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 **PETITIONERS' OBJECTION TO PROPOSED DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

COME NOW Karen Potter, Mark Potter, and Donita Potter ("Potters" or "Petitioners"), through undersigned counsel, and hereby respectfully submit this Objection to the Proposed Decision, Findings of Fact, Conclusions of Law, and Order ("Proposed Decision"). Petitioners incorporate and expressly preserve all arguments made in this contested case matter, including, but not limited to, all such arguments and assertion of legal rights raised in their communications, pleadings, filings, motion practice, discovery, at the Contested Hearing, and in their Post-Hearing Brief, Proposed Findings of Fact and Conclusions of Law, and their Proposed Decision.[1]

INTRODUCTION

The Board of Minerals and Environment ("BME") is the final administrative gatekeeper that can prevent the permitting of Prairie Pothole land surrounded by and containing wetlands, groundwater, surface water, streams, and floodplains that is not suitable for a landfill, and to a municipality that has shown that is irresponsible and has a long history of "unacceptable" non-

[1] 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 City of Madison ("City")/ DANR 24-001 record herein. Petitioners maintain and do not waive their argument that DANR and BME were not proper parties to or participants in the proceedings at specifically noted times, pursuant to legal authority. *See* Motion for Reconsideration and Clarification of OHE's Initial Actions Regarding the Foundational Construct of this Contested Action dated August 2, 2024, and other related motion filings and oral arguments.

compliance with its prior landfill at the Junius site.[2] We cannot un-ring that bell if City pollutes our wetlands, downstream watersheds, grasslands, and unique environment.

Ultimately, City and DANR failed to establish the two-criterion City has the burden of proving: (1) that the proposed Winfred facility will meet all requirement of SDCL §§ 34A-6-1.1 to 34A-6-1.38, and (2) is in the "public interest." In fact, City and DANR scantly even tried to make a case that the facility could be in the public interest. City and DANR failed to call any area citizens or residents to speak about the supposed public interest of the facility, they failed to call a single contractor or local producer who may use the proposed facility, and they failed to call the owner/previous owner of the property and a Permit Application signatory (i.e., Wayne Bessman, who testified at his deposition that he offered City the opportunity to conduct environmental testing, including required soil borings - but City passed). City also failed to call their own designated 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 the proposed development matter (e.g., Ryan Hegg or Civil Design, Inc.). Moreover, Petitioners have shown that City has (1) made many misrepresentations of material facts in it application and throughout the application and permitting processes, (2) violated numerous environmental laws of

[2] *See, e.g.,* "**Solid Waste Inspection Reports**" and inspection-related documents, images, communications, including inspections on (i) **Ex. 256**//***Apr. 19, 2024*** - unauthorized waste, chemically treated wood, putrescible waste, nonexistent soil cover, blowing debris, increased fire potential, chemicals and treated materials being burned; (ii) **Petitioners' Post-Hearing Brief at Ex. A**//***Apr. 9, 2019*** - unlawful and "still smoldering" burning ("approximately two weeks" after ignition) of unauthorized waste-C&D, waste tires, filled trash bags, painted and chemical waste, unacceptable operations, compliance infractions, permit violations, state's air quality violations [SDCL 34A-1-1 Air Quality Policy of State], unacceptable records and information management, failed mandatory burn notices to DENR/WMP, windblown litter on neighboring land, unacceptable inspection findings, unacceptable "Overall Facility Rating"; and (iii) **Petitioners' Post-Hearing Brief at Ex. B**//***Sep. 3, 1997*** - failure to construct required drainage berms, receipt of unacceptable waste materials, unlawful acceptance of "special waste" [ARSD 74:27:13:17], including "bulky waste"/white goods, "waste tires" and "industrial waste such as the cable cutting waste from Madison Metal Inc." *See also* ***May 13, 2024*** - Jim Wendte "Madison RU" email: "Spoke with Roxie about disappointment in soil cover and unauthorized wastes. Told her no guarantee but this kind of info could be a discussion topic during a new permit hearing. Wouldn't shine a very bright light on Madison's ability to operate a compliant site"; referencing **Ex. 256**//***Apr. 19, 2024*** inspection; see also Hearing transcript referencing same.

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 elected commissioners, and even those in attendance at the contested hearing regarding its actions in seeking a permit in this matter. City has shown that it is unreliable, unqualified and untrustworthy in safely and professionally operating the proposed facility, especially one that is significantly impacted by the abounding waters of our State.

Petitioners respectfully request that BME apply its gatekeeping function and protect our environment and public welfare by denying the City's permit application.

ANALYSIS

I. Legal Standard.

The Office of Hearing Examiners set forth the legal standard in its Proposed Decision. 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."[3] In other words, City must show that the facility (1) will meet the requirements of §§ 34A-6-1.1 to 1.38, and (2) 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 application must be denied because, per the statute, the Board may only issue a permit if both parts of the test are satisfied. City woefully fails the test and fails its burden of proof.

[3] 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 (5) 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.

