores a key part of the rule, which is the recognition that putting notice in the mail is “deemed” to complete service. “Deem” means “to hold; consider; adjudge; believe; condemn; determine; treat as if; construe.” Black’s Law Dictionary (6<sup>th</sup> ed.).

That is logical because an agency cannot control what happens after it places notices in the mail. It cannot control whether the mail is actually picked up or delivered, and consequently APCEC Rule 8.211(2)(B) assigns no legal significance to either. It likewise makes sense that APCEC Rule 8.603(B)(2) measures the deadline to appeal using a date that is common for all parties to ensure that everyone has the same time to appeal and that the APCEC has a bright line for determining whether appeals are timely. The City's argument that the mail was not actually postmarked until March 20 is simply not a factor under APCEC Rule 8.211(2)(B) for determining when service is "deemed" to be complete.

The City's attempt to create doubt about DEQ's March 17 service date is conjectural and ignores three lines of uncontradicted evidence that all establish a mailing date of March 17, 2023. First, the Permit has a certificate of service included above that states it was mailed to Eco-Vista on March 17, 2023. That should be the end of the discussion. The City has provided nothing to cast any doubt on DEQ's certificate of service. Second, Eco-Vista's Exhibit 1, which is a certification from DEQ confirming that DEQ "has issued" the Permit as of March 17, 2023, and that DEQ has mailed such notice on March 17, 2023, to interested members of the public is additional evidence that the 30-calendar-day clock started on March 17, 2023, per APCEC Rule 8.603(B)(2). The City's attempt to downplay the importance of Eco-Vista's Exhibit 1 by arguing it says nothing about mailing is thus incorrect. Finally, the City's Exhibit 2, the email from DEQ's mail service, is more evidence of the same. DEQ's mailing service confirmed "the mail arrived on a Friday" and the service waited to meter the mail on Monday.

The City might argue that the notices must be delivered to the U.S. Postal Service before they are "placed in the mail," but that inserts requirements into Rule 8.211(B)(1) that are simply not there. The word "mail" is a common noun. If the rule was intended to be limited to the U.S.

Postal Service, it would have said so. Furthermore, the rule does not require that the U.S. Postal Service, or anyone else, take possession of anything before service is “deemed” complete, just that DEQ has placed it in the mail. Finally, the commercial service that postmarked DEQ’s notices did so by authorization from the U.S. Postal Service, so even if “mail” had a narrower reading, a commercial service acting per authority from the U.S. Postal Service qualifies. None of this, however, is a factual issue the APCEC needs to resolve. The key point is the City has not provided any detailed legal or factual basis for arguing the foregoing did not satisfy applicable requirements, which the City was required to do in order to survive Eco-Vista’s motion to dismiss.

Finally, the City argues that APCEC Rule 8.211(C)’s requirement that “notice to all of these persons shall be placed in the mail on the same date” saves the City’s appeal. City’s Response at 2. It does not. The Permit’s certificate of service, Eco-Vista’s Exhibit 1, and Exhibit 2, all confirm the DEQ’s permitting notices were picked up on March 17, 2023, with Eco-Vista’s Exhibit 1 in particular stating the notice was mailed on March 17, 2023, the same day the Permit was put in the mail per its certificate of service. To the extent the City’s notice might have said anything different, the City lost that evidence or at least has not used it in this proceeding. It is pure conjecture to suggest that the City’s notice was not “placed in the mail on the same date,” March 17, 2023, as the notice to Eco-Vista, and that is all that APCEC Rule 8.211(C) requires.

**B. The APCEC Precedent is Clear and Controlling**

The City’s argument that everyone else does not count weekends when calculating filing deadlines does not try to distinguish the instant case from the APCEC’s decision in Order No. 8 of *In the Matter of Elemental Environmental Solutions, LLC*, Docket No. 20-004-P (“*EES*”), because it is squarely on point. Relying on findings of fact identical to those in Eco-Vista’s motion to dismiss, the APCEC ruled in *EES* that the filing deadline in APCEC Rule 8.603(B) is expressly

set at 30 calendar days and there is no ambiguity in the APCEC Rules that, per APCEC Rule 8.611, authorizes the APCEC to look to the Arkansas Rules of Civil Procedure for guidance on whether weekend filing is required if that is when the deadline to appeal falls.

The APCEC's decision in *EES* is not the outlier that the City claims. The City cites many rules of different jurisdictions that do not count weekends towards filing deadlines, but that largely proves the point in *EES*. If the APCEC intended not to count weekends, it too could have promulgated such a rule such as Federal Rule of Civil Procedure 6(a)(1)(C) or Arkansas Rule of Civil Procedure 6(a) and it did not. At a bare minimum, the APCEC's rule could have specified "days" like most jurisdictions, but instead it elected to specify "calendar days."

