

**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,</b>	§	<b>OF</b>
<b>LLC FOR PROPOSED</b>	§	
<b>PERMIT NO. 2383</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**CLOSING ARGUMENT OF  
PLUM CREEK CONSERVATION DISTRICT**

**I. INTRODUCTION**

Plum Creek Conservation District (“District” or “the District”) files this Closing Argument following the hearing on the above referenced application. The District has determined that it will not file arguments on each of the topics that were listed in the Agreement among Parties listing topics for Closing Argument. However, the District will use the list of topics as the outline for the statements and Arguments that it chooses to submit.

In reviewing the list of topics, the District realized that a number of its arguments would fit within several of the topics listed. For that reason most of the comments of the District will be submitted once and then referenced under other topic headings. Where there are supplements to the District’s initial comments, those will be noted. In choosing to submit in this manner the intent is to organize the Argument in a way that is most useful to the other Parties and to the Judges. In order to further make this submission easy to reference, the topics will be identified using the same numbering system as on the list of agreed topics.

**II. COMMENTS BY TOPIC NUMBER**

**1. Sufficiency of Property Rights.**

The applicant has applied for a permit for a landfill to be located on property in Caldwell County that is presently owned by Cathy Moore Hunter, according to the affidavit on file with the application. As far as is known to the District the Applicant does not presently own the property

but has an option agreement allowing the property (the "Hunter Tract") to be purchased. The exhibits submitted by the District show that the District has an easement on the Hunter Tract. Any discussion about the "sufficiency of Property Rights" must, therefore, include a discussion of the relationship between the fee ownership of the Property, and the rights of an easement holder over that same property to determine whether there is anything in the easement that would impact or affect the ability of the fee owner to construct and operate a landfill. The reason that the discussion is necessary is that, under Texas law, the easement in a tract of land is the "dominant estate" and the surface owner cannot do anything that would interfere with the easement owner's exercise of the easement rights.

In determining what rights are held by the easement owner, Texas law is also clear that the terms of the easement define the limits of the easement.

It should be noted that although Plum Creek Conservation District is the owner of the easement and is making use of the easement, the District was not identified as a "property owner" by the Applicant at the time the application was filed. Although not in the record, the Applicant and the District had some communication about the District's easement in advance of filing the application even though the District was not identified as a landowner when the application was filed and the lake was shown as an "SCS" reservoir. Those facts were not significant because, although it was not on the mailing list, the District had actual notice the filing of the application, was given a copy of the application by the Applicant shortly after it was filed and, as the record reflects, was a party to the Hearing on the filed application.

It should also be noted that there was nothing in the application that made reference to the fact that there was a Plum Creek Small Watershed Protection Work Plan in place that covered the area proposed to be used for the landfill. In the hearing none of the witnesses could cite another application for landfill that had been made within a Small Watershed Protection Work plan so there

was no indication of accommodations relating to such a work plan with an operating landfill.

The District has maintenance and operational responsibility for a dam on the Hunter Tract. That dam is part of a small watershed protection program of the United States and the dam and Lake behind it are known as Site 21 under the terminology of that program. Although the District was not identified as a “landowner”, as noted above, the Lake that is formed by water impounded by that dam is identified on the maps in the application as an “SCS” lake. “SCS” is an old acronym for an agency of the United States that was known as the United States Soil Conservation Service which is now known as the Natural Resources Conservation Service. The Agency is a part of the United States Department of Agriculture.

As noted in Plum Creek Exhibit 1.1, the collected easements that were obtained by the District at the time of the construction of the dam and formation of the Site 21 Lake on the Hunter Tract allow landowners of tracts covered by the District’s easements to make any use of their property covered by an easement as long as that use “... is not inconsistent with the District’s use of its easement rights”.

The rights granted in the easement document are to be used: “For or in connection with the construction, alteration, operation, maintenance and inspection of the following works of improvement to be located on the above described land; for the flowage of any waters in, over upon or through such works of improvements; and for the permanent storage and temporary detention, either or both, of any waters that are impounded, stored, or detained by such works of improvement: Floodwater retarding structure, consisting of an earthen dam, emergency spillway, work site adjacent to construction area, and portions of the sediment, sediment reserve and detention storage pools, including an area that will be inundated during emergency spillway flow.”

The surface area covered by the easement for the “works of improvement” is described in the easement as about 327 acres of land out of a larger tract consisting of approximately 1,245.71 acres.

The “works of improvement” description relates to a description in a “Work Plan” Agreement for watershed protection and flood prevention for the Plum Creek Watershed in Hays, Caldwell and Travis Counties. That Work Plan is Exhibit 1.2 of Plum Creek Conservation District and was originally signed on May 24, 1960. Site 21, the dam and Lake on the Hunter Tract, are described in that original Work Plan Agreement.