II. <u>Procedurally, City Does Not Have Requisite Approval by Lake County Under SDCL § 34A-6-103.</u>

In the Proposed Decision, the Chief Hearing Examiner concludes as a matter of law that Lake County's prior resolution approval has "expired." *See* Proposed Decision, Conclusion of Law # 19. As a result, City's permit application **<u>must</u>** be denied as a matter of law.

Our law states that a permit *cannot* be granted unless approval is obtained no more than twenty-four months before the issuance of the permit:

> 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 <u>before the issuance</u> 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.

SDCL § 34A-6-103.

City obtained approval from Lake County on September 5, 2023.[4] Ex. 100 at p. 10 (Resolution 2023-15). However, the county's approval expired on its own terms on September 5, 2025, prior to the date of the contested case proceeding, entirely consistent with State law. *See id.*; *see also* HT 27:2-28:24. Prior to the resolution's expiration, City did nothing and took no action whatsoever to avoid the rule of law. DANR similarly slept on the plain and unambiguous limitation language of SDCL 34A-6-103.

City and DANR attempted to circumvent this requirement by adding approval by Lake County as a condition subsequent; however, such a condition violates the laws of our State. Our law is clear that a permit cannot be granted unless City first secures valid county support and approvals. Because there is no valid approval by Lake County, the permit must be denied. Approval by the County cannot be made a "condition" of the permit because it would require the permit to be granted first, which our law does not allow.

[4] Potters objected and argued against any approvals by Lake County's commissioners and zoning authority based upon legal failures of local and state rules and regulations, and basic due process requirements.

III. Procedurally, DANR Modified its Secretary's Recommendation and Draft Permit in Plain Violation of SDCL § 34A-6-1.14.

The Proposed Decision errs by failing to recommend the denial of the permit on the basis that DANR cannot modify its recommendation to the Board, which it expressly and knowingly did at Contested Hearing and which the Proposed Decision adopted.[5]

Once DANR has made a recommendation regarding a solid waste permit and that recommendation has been published in a newspaper, by law DANR cannot make a new recommendation without starting the process over. Yet that is precisely what DANR attempted to do at the beginning and 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 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

[5] At best, the OHE made a passing reference to this statute in Conclusion of Law No. 3.

> 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.

Moreover, the introduction of a modified permit 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.

III. <u>Procedurally, under ARSD 74:27:08:19, City Cannot Seek an Amendment of its Own Permit Application.</u>

The Proposed Decision erred by failing to recommend the denial of the permit on the basis that the City cannot amend 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 application once the secretary has made a recommendation on the application, and said recommendation has been public noticed.

IV. Procedurally, DANR Failed to Properly Publish the Secretary's Recommendation Pursuant to ARSD 74:27:08:16.

The Proposed Decision erred by failing to recommend the denial of the permit on the basis that City's permit application must 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. 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. Here, 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.

V. Procedurally, the Contested Case Proceeding Was Not Held Within 60 Days in Violation of ARSD 74:27:08:18.

The Proposed Decision erred by failing to recommend the denial of the permit on the basis that 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." Here, the board failed to promptly schedule a hearing upon receipt of either Mrs. Schaefer's or Potters' petitions. 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 window 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.

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

Petitioners provided a detailed and comprehensive explanation in its Post-Hearing Brief for all the reasons that City failed to satisfy its burdens of proof and demonstration, including the fact that, as stated at the top of this Objection, all such arguments are incorporated herein.

City failed to demonstrate that it complied with the requirements of SDCL § 34A-6-1.1, including that City did not fulfill its legal obligation to perform soil borings as required by SDCL § 34A-6-1.6 and ARSD 74:27:12:04, that the application was incomplete, inaccurate, unsigned, and not certified, that City did not consider or adhere to the policy set forth in SDCL § 34A-6-1.2 to reduce reliance upon land disposal of solid waste, and that the proposed facility would violate ARSD 74:27:11:03 for be located within the boundaries of a 100-year floodplain.

Petitioners emphasize that the Proposed Decision does not reflect any record evidence that City satisfied its burden of demonstrating that the proposed landfill is in the public interest. The Proposed Decision is correct that this was the *City's* burden; however, the City did not set forth evidence that the landfill was in the public's interest.

The Proposed Decision merely states that the proposed facility is in the "public interest," but fails to provide any reason why except for a passing reference that "[e]vidence was presented that contractors and residents had requested access to a local restricted use facility." The South Dakota Supreme Court has rejected a generic determination that a site is in the public interest and remanded the issue in *Matter of SDDS, Inc.*, 472 N.W.2d 502 (S.D. 1991). 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)).

City failed to introduce sufficient evidence at the hearing that the landfill is in the public interest.d City called <u>one</u> 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 was the supervisor of the now-closed Junius restricted use site and would be the supervisor of the Winfred site, if permitted and constructed. 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.

Mr. Gonyo was a legal signatory to City's permit application. But City elected to not call Mr. Gonyo to offer supportive testimony. City also did not call Roxie Ebdrup,[6] 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,[7] who was a central witness working directly and closely with Mayor Lindsay regarding the proposed new Winfred 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, or any of the third-party engineers at Civil Design, Inc. who prepared the one-page page site map attached to the recommended permit, or any expert witness regarding the need, viability, or wisdom of a very large solid waste landfill being constructed and operated for many decades in the East Fork Vermillion River Valley area and Prairie Pothole region. Finally, City failed to 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. It offered no data, calculations, or certification of landfill need. Mayor Lindsay made a short passing hearsay reference in his testimony that "contractors" 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. HT 145:16-21. In the cross-examination of Mr.