The APCEC does allow electronic filing on the weekend under APCEC Rule 8.606(E), so filings can be made on the weekend. In so doing, the ACPEC is in-line with many federal courts who have likewise concluded that electronic filing renders the clerk's office "accessible" for purposes of Rule 6(a)(3) of the Federal Rules of Civil Procedure even when the clerk's office is physically closed or cannot be reached (due to weather for example). See *McElveen v. Westport Recovery Corp.*, 310 F. Supp. 3d 1374, 1378 (S.D. Fla. 2018) (citing with approval many cases in which federal courts have noted that the availability of electronic filing cures any accessibility issue arising from the clerk's office not being open on a particular day). The City has supplied no reason why the APCEC can or should depart from the rule in *EES*, which compels that Eco-Vista's motion to dismiss be granted.

Wherefore, Eco-Vista respectfully requests that its motion to dismiss be granted for the foregoing reasons.

Respectfully submitted,

QUATTLEBAUM, GROOMS & TULL PLLC  
111 Center Street, Suite 1900  
Little Rock, Arkansas 72201  
Telephone: (501) 379-1700  
Facsimile: (501) 379-1701  
cchiles@qgtlaw.com  
mheister@qgtlaw.com  
sbolden@qgtlaw.com

By: /s/ Michael B. Heister  
E. B. Chiles IV (96179)  
Michael B. Heister (2002091)  
Sarah Keith-Bolden (2007235)

*Attorneys for Eco-Vista, LLC*

**CERTIFICATE OF SERVICE**

I, Michael Heister, hereby certify that a copy of the foregoing has been served by first-class regular mail and email to the following parties of record this 5<sup>th</sup> day of June 2023.

Richard Mays  
Richard Mays Law Firm, PLLC  
2226 Cottdale Ln., Ste. 210  
Little Rock, AR 72202  
(501) 891-6116  
njackson@richmayslaw.com

Ross Noland  
Noland Law Firm  
P . O. Box 251402  
Little Rock, AR 72225  
(501) 541-7374  
Ross@NolandFirm.com

Lisa Thompson  
Mark Robinette  
Division of Environmental Quality  
5301 Northshore Drive  
North Little Rock, AR 72118  
(501) 682-0888  
(501) 682-0798  
lisa.m.thompson@adeq.state.ar.us  
robinette@adeq.state.ar.us

/s/ Michael B. Heister  
Michael B. Heister



# **EXHIBIT A**

**FINAL PERMIT  
FOR THE CONSTRUCTION AND OPERATION OF A  
SOLID WASTE DISPOSAL FACILITY**

**ISSUED BY  
STATE OF ARKANSAS  
DEPARTMENT OF ENERGY AND ENVIRONMENT  
DIVISION OF ENVIRONMENTAL QUALITY  
OFFICE OF LAND RESOURCES**

**Class 4 Landfill**

Permit Number	0290-S4-R2
AFIN	72-00144
Modification Effective Date	March 17, 2023
Original Issue Date	April 16, 1997
Modifications	0290-S4-R1 Dated April 11, 2000
Permit Owner & Address	Eco-Vista, LLC 2210 Waste Management Drive Springdale, Arkansas, 72762
Facility Site Name & Address	Eco-Vista, LLC Class 4 Landfill 2210 Waste Management Drive Springdale, Arkansas, 72762
Location	Section 23, Township 17 North, Range 31 West, Washington County, Arkansas
Permitted Waste Disposal Area	40.7 Acreage
Property Area	609 Acreage
Latitude/Longitude	36°08'23.97364"/94°15'23.68158"

By this permit Eco-Vista, LLC, hereinafter called "owner" or "permittee," is authorized for the construction and operation of the solid waste disposal facility as set forth in the permit modification application to the Division of Environmental Quality (DEQ) received on July 6, 2021 (Document ID 80453). The application was completed through a series of documents furnished by the applicant which includes Document ID 81907 (May 9, 2022), Document ID 80395 (June 28, 2021), Document ID 82167 (June 17, 2022), Document ID 82353 (June 22, 2022), and Document ID 82354 (July 13, 2022). This permit is issued pursuant to the provisions of the Arkansas Solid Waste Management Act (Arkansas Code Annotated § 8-6-201 et seq.) as amended, hereinafter called the "Act"; Rule No. 22, Arkansas Solid Waste Management Code, as adopted by the Arkansas Pollution Control and Ecology Commission (APC&EC), hereinafter called APC&EC Rule No. 22; all other applicable Rules of the Division of Environmental Quality, hereinafter called "Division" or "DEQ"; and the following terms and conditions:

<b>EXHIBIT A</b>
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## DESCRIPTION OF THIS PERMIT ACTION

This permit modification is for a lateral expansion of the permittee's Class 4 landfill. This permit modification expansion will allow disposal on an additional 12.2 acres and approximately 11.6 years of continued disposal of waste eligible for a Class 4 landfill as defined in APC&EC Rule No. 22. On the effective date, this permit modification supersedes all prior permits and permit modifications issued by the Division for this Class 4 Permit.

