

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

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

**CALDWELL COUNTY’S RESPONSES TO 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 responses to the exceptions raised by various parties in their 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 and Summary**

Caldwell County submits that the PFD and corresponding Order by the ALJs are factually and legally flawed and should not be accepted by the Texas Commission on Environmental Quality (TCEQ). The application of 130 Environmental Park, L.L.C. (“Applicant” or “130EP”), Permit No. 2383, should be denied because the Applicant failed to meet its burden of proof demonstrating compliance with the requirements established by the TCEQ.

Caldwell County incorporates as evidentiary and factual support the arguments set forth in its Exceptions to the Proposal for Decision filed on March 13, 2017. Further, Caldwell County joins and adopts the Exceptions submitted by TJFA, L.P., and Environmental Protection in the Interest of Caldwell County (“EPICC”), and the Office of the Public Interest Counsel (“OPIC”) at the TCEQ.

## II. Response to TJFA & EPICC and OPIC Exceptions

It is undisputed that the application of 130EP, Permit No. 2383, 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(6) 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), as required by the Texas Commission on Environmental Quality's ("TCEQ" or "Commission") rules.

Caldwell County asserts that the Applicant bears the burden of proving that its application complies with all applicable statutory and regulatory requirements. As noted in Caldwell County, TJFA, EPICC, and OPIC's Exceptions, the Application is deficient and fails to comply with several TCEQ rules and requirements. The PFD specifically noted deficiencies as stated above and expressed that "the ALJs have concerns regarding the compatibility of the Landfill with the Site 21 Reservoir on the Hunter Tract." *See* PFD, page 2.

During the hearing, and as noted in the Exceptions to the PFD by the protesting parties, extensive evidence was presented demonstrating the unique and uncommon characteristics and circumstances that exist at this proposed landfill site. These unusual issues were not properly addressed by the Applicant and the Applicant failed to meet its burden of proof including, but not limited to: land use compatibility; the existence of a high hazard dam and reservoir (Site 21 Reservoir); adequately addressing surface water drainage; properly identifying the geology and hydrogeology; evidence of competency and compliance history; adequacy of site access; and the existence of an adequate water supply. Further, "[m]ost notably OPIC finds that the Applicant provided either false or misleading information about the facility's ownership to the Executive

Director during technical review.” See OPIC’s Exceptions, subsection B, pages 2 through 10 and at page 19.

Caldwell County requests that the permit application of 130 Environmental Park, Permit No. 2383, be **DENIED** as the Applicant failed to meet its burden of proof demonstrating that the application complies with all legal requirements.

### **III. Response to the Executive Director’s and Applicant’s Exceptions**

Although Caldwell County believes that the permit application should be denied, Caldwell County will alternatively address the exceptions to the PFD and proposed Order submitted by the TCEQ Executive Director (“ED”) and the assertions raised in the Applicant’s Exceptions. Specifically, Caldwell County disagrees that the Commission should grant 130EP’s Application and issue a Municipal Solid Waste Landfill Type I permit. Caldwell County will address the most significant disagreements with the ED’s and Applicant’s Exceptions below.

First, Applicant’s Exceptions to Proposal for Decisions contains approximately 112 pages of documents not in the record before the Commission. The evidentiary hearing on this matter closed on August 26, 2016. Several parties filed additional information/evidence and requested that the ALJs include it in the record. See PFD, page 5. The ALJs granted the request to allow the admission of some additional evidence. *Id.*; see also, SOAH Order Nos. 29, 31, 32. Therefore, the evidentiary record closed on December 22, 2016. The documents attached to Applicant’s exceptions are not in evidence and should not be considered by the TCEQ. Applicant’s arguments related to facts not in evidence should similarly be disregarded. Therefore, Caldwell County requests that the attached documents to Applicant’s Exceptions and the related arguments in the Applicant’s Exception be struck.