[6] Petitioners called Roxie Ebdrup adversely later at the hearing.
[7] Petitioners called Jameson Berreth adversely later in the hearing.

Lindsay, he could only reference the cost at the Junius site (which was profitable for the City, as shown at the hearing), as a reason for moving to an entirely new location. HT 132:13-21.

In contrast, Petitioners set forth overwhelming evidence that the proposed landfill was not in the public interest. That evidence is set forth in detail in Petitioners' Post-Hearing Brief at pp. 33-44, including, but not limited to, evidence that (1) the proposed facility and location is simply not suitable for a landfill, which included expert opinions from Lee Daigle and Mark Torresani out of Cornerstone Environmental Group, LLC; (2) the proposed facility lacked proper due diligence and investigation; (3) the proposed facility contained the presence of wetlands, water flow, surface waters, 100-year floodplains, water springs, and overall water drainage; (4) the proposed site is not in the public interest due to adversely affecting wildlife and recreation; (5) the proposed site is not in the public interest because it impacts the health and safety of the immediate area and the State; (6) Petitioners introduced evidence regarding the lack of appropriate road infrastructure for the proposed site; (7) the proposed site is not in the public interest due to negative impact on the aesthetic value of the area; (8) 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; (9) Petitioners introduced evidence that there was no need or reason to relocate from the existing Junius site, and (10) Petitioners introduced evidence that City had legal rights to laterally expand its capacity and allow City to remain at its Junius site for decades to come - contrary to City's representations.

SDCL § 34A-6-1.2 specifically establishes the state's official solid waste management policy and priority hierarchy - aimed at promoting the state's first goal of protecting public health, safety, and the welfare of citizens, 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 less environmental risk, and when there could be numerous other locations throughout the 360,000+ acres of Lake County that are safer and more suitable for solid waste disposal, dumping, or burning 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. City failed its evidentiary burdens; its permit application must be denied.

VII. Petitioners Satisfied Their Burden of Demonstrating that 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 did not seek denial of the permit under items (2) and (4).

First, the Board should deny the permit under subsection (1) because City made numerous misrepresentations in its application and the application process. The Proposed Decision incorrectly concluded (at COL 13) that Petitioner must prove "intentional" misrepresentations; however, SDCL § 34A-6-1.13 does not state that a petitioner must show that a misrepresentation was intentional. DANR conceded that City misrepresented material facts in its Application by incorrectly answering several 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 73.04-acre 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.

Second, the permit should be denied because City has violated the environmental laws of South Dakota. The Proposed Decision incorrectly concluded (at COL 15) that there must be a formal enforcement action or prior finding of violation to satisfy this position. However, again, there is no such requirement in SDCL § 34A-6-1.13. Instead, it merely states that a petitioner has the burden of demonstrating that the applicant has violated an environmental law. Petitioners presented overwhelming evidence of environmental violations of laws and permit terms at the contested hearing and in its submissions to the official record. Petitioners introduced inspection reports from DANR that shows a multi-year pattern of City violating numerous environmental laws of South Dakota. See, e.g., footnote 2. 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 ongoing lack of required soil cover application. He further warned he "[w]ouldn't shine a very bright light on Madison's ability to operate a compliant site." HT 403:4-23; *see also* Wendte May 13, 2024 "Madison RU" email.

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* Petitioners' Post-Hearing Brief, Ex. A (2019 Inspection Report). 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 for City 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[.]" *Id.* at Ex. B (1997 Inspection Report).

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 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.

Third, the permit should be denied because City has demonstrated through previous actions the lack of character or competency to reliably carry out the obligations imposed upon them. The Proposed Decision (at COL 16) incorrectly concluded that although Petitioners presented credible concerns regarding historical operations at the Junius site, the evidence did not establish that the City lacked the character or competency to operate the proposed site in compliance with state law. As set forth in length in the Post-Hearing Brief (at pp. 47-53), City lacks the character and competency to reliably carry out the obligations imposed upon them. City has a history of non-compliance at its prior site, its own City Administrator rejected the notion that he worked for the public, the City was dishonest to its own general public, its commissioners, State officials, and even to the Office of Hearing Examiners.

The proposed site is not suitable for the proposed facility. The Board should not trust a municipality which has shown repeatedly it cannot comply with the laws of this state, nor the conditions of its permits, to manage a proposed site surrounded by wetlands and waters which presents such an unnecessary, heightened danger to the residents, citizens, agricultural operations, livestock, environment, wildlife, cultural and historic context, and the public.

CONCLUSION

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

Dated this November 2, 2026.

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CERTIFICATE OF SERVICE

I, Jonathan A. Heber, do hereby certify that on this November 2, 2026, the original "PETITIONERS' OBJECTION TO PROPOSED DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER" 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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