## SITE SPECIFIC CONDITIONS

1. This permit is for an approximately 609-acre site with a permitted waste disposal area of approximately 40.7 acres as indicated on the approved design plans (Document ID 80453). The final grades and elevations shown on the approved plans shall not be exceeded in anticipation of settlement and consolidation of the waste mass. This permit will expire when the disposal area described in the approved plans has been filled to design capacity, is closed, and post closure care is completed in accordance with the provision of APC&EC Rule No. 22.
  - a. The Division shall be notified in writing upon construction of each disposal unit and upon facility closure in order that it may be inspected.
  - b. Changes to or deviations from the construction/layout and operation of the facility, as indicated on the approved facility plans indicated below, and on the approved permit application documentation, are not authorized unless approved in writing by the Division.
  - c. The approved permitted plans for Eco-Vista, LLC Class 4 Landfill include the following:

i).	Existing Conditions and Site Map	Sheet 2 of 12, Document ID 80453
ii).	Subgrade Plan	Sheet 3 of 12, Document ID 80453
iii).	Top of Clay Liner	Sheet 4 of 12, Document ID 80453
iv).	Final Cover	Sheet 5 of 12, Document ID 80453
v).	Storm Water Plan	Sheet 6 of 12, Document ID 80453
vi).	Cross section A	Sheet 7 of 12, Document ID 80453
vii).	Cross Section B	Sheet 8 of 12, Document ID 80453
viii).	Liner and Final Cover Details	Sheet 9 of 12, Document ID 80453
ix).	Liner and Final Cover Details cont.	Sheet 10 of 12, Document ID 80453
x).	Leachate Collection Details	Sheet 11 of 12, Document ID 80453
xi).	Erosion Control Details	Sheet 12 of 12, Document ID 80453
2. The facility is permitted for 4,590,000 cubic yards of solid waste disposal, including daily and intermediate cover material.
3. The initial total amount of financial assurance is **\$1,234,162**. Of this amount, **\$1,092,022** will be required for closure costs; **\$142,140** will be required for post-closure costs. An 80% reduction in financial assurance for post-closure care is available to facilities that contribute to the post-closure trust fund. This amount shall be subject to annual adjustments and may be

increased at the discretion of the Division based upon the estimated cost for a third party to close the largest area requiring final cover during the active life of the facility and the cost for a third party to perform post-closure care.

- a. The financial instruments used must be in one of the forms set forth in APC&EC Rule No. 22 or as otherwise approved by the Division;
  - b. Operations allowed under this permit shall not commence until all financial assurance is satisfactorily filed with the Division; and
  - c. A portion or all of the financial assurance may be held by the Division beyond the time of cessation of disposal operations at the site to ensure satisfactory closure and post closure care (APC&EC Rule No. 22.1402(b) & 1403(b)).
4. This permit is for the disposal of bulky inert, non-putrescible Class 4 solid waste as defined by APC&EC Rule No. 22. This waste includes non-compostable wood waste such as tree trunks, stumps, demolition and construction debris, shredded or processed tires as defined by APC&EC Rule No. 36, Rules and Administrative Procedures for the Waste Tire Program, and furniture and other inert wastes that the Division may approve for disposal. Appliances may be disposed provided polychlorinated biphenyls (PCBs) and chlorofluorocarbons (CFCs) are removed from the appliance prior to disposal in accordance with applicable state and federal regulations. Hazardous and/or toxic waste materials, liquid or semi-liquid waste, household wastes of any kind, putrescible waste, paper waste including bulk cardboard and "Special Materials" as these terms may be used by APC&EC Rule No. 22 are not authorized for acceptance and disposal at the facility. Cardboard mixed with construction and demolition waste may be disposed in the landfill.
  5. At a minimum, a weekly cover of six (6) inches of compacted soil shall be applied to all exposed waste or on a regular schedule authorized by the Division. Cover material shall be applied on a more frequent basis if necessary to provide for the control of leachate, blowing litter, disease vectors, fires, odors, scavenging, or to prevent harm to human health or the environment. An intermediate cover of sufficient quantity but not less than twelve (12) inches of soil cover (including six (6) inches of daily cover) shall be applied over disposed waste in any area that is not to receive an additional application of waste or final cover within one hundred eighty (180) days in accordance with Section 22.609(b) of APC&EC Rule No. 22.
  6. Prior to construction of any cell of the lateral expansion, the permittee must notify the DEQ Office of Water Quality of the proposed changes in the storm water collection system and submit an application for a revision of the permittee's National Pollutant Discharge Elimination System (NPDES) permit(s) to establish compliance with APC&EC Rule No. 22.615.
  7. The permittee shall implement the Construction Quality Assurance (CQA) Plan under Document ID 82167. In addition to the implementation of the approved CQA Plan, the facility shall fully meet all requirements of APC&EC Rule No. 22.624. The facility shall be required to submit construction plans and specifications to the Division prior to each construction event at the facility.

