

SOAH DOCKET NO. 582-15-2082
TCEQ DOCKET NO. 2015-0069-MSW

APPLICATION BY § BEFORE THE STATE OFFICE
130 ENVIRONMENTAL PARK, LLC § OF
FOR PROPOSED §
PERMIT NO. 2383 § ADMINISTRATIVE HEARINGS

CALDWELL COUNTY’S EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Caldwell County, a protestant in the above-referenced matter, files its exceptions to the Administrative Law Judges’ (“ALJ”) Proposal for Decision (“PFD”) and corresponding proposed Order issued on February 17, 2017. Caldwell County would show the Commissioners the following:

**I.
Introduction**

The ALJs’ PFD states that the ALJs have concluded that the application of 130 Environmental Park, L.L.C. (“Applicant” or “130EP”), Permit No. 2383, has met the objective requirements of the Texas Commission on Environmental Quality’s (“TCEQ” or “Commission”) rules and recommend that the Commission issue the Draft Permit. However, the ALJs note several deficiencies in the Application and leave it to the Commission to determine whether these deficiencies warrant a denial of the Application. Specifically, the PFD notes that the Applicant failed to (1) list the Plum Creek Conservation District’s (“District”) easement on the Hunter Tract, as required by 20 Texas Administrative Code (“TAC”) §§ 281.5(60 and 330.59, (2) obtain approval from the TCEQ Executive Director (“ED”) concerning its boring plan for the subsurface investigation of the Site prior to initiating work, as required by 30 TAC § 330.63(4), and (3) obtain a floodplain development permit from the County, as required by 30 TAC § 330.63(c)(2)(D)(ii); thus, the Application remains deficient. Further, the PFD states that “the

ALJs have concerns regarding the compatibility of the Landfill with the Site 21 Reservoir on the Hunter Tract.” *See* PFD, page 2. Finally, the ALJs also note that “130EP had a duty to reasonably preserve discoverable material. 130EP breached its duty because it knew or should have known that there was a substantial chance that a contested case hearing on the Application would take place and that documents in its possession or control would be material and relevant to the hearing. By destroying the field logs and soil samples, 130EP precluded Protestants from conducting full discovery.” *See* PFD, proposed finding of fact number 24.

For the reasons addressed herein, Caldwell County asserts that the ALJs’ recommendation is factually and legally flawed and should therefore be rejected by the Commission. Accordingly, Caldwell County requests that the permit application of 130 Environmental Park, L.L.C. (“Applicant”), Permit No. 2383, be **DENIED** as the Applicant failed to meet its burden of proof demonstrating that the application complies with all legal requirements.

II. Summary

Caldwell County submits that the 130EP application (“Application”) should be denied because the applicant failed to meet the requirements established by the Texas Commission on Environmental Quality (TCEQ). The Applicant failed to demonstrate that the proposed landfill site is compatible with area land uses. Additionally, the application does not adequately address surface water drainage nor does it include the information and analyses required to determine if the natural drainage pattern will be significantly altered by the development of the landfill. Finally, the Application failed to comply with the TCEQ requirements concerning sufficiency of property rights, evidence of competency, transportation information, geology and hydrogeology, and adequate water supply.

III. Exceptions and Arguments

A. Applicant failed to meet its burden that the proposed facility is compatible with area land uses.

Caldwell County files these exceptions concerning Section III (N), Land-Use Compatibility, of the Proposal of Decision and to the corresponding proposed findings of fact and conclusions of law.

The TCEQ rules state that “a primary concern is that the use of any land for an MSW site not adversely impact human health or the environment” and that “the impact of the site upon a city, community, group of property owners, or individuals must be considered in terms of compatibility of land use, zoning in the vicinity, community growth patterns, and other factors associated with the public interest.” *See* 30 Tex. Admin Code (TAC) § 330.53(b)(8). The applicant is required to provide the following to assist the executive director in evaluating the impact: “(A) zoning at the site and in the vicinity. If the site requires approval as a nonconforming use or a special permit from the local government having jurisdiction, a copy of such approval shall be submitted; (B) character of surrounding land uses within one mile of the proposed facility; (C) growth trends of the nearest community with directions of major development; (D) proximity to residences and other uses (e.g., schools, churches, cemeteries, historic structures and sites, archaeologically significant sites, sites having exceptional aesthetic quality, etc.). Give the approximate number of residences and business establishments within one mile of the proposed facility including the distances and directions to the nearest residences and businesses; and (E) description and discussion of all known wells within 500 feet of the proposed site.” *Id.*

Caldwell County excepts to the ALJs conclusion that “the Facility is generally compatible with the land uses on and surrounding the Site and should not have an adverse impact on human health and the environment.” *See* PFD, page 175. Further, Caldwell County generally excepts to proposed findings of fact numbers 290 through 320. Specifically, Caldwell County disagrees with the ALJs discussion and findings concerning the Caldwell County Solid Waste Disposal Ordinance. *See* PFD, proposed findings of fact numbers 316 through 319; numbers 325 through 327. Finally, Caldwell County takes exception with the proposed finding of fact and conclusions of law that the Facility will not adversely impact human health and the environment and will be compatible with surrounding land uses. *See* PFD, finding of fact number 320 and conclusions of law numbers 17 and 18; number 41.

