

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

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

APPLICANT'S RESPONSE TO TJFA/EPICC'S MOTION TO STRIKE PORTIONS OF
APPLICANT'S RESPONSE TO CLOSING ARGUMENTS

**TO: THE HONORABLE KERRIE JO QUALTROUGH, ADMINISTRATIVE LAW JUDGE
AND THE HONORABLE CASEY A. BELL, ADMINISTRATIVE LAW JUDGE**

130 Environmental Park, LLC, the Applicant in this proceeding, files this response to TJFA, L.P. and Environmental Park in the Interest of Caldwell County's Motion to Strike Portions of Applicant's Response to Closing Arguments (TJFA/EPICC's Motion to Strike) and respectfully requests that the ALJs deny the Motion.

I. LIST OF PENDING MOTIONS

There are two motions pending at this time:

- TJFA/EPICC's Motion to Strike Portions of Applicant's Response to Closing Arguments (which this Response addresses) requests that the ALJs strike various portions of Applicant's Response to Closing Arguments. This motion was filed on December 22, 2016. The deadline for responses to this motion is December 27, 2016.

- TJFA/EPICC's Motion to Re-Open the Record to Admit Protestants' Exhibit P-47 & P-48 requests that the ALJs admit into evidence Protestants' Exhibit P-47 (a letter from the TCEQ Executive Director regarding the permit application for the Pintail Landfill in Waller County) and Exhibit P-48 (a copy of the TCEQ registration for the Pintail Landfill Transfer Station in Waller County). This motion was filed and served after 5:00 p.m. on December 22, 2016. Pursuant to Order No. 19, this motion is deemed filed and served on December 23, 2016. The deadline for responses to this motion is December 28, 2016.

II. ARGUMENT

TJFA/EPICC's Motion to Strike requests that the ALJs strike discussion of four topics in and strike two attachments to 130 Environmental Park, LLC's Response to Closing Arguments. Each request

is addressed below. But, as an initial matter, 130 Environmental Park, LLC would point out that TJFA/EPICC's motion is not timely because it was not filed until 24 days after 130 Environmental Park, LLC filed and served its Response to Closing Arguments and that TJFA/EPICC have not identified any legal basis for or standards applicable to the ALJs striking the contents of or attachments to a pleading such as 130 Environmental Park, LLC's Response to Closing Arguments. For these reasons alone, TJFA/EPICC's Motion to Strike should be denied.

1. Exhibit 130EP-23 and Soil Boring Plan Approvals. TJFA/EPICC request that "any references to or reliance on [Exhibit 130EP-23] in the written arguments...be stricken", because an objection to the exhibit was sustained. This request should be denied because TJFA/EPICC have not identified the specific portion or portions of 130 Environmental Park, LLC's Response to Closing Arguments they seek to have stricken. In addition, 130 Environmental Park, LLC's reference to Exhibit 130EP-23, an email from Change Goodin (Manager of TCEQ's Municipal Solid Waste Permits Section), is remarkably similar to TJFA/EPICC's briefing reference to and inclusion of another document not in evidence. On page 16 of their Reply to Responses to Closing Arguments, TJFA/EPICC refer to "an ASTM standard" and Attachment B to that pleading is a copy of the 12-page ASTM D2488-09a "Standard Practice for Description and Identification of Soils (Visual-Manual Procedure)". Footnote 24 on page 16 of TJFA/EPICC's Reply to Responses to Closing Arguments states: "The ASTM standard is included as an attachment to this brief. Protestants do not seek to admit this into evidence because Protestants are not relying on this ASTM standard to prove any element of their case. Rather, it is offered for demonstrative purposes, and as a rebuttal to Applicant's latest argument that Mr. Snyder recognizes no distinction between fissures and blocky texture." Similarly, 130 Environmental Park, LLC included in its Response to Closing Arguments a reference to Exhibit 130EP-23, did not re-offer it into evidence because it is not relied on to prove any element of its case, and referenced it for demonstrative purposes and as a rebuttal to TJFA/EPICC's argument that the drilling of soil borings prior to the Executive Director's approval of the soil boring plan "renders the geology report and Applicant's expert opinions legally insufficient; they constitute 'no evidence' of the subsurface geology." *TJFA/EPICC Closing Arguments at pp.20-22.* Because TJFA/EPICC assert this same line of reasoning in support of Attachment B to their Reply to Responses to Closing Arguments, they should not be heard to complain about 130 Environmental Park, LLC's reference to Exhibit 130EP-23 and TJFA/EPICC's first motion to strike should be denied.