8. The bottom liner system shall be eighteen (18) inches or more of compacted clay material exhibiting permeability equal to or less than  $1.0 \times 10^{-5}$  cm/sec. The approved bottom liner configuration is shown on Sheet 4 of 12, Document ID 80453 (APC&EC Rule No. 22.621(c)).
  - a. Proper construction of the bottom clay liner of each waste cell shall be observed and certified to the Division by a Registered Professional Engineer in a Construction Certification Report in accordance with the approved CQA Plan whenever a cell is prepared for use.
  - b. The Construction Certification Report shall include Construction Quality Assurance/Quality Control (CQA/QC) test results as indicated in the approved CQA Plan; drawings indicating the location, designation, and extent of area(s) actually constructed for use; and test locations.
  - c. The Certification Report shall be submitted to the Division at least fourteen (14) days prior to waste placement in that cell.
9. The permittee shall implement the requirements detailed in the Operating Plan and Narrative submitted to the Division under Document ID 80453. In addition to the implementation of the approved Operating Plan and Narrative, the facility shall fully meet all operating requirements of APC&EC Rule No. 22 unless specifically addressed by a permit condition.
10. After the final elevations are attained, the final cover system shall be constructed and a thick vegetation cover shall be established and maintained. Following establishment of cover vegetation, the vegetation shall be mowed at least annually or as needed during the growing season to control undesirable annual weeds and woody vegetative growth, and to facilitate proper inspection of the final cover system (APC&EC Rule No. 22.607(i)).
11. The Final Cover system will consist of either eighteen (18) inches of compacted clay with a permeability of  $1 \times 10^{-5}$  cm/sec or less and six (6) inches of topsoil or a geosynthetic clay liner, twelve (12) inches of soil and six (6) inches of topsoil. A suitable vegetative cover of perennial grasses shall be established and maintained.
12. The post-closure maintenance period for this facility shall be a minimum of two (2) years starting on the date the Division accepts closure of the facility. The length of the post closure period may be decreased or increased by the Director in accordance with APC&EC Rule 22.1302(c)(4).

13. Leachate shall be trucked to a sewage treatment plant or disposed in an alternate manner approved by the Division. The quality and quantity of leachate produced shall be monitored during the active life of the landfill and during the post-closure period for as long as significant amounts of leachate are produced. Leachate storage capability is subject to Division approval based upon actual leachate flow rates. Division approval must be obtained prior to any changes in leachate disposal methods. The following shall be monitored for each leachate disposal event:

Monitored Parameters and Constituents	
Volume Disposed	Cadmium
COD (or TOC)	Chloride
BOD5	Chromium
pH	Copper
Total Dissolved Solids	Lead
	Nickel
	Sulfate
	Zinc

Monitoring results shall be submitted directly from the contract laboratory to the Division after each monitoring event. For disposal of leachate at publicly owned treatment works [POTW] with approved industrial wastewater pre-treatment programs, testing requirements of the POTW may be substituted for tests required herein.

Drainage material used in the leachate collection system must be free of organic and carbonate material and meet the requirements of Section 22.425 (d) (2) of Rule No. 22.

14. A groundwater monitoring system shall be established and maintained to include the Class 4 area. Because of the proximity of the Class 4 landfill to the Class 1 landfill, the groundwater monitoring system for both landfills will be treated as one system with most monitoring details located within the Class 1 permit. The groundwater monitoring system will follow the requirements of Chapter 12 of APC&EC Rule 22. The Division reserves the right to require changes to the groundwater monitoring system based upon a review of the pending Class 1 permit modification application and the results of monitoring at existing monitoring wells.
15. Spring/Creek Sampling – The facility shall conduct surface water sampling of the location where dye was documented to be discharging in a February 22, 2022 complaint for Wildcat Creek (see Document ID 82225). The dye had previously been injected into a pit in the Class 4 landfill expansion area. This Wildcat Creek location is just north of the intersection of County Road 31 (Harmon Road) and County Road 863 (Clear Water Road). A #5 rebar was set on the north bank of the creek, downstream of the entrance of the spring discharge into Wildcat Creek. The surveyed coordinates for the rebar are: Geodetic LAT: 36°09'01.750" LON: 94°16'35.065" with State Plane: North 669195.1 East 640296.7 (Document ID 82354). The sampling location will be near this rebar and downstream of the entrance of the spring discharge into Wildcat Creek (Document ID 82354).

The sampling results for this location will be for informational purposes and will not be subject to the groundwater monitoring regulations within Chapter 12 of APC&EC Rule 22. However, if concentrations within the spring and creek indicate impacts, the Division may

require the landfill facility to perform additional investigations to determine if the facility is the source of the impacts.

This location will be sampled semi-annually for iron, manganese, and the Assessment Monitoring Constituent (AMC) list as defined in APC&EC Rule 22 for the conjoined Class 4 and Class 1 groundwater monitoring system. The AMC list consists of APC&EC Rule 22 Appendix 1 parameters and any APC&EC Rule 22 Appendix 2 parameters detected in the groundwater monitoring well system. If the facility moves into detection monitoring, the sampling parameters will consist of iron, manganese and the APC&EC Rule 22 Appendix 1 parameters. Laboratory results will be included as an appendix in the normal groundwater monitoring reports for the Class 4 and Class 1 system for that sampling period. In addition, graphs of detected parameters will be included in the same groundwater monitoring reports.