1. Caldwell County enacted an Ordinance on December 9, 2013, prohibiting the processing or disposal of municipal or industrial solid waste or the operation of a solid waste facility in certain areas of Caldwell County; therefore, the Application should be denied.

As stated in the proposed findings of facts, procedural history, 130 EP filed Parts I and II of the Application, land-use determination only, on September 4, 2013, which the ED declared administrative complete on September 27, 2014. *See* PFD, proposed finding of fact 8.

On December 9, 2013, the Caldwell County Commissioners Court entered an Order to Adopt Ordinance Prohibiting Solid Waste Disposal in Caldwell County and enacted Caldwell County Solid Waste Disposal Ordinance (the “Ordinance”), exercising the full authority conferred on the County under the Texas Health and Safety Code, Sections 363.112 and 364.012, to prohibit the processing and disposal of solid waste in certain areas of Caldwell. The Ordinance prohibits the processing or disposal of municipal or industrial solid waste or the operation of a solid waste facility in all portions of Caldwell County exception where such activity is not

prohibited in the County. The Ordinance provides that the processing or disposal of municipal or industrial solid waste or the operation of a solid waste facility is not prohibited in following area:

The property owned by Caldwell County, Texas, located east of Seawillow Road (County Road 205) and assigned Property ID Number 31061 and Geographic ID Number 0002194-120-100-00 by the Caldwell County Appraisal District; and described as 18.232 acres of land out of the P.B. McCarley Survey, conveyed to Caldwell County by Clarence V. Moses and wife, Bobbie Moses by deed recorded in volume 487 at Page 63 of the Deed Records of Caldwell County Texas, and being more particularly described in Exhibit A..

See Caldwell County Exhibit 3, SOAH Proceeding.

Following the enactment of the County's Ordinance, nearly two months later, the Applicant filed Parts III and IV of the Application on February 18, 2014, and the ED declared those parts administrative complete on February 28, 2014. *See* PFD, proposed finding of fact 9. Further, "the Notice of Receipt of Application and Intent to Obtain Municipal Solid Waste Permit was published on April 17, 2014." *See* PFD, proposed finding of fact 10. Finally, "the ED determined that the Application was technically complete on October 28, 2014," approximately eleven months after the County's Ordinance. *See* PFD, proposed finding of fact 12.

It is policy of the State of Texas to safeguard the health, general welfare, and physical property of the people and to protect the environment by encouraging the reduction in solid waste generation and the proper management of solid waste, including disposal and processing to extract usable materials or energy. Tex. Health & Safety Code § 363.002. The Texas Legislature has found that the improper management of solid waste creates hazards to the public health, can cause air and water pollution, creates public nuisances, and causes a blight on the landscape; and that there is increasing public opposition to the location of solid waste land disposal facilities. *Id.* § 363.003. As such, the Comprehensive Municipal Solid Waste Management, Resource Recovery, and Conservation Act ("Comprehensive Solid Waste Act")

authorizes Texas counties to prohibit the processing and disposal of solid waste in certain areas. *Id.* § 363.112. The County Solid Waste Control Act further authorizes a county to prohibit the disposal of municipal or industrial solid waste in a county. *Id.* § 364.012. These statutes are similar in language and effect. They provide for the prohibition of solid waste disposal through the passage of an ordinance that specifically designating the areas where such disposal is not prohibited. *Id.* §§ 363.112(a), 364.012(b). Both statutes expressly provide that the Commission may not grant an application for a permit to process or dispose of municipal or solid waste in an area in which the processing or disposal of such waste is prohibited by a county ordinance. *See id.* §§ 363.112(d), 364.012(f).

At the time that the Ordinance was enacted, it is undisputed that 130EP had not filed Parts III and IV with the TCEQ. Caldwell County asserts that 30EP did not have an application filed and pending before the Commission until Parts III and IV were submitted. The Ordinance did not prohibit the processing or disposal of solid waste in an area of the County for which an application for a permit or other authorization under the Solid Waste Disposal Act had been filed with, and was pending before the Commission. Therefore, effective December 9, 2013, the processing or disposal of municipal or industrial solid waste or the operation of a solid waste facility was prohibited in Caldwell County and only allowed as provided in the specific areas mentioned above.

