STATE OF SOUTH DAKOTA
OFFICE OF HEARING EXAMINERS

CITY OF MADISON PERMIT APPLICATION TO CONSTRUCT AND OPERATE A SOLID WASTE RESTRICTED USE FACILITY	DANR 24-001 **POTTERS' REPLY TO CITY'S ARGUMENT AND IN SUPPORT OF LANDOWNERS' OBJECTIONS**

COME NOW Karen Potter, Mark Potter, and Donita Potter ("Potters" or "Petitioners"), through undersigned counsel, and hereby respectfully submit this Reply to City's Argument and in Support of Objection to the Proposed Decision, Findings of Fact, Conclusions of Law, and Order ("Proposed Decision"). Specifically, Potters submit this Reply to respond to the new arguments raised by City in its Response filed on November 4, 2026, which, for the first time in these proceedings, seeks to argue that floodplains running through the central segment of the subject Prairie Pothole Region property are 500-year floodplains rather than 100-year floodplains. Although City seems to characterize the area as a "hazard" rather than a "floodplain," which is nevertheless incorrect, City seems to want to handwave and play semantics rather than directly address the devastating environmental consequences of potential contamination of leachate, PFAS, and other byproducts generated by City's misguided restricted use facility.

ANALYSIS

City does not respond to Potters' evidence-backed arguments that, *inter alia*, City utterly failed to introduce any evidence that the restricted use site is in the public interest, that City's application is procedurally and substantively defective due to its failure to have approval from the County prior to issuance of the permit, that City has failed inspections and violated environmental

laws, and for the reasons that City has not shown that it has the character or reputation to manage a restricted use site that presents the environmental and ecological concerns that this restricted use site poses to public health, safety, and welfare, among other fatal defects pointed out in Potters' previous briefings and objections.

Instead, City chooses only to argue that the floodplain in the central segment of the proposed restricted use site is a 500-year floodplain and not a 100-year floodplain. The glossary on FEMA's website defines "500-year floodplain" as "the boundary of the flood that has a 0.2 percent chance of being equaled or exceeded in any given year[,] [o]fficially termed the 0.2-percent annual chance floodplain." *See* https://training.fema.gov/is/course/glossary.aspx. City is incorrect to assert that this is merely a "flood hazard," as if to downplay the significant, and not a "floodplain," which highlights the inappropriate nature of raising these arguments for the first time through briefing and not through testimony. Indeed, at the contested hearing, DANR's counsel, Mr. Blair, solicited testimony from its own representative, engineer, and expert witness—Mr. Steve Kropp—who testified that the orange area on the map referenced in City's Response was identified as a "100-year floodplain." That evidence was not rebutted, controverted, or contradicted at the contested hearing. As such, it was DANR's position at the contested hearing that a 100-year floodplain is located upon the subject parcel.

A portion of the transcript from the contested hearing is contained below, which includes question from DANR's counsel and responses from Mr. Kropp:

Q (By Mr. Blair) Okay. For -- we'll just stick with this map for what I'll call the eastern half

Paige K. Frantzen
Paige.Frantzen@gmail.com

or two-thirds of the property. After reviewing this map, did you reach any conclusions about the location of floodplains on the proposed site?

A Yes.

Q And for this portion of the parcel, what were those conclusions?

A That the FEMA flood hazard map had identified what appeared to be a 100-year floodplain through there. They would have classified it as the orange thing and the other areas of flood hazard.

Q Is it your -- I might have missed that last part. Is it your testimony the orange is the 100-year floodplain?

A Yes.

Transcript at 296:24-297:14.

City's lawyer argument in its Response constitutes improper expert testimony that, procedurally, must be rejected. DANR's own witness testified that a 100-year floodplain runs through the property. No expert testimony was elicited to contradict this conclusion. In fact,

Petitioners' expert witness, Lee Daigle, testified that we need to be identifying optimal locations with less wetlands and not low-lying areas that contain floodplains. Transcript at 815:5-10. Petitioners also introduced testimony from other witnesses identifying the flooding and otherwise wet conditions of the proposed site.

Even if the orange area in the map submitted by DANR constitutes a 500-year floodplain—or "flood hazard" as City calls it—rather than a 100-year floodplain, it does not change the fact that the land is clearly unsuitable for the restricted use site. Either way, a water, rain, snow melt, precipitation, water flow runs through the heart of the parcel in many directions -- including heavy patters flowing East to West that, statistically, will flood at some point in our future, and to which drains into and from the wetlands on the East and a wetland and Schaefer Lake on the West, that impacts our environment, wildlife, habitat, livestock, and the public health, safety, and welfare of our citizens. City has not demonstrated and otherwise ignores that the restricted use site is not in the public interest, that it is not trustworthy to manage the restricted use site, and that the land is simply not suitable for its intended use.

CONCLUSION

Petitioners Potters respectfully request that the Board reject the Proposed Decision and deny the permit.

Dated this November 16, 2026.

/s/ Jonathan A. Heber
Jonathan A. Heber
Cutler Law Firm, LLP
140 N. Phillips Avenue, 4th Floor
Sioux Falls, SD 57101-1400
jonathanh@cutlerlawfirm.com

Daniel L. Scott, Esq.; SD License 2347
1740 Summit Avenue
Saint Paul, MN 55105

daniellorenscott@gmail.com

Michael M. Hickey
Bangs McCullen Law Firm
5048 E. 57th Street, Suite B
Sioux Falls, SD 57108
mhickey@bangsmccullen.com
Attorneys for Potters

CERTIFICATE OF SERVICE

I, Jonathan A. Heber, do hereby certify that on this November 16, 2026, the original "REPLY TO CITY'S ARGUMENT, AND IN SUPPORT OF LANDOWNERS' OBJECTIONS" was submitted via electronic mail upon the following to be filed in the above-captioned matter:

Emily Greco
1302 E. Hwy. 14, Suite 1
Pierre, SD 57501-8501
Attorney for Board of Minerals and Environment

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

Brenda Binegar
Dept. of Agriculture & Nat. Resources
523 E. Capitol Avenue
Pierre, SD 57501

Steven R. Blair
Deputy Attorney General
PO Box 70
Rapid City, SD 57702
Attorneys for DANR – Waste Management Program

David J. Jencks
Jencks Law, P.C.
121 North Egan
P.O. Box 442
Madison, SD 57042
Attorneys for City of Madison - Permit Applicant

Patricia Schaefer
23234 441 A. Avenue
Winfred, SD 57076
Landowner Petitioner - Pro Se

/s/ Jonathan A. Heber
Attorney for Petitioners Karen Potter, Mark Potter, and Donita Potter