16. Additional Monitoring Wells – Within sixty (60) calendar days of effective date of this permit, the Permittee shall submit a work plan for Division approval for installation of four additional monitoring wells near the Class 4 landfill. Two wells should be between current monitoring wells MW-20 and MW-3N and two monitoring wells should be to the north and northwest of the new Class 4 expansion area.

## GENERAL CONDITIONS FOR CLASS 4 FACILITIES

17. This permit is issued in reliance upon the statements and representations made in the application, operating narrative, plans, specifications, correspondence, and other related documents. The Division bears no responsibility for the adequacy or proper functioning of the disposal facility. Nothing contained herein shall be construed as releasing the permittee from any liability from damage to persons or property due to the installation, maintenance, or operation of the disposal facility or any act of the permittee, or the permittee's employee or agents.
18. The disposal facility shall be constructed, maintained, and operated in accordance with the final plans, specifications, and operating plan and narrative submitted in the application, and in compliance with all applicable provisions of the Act, APC&EC Rule No. 22, and all other applicable rules and regulations.
19. Any statements in the operating narrative, specifications, and/or engineering plans that conflict with APC&EC Rule No. 22, permit conditions herein, or other applicable laws and regulations shall not be considered authorized by the Division.
20. At all times the disposal facility shall be maintained in good condition and operations shall be conducted by licensed, qualified on-site operators holding the appropriate license as required by APC&EC Rule No. 27, Licensing of Operators of Solid Waste Management Facilities and Illegal Dump Control Officers.
21. All disposal fees shall be paid to the Division in accordance with APC&EC Rule No. 11.
22. The bottom liner shall be eighteen (18) inches or more of compacted clay material exhibiting permeability equal to or less than  $1.0 \times 10^{-5}$  cm/sec (APC&EC Rule No. 22.621(c)).
23. The final grades and elevations shown on the approved plans shall not be exceeded at any time or in anticipation of settlement and consolidation of the waste mass.
  - a. Timely initiation and completion of closure of landfill cells or units shall be made in accordance with APC&EC Rules No. 22.1301(f) and (g).
  - b. Proper construction of the final cover system shall be observed and certified in writing to the Division by a Registered Professional Engineer in a Construction Certification Report in accordance with the approved Construction Quality Assurance (CQA) Plan whenever a cell, module, area or phase of the landfill is closed-out (APC&EC Rule No. 22.624).
  - c. The Certification Report shall include CQA/QC test results as indicated in the approved CQA Plan; drawings indicating the location, designation and extent of closed area(s); and test locations (APC&EC Rule No. 22.624).
24. The permittee shall maintain an Operating Record at the location indicated in the permit application, or at an alternate location approved in writing by the Division.



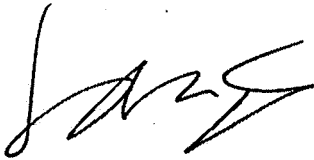
- a. At a minimum, the following documents and materials shall be permanently retained in the facility operating record for review by authorized representatives of the Division:
    - i. The approved facility operating plan, approved permit plans and specifications, CQA reports, site inspection reports, operator licenses, this disposal permit and written authorizations issued by the Division that provide modifications to the facility or its operations, all environmental monitoring or test results, and other pertinent records, certifications and correspondence as required by APC&EC Rule No. 22 or other permit conditions herein;
    - ii. All construction test results, certifications, acceptances, construction reports, photographs, layout drawings, record (as-constructed) drawings, shop drawings, construction drawings, and other documentation required by the specifications, and CQA/QC plans, reports and documents; and
    - iii. Other documents that pertain to the operation and maintenance closure and/or post-closure of the facility, or as directed by the DEQ.
  - b. The permittee shall forward a copy of information from the Operating Record when requested by the Division.
25. This permit may be revoked or modified whenever, in the opinion of the Division, the facility is no longer in compliance with the Act, APC&EC Rule No. 22, or other applicable rules and regulations. Except where expressly authorized by the Division, this permit shall not relieve the permittee, or the permittee's employees or agents, from compliance with the provisions of the Act and APC&EC Rule No. 22 (APC&EC Rule No. 22.309(e)).
  26. The Division may issue modifications or amendments to this permit governing the design, operation, maintenance, closure or post closure of the facility during the term of this permit. Such modifications or amendments shall be incorporated into this permit and shall be fully maintained and enforceable as a condition or conditions of this permit (APC&EC Rule No. 22.308(f)).
  27. The Division has received an initial permit fee from the permittee. Annual permit fees are due thereafter and shall be assessed in accordance with APC&EC Rule No. 9, Fee System for Environmental Permits. The Permittee shall remit quarterly payments for disposal fees no later than January 15, April 15, July 15, and October 15 following the quarter to which the payments pertain (APC&EC Rule No. 11.207(a)). Failure to pay permit fees when due may result in revocation of this permit (APC&EC Rule No. 22.309(e)).
  28. Any change in the ownership of the facility or control of the operation may be considered a permit modification and shall be fully disclosed to the Division. For purposes of this evaluation, ownership or control may result from a change in the debt or equity of the permittee of five percent (5%) or more. A permit transfer will not be required when a change in ownership or control of the facility is among the persons and/or entities previously disclosed to the Division in the Disclosure Statement or similar disclosure.