The Commission has promulgated specific rules addressing Permit and Registration Applications for Municipal Solid Waste Facilities. *See* 30 Tex. Admin. Code § 330.57. Subjection 330.57(a) deals with the manner in which applications for permits are processed. It provides in pertinent part:

- (a) Permit application. The application for a municipal solid waste facility is divided into Parts I-IV. Parts I-IV of the application shall be required before the application is

declared administratively complete in accordance with Chapter 281 of this title (relating to Applications Processing). The owner or operator shall submit a complete application, containing Parts I-IV, before a hearing can be conducted on the technical design merits of the application. An owner or operator applying for a permit may request a land-use only determination. If the executive director determines that a land-use only determination is appropriate, the owner or operator shall submit a partial application consisting of Parts I and II of the application. The executive director may process a partial permit application to the extent necessary to determine land-use compatibility alone. If the facility is determined to be acceptable on the basis of land use, the executive director will consider technical matters related to the permit application at a later time. When this procedure is followed, an opportunity for a public hearing will be offered for each determination in accordance with § 39.419 of this title (relating to Notice of Application and Preliminary Decision). A complete application, consisting of Parts I-IV of the application, shall be submitted based upon the results of the land-use only public hearing...

Section 330.57 sets out the parameters for a bifurcated application process, where land-use may be addressed before technical matters are even considered. Under this process, a proposed landfill operator initially submits a partial application. The Executive Director is under no obligation to consider the partial application. If the Executive Director determines that a land-use only determination is appropriate, he may process parts I and II of the application to the extent necessary to determine land-use compatibility alone. The proposed operator is not applying for authority to conduct any activity by submitting a partial application. Rather, it is merely requesting the Commission to determine whether a municipal solid waste facility would be acceptable at a particular location, on the basis of land use. If the Executive Director determines that the proposed land-use would be acceptable at that location, he may consider technical matters related to the permit application for a proposed facility at a later time (i.e., after Parts III and IV are submitted). Every Part of a municipal solid waste facility application (i.e., Parts I through IV) must be filed with the Commission before the application can be declared administratively complete.

Whether an application should have been declared administratively complete also depends on whether it contains complete information. The Executive Director determines when an application is administratively complete. Tex. Health & Safety Code § 361.066(a). The Commission's rules set out the basic elements of a municipal solid waste application. *See* 30 Tex. Admin. Code §§ 330.57 – 330.65. Failure to provide complete information as required by those rules may be cause for the Executive Director to return the application without further action. *Id.* § 330.57(d). Submission of false information shall constitute grounds for denial of the permit or registration application. *Id.* If the application is not amended to include the information that the Executive Director determines is necessary for administrative completeness, “the application is considered withdrawn, unless there are extenuating circumstances. Tex. Health & Safety Code § 361.066(b).

It is clear that more than five months later after filing its land use determination, 130EP elected to abandon the bifurcated approval process, amending its filing to include all four Parts of an application. Parts III – IV were not filed until almost two months after the adoption of the county ordinance. Further, as noted by the ALJs and discussed above, the Application contains deficiencies and thus, is still not complete. Specifically, the Application remains deficient as it (1) fails to list the Plum Creek Conservation District's (“District”) easement on the Hunter Tract, as required by 20 Texas Administrative Code (“TAC”) §§ 281.5(60 and 330.59, (2) did not obtain approval from the TCEQ Executive Director (“ED”) concerning its boring plan for the subsurface investigation of the Site prior to initiating work, as required by 30 TAC § 330.63(4), and (3) has not obtain a floodplain development permit from the County, as required by 30 TAC § 330.63(c)(2)(D)(ii). As such, 130EP had no application pending before the Commission when the Ordinance became effective and still has a deficient application. It is, thus, unlawful to

operate such facilities in the areas proposed by 130EP. Therefore, the Commission should deny any applications from 130EP to process or dispose of municipal or industrial solid waste in Caldwell County at the proposed site, the Hunter Tract.

To determine that the 130EP had a complete application and/or that the County's Ordinance does not prohibit the processing or disposal of municipal or industrial solid waste or the operation of a solid waste facility at the proposed site, would be contrary to the plain language of the applicable statutes and administrative code provisions. The Texas Health and Safety Code, Section 363.112 of the Comprehensive Solid Waste Act and Section 364.012 of the County Solid Waste Control Act, cannot be construed to prohibit a county from enacting solid waste legislation where a person simply mails an incomplete solid waste application to the Commission. Such provisions provide that a partial application for a land-use determination does not constitute a request that the Commission authorize a permit for the operation of a municipal solid waste facility. It merely requests the Commission to determine whether such a facility would be acceptable at a particular location, on the basis of land-use only. Any response from the Commission in response to the partial application would be merely preliminary to the filing of the full application. A substantive review of a permit application cannot begin until all parts of the application are submitted and determined by the Executive Director to be administratively complete, February 28, 2014, nearly two months after the County adopted its Ordinance.