2. Attachment 1 and Retention of Geoscientific Records. TJFA/EPICC request that "Attachment 1 to Applicant's Response to Closing Arguments and any references to or reliance on the Attachment in the Response to Closing Arguments should be stricken", because "Applicant has not moved to offer this attachment into evidence". 130 Environmental Park, LLC's reference to and inclusion of Attachment 1, recent materials that are confidential by law, is remarkably similar to TJFA/EPICC's briefing reference to and inclusion of another document not in evidence. On page 16 of their Reply to Responses to Closing Arguments, TJFA/EPICC refer to "an ASTM standard" and Attachment B to that pleading is a copy of the 12-page ASTM D2488-

09a “Standard Practice for Description and Identification of Soils (Visual-Manual Procedure)”. Footnote 24 on page 16 of TJFA/EPICC’s Reply to Responses to Closing Arguments states: “The ASTM standard is included as an attachment to this brief. Protestants do not seek to admit this into evidence because Protestants are not relying on this ASTM standard to prove any element of their case. Rather, it is offered for demonstrative purposes, and as a rebuttal to Applicant’s latest argument that Mr. Snyder recognizes no distinction between fissures and blocky texture.” Similarly, Attachment 1 was attached to and referenced in 130 Environmental Park, LLC’s Response to Closing Arguments, 130 Environmental Park, LLC did seek to admit it into evidence because it is not relied on to prove any element of its case, and 130 Environmental Park, LLC included and referenced it for demonstrative purposes and as a rebuttal to TJFA/EPICC’s argument that 130 Environmental Park, LLC’s permit application violates TCEQ and Texas Board of Professional Geoscience rules, at 30 TAC §330.57(f) and 22 TAC §851.106(f), respectively. *TJFA/EPICC Closing Arguments at pp.27-28 and 32*. Because TJFA/EPICC assert this same line of reasoning in support of Attachment B to their Reply to Responses to Closing Arguments, they should not be heard to complain about 130 Environmental Park, LLC’s reference to and inclusion of Attachment 1 to its Response to Closing Arguments and TJFA/EPICC’s second motion to strike should be denied.¹

3. TxDOT Hydraulic Design Manual. TJFA/EPICC “move to strike the TxDOT hydraulic design manual that is included as an attachment to Applicant’s Response to Closing Arguments and move to strike all arguments that are based on or rely on this design manual”, because “the design manual was never offered into evidence”. This request should be denied because TJFA/EPICC have not identified the specific portion or portions of 130 Environmental Park, LLC’s Response to Closing Arguments they seek to have stricken. In addition, the TxDOT Hydraulic Design Manual is specifically referenced in TCEQ’s municipal solid waste rules at 30 TAC §330.305(f)(1) and is discussed/referenced in the testimony of Tyson Traw, P.E. at *Tr. pp.716, 718, and 2022* and in 130 Environmental Park, LLC’s permit application at *Ex. 130EP-2 pp.57-58, 180, 216, 217, 220, and 230*. Also, 130 Environmental Park, LLC’s reference to the TxDOT Hydraulic Design Manual is remarkably similar to TJFA/EPICC’s briefing reference to and inclusion of another document not in evidence. On page 16 of their Reply to Responses to Closing Arguments, TJFA/EPICC refer to “an ASTM standard” and Attachment B to that pleading is a copy of the 12-page ASTM D2488-09a “Standard Practice for Description and Identification of Soils (Visual-Manual Procedure)”. Footnote 24 on page 16 of TJFA/EPICC’s Reply to Responses to Closing Arguments states: “The ASTM standard is included as an attachment to this brief. Protestants do not seek to admit this into evidence because Protestants are not relying on this ASTM standard to prove any element of their case. Rather, it is offered for demonstrative purposes, and as a rebuttal to Applicant’s latest argument that Mr. Snyder recognizes no distinction between fissures and blocky texture.” Similarly, TxDOT Hydraulic Design Manual was attached to and referenced in 130 Environmental Park, LLC’s Response to Closing Arguments, 130 Environmental Park, LLC did seek to admit it