There were, and are, three local sponsors for the watershed protection and flood prevention work plan. Plum Creek Conservation District was, and is, one of the local sponsors. In fact, the District is the “primary” local sponsor and, under the terms of the Agreement, has the responsibility for “... operation and maintenance of the 21 floodwater retarding structures” listed in the original Plan, including the dam and Lake at Site 21.

Because the easement obtained by the District is for a dam that is to be a part of a watershed protection work plan funded by the United States in terms of the initial capital outlays for dam construction and then maintained by the District in accord with the terms of that Work Plan Agreement, the easement language has to be interpreted to assure that none of the obligations in the Work Plan Agreement, including the operation and maintenance of the dam at Site 21 and the related impoundment, are adversely affected by the actions of landowners outside the easement area..

In addition to the terms of the Work Plan Agreement, the District also now has responsibility under the Texas Dam Safety Act program to assure that that dam at Site 21 meets current regulatory standards of the State of Texas for dams. Any actions that would interfere with the District’s responsibilities under the Texas Dam Safety Act and regulations adopted pursuant to

that Statute for the dam located on the easement would also not be allowed under the terms of the easement held by the District.

In summary on this point, the Sufficiency of Land Rights held by the Applicant necessarily involves an assessment of the easement rights of Plum Creek Conservation District. There was nothing about the Plum Creek District's easement rights in the application or in the applicant's evidence. Because the District's position in the hearing, information that the District thought was appropriate for consideration was supplied into the record by the District.

2. Evidence of Competency.

The District submits no argument on this point.

3. Compliance History.

The District submits no argument on this point.

4. Land Use Compatibility.

Please note the Argument of the District submitted under the first topic, above. That argument can be considered an argument on the compatibility of the applicant's use of a portion of the property with the District's use of the rights it holds in its easement.

Factually, the District sought Party Status in the hearing in order to learn about the potential for impacts on the District's easement rights both in terms of surface water quality and quantity and in terms of groundwater because although the District is a political subdivision known as a Water Control & Improvement District in Texas, it also has statutory authority to exercise the powers of a Groundwater Conservation District.

The information on water quality presented by the Applicant at the hearing was that no discharge of "contaminated" water would be permitted. However, the definition of "contaminated water" as used in the context of the hearing is so limited that there are areas of operation at the proposed landfill where storm water discharged from the area of the landfill that would drain into

Site 21 would not be within the definition of “contaminated” water. When the District asked questions about other pollutants that might be in the water discharged from the landfill that was not within the definition of “contaminated” water, little information was presented other than the discharges would be covered by standard conditions for discharges in storm water permits from industrial activities. As a result the District is not able to determine whether there could be operations designed or implemented by the Applicant that would result in an incompatible land use when the District’s easement rights are considered from a water quality perspective for a range of reasons.

One result of the hearing is that the District does plan to consider its own monitoring program to develop information related to potential water quality impacts on the water impounded at Site 21 to it will know of any impacts to the water quality in the Site’s impounded water. While there will be some monitoring and reporting of discharges under the storm water permits, the District is particularly concerned with water quality impacts on the water impounded at Site 21 and no monitoring of that water was discussed during the hearing.

The District did learn at the hearing that there would be an increase in the quantity of water projected for discharge to Site 21 as a result of the landfill’s operation. Whether that increase would cause a “compatibility” problem to the District for use of its land rights is dependent on facts that are not in evidence. However, if such a problem does develop the District has remedies available to it under state law governing easement rights.

Another issue of concern to the District is whether the landfill’s operation would contribute debris or pollutants to the water quality of the lake’s water in Site 21 that could require work to address. There was not really any discussion about that matter at the hearing because of the sparse data on design of the operating facilities at the proposed landfill outside the active waste disposal area. At the hearing the District noted its responsibilities to maintain and operate the dam at Site 21

and also noted its experience in addressing debris accumulations following storm events at other Sites in the Watershed Plan that it maintains. Therefore, if any debris problems come into being the District anticipates that it will address those problems using all available appropriate remedies as it has done in the past at other Sites.

5. Transportation and Traffic.

The District submits no argument on this point.

6. Geology and Soils.

The District submits no argument on this point.

7. Hydrogeology.

As noted in questions and testimony from the District's consulting geologist (who was called as a witness by one of the other parties) the District's geologist believes that the Wilcox formation that supplies water to many in Caldwell County outcrops under the waters impounded at Site 21. While the impoundment is not in the area that is described in the permit sought by the Applicant, the District believes 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.

8. Faults.

The District submits no argument on this point.

9. Groundwater Monitoring.

In response to questions of the District during the hearing, the Applicant stated that no monitoring of water quality in wells located on the South side of FM 1185 was planned by the Applicant as a part of its operations. There is evidence submitted by the Applicant in its application that there are at least 2 Wilcox Formation water wells on the Southern side of FM 1185 close to the proposed landfill. The District believes that a monitoring program addressing water quality of

those wells on some basis should be a requirement in any permit issued for the proposed landfill operation.