Construing a partial application for a land-use only determination as an actual permit application pending before the Commission would also contravene the rules of statutory construction. In enacting Sections 363.112 and 364.012, it is presumed that a just and reasonable result is intended, and that public interest is favored over any private interest. Tex. Gov't Code § 311.021. Further, in construing statutes one should consider the object to be obtained and the

consequences of a particular construction. Sections 363.112 and 364.012 clearly seek to safeguard the health, general welfare, and physical property of the people and to protect the environment by providing counties the authority to restrict or prohibit solid waste processing and disposal in certain areas. As this is a matter of public interest, the statutes prescribe that solid waste ordinances be publicized and that public interest be considered before they are enacted. The provisions in these statutes limiting solid waste prohibitions in areas where permit applications are pending before the Commission do not favor a private interest over a public interest. Consequently, these statutes should not be construed to allow a private actor to subvert the legislative authority of a commissioners court by filing documents with the Commission that in substance are merely a request for a determination about land-use, and wholly fail to meet the relevant statutory and administrative criteria for an application for a solid waste facility. The consequence of such a construction would endorse the filing of sham applications in efforts to avoid the rule of law.

For these reasons, the Commission should deny the Application as the Caldwell County Commissioners Court enacted its Ordinance on December 9, 2013, exercising the full authority conferred on the County under Sections 363.112 and 364.012 of the Texas Health and Safety Code, and 130 EP failed to submit an application that meet the relevant statutory and administrative criteria before the adoption of the county ordinance.

2. Applicant failed to demonstrate that the proposed landfill site is compatible with area land uses.

a. Surrounding Use

During the hearing, the evidence established that Applicant's witness, John Worrall was unaware that Caldwell County had a development ordinance. *See* Hearing Transcript ("Transcript"), pages 111-112. Mr. Worrall testified that he was not familiar nor did he review

any documents from Caldwell County related to the County's development ordinance, subdivision regulations and septic permits. *Id.* Further, Mr. Worrall has not reviewed all permits granted by Caldwell County for subdivisions and/or septic permits within one mile of the proposed landfill site to determine any anticipated growth. *Id.* Finally, Mr. Worrall testified that he did not review any data concerning the anticipated growth trends by Lockhart ISD for Strawn Elementary and Plum Creek Elementary. *See* Transcript at page 120. The Alma Brewer Strawn Elementary is the newly constructed Lockhart ISD elementary school about two and half to three miles east along FM 1185 from the proposed landfill site. *See* Transcript at page 90.

Thus, the application, its land use report, and the testimony of Applicant's witness demonstrate a very limited discussion concerning growth near the proposed landfill site. By limiting its discussion, the applicant has failed to take into consideration the continued projected growth for Caldwell County, the contribution of the additional rural growth, the newly constructed elementary school and/or any permits granted by Caldwell County near the proposed landfill site for subdivisions and septic systems. Therefore, the applicant failed to demonstrate that the proposed landfill site is compatible with area land uses.

b. Site 21 Reservoir

As discussed in the PFD, "the ALJs have concerns regarding the compatibility of the Landfill with the Site 21 Reservoir on the Hunter Tract." *See* PFD, page 2.

The Site 21 Reservoir and the proximity of the floodplain, as discussed above, make this type of proposed development "uncommon." *See* Transcript page 552-553. During Mr. Traw's deposition, he testified that he was unaware of any other landfills that are adjacent to a dam As stated herein, the unusual shape of the proposed landfill as well as, its location to the floodplain and the Site 21 Reservoir should preclude the TCEQ from issuing a permit. Mr. Bratton testified

that This reservoir is classified as “High Hazard”. A dam being classified as high hazard means that failure or mis-operation of the dam is expected to result in the loss of human life. In the Dam Assessment Report dated October 8, 2010 the reservoir was found to be in need of substantial improvements. The improvements are required to make the reservoir compliant with performance and safety standards for high hazard dams. The scope of improvements include major changes to the dam and spillway.

B. Applicant failed to adequately address drainage, did not demonstrate that stormwater controls are adequate, and accurately determine the location of the floodplain at the proposed site.

Caldwell County addresses its exceptions to the Proposal for Decision and applicant’s failure to adequately address drainage and floodplains in this section. Specifically, Caldwell County files these exceptions concerning drainage to Sections III(L) and III(M) of the Proposal of Decision and related proposed findings of fact and conclusions of law.

1. Drainage

Caldwell County files these exceptions to the ALJs analysis and conclusions discussed in the PFD that 130 EP demonstrated that the Application complies with 30 TAC §§ 330.63(c)(1), 330.303, and 330.305. Further, Caldwell County disputes that the Tyson Traw, Applicant’s engineer, properly assessed both the 25-year, 24-hour storm event and the 100-year, 24-hour storm event to determine whether the development would adversely alter existing drainage patterns. Finally, Applicant’s failure to properly analyze these events led to inaccurate information concerning peak discharge, volume and velocity between the existing and post-development drainage patterns.