¹ In their Motion to Strike, TJFA/EPICC erroneously assert that, in filing Attachment 1 to its Response to Closing Arguments, 130 Environmental Park, LLC failed to comply with SOAH’s rule at 1 TAC §155.101(c)(3). 130 Environmental Park, LLC appropriately filed Attachment 1 pursuant to, and in compliance with, 1 TAC §155.101(c)(1), which addresses “filing materials made confidential by law”. The subsection referenced by TJFA/EPICC, 1 TAC §155.101(c)(3), applies to “materials submitted for in camera review”, refers to material “for which a privilege is asserted”, and does not apply to Attachment 1, which is material that is confidential by law.

into evidence because it is not relied on to prove any element of its case, and 130 Environmental Park, LLC included and referenced it for demonstrative purposes and as a rebuttal to Caldwell County's reliance on Mr. Bratton's testimony to support its claim that the modeling done by Mr. Traw should have used a "Manning's n" roughness coefficient of 0.045, rather than the 0.065 Mr. Traw used. *Caldwell County's Closing Arguments at pp.11-12*. Because TJFA/EPICC assert this same line of reasoning in support of Attachment B to their Reply to Responses to Closing Arguments, they should not be heard to complain about 130 Environmental Park, LLC's reference to and inclusion of the TxDOT Hydraulic Design Manual in its Response to Closing Arguments and TJFA/EPICC's third motion to strike should be denied.

4. TDS, Bob Gregory, and the TDS landfill permit. TJFA/EPICC "move to strike all arguments that refer to TDS, Bob Gregory, or the TDS landfill permit", because "[t]hese accusations are unfounded and based on no evidence. TDS is not a party to this proceeding²." This request should be denied because TJFA/EPICC have not identified the specific portion or portions of 130 Environmental Park, LLC's Response to Closing Arguments they seek to have stricken. In addition, 130 Environmental Park, LLC's references to TDS, Bob Gregory, and the TDS landfill permit are similar to TJFA/EPICC's briefing reference to a document not in evidence. On page 16 of their Reply to Responses to Closing Arguments, TJFA/EPICC refer to "an ASTM standard" and Attachment B to that pleading is a copy of the 12-page ASTM D2488-09a "Standard Practice for Description and Identification of Soils (Visual-Manual Procedure)". Footnote 24 on page 16 of TJFA/EPICC's Reply to Responses to Closing Arguments states: "The ASTM standard is included as an attachment to this brief. Protestants do not seek to admit this into evidence because Protestants are not relying on this ASTM standard to prove any element of their case. Rather, it is offered for demonstrative purposes, and as a rebuttal to Applicant's latest argument that Mr. Snyder recognizes no distinction between fissures and blocky texture." Similarly, 130 Environmental Park, LL referenced TDS, Bob Gregory, and the TDS landfill permit in 130 Environmental Park, LLC's Response to Closing Arguments, did seek to admit any new information into evidence because it is not relied on to prove any element of its case, and included these references for demonstrative purposes, as a rebuttal to TJFA/EPICC's arguments regarding waste acceptance rates, operating hours, and permit special provisions, and to show reasonable motivations of TJFA, an entity that is closely affiliated with TDS, related to these topics. (*TJFA/EPICC Closing Arguments at pp.17-19, 69-71, 87, and 92-94*). Because TJFA/EPICC assert this same line of reasoning in support of Attachment B to their Reply to Responses to Closing Arguments, they should not be heard to complain about 130 Environmental Park, LLC's references to TDS, Bob Gregory, or the TDS landfill permit in its Response to Closing Arguments and TJFA/EPICC's fourth motion to strike should be denied.