10. General Facility Design.

There was only sparse information available and submitted during the course of the hearing about stormwater drainage quantity and quality from areas outside the active waste disposal portion of the landfill. While there was evidence that the discharges would be covered by standard stormwater discharge permits, when asked the Applicant could not number the discharge points nor describe their locations. As a result the District has little information available to evaluate potential impacts on the use of its easement, other than learning that except for a small area associated with the entrance to the facility, the water from transport areas and other operating areas of the landfill will drain into and be captured by the dam at Site 21.

As the District stated in its request to be admitted as a Party to the hearing, the District is neither in favor nor opposed to the permit being issued to the Applicant by TCEQ. However, also as the District noted, because of its easement rights, it desired to have questions about potential impacts on its rights be addressed at the hearing. Many of the District's questions remain.

In addition, in terms of general facility design, water quantity needed for construction of the landfill was never estimated by the Applicant although there was acknowledgement that large quantities of water would be needed for construction of the earthen facilities planned and designed for the landfill operations. Then, on the penultimate day of the hearing, in response to questions asked during the hearing, the Applicant finally gave an estimate of needed quantities of water for operations. While the estimated quantity of necessary water for operations is known, the source of the water is uncertain. The Applicant did submit a letter from Polonia Water Supply Corporation noting that the proposed landfill was within the CCN, or service area, of Polonia WSC and that Polonia had the obligation to supply water to those in its service area, there was also an

acknowledgement that the only water supply from Polonia to the Hunter Tract currently is a small diameter line that is made available under the terms of a “standard” service agreement. There was also testimony that a Standard Service Agreement is for an individual household. To provide water for other types of uses it is necessary that there be a “non-standard” service agreement in place with Polonia Water Supply Corporation. There is no evidence in the record that such an Agreement exists. Therefore there is no evidence in the record that Polonia has examined the water needs of the Applicant and has sufficient capacity and infrastructure in place to supply those needs. Water needs not really defined until late in the hearing but there is no evidence of an agreement that the estimated needed water is available.

The last item in the topic of “general facility design” that the District noted in the hearing is that the operating plan for the Landfill describes the use of soil for control of potential fires. The District cannot recall anything specific in the Application nor specific testimony about the locations of or quantities of soil that in any stockpiles to be available for fire suppression.

As a result of these observations of the District, it has formed the conclusion that the Application has a “conceptual” plan and will leave many of the details of the design for operation, should a permit be issued, to a later time. The District has a desire to be kept informed about the plans so it can make comments, if it has any, about the details if the District sees that there may be potential impacts on the rights of the District for operations in its easement. As noted by the President of the District’s Board in its public meeting at the time it determined to seek Party status in this hearing, assuming the permit is granted, the District and the landfill operator are going to be neighbors for a long time into the future. Assuming that the District does rehabilitate the dam at Site 21 its obligations under agreements with the Natural Resources Conservation Service for maintenance and operation of the dam and easement area at Site 21 under the Small Watershed Protection Program are projected to be 100 years after completion of the rehabilitation, as noted in

Exhibit 1.6 submitted by the District into the record. Many changes could be considered by the Applicant pursuant to any permit for a landfill issued by TCEQ and, as noted, some of those changes would not get public notice nor would the opportunity for input into potentially adverse impacts to the District's easement rights be considered in connection with those changes. So, the District wishes that there be some mechanism developed and incorporated into any permit that requires that the District receive notice of any planned changes in operations, design, or waste acceptance to avoid addressing problems after the fact rather than before problems are noticed.

11. Waste Management Unit Design.

The District submits no argument on this point.

12. Unstable areas.

The District submits no argument on this point.

13. Landfill Gas Monitoring.

The District submits no argument on this point.

14. Endangered or threatened species.

The District submits no argument on this point.

15. Wetlands.

The District submits no argument on this point.

16. Surface Water and Drainage.

As previously noted, water quality of proposed discharges is unknown except as described in standard permit terms and conditions that the Applicant put into the record and that there will be a prohibition of discharge of "contaminated water" as defined. The "contaminated water" definition used in the hearing does not necessarily include everything that could result from landfill operations outside active landfill areas for several reasons. PCCD does worry about the water quality in the Lake at Site 21 because of responsibilities under Federal programs. As noted above

the District will consider implementing its own surface and groundwater quality monitoring programs to generate data and supply information.