The TCEQ requires the applicant to “determine and report to the executive director any site-specific conditions that require special design considerations and possible mitigation of

conditions....” *See* 30 Tex. Admin. Code § 330.61. The applicant must submit a facility surface water drainage report which consists of the following information and analyses:

- (A) drawing(s) showing the drainage areas and drainage calculations;
- (B) designs of all drainage facilities within the facility area, including such features as typical cross-sectional areas, ditch grades, flow rates, water surface elevation, velocities, and flowline elevations along the entire length of the ditch;
- (C) sample calculations provided to verify that **existing drainage patterns will not be adversely altered**;
- (D) a description of the hydrologic method and calculations used to estimate peak flow rates and runoff volumes including justification of necessary assumptions:
 - (i) the 25-year rainfall intensity used for facility design including the source of the data; all other data and necessary input parameters used in conjunction with the selected hydrologic method and their sources should be documented and described;
 - (ii) hydraulic calculations and designs for sizing the necessary collection, drainage, and/or detention facilities;
 - (iii) discussion and analyses to demonstrate that **existing drainage patterns will not be adversely altered as a result of the proposed landfill development**; and
 - (iv) structural designs of the collection, drainage, and/or storage facilities.

See 30 Tex. Admin. Code § 330.63(c)(1) (emphases added). Additionally, the applicant must demonstrate that the proposed facility will be “constructed, maintained, and operated to manage run-on and runoff during the peak discharge of a 25-year rainfall event and must prevent the off-site discharge of waste and feedstock material, including, but not limited to, in-process and/or processed materials.” *See* 30 Tex. Admin. Code § 330.303(a). Further, the “[s]urface water drainage in and around a facility shall be controlled to minimize surface water running onto, into, and off the treatment area.” *See* 30 Tex. Admin. Code § 330.303(b).

The testimony and evidence is undisputed that during Caldwell County’s initial review of the analysis relating to existing drainage conditions (for a preliminary plat), the applicant submitted the identical drainage analysis from this application. *See* Exhibit Caldwell County 1, page 4 and Transcript, page 1886. The evidence and testimony demonstrate that the analysis is faulty and contains over simplifications that call in to question the validity of the results

presented. Further, many of the elements contained in the analysis lack details necessary to evaluate whether the Applicant's proposed landfill is feasible. *Id.*

In accordance with the TCEQ rules, the applicant identified the hydrologic method and calculations used in its drainage analysis. However, as Tracy Bratton testified that “[i]n developing the hydrologic modeling of this landfill, the application improperly uses Shallow Concentrated Flow in many areas where channels are visible on aerial photographs, blue lines that indicate streams appear on USGS maps, and where publicly available LIDAR topographic data exists.” *See Exhibit Caldwell County 1, pages 7-8.* Additionally, the analysis exceeds common engineering practices of limiting the use of shallow concentrated flow lengths to approximately 1,000-ft or less in engineering analysis. Mr. Bratton testified that the applicant used shallow concentrated flow lengths of up to 8,945-ft and that there were many times where the applicant mischaracterized these watersheds with shallow concentrated flow instead of channel flow. Specifically, Mr. Bratton testified those failures in the analysis consisted of watershed areas OS1, OS2, OS3, OS4, OS5, OS6, OS7, OS8, OS9, OS10, OS16, OS17, A2, A4, and A5 as well as potentially, OS 14 and OS 15. *See Transcript pages 1818-1821.* See also, Exhibit 130EP-2, page 94.

By mischaracterizing these watersheds as shallow concentrated flow, this analysis creates an unreasonable assumption that the “velocity of runoff accumulating in a shallow concentrated manner in this watershed will be 1.53 feet per second over a length thousands of feet or that the water depth at its deepest flow would be less than 0.5 feet.” *See Caldwell County Exhibit 1, pages 9-10.* As an example of the effect of this inaccurate modeling, the portion of watershed OS1 that the applicant assumes as shallow concentrated flow drains several hundred acres. To accept the calculations presented as correct, we would have to accept that in a 100-year storm

event in this portion of the watershed that the deepest and fastest flowing portion of the stream draining several hundred acres is flowing at depth of less than 6-inches and a speed approximately two thirds slower than an average walking speed.” *Id.*

By using shallow concentrated flow inappropriately, the applicant has increased the time of concentration in its modeling. As Mr. Bratton testified, long times of concentration underestimates the peak flows and which results “in incorrect calculations of the water surface elevation for the storm event being analyzed.” Therefore, such an error produces water surface elevations lower than those using the correct peak flows – resulting in an underestimation of the floodplain.