29. The permittee shall furnish the Division annual engineering inspection reports in accordance with APC&EC Rule No. 22.619. This report is due on June 30 of each year and shall cover the preceding period beginning January 1 and ending December 31.
30. A survey control system shall be established and maintained at the landfill site that complies with APC&EC Rule No. 22.622 and No. 22.426.
31. The landfill working face shall be confined to the smallest practical area (APC&EC Rule No. 22.607(c)).
32. The permittee may engage in or allow salvage operations at the facility in accordance with the approved salvage plan. The Division may review and approve requests for future salvage of disposed materials for recycling purposes on a case-by-case basis (APC&EC Rule No. 22.607(e)).
33. Disposal of bulk liquid waste in the landfill is prohibited. Liquid waste is waste that contains "free liquids" as defined by Method 9095 (Paint Filter Liquids Test) in EPA Publication No. SW-846 (APC&EC Rule No. 22.616).
34. Appropriate NPDES construction/storm water permit(s) shall be obtained for storm water discharges from the landfill site and borrow sites. A Storm Water Pollution Prevention Plan (SWPPP), which outlines erosion and sediment control measures, shall be prepared and implemented in accordance with applicable NPDES requirements. A copy of the SWPPP shall be maintained on-site for reference by operating staff (APC&EC Rule No. 22.614, No. 22.615 and No. 22.623).
35. The Permittee shall comply with the air criteria requirements of APC&EC Rule No. 22.612. Those requirements include meeting the State Implementation Plan (SIP) pursuant to Section 110 of the Clean Air Act, prohibiting open burning of solid waste, unless authorized by the Division, and establishing fire safety procedures.
36. The permittee shall implement a hazardous waste screening and detection program at the facility in accordance with the approved operating plan and APC&EC Rule No. 22. The program shall include procedures for the evaluation of any questionable wastes prior to disposal to determine whether the waste complies with the APC&EC Rule No. 22 requirements for disposal in the facility.
37. Erosion and sediment controls shall be implemented and maintained on an ongoing basis at each borrow site (whether on-site or off-site) to minimize sediment losses until final reclamation/stabilization of the borrow site is accomplished and final reclamation of the borrow site is determined to be acceptable by the Division. Final reclamation/stabilization of each borrow site shall include final grading to promote proper drainage and establishment of suitable perennial grasses such that all disturbed area are fully stabilized, or reclamation through other means approved in writing by the Division. Final side slopes at borrow pits shall not be any steeper than 3:1 (horizontal:vertical).
38. Measures to control and prevent storm water from running through or into the active fill area shall be constructed and maintained at the site and no waste shall be deposited in standing

water or within five (5) feet of the ground water table (APC&EC Rule No. 22.607(h) and 22.615(5)).

39. The Division, its employees, agents, or any authorized person shall have the right to enter the property at any time for any reason as set out in APC&EC Rule No. 22 for the purposes of, including but not limited to, taking samples, reviewing the operating record, inspecting the facility, and performing other enforcement or engineering action without interference or delay from the permittee (APC&EC Rule No. 22.1501).
40. The Division's decision to issue this permit is final for purposes of appeal as of the date indicated in the Certificate of Service below. If any provision of these conditions or the application of these conditions thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of these conditions that can be given effect without the invalid provision or application. Therefore, to this end, the provisions of these conditions are declared to be severable.

APPROVED BY: **Division of Environmental Quality**  
5301 Northshore Drive  
North Little Rock, Arkansas 72118-5317



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Jarrold Zweifel, P.G.  
Associate Director

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March 17, 2023  
Date

#### CERTIFICATE OF SERVICE

I, *Ken Blue*, hereby certify that a copy of this permit has been mailed by first-class mail to David Conrad at 100 Two Pine Drive, North Little Rock, AR, 72117, on or before this 17<sup>th</sup> day of March, 2023.

BEFORE THE ARKANSAS POLLUTION CONTROL  
AND ECOLOGY COMMISSION

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

**REPLY IN SUPPORT OF MOTION TO DISMISS**

Permittee Eco-Vista, LLC, (“Eco-Vista”) moved to dismiss the request for hearing filed by a group of individuals, the “Petitioners,” in the above-captioned docket. The Petitioners’ filed their Response on May 30, 2023, opposing dismissal. Petitioners argue their pleading “that provides notice to the other parties and the ALJ of the essence of the facts and law related to the appeal” will suffice. (emphasis in original). Individual Petitioners’ Response to ADEQ’s And Eco-Vista, LLC’s Motion to Dismiss at 3 (“Petitioners’ Response”). Petitioners are incorrect.