17. Floodplains.

The District is aware that flood plains are being examined in the vicinity. The District is not directly involved in the process, However, the largest flood control facility in the area is Site 21 so if there are changes, those could impact the District and the Applicant/ operator of the landfill. In addition, the NRCS proposal for rehabilitation of the dam at Site 21 now carries a statement that NRCS is recommending the easement area upstream of the dam be expanded to an area corresponding to that of the top of the dam, as rehabilitated. As noted in that same proposal, the District has resisted the suggestion but cannot control whether the requirement would be imposed by the United States. As it stands now, NRCS has agreed that it is not necessary for several reasons and is still planning on providing funding for the rehabilitation that might be required to meet dam Safety standards. Without such funding rehabilitation to those standards would be problematic for the District to accomplish.

As previously noted, the District sought party status in this hearing so the potential impacts on the District and its use of its easements could be submitted for consideration. The District wants the Applicant to be aware of the problems that the District, and consequently the Applicant, might face in the future because of the location and use of the District's easement.

18. Local Regulations/Approvals.

As noted above, because of its easement rights the District would like to be kept informed and aware of details of construction and operational determinations made that could potentially impact the easement rights of the District. While the exercise of easement rights is primarily a question of "real property" law in Texas the District would be the one to make at least an initial determination of whether some activity would impact its exercise of its rights. The exercise of

easement rights could include requirements placed on the District through Agreements related to the operation of the Small Watershed Protection Plan that is in place, Texas Dam Safety Act requirements and the scope and terms of obligations that might fall on the District as those may change over time as a result of program changes made by the agencies of the United States of the State of Texas that have responsibility to oversee the program including operations of the dam, impoundment of water, and floodplains, among others

It should be noted that the District does not waive any of the rights and powers conferred on it through Texas law and the District expects that it will continue to exercise all of those rights, duties, and powers should it be necessary to address matters related to its use of its easements.

19. Waste Acceptance Plan.

The District submits no argument on this point, other than its previously expressed desire to be informed of changes to waste acceptance that might impact the District's easement rights.

20. Site Operating Plan.

The District's comments about the Site Operating plan have been addressed above in Section 10 on General Facility Design. The District does urge that the Operating Plan include evidence of an adequate water supply for construction and operations, and that the operating plan address soil placement and quantity in connection with plans for soil use in fire suppression.

21. Odor.

The District submits no argument on this point.

22. Water Supply.

As previously noted, the District urges that the Applicant show 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 of supply. The Site will operate in the CCN of Polonia Water Supply Corporation. While the landfill is in the

CCN and Polonia has acknowledged that it is the duty under the CCN to provide service, service of the type sought by Applicants requires a “non-standard” service agreement. No such an agreement is yet in place. There is no information in the record related to the question of whether water is available from Polonia in the required quantities.

23. Buffer Zones.

The District submits no argument on this point.

24. Screening.

The District submits no argument on this point.

25. Permit duration.

The District submits no argument on this point.

26. Closure plan.

The District submits no argument on this point.

27. Post-Closure plan.

The District submits no argument on this point.

28. Financial Assurance.

The District submits no argument on this point.

29. Impacts on health, welfare, environment, or physical property of nearby residents and property owners.

The District could have placed all of its arguments into this item on the list because, as a holder of an easement covering part of the Hunter Tract which is the property under option for the Applicant where it plans to construct and operate its landfill. Rather than repeat what it previously submitted, the District would like to emphasize that its participation in the hearing all relates to the fact that it has a real property interest in the Hunter Tract and that proposed operations have the potential for impacting the District’s real property right.

30. Enforceability of Draft Permit.

The District makes no argument on this issue, other than noting that it expects that TCEQ will enforce the terms of any permit that is issued.

31. Permit Special Provisions.

As noted in other portions of this Argument, the District urges that the following provisions be included in the terms of any permit issued to the Applicant as a result of this hearing:

- No construction or operation should begin without having a water supply agreement in place for necessary water for construction and operations.
- No operations should be authorized until there is a soil stockpile for fire suppression and cover in place that satisfies the quantity and placement requirements of TCEQ.
- If monitoring of surface or groundwater quality reveals potential problems, operations will cease until the cause is determined and corrective action taken
- No interference with or adverse impacts on PCCD's easement rights are authorized.

32. Additional issues

The only additional matter that the District would like to have noted is that the District intends to make use of and to exercise all of its powers and rights under Texas law.

### III. CONCLUSION

For the Reasons stated above, Plum Creek Conservation District requests that its comments in this Closing Argument be favorably considered and requested Special Provisions be incorporated into any permit that is recommended for Approval by the Commission as a result of this hearing.

Respectfully submitted,

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*sup [Signature]*

10/24/16

ATTORNEYS FOR PLUM CREEK CONSERVATION  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the above and foregoing Plum Creek Conservation District's Closing Statement was sent via e-mail or Regular U.S. Mail, as indicated on the Service List, to the parties on the attached Service List on this the 24<sup>th</sup> day of October, 2016.

Bob Wilson

Robert Wilson

*sup [Signature]*

**SERVICE LIST**

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

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