III. PRAYER

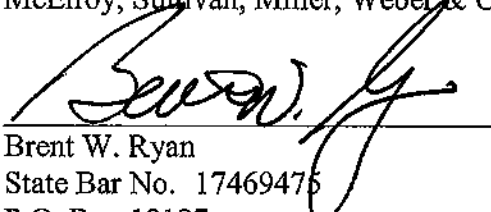
Wherefore, premises considered, 130 Environmental Park, LLC respectfully requests that the ALJs deny TJFA/EPICC's Motion to Strike Portions of Applicant's Response to Closing Arguments.

² This last point is especially ironic, given the repeated presentation of evidence, filing of motions, and briefing by TJFA/EPICC regarding Green Group Holdings, LLC, and Pintail Landfill, LLC, two other entities that are not parties to this proceeding.

Respectfully submitted,

McElroy, Sullivan, Miller, Weber & Olmstead, LLP

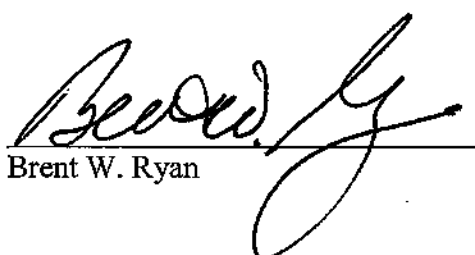
By:


Brent W. Ryan
State Bar No. 17469475
P.O. Box 12127
Austin, TX 78711
Tel: (512) 327-8111
Fax: (512) 327-6566

Attorneys for
130 Environmental Park, LLC

CERTIFICATE OF SERVICE

On December 27, 2016, a true and correct copy of the foregoing was sent to each party representative via email and/or first-class mail, as shown on the attached service list.


Brent W. Ryan

SERVICE LIST

SOAH Docket No. 582-15-2082; TCEQ Docket No. 2015-0069-MSW
Application of 130 Environmental Park Landfill, LLC for Proposed Permit No. 2383

Kayla Murray *via email kayla.murray@tceq.texas.gov*
Anthony Tatu *via email anthony.tatu@tceq.texas.gov*
Aaron Vargas *via email Aaron.Vargas@Tceq.Texas.Gov*
Texas Commission on Environmental Quality
Environmental Law Division
P.O. Box 13087, MC-173
Austin, TX 78711-3087
Attorneys for TCEQ Executive Director

Aaron Tucker *via email aaron.tucker@tceq.texas.gov*
Texas Commission on Environmental Quality
Office of Public Interest Counsel
P.O. Box 13087, MC-103
Austin, TX 78711-3087
Attorney for TCEQ Office of Public Interest Counsel

Eric Magee *via email e.magee@allison-bass.com*
Allison, Bass & Magee, LLP
402 W. 12th Street
Austin, TX 78701
Fax: (512) 480-0902
Attorney for Caldwell County, Texas

Robert Wilson *via email bwilson@jacksonsjoberg.com*
Jackson, Sjoberg, McCarthy & Townsend, LLP
711 W. 7th Street
Austin, TX 78701
Attorney for Plum Creek Conservation District

Marisa Perales *via email marisa@lf-lawfirm.com*
Eric Allmon *via email eallmon@lf-lawfirm.com*
Brad Rockwell *via email brad@lf-lawfirm.com*
Frederick, Perales, Allmon & Rockwell, PC
707 Rio Grande, Suite 200
Austin, TX 78701
Attorneys for TJFA, L.P. and Representative for Aligned Protestants

Ben Pesl *via First-Class Mail*
P.O. Box 242
Dale, TX 78616