The general principle of protecting the health, safety, welfare and environment must always be considered when evaluating an applicant’s submitted data. The Manning’s Roughness sets the parameters for determining “the roughness, or resistance, to water flow in this case in a stream.” *See Caldwell County Exhibit 1, pages. 12 -13.* By using a higher value of .065, the applicant is reducing the speed within the streams and increasing the time of concentration. *Id.* The application is devoid of any explanation to support its justification or analysis of a higher value than .045 requested by Caldwell County during the preliminary plat review. *Id.* Mr. Bratton testified that “[t]his value of 0.045 is an appropriate Manning’s n for small natural streams that are winding, weedy, and include ineffective areas or areas of pooling. In addition, as an engineer you should justify your assumption or make an assumption that is protective or conservative. Assuming a value of 0.065 results in a less protective analysis of the storm event being analyzed. *Id.* at page 13 Further, Mr. Bratton testified that “just as with the excessive lengths used for shallow concentrated flows, using excessively high roughness coefficients

translates in to higher time of concentration, lag time, and results in additional underestimation of the peak flow for the storm event being modeled.” *Id.*

As demonstrated by the chart below, the Applicant submitted identical data to both the TCEQ and Caldwell County – correcting the data during Caldwell County’s preliminary plat review and leaving the TCEQ data without revisions. As demonstrated below, Table 1 is the current data provided in the application and Table 2 demonstrates the revisions submitted to Caldwell County.

Table 1.

Table 2.

Hydrologic Element	Drainage Area	Peak Discharge	Hydrologic Element	Drainage Area	Peak Discharge
OS16	.521	928.4 cfs	DC3	.51	1164.6 cfs
A5	.234	550.5 cfs	DC4	.233	599.1 cfs
OS5	.527	1149.3 cfs ¹	TF1	.527	1253.6 cfs ²

As the testimony demonstrated during the hearing, the aforementioned areas are examples of the revisions made by the Applicant following Caldwell County’s review of the hydrologic modeling. *See* Caldwell County, Exhibits 6 through 9; Testimony of Tyson Traw, Transcript pages 685 – 662. The information submitted by the Applicant’s engineer, Tyson Traw, demonstrates the changes based on the Manning roughness from .065 to .045 and decreasing the area for shallow concentrated flow down to an approximate 1000 feet in length. *See* Transcript page 663. The same hydrologic elements consisting of nearly identical drainage areas saw significant increases in peak discharge with the requested revisions.

Another example is demonstrated on EP-2, page 95 and EP-2, page 270, the application provides different modeling using the Manning’s Roughness coefficient for the exact same

¹ *See* Caldwell County, Exhibit 6 and Exhibit 7.

² *See* Caldwell County, Exhibit 8 and Exhibit 9.

watershed under identical conditions (both entitled 130 Environmental Park Kinematic Wave Routing Parameters, Existing Watershed Characteristics; .045 Manning's Roughness and .065 Manning's Roughness, respectively). *See* Transcript pages 2043, 2051-2052; Exhibit EP-2, pages 95 and 270. Further, Mr. Traw testified that he gave all of the off-site parameters a .065 Manning's Roughness coefficient which he used to determine the floodplain and drainage analysis for the proposed application. *See* Transcript page 2113. However, Mr. Traw admitted that he didn't personally evaluate these off-site drainage channels to determine the Manning's Roughness. *Id.*

In this matter, the trustworthiness of the information submitted in the application should be weighed for reliability against the Applicant's own actions and willingness to change any parameters to obtain approval. It is evident from the testimony and exhibits that the Applicant made numerous changes to the hydrologic data submitted to Caldwell County in order to obtain the preliminary plat and satisfy Caldwell County's assessment that the data was inaccurate/inconsistent and that the modeling uses inappropriate methods. Mr. Traw provided contradictory testimony throughout the hearing and is clearly willing to submit one set of information to TCEQ and another set of information to Caldwell County in order obtain approval from both entities.

2. Floodplains

Caldwell County files these exceptions to the ALJs analysis and conclusions discussed in the PFD that 130 EP met the TCEQ's requirements and provided sufficient information to demonstrate compliance with 30 TAC §§ 330.61(m)(1), 330.63(c), and 330.547.

As demonstrated above, the Applicant fails to provide sufficient analysis for drainage to accurately determine the location of the floodplain at the proposed site. The TCEQ rules "require

that a landfill be protected from flooding by suitable levees constructed to provide protection from a 100-year frequency flood. Such levees must have a freeboard of at least three feet, and must not significantly restrict the flow of a 100-year frequency flood nor significantly reduce the temporary water storage capacity of the 100-year floodplain. In Section 330.547, the rules provide that no waste disposal operations shall be in the 100-year floodway as defined by FEMA and MSW storage and processing facilities must be located outside of the 100-year floodplain. Also, this rule provides that new municipal solid waste management units shall not restrict the flow of the 100-year flood or result in washout of solid waste so as to pose a hazard to human health and the environment.” *See* 30 Tex. Admin. Code §330.307. Further, the TCEQ rules require that “no solid waste disposal operations shall be permitted in areas that are located in a 100-year floodway as defined by the Federal Emergency Management Administration. New municipal solid waste management units, existing municipal solid waste units, and lateral expansions located in 100-year floodplains shall not restrict the flow of the 100-year flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste so as to pose a hazard to human health and the environment.” *See* 30 Tex. Admin. Code § 330.547.