### **A. Deficiencies**

The Applicant excepts to the ALJs' characterization of the three failures to meet TCEQ's requirements as "deficiencies." Although the ED does not except to the ALJs' deficiencies, the ED states that "none of the deficiencies noted by the ALJs are a substantive deficiency which would justify denying the application."

Caldwell County objects to the oversimplification that the noted deficiencies are not substantive or even deficiencies. The Applicant failed to (1) list the Plum Creek Conservation District's ("PCCD" or "District") easement on the Hunter Tract, as required by 20 Texas Administrative Code ("TAC") §§ 281.5(6) 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. *See* PFD, page 2.

First, the Application fails to list PCCD's easement on the Hunter Tract. The importance of properly identifying PCCD's interest is evident by the highly unusual and unprecedented application for siting a landfill near a floodplain with a reservoir and a high-hazard dam. Although PCCD participated in the hearing, the proper identification of all interests in the property is necessary to assist in the review and evaluation to fully develop land use compatibility and any potential dangers associated with siting the proposed landfill near the Site 21 Reservoir and high-hazard dam, as shown through the evidence and testimony in the hearing and the briefing of TJFA and EPICC, Caldwell County, PCCD and OPIC.

Next, it is clear that the Applicant simply chose to disregard the regulatory requirements that it must obtain approval from the TCEQ ED concerning its boring plan, prior to its

implementation. As shown through the evidence and testimony in the hearing and the briefing of TJFA and EPICC, the geology report in the application contains inconsistencies and inaccurate information. The requirement to obtain prior approval of the boring plan for a proposed landfill site insures that sub-surface geology will be adequately evaluated.

Finally, the TCEQ requirements state that “owner or operator *shall* for construction in a floodplain, *submit*, where applicable floodplain development permit from the city, county, or other agency with jurisdiction over the proposed improvements.” *See* 30 TAC§ 330.63(c)(2)(D)(ii). Such approval ensures that all potential dangers to the health, safety and welfare of the citizens and the environment have been identified and adequately addressed prior to TCEQ’s review of the application. As discussed in Caldwell County’s Exceptions and in the evidence and testimony at the hearing, 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 TCEQ 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, Caldwell County requests that the TCEQ deny this application.

**B. Permit Boundary**

The Applicant and ED except to the ALJs' recommendation that the permit boundary be expanded to include the access road and assert that there is no requirement that the access road be included in the permit boundary. Contrary to both the ED and Applicant's arguments, there were significant issues raised concerning the access road. Most importantly, the access road crosses the floodplain in several locations. There continues to be a failure by the Applicant to demonstrate the required approval for development in the floodplain through a floodplain development permit issued by Caldwell County.

Caldwell County's expert, Tracy Bratton, testified regarding his concerns related to accessibility of the site in a disaster or emergency. The TCEQ requirements state that site development plan must include criteria that in the selection and design of a facility will provide for the safeguarding of the health, welfare, and physical property of the people and the environment through consideration of geology, soil conditions, drainage, land use, zoning, adequacy of access roads and highways, and other considerations as the specific facility dictates." *See* 30 TEX. ADMIN. CODE § 330.63(A). Specifically, Mr. Bratton testified that "the Applicant has represented that they will not be taking access to the site off of the adjacent County roadway. That means that the only access to the site is from SH 130. In the event of a fire, this presents significant safety hazards and challenges to fighting a fire. Depending up on the proximity of the fire to the single access road to the landfill or the wind direction, emergency services may not be able to access the site at all. In addition, the single road accessing the

landfill crosses the floodplain in 2 locations.” See Caldwell Exhibit 1, Testimony of Tracy Bratton, pages 16–18. It is clear in the record through the testimony of Applicant’s witnesses that it has not obtained a floodplain development permit. Additionally, the application does not include adequate information concerning the access road which does not account for headwalls or erosion protection of these critical culverts and no assurances that the roadway or the culverts will be armored to protect them from wash out during a storm event exceeding the design storm.” *Id.* Further, TJFA and EPICC’s expert witness, Bob Harden, testified about his concerns with the access road and stated that “[i]f the access road is unpassable because of flood damage, then leachate cannot be pumped from the collection system and transported to the storage tanks.” See TJFA/EPICC Exhibit P–9, Testimony of Bob Harden, page 21. Additionally, Mr. Harden raised concerns with the way in which the floodplain could eliminate access to the landfill footprint creating potential periods when emergency access may be needed to the landfill area and could not be provided.