This is an administrative proceeding, and the purpose of it is to assist the state government, acting through the Arkansas Department of Energy and Environment Division of Environmental Quality (“DEQ”) and Arkansas Pollution Control & Ecology Commission (“APCEC”), to reach the right permitting result under the law. The object is not to raise storm and fury that, from a legal perspective, signifies nothing.<sup>1</sup> That is why Arkansas law and the APCEC’s implementation of rules such as Rule 8.603(C)(1)(c) require “detailed” information from the start. Without that, the DEQ and APCEC cannot determine expeditiously whether they have reached the correct

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<sup>1</sup> *Shakespeare, William*. Macbeth (Act 5, Sc. 5). Petitioners’ repeated description of Eco-Vista, LLC, as “EVL” is a gift-wrapped example.

outcome. Once the ALJ moves beyond Petitioners' rhetoric, there is nothing left that meets the pleading requirements that apply to this proceeding and dismissal is the correct remedy.

## **I. PETITIONERS CITE THE WRONG PLEADING STANDARDS**

The rule governing pleading in this administrative proceeding is clear. A request for hearing must provide APCEC a "detailed statement identifying the legal and factual objections to the permit action." Commission Rule 8.603(C)(1)(c). The APCEC is required to use this heightened pleading standard under Arkansas law. Ark. Code Ann. § 8-4-205(b)(3). Consequently, Petitioners' references to the Arkansas Rules of Civil Procedure (which require fact pleading, not notice pleading),<sup>2</sup> are of no use to Petitioners.

APCEC Rule 8.603(C)(2) further requires that "a failure to file a Request for Hearing in the form and manner set out in Reg.8.603(C)(1) may result in the dismissal of the Request for Hearing." The APCEC has made it crystal clear in decisions such as *In the Matter of Big River Steel, LLC*, Docket No. 13-006-P, Order No. 9 at p. 16, what is required. Petitioners' failure to acknowledge this analytical framework and explain how it is satisfied here implicitly concedes the point – Petitioners have not met the standard. Dismissal is therefore appropriate.

## **II. PETITIONERS ARGUE DEQ "WAS NOT AUTHORIZED BY LAW" TO PROCESS ECO-VISTA'S APPLICATION**

Petitioners' first and third arguments in opposition are that they have raised a question of whether APCEC Rule 22.204(c), "Host Community Approval Of Site Selection," is satisfied, but

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<sup>2</sup> Arkansas is a fact-pleading state and the court looks to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled. *Panhandle Oil & Gas, Inc. v. BHP Billiton Petroleum (Fayetteville), LLC*, 2017 Ark. App. 201, 6–7, 520 S.W.3d 277, 282 (2017). Even under the Arkansas Rules of Civil Procedure, a complaint must still allege facts that establish a prima facie cause of action, not just conclusory allegations. *Parnell v. FanDuel, Inc.*, 2019 Ark. 412, 5, 591 S.W.3d 315, 319 (2019). As explained herein, Petitioners' Request for Hearing would not survive in state court either because it does not identify any facts that, if true, give rise to a cause of action.

Petitioners never provide any detail, as required by APCEC Rule 8.603(C)(1)(c).

Petitioners' argument, at its heart, is that because DEQ and Eco-Vista are arguing the "merits" of Petitioners' claim, it must follow that Petitioners have pleaded something specific enough to survive a motion to dismiss. That is not an adequate response. Both DEQ and Eco-Vista acknowledge the applicable requirements of APCEC Rule 22.204(c) and identify the specific manner in which the requirements are satisfied by the City of Tontitown's adoption on July 3, 2018, of Resolution 2018-07-7970-R ("July 2018 Resolution"). (Eco-Vista Brief in Support of Motion to Dismiss, Exhibit 1). It is not enough for Petitioners to complain that this does not satisfy APCEC Rule 22.204(c), they must provide some detail as to the "how" or "why" (i.e., they must explain what was legally or factually improper about DEQ's acknowledgment of the July 2018 Resolution and DEQ continuing to process Eco-Vista's application). They did not.

Petitioners claim Eco-Vista "was obviously on notice of the legal and factual claims made by Petitioners on this issue," but mere notice does not satisfy APCEC Rule 8.603(C)(1)(c). It is also not true. The only argument Eco-Vista can piece together from Petitioners' opposition is that Petitioners' think the City's July 2018 Resolution was not "unconditional" or "definitive." Petitioners' Response at 5. However, nothing in APCEC Rule 22.204(c) requires that it be. All it requires is that a city needs to make "definitive findings in conformance with [Rule 22.204]." The Petitioners did not identify a single finding "in conformance with" APCEC Rule 22.204 that was required by law to be in the July 2018 Resolution that was not.