Tracy Bratton testified that “in reviewing the applicant’s floodplain analysis for existing conditions, [his office] found it to be lacking and required corrections. Based upon my review of the materials submitted to TCEQ for the landfill application, I find them inadequate for the purpose of issuing a construction permit. The analysis lacks sufficient detail in with respect to stormwater management for the estimated 44-year operating life of the landfill.” *See* Caldwell County Exhibit 1, pages 15-16. As discussed generally in Section P, “if the design flow rates as calculated by the applicant in HEC-HMS are inaccurate due to unreasonable time of

concentration calculations, the floodplain as delineated by the applicant both in Site 21 and in the channels flowing through the landfill site are inaccurate.” *Id.* Further, Mr. Bratton testified that the ponds appear to be tightly squeezed between the landfill perimeter channels and the floodplain. Therefore, since some the ponds appear to be within 20-ft horizontally of the floodplain. The previously discussed inaccuracies in the applicant’s floodplain hydrology and hydraulic results brings in to doubt whether these detention ponds are in fact outside of the 100-year floodplain. *Id.*

Further, Dr. Lauren Ross testified and as undisputed by the Applicant that the proposed access road lies within the FEMA-mapped 100-year floodplain. *See* Protestants’ Exhibit 5, pages 46-47. Additionally, Dr. Ross testified that the Applicant has failed to account for the effect of existing wetland features and ponds in hydrologic calculations, as required by FEMA standard policies. *Id.* Specifically, there are eight open-water stock ponds or natural water features at the proposed site, occupying more than 20 acres. There are additionally 46 emergent wetlands that have been identified onsite. The application does not provide data that these existing ponds and wetlands on the site have been included in its hydrologic analysis. *Id.*

The application fails to meet the requirements of the TCEQ and should be denied in its entirety.

3. Other Exceptions

For the reasons stated in previously filed briefing in the SOAH proceeding, Caldwell County also excepts to the PFD and the proposed findings of fact and conclusions of law related to: (1) Applicant’s failure to demonstrate and satisfy the TCEQ rules concerning sufficiency of property rights (Section A of the PFD) and (2) Applicant’s failure to adequately comply with the

requirements for competency and compliance history (Section B of the PFD) as well as, financial assurance (Section V of the PFD).

Further, Caldwell County files these exceptions to the PFD and the proposed findings of fact and conclusions of law related to transportation and traffic (Section C of the PFD). As demonstrated during the hearing, Applicant relied upon inaccurate data concerning the traffic volume site. The evidence and testimony during the contested case hearing demonstrated that the application fails to comply with TCEQ rules concerning the adequacy and availability of road that will be used to access the proposed landfill site, the supporting data for traffic and site-generated traffic, and account for current and future development that could impact traffic.

Caldwell County files exceptions to the PFD and proposed findings of fact and conclusions of law related to geology and soils and hydrogeology (Sections D & E of the PFD). Caldwell County asserts that the evidence demonstrates that the Applicant failed to properly identify the soils and geology at the proposed site, to provide sufficient data concerning any potential faults, to adequately describe the geotechnical properties of the subsurface soil materials, and to properly identify potential groundwater as well as, identify the uppermost aquifer and any lower aquifers that are hydraulically connected beneath the proposed facility.

Finally, Caldwell County believes that the Applicant has failed to meet the TCEQ's requirements concerning adequate water supply and water for fire protection as discussed in the Site Operating Plan. Specifically, Caldwell County files these exceptions to the PFD and proposed findings of fact and conclusions of law, Sections P & R of the PFD). The application is completely silent concerning approval of water service at the proposed site. Plum Creek Conservation District in its stated that the Applicant showed that it has available adequate supplies of water for initial construction and then have firm supplies of the approximately

350,000 gallons per month for operations as estimated by Application from a dependable source supply. Further, PCCD asserts that the type of water service requested by the Applicant “requires a ‘non-standard’ service agreement” from Polonia, which “[n]o such an agreement is yet in place.” The testimony and evidence demonstrate that there is no information in the record related to the simple question as to whether an adequate water supply is available from Polonia.

The application fails to provide sufficient information related to the Applicant’s source to fulfill its water needs including but not limited to, daily landfill operations, wheel wash, dust control, fire prevention, and landscaping (buffering and screening).

IV. Undisputed Issues

A. Local Regulations

As noted in the PFD, Section III(O), Section 330.63(c)(2)(D)(ii) states that the owner or operator “shall ... for construction in a floodplain, submit ... a floodplain development permit from the city, county, or other agency with jurisdiction over the proposed improvements.” *See* PFD, page 179. The evidence is uncontroverted that 130EP does not have the required floodplain development permit from the County. Accordingly, the ALJs concluded that the Application did not comply with 30 TAC§ 330.63(c)(2)(D)(ii).