As the current application does not include approximately one (1) mile of access road within the proposed permit boundary, the ALJs have recommended that the access road in its entirety should be included in the permit boundary. Neither the Applicant nor the ED have identified any provision within the TCEQ rules and regulations that provide enforcement authority to the TCEQ for the approximate one (1) mile of access road that is not included in the permit boundary. Finally, in the event that Applicant files for bankruptcy and/or fails to meet the TCEQ’s requirements (financial assurances, closure and post-closure), Applicant and the ED have failed to identify any statutory provisions granting the TCEQ authority over roadways outside the permit boundary.

### **C. Waste Acceptance and Operating Hours**

The Applicant and ED except to the ALJs' recommendation concerning operating hours. Should a permit be granted, the operation of the proposed landfill would have an adverse impact on the nearby community. Kenneth Welch, Applicant's engineer in charge of Parts I and II of the application, stated that the operation of heavy equipment would generate noise and light during the evening hours and that such noise and light could be incompatible with residents who live near the landfill. *See* Hearing Transcript, page 1217. As stated by the ALJs, the Applicant had the burden of proof to show that expanded operating hours were appropriate and that there is no evidence in the record to support expanded hours. *See* PFD, page 188. Therefore, the Applicant failed to meet its burden.

### **D. Compatibility with Site 21 Reservoir**

Applicant excepts "to the ALJs expression of 'concern' regarding the compatibility of the Landfill with the Site 21 Reservoir." *See* Applicant's Exceptions, page 21. Applicant argues that evidence in the record demonstrates that the proposed landfill is compatible.

However, during the hearing, there was evidence and testimony concerning with the compatibility of the location of the proposed landfill in close proximity to Plum Creek Conservation District's ("PCCD") Site 21 Reservoir. As stated above, the ALJs noted in the PFD their "concerns regarding the compatibility of the Landfill with the Site 21 Reservoir on the Hunter Tract." *See* PFD, page 2.

During the hearing, there were concerns of potential adverse impacts and pollutants related to surface water drainage and floodplains related to the Site 21 Reservoir. Further, there was evidence demonstrating that the Site 21 Reservoir dam has been re-classified as high-hazard. Finally, PCCD, TJFA, and EPICC noted that there is evidence that the Wilcox formation is

present at or near the proposed landfill and Site 21. Specifically, PCCD argued that “it would be prudent to explore formations under the impoundment area of Site 21 to determine additional information related to potential impacts of planned operations at the proposed landfill.” *See* PCCD Closing Arguments, page 7. It is clear that the application failed to provide adequate information to address these concerns. The evidence and testimony demonstrated that at least two (2) wells have been drilled within the Wilcox Formation in close proximity to the proposed landfill. PCCD asserts that “a monitoring program addressing water quality of those wells . . . should be a requirement in any permit issue for the proposed landfill operation.” *See* PCCD Closing Arguments, page 8.

Caldwell County asserts that the record demonstrates that the Applicant failed to present evidence addressing all the concerns with siting a landfill in close proximity to a high-hazard dam and reservoir. Further, Caldwell County requests that the permit application be denied as the proposed landfill is incompatible with Site 21 Reservoir.

**E. Destruction of Field Logs and Soil Samples**

Additionally, the Applicant excepts to the ALJs references in the PFD and proposed findings of fact that the Applicant destroyed field logs and soil samples. The ALJs accurately and appropriately determined in the PFD 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.