Petitioners also argue the City of Tontitown withdrew its approval. Petitioners' Response at 9-10. Again, Petitioners identify no statute or rule that directs DEQ to stop processing a permit application if a municipality adopts a new resolution that seemingly conflicts with, but contains

no language superseding, the July 2018 Resolution. Their claim thus fails to satisfy APCEC Rule 8.603(C)(1)(c) and should be dismissed.

### III. PETITIONERS PROVIDE NO AUTHORITY FOR WHY THEY MAY ATTACK THE CERTIFICATE OF NEED IN THIS PROCEEDING

Petitioners’ second argument regarding its challenge to the “Certificate of Need” issued by the Boston Mountain Regional Solid Waste Management District (the “District”), unlike their challenge to the July 2018 Resolution, does articulate two distinct issues and specific facts. Petitioners’ Response at 8. Unfortunately for Petitioners, both of those arguments were ones that could and should have been raised with DEQ in a challenge to the Certificate of Need. Ark. Code Ann. § 8-6-706(c); APCEC Rule 22.206. They were not timely raised and they are time barred.

Petitioners’ fourth argument, which also pertains to the District’s Certificate of Need, tries to create an issue of fact for the APCEC to resolve by ignoring the obvious. Eco-Vista’s permit application was served via electronic mail on DEQ on July 6, 2021, as plainly stated on the first page of the application in DEQ’s own files at Doc Id. 80453, which is publicly available. If Petitioners plan to argue that the date an email was sent is not accurate that requires some detail, and Petitioners’ Request for Hearing and their Response do not have it.

It is also fair to note that the Petitioners are simply wrong. A brief review of DEQ’s website shows DEQ provides two dates for documents, a “Letter Date” and an “Entry Date”:

Eco-Vista, LLC			
Eco-Vista, LLC Tontitown	Facility Class:	4	County: Washington
Permit #: 0290-S4-R2	Permit Status:	Active Permit	Engineer: Annette Cusher
AFIN: 72-00144	Facility Status:	Open	Inspector: Jason Gilkey
Contact: Ms. Jodi Reynolds-Coffelt	Title:	Environmental Manager	Phone: (479) 699-1475
Address: 88 Joyce Lane		Russellville, AR 72802	Fax:

[View Permit](#)  
[View Inspections](#)

#### Permitted Facility Report

Note: Click underlined Entry number for PDF copy of the original document.

Letter Date/ Entry Date	Entry/XRef	Score	Summary

DEQ's website plainly states that Eco-Vista's application was dated July 6, 2021, but that DEQ did not enter it into its electronic system until the next day:



Had Petitioners reviewed DEQ's website, they would have seen that DEQ usually enters correspondence into its online file the same day, but there are plenty of examples where a document is not entered into the online system for weeks or even months.<sup>3</sup> Again, if Petitioners intended to argue that DEQ's "Date of Entry" for documents that are published online is the legal date of service, that is an argument requiring a far more detailed discussion with citations to authority than Petitioners provide. None of the foregoing requires any findings of fact that stand in the way of dismissal. It simply highlights that Petitioners, who have the burden under ACPEC Rule 8.603(C)(1)(c) of providing a "a complete and detailed statement" of what they are appealing, have not done so. Dismissal is the proper remedy.

Wherefore, Eco-Vista, LLC, respectfully requests that its Motion to Dismiss be granted.

Respectfully submitted,

QUATTLEBAUM, GROOMS & TULL PLLC  
111 Center Street, Suite 1900  
Little Rock, Arkansas 72201  
Telephone: (501) 379-1700  
Facsimile: (501) 379-1701  
cchiles@qgtlaw.com  
mheister@qgtlaw.com  
sbolden@qgtlaw.com

By: /s/ Michael B. Heister

<sup>3</sup> [https://www.adeg.state.ar.us/sw/permits/p\\_facil\\_report.aspx?PermitNumber=0290-S4-R2](https://www.adeg.state.ar.us/sw/permits/p_facil_report.aspx?PermitNumber=0290-S4-R2) (last visited June 3, 2023).



E. B. Chiles IV (96179)  
Michael B. Heister (2002091)  
Sarah Keith-Bolden (2007235)

*Attorneys for Eco-Vista, LLC*

**CERTIFICATE OF SERVICE**

I, Michael Heister, hereby certify that a copy of the foregoing has been served by first-class regular mail and email to the following parties of record this 5<sup>th</sup> day of June 2023.

Richard Mays  
Richard Mays Law Firm, PLLC  
2226 Cottdale Ln., Ste. 210  
Little Rock, AR 72202  
(501) 891-6116  
njackson@richmayslaw.com

Ross Noland  
Noland Law Firm  
P . O. Box 251402  
Little Rock, AR 72225  
(501) 541-7374  
Ross@NolandFirm.com

Lisa Thompson  
Mark Robinette  
Division of Environmental Quality  
5301 Northshore Drive  
North Little Rock, AR 72118  
(501) 682-0888  
(501) 682-0798  
lisa.m.thompson@adeq.state.ar.us  
robinette@adeq.state.ar.us

/s/ Michael B. Heister  
Michael B. Heister