The ALJs discussion concerning the use of a special provision to resolve this issue is flawed. The very nature of the requirement is to provide assurance to the TCEQ that the proper regulatory authority/governmental body has reviewed the proposed development in the floodplain. Further, it demonstrates that the responsible governmental body has evaluated any issues, risks, and/or other problems prior to granting such a development permit in the floodplain. By allowing a special provision, the plain language of the rule and the purpose of the requirement would be defeated. The TCEQ in a similar matter, Pescadito Environmental

Resource Center, Permit No. 2374, is currently considering this very issue where the applicant has failed to obtain the required floodplain development permit prior to filing an application.

During the hearing in this matter, the evidence and testimony demonstrated that Caldwell County also has subdivision rules and regulations and a development ordinance. The TCEQ requires that the “owner or operator [tø] obtain any permits or approvals that may be required by local agencies such as for building construction, discharge of uncontaminated waters into ditches under control of a drainage district, discharge of effluent into a local sanitary sewer system, etc.” See 30 Tex. Admin. Code § 330.67(d). It is undisputed that Caldwell County has only reviewed the applicant’s preliminary plat application for compliance with local regulations. The Applicant has not provided Caldwell County with a final plat or application for a commercial development permit for the proposed landfill.

As demonstrated above, it is necessary that the TCEQ be provided the floodplain development permit and any other regulatory permits, prior to reviewing and/or granting any applications for landfill permits, in order to ensure that all potential dangers to the health, safety and welfare of the citizens and the environment have been identified and adequately addressed. As discussed in these Exceptions, the Applicant provided insufficient and inaccurate data and modeling by using excessive lengths to determine shallow concentrated flows and by using excessively high roughness coefficients. The modeling resulted in the underestimation of the peak flow for the storm events being modeled. In part, such modeling is necessary to assist in properly identifying the floodplain as well as determining the natural drainage patterns and whether they will be altered by the developed landfill. Caldwell County required that 130EP resubmit corrected data to Caldwell County. However, the Applicant failed to submit the corrected data to the TCEQ. This corrected information submitted by the Applicant’s engineer,

Tyson Traw, demonstrated changes based on the Manning roughness from .065 to .045 and decreased the area for shallow concentrated flow down to an approximate 1000 feet in length. *See* Transcript, page 663. The same hydrologic elements consisting of nearly identical drainage areas saw significant increases in peak discharge with the requested revisions. Therefore, these required regulations and permits demonstrate why it is vital to the safety of environment and safety of the citizens and the necessity that they be submitted as part of the application for review by the TCEQ; especially, the floodplain development permit.

Therefore, based on these reasons, the Application should be denied as 130EP failed to obtain a floodplain development permit from Caldwell County and submit it to the TCEQ as required by 30 TAC§ 330.63(c)(2)(D)(ii).

V. Transcript Costs

The ALJs recommend that 130EP pay 50% of the transcript costs, and the County and Protestants each pay 25% of the costs. Caldwell County files these exceptions to the ALJs' conclusion that that such apportionment is fair and reasonable based on the factors set forth in 30 TAC§ 80.23(d)(l). It is clear from the PFD that several deficiencies were identified as part of this hearing process. Specifically, the Applicant's failure to obtain a floodplain development permit. Further, many issues were raised and addressed during the hearing concerning the protection of human health and the environment; especially, all concerns related to the Site 21 Reservoir. It appears that Caldwell County is being penalized for actively participating in the public hearing and bringing up reasonable concerns with the application and the proposed design of the landfill.

Caldwell County asserts that the burden of proof is on the Applicant. Specifically, the TCEQ rules concerning contested case hearings states that "the burden of proof is on the moving party by a preponderance of the evidence...." *See* TAC §80.17(a). The majority of Caldwell

County's participation in the contested hearing was limited to the cross-examination of the multiple witnesses presented by Applicant. Caldwell County's presentation of its case-in-chief consisted of 79 pages (including direct, cross-examination and redirect) provided by its expert witness, Tracy Bratton.

Caldwell County believes that the entirety of the cost for the court reporting services and transcription should be assessed against Applicant.

VI. Conclusion

Caldwell County asserts that it would be error for the Commission to accept this PFD, put in language about deficiencies. The evidence in the record, the arguments addressed herein, and Caldwell County's previously filed briefs, demonstrate that the PFD should also be rejected; particularly, those findings of fact and conclusions of law regarding (1) land-use compatibility, (2) surface water drainage and floodplains, and (3) local regulations (floodplain development permit). Further, Caldwell County excepts to all findings of facts and conclusions of law included in the PFD that are contrary to the positions as discussed herein. For these reasons, Caldwell County files these exceptions to the PFD and requests that the Commission issue an order denying the application of 130 Environmental Park, L.L.C., Permit No. 2383.

Respectfully submitted,

/s/ J. Eric Magee

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I hereby certify that on the 13th day of March, 2017, I forwarded the foregoing to the attorneys of record by certified mail return receipt requested, facsimile, and/or electronically to the following:

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