

**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**

**APPLICANT’S RESPONSE TO
TJFA/EPICC MOTION TO REOPEN THE RECORD FOR
ADMISSION OF AFFIDAVIT OF PATTON SPENCER KING**

**TO: THE HONORABLE KERRIE JO QUALTROUGH, ADMINISTRATIVE LAW JUDGE
and
THE HONORABLE CASEY BELL, ADMINISTRATIVE LAW JUDGE**

130 ENVIRONMENTAL PARK, LLC, (130 Environmental Park), files this response to TJFA, L.P. (TJFA) and Environmental Protection in the Interest of Caldwell County’s (EPICC) (collectively TJFA/EPICC) Motion to Reopen the Record for Admission of Affidavit of Patton Spencer King (TJFA/EPICC Motion to Reopen the Record), respectfully requesting that the ALJs deny the motion, and would show as follows:

I. BACKGROUND

On September 4, 2013 (more than 39 months ago), 130 Environmental Park filed its Application for Municipal Solid Waste Permit No. 2383 (the Application), including the “Evidence of Competency” section (Part I, Section 6 of the Application). The TCEQ Executive Director determined that the Application was technically complete more than two years ago, in October 2014. The evidentiary hearing on the Application was conducted between August 15 and August 26, 2016. Parties filed closing arguments on October 24, 2016 and responses to closing arguments on or before November 28, 2016. Also on November 28, 2016, TJFA/EPICC filed its Motion to Reopen the Record, seeking admission into evidence of an affidavit of Patton Spencer

King, signed November 25, 2016, the substance of which is statements he asserts he heard at an October 25, 2016 TCEQ public meeting regarding the Pintail Landfill project.

II. ARGUMENT

A. ADMISSIBILITY UNDER TEXAS RULES OF EVIDENCE

The Affidavit of Patton Spencer King is hearsay and is not admissible under the Texas Rules of Evidence. Under Rule 802, hearsay is not admissible “except as provided by statute or these rules or by other rules prescribed pursuant to statutory authority”. Under Rule 801, hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted”. The substance of Mr. King’s affidavit, set out in Paragraph 5 thereof, is self-evidently hearsay: it merely purports to repeat statements Mr. King claims were made by another person. While information that would otherwise constitute hearsay may be admitted if it forms the basis of a testifying expert witness’s opinions, Mr. King is not a testifying expert witness and his opinions are not admissible, nor can any hearsay that forms the basis of such unqualified opinions be admissible. Mr. King’s affidavit also does not satisfy the requirements for any other exception to the general prohibition against hearsay being admitted as evidence.

B. RELEVANCE UNDER RULES APPLICABLE TO THE APPLICATION

The Affidavit of Patton King is not relevant to the issues in this case and it should not be admitted into evidence in this proceeding. The issues in this proceeding are whether the Application complies with applicable statutory and regulatory requirements.¹ 30 TAC §330.59(f) requires an owner or operator to submit, as part of an application for a municipal solid waste permit, certain “evidence of competency” information. Pursuant to Section 330.59(f), an

¹ 30 TAC §55.210.

application must include:

- (1) The owner or operator shall submit a list of all Texas solid waste sites that the owner or operator has owned or operated within the last ten years. The site name, site type, permit or registration number, county, and dates of operation shall also be submitted.
- (2) The owner or operator shall submit a list of all solid waste sites in all states, territories, or countries in which the owner or operator has a direct financial interest. The type of site shall be identified by location, operating dates, name, and address of the regulatory agency, and the name under which the site was operated.
- (3) The executive director shall require that a licensed solid waste facility supervisor, as defined in Chapter 30 of this title (relating to Occupational Licenses and Registrations), be employed before commencing facility operation.
- (4) The names of the principals and supervisors of the owner's or operator's organization shall be provided, together with previous affiliations with other organizations engaged in solid waste activities.
- (5) For landfill permit applications only, evidence of competency to operate the facility shall also include landfilling and earthmoving experience if applicable, and other pertinent experience, or licenses as described in Chapter 30 of this title possessed by key personnel, and the number and size of each type of equipment to be dedicated to facility operation.

As set forth in Section 2 - Evidence of Competency in 130 Environmental Park's Written Closing Argument, the Application contains, at Part I, Section 6, all information required by 30 TAC §330.59(f). 130 Environmental Park does not own or operate (and has not owned or operated) other facilities in Texas, and 130 Environmental Park has no financial interests outside the state of Texas. *Ex. 130EP-1 p.50*. The Application includes the names of the principals and supervisors of 130 Environmental Park's organization, together with previous affiliations with other organizations engaged in solid waste activities *Ex. 130EP-1 pp.50-51*. The Application contains the number and size of each type of equipment to be dedicated to facility operation. *Ex. 130EP-1 pp.51-52; Ex. 130EP-5 p.119-121*. The Application states that the 130 Environmental Park landfill manager will have a Class A license as a municipal solid waste facility supervisor (per TCEQ licensing requirements), experience in earthmoving operations, and a minimum of one year of landfill operations experience. *Ex. 130EP-1 p.51*.

Other than the requirement that a licensed solid waste facility supervisor must be employed “before commencing facility operation”, 30 TAC §330.59(f) is an informational requirement: it identifies information to be included in a permit application. The information provided in the Application was current and accurate when the Application was submitted to the TCEQ and through the time the Application was declared technically complete. The Executive Director determined that the Application contains the information regarding evidence of competency required by the TCEQ rules.²

As discussed above, the issue in this proceeding is whether the Application complies with applicable statutory and regulatory requirements. Neither 30 TAC §330.59(f) nor any other TCEQ rule requires that the information provided in an application be updated throughout the pendency of a contested case process. Imposing such a requirement would mean that an application could never be “done”. Applicants would be required to constantly and repeatedly update their applications during contested case proceedings (which can last for years) regarding not only changes in personnel, but changes to things like area and regional land use and growth trends, adjacent property ownership, the names of elected officials and government representatives, etc.

III. PRAYER

WHEREFORE, 130 Environmental Park respectfully requests that TJFA/EPICC’s Motion to Reopen the Record be denied.

² See, Executive Director’s Closing Arguments, pp. 3-4.

Respectfully submitted,

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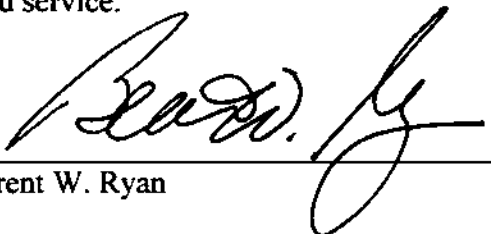
By:



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CERTIFICATE OF SERVICE

On December 5, 2016, a true and correct copy of the foregoing was sent to each party representative via email, first-class mail, facsimile, or hand delivery as shown on the attached service list. In addition, two courtesy copies of the foregoing will be hand delivered to the Administrative Law Judges following filing and service.



Brent W. Ryan

SERVICE LIST

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

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