As demonstrated by the evidence, the information related to geology submitted with the application, including the boring logs, were inaccurate. Through cross-examination of Applicant's witnesses and the expert testimony of Dr. Lauren Ross, Michael Rubinov, and Scott Courtney, it was demonstrated that the application contains generalized and oversimplified data and descriptions concerning the geology at the site. Applicant failed to properly identify the soils and geology at the proposed site, provide sufficient data concerning any potential faults, adequately describe the geotechnical properties of the subsurface soil materials, and properly identify potential groundwater as well as, identify the uppermost aquifer and any lower aquifers that are hydraulically connected beneath the proposed facility. As an example of these oversimplifications and/or mischaracterizations, Applicant's boring logs repeatedly describe the soil encountered as only "CH" or fat clay. TJFA and EPICC presented documented evidence contradicting information presented in the Applicant's Geology Report concerning these matters. The Applicant's attempt to include a supplemental geology report was inappropriate. The ED's staff has not performed a technical review of the information of the newly submitted supplemental geology report.

The Applicant has failed to meet the requirements of the TCEQ's requirements.

**F. Caldwell County Disposal Ordinance**

The Applicant excepts to the ALJs' conclusion that the Caldwell County Disposal ordinance should have been considered in the evaluation of land use compatibility for this proposed landfill site.

Caldwell County asserts that the burden of proof was on the Applicant to present evidence that the Caldwell County Solid Waste Disposal Ordinance (the "Ordinance") did not apply to the proposed landfill site when making determinations of land use compatibility in its

application. Instead, John Worrall, applicant's witness concerning land use compatibility, testified during the hearing, as follows:

2 Q Okay. Are you aware whether the county has a  
3 landfill siting ordinance?

4 A I'm not aware of that.

10 Q And you've testified that you haven't checked  
11 to see whether a county landfill siting ordinance has  
12 been enacted by the county. Is that right?

13 A That's correct.

2 ... My understanding is you're not  
3 aware that the county has one of those?

4 A That's correct.

*See SOAH Hearing Transcript, pages 62, 67, and 112, respectively.*

Further, Applicant's engineer of record, Kenneth Welch, testified that:

5 Q Is it your understanding that Caldwell County  
6 has passed a landfill siting ordinance?

7 A I don't know.

*See SOAH Hearing Transcript, page 1238.*

It is undisputed that 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, 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 County. 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 except 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 the 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 Attached, and also as Caldwell County Exhibit 3, SOAH Proceeding.*

At the time of the enactment of the Ordinance, the Applicant had only submitted Parts I and II of the Application, a land-use determination only, which had been submitted on September 4, 2013. Following the enactment of the County's Ordinance, nearly two (2) months later, the Applicant filed Parts III and IV of the Application on February 18, 2014. Thus, there was no application pending approval from the TCEQ. The TCEQ's authority would be to determine whether such a facility would be acceptable at a particular location, on the basis of land-use only.

As previously stated in the County's Exceptions, 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. *See HEALTH & SAFETY CODE § 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 designates 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).

For these reasons, the Commission should deny the Application as the Applicant failed to meet its burden of proof concerning land use compatibility.

**G. Applicant's Requested Changes ALJs' Proposed Order and Draft Permit**

In the Prayer to the Applicant's Exceptions, Applicant requests changes to the ALJs' proposed order as set out in Items a through ii and requested a Draft Permit be issued with the modification set out in Item jj. Caldwell County objects to the inclusion of any of these changes requested by the Applicant for the reasons stated herein and again asserts that the application should be denied as it failed to meet the TCEQ requirements.

**IV.  
Conclusion**

For these reasons, Caldwell County asserts that it would be error for the Commission to accept the PFD and the proposed Order as the Applicant failed to meet its burden of proof related to numerous requirements established by the TCEQ including but not limited to, the application's blatant deficiencies of failing to: (1) list the Plum Creek Conservation District's easement; (2) obtain approval for its boring plan; and (3) obtain a floodplain development permit from Caldwell County. Therefore, Caldwell County 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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**CERTIFICATE OF SERVICE**

I hereby certify that on the 23rd 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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