

**Proposed Permit No. 2374
Tracking No. 14669041
CN 603835489/RN 106119639**

APPLICATION OF RANCHO VIEJO WASTE MANAGEMENT, LLC – PROPOSED PERMIT NO. 2374 NEW PERMIT APPLICATION – SECOND NOTICE OF DEFICIENCY (NOD) TRACKING NO. 14669041; CN 603835489/ RN 106119639	§ § § § § § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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**ANB CATTLE COMPANY, LTD.’S REPLY TO THE RESPONSES TO REQUESTS
FOR CONTESTED CASE HEARING**

TO THE HONORABLE COMMISSIONERS:

Comes now ANB Cattle Company, Ltd. (“ANB”) and files this Reply in support of its request and the requests of other parties that this matter be referred to the State Office of Administrative Hearings (“SOAH”) for a contested case hearing on all relevant issues.

1. ANB’s Request for Contested Case Hearing

In response to the July 3, 2012, Decision of the Executive Director (“ED”), ANB filed its Request for Contested Case Hearing on July 30, 2013.¹ The ED, the Office of Public Interest Counsel (“OPIC”), and the applicant filed responses to the Requests for Contested Case Hearing filed by ANB and by other protesting parties. Pursuant to 30 T.A.C. § 55.209(g), ANB files this written Reply to those Responses.

2. Contested Case Hearing Issues

The ED and OPIC have joined ANB in requesting that a contested case hearing be held in this matter. In the referral of this matter to SOAH for hearing, ANB supports the list of issues recommended by the ED to be heard with one exception. Because of the special nature of the property rights in certain lands involved in this case, it would be improper to exclude the impact this facility would have on “mineral rights.” For the reasons explained herein, the exclusion of “mineral rights” as suggested in the ED’s Response to Hearing Request, Issue 3.1 at p. 24, should be deleted. Otherwise, ANB requests that all other issues listed by the ED be included in the referral to SOAH.

¹ ANB also filed Requests for Contested Case Hearing in this matter on November 21, 2011, July 26, 2012, and February 28, 2013.

3. The Applicant does not own the requisite property rights in the State Mineral Classified Lands for a MSW facility

The applicant proposes to include certain State of Texas Mineral Classified lands in the proposed MSW site. Those lands are Surveys 112 and 2366, and are shown on the plat attached hereto as **Exhibit A**. Because of the broad nature of the rights statutorily retained by the State in Mineral Classified Lands, the applicant does not own the requisite rights to use the surface of Surveys 112 and 2366 for the proposed MSW site.

Mineral Classified Lands are the public lands of the State dedicated under our Constitution for the benefit of the State's public schools. The legislature specified that such public lands be "classified" into certain use categories and authorized limited surface rights to be sold, with the State reserving the rights to all minerals. The State's retained ownership interest includes significantly more property rights than the mineral interest severed from the surface estate in the typical private party transaction.² Because all mineral classified land sales are strictly construed in favor of the State, any property interest not explicitly granted is retained by the State.³

The State's "mineral rights" cover much more than oil and gas. They expansively include any mineral or other material on or under the land having commercial value.⁴ Physical minerals of value that are part of or near the surface, are owned by the State and not the surface owner. The State also has special easement rights to all minerals that are superior to the rights of private mineral owners.⁵

It appears that the ED erroneously limited the analysis of "mineral interest" to oil and gas mineral rights contemplated in private transactions. See ED's Response to Public Comment 43, at page 48. The applicant also urges the same erroneous assumption about the nature of the State's mineral interest in its Response to ANB's Request for Contested Case Hearing, pp. 6-7.

A proper examination and analysis of the law and facts of the Mineral Classified Lands in this case and the applicant's proposed use of the surface and subsurface of those lands, will confirm that the applicant does not own the property rights required to include those lands in the proposed MSW site. A proper analysis of the property rights issues in this case cannot exclude consideration of the nature and extent of the State's retained "mineral interest."⁶

² *Schwarz v. State*, 703 S.W.2d 187, 189-191 (Tex. 1986).

³ *Schwarz v. State*, 702 S.W.2d at 189.

⁴ See e.g., *State v. Cemex Construction Materials South, L.L.C.*, 350 S.W.3d 396, 410 (Tex. App. – El Paso 2011, judgment vacated by agmt).

⁵ *Empire Gas & Fuel Co. v. State*, 47 S.W.2d 265, 268 (Tex. 1932).

⁶ Perhaps the ED did not intend for the excluding label of "mineral rights" in part 3.1 of his Response to apply to the Mineral Classified Lands in this case. The cited comment in the Texas Register appears to be concerned with private oil and gas leases rather than Mineral Classified Lands. Moreover, in light of the Supreme Court's decision in *Texas Rice Land Partners, Ltd., v. Denberry Green Pipeline-Texas LLC*, 363 S.W.3d 192 (Tex. 2012), categorically excluding the impact of MSW permits on property rights of mineral owners is suspect and would be in ANB's view error. See further discussion of the *Denberry Green* case in ANB's July 30, 2013 Request for Contested Case Hearing.

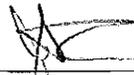
4. ANB's Ownership Interest in the Mineral Classified Lands

The applicant's surface use rights in Surveys 112 and 2366 are further limited by ANB's co-ownership of that surface estate. Under the Relinquishment Act, ANB and the applicant, as owners of the surface, share in the proceeds derived from the State's oil and gas minerals. This sharing is compensation for carrying out the statutorily imposed duty to protect and develop those minerals for the best interests of the State and for the adverse impact the State's mineral interest has on their use of the surface. It is also important to note that the surface owners' duty to act in the best interest of the State is fiduciary in nature.⁷ To the extent the proposed MSW facility impacts the State's minerals, it also impacts ANB's property rights in that mineral interest.

As part of a rather complicated transaction involving numerous properties, ANB and the applicant agreed that the applicant would have the use of the surface of Surveys 112 and 2366, but with limitations. It is important to understand that *none* of the transaction documents divested ANB of its surface ownership of those Surveys.⁸ While the applicant was given exclusive possession of these Surveys to be used with applicant's adjacent land for ranch operations, that possession was limited to "hunting and grazing purposes."⁹ Clearly, a MSW facility is not hunting or grazing and would, in fact, prevent any hunting and grazing on those Surveys. No title document elevates the applicant's limited possessory rights of Surveys 112 and 2366 to the type of ownership entitling it construct a MSW facility which permanently takes or impairs the surface ownership rights of ANB and the mineral rights of the State.

Wherefore, ANB prays that a contested case hearing be ordered and this case be referred to SOAH, and that ANB be granted party status in that proceeding. ANB supports the ED's listing of issues to be referred to SOAH with the exception that the suggested exclusion of the consideration of "mineral interests" in part 3.1 on page 24 of the ED's Response, be deleted.

Respectfully submitted,



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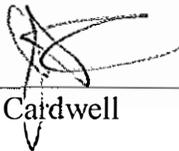
⁷ See *Scott v. Exxon Corp.* 763 S.W.2d 764, 767 n. 3 (Tex. 1988).

⁸ It is important to note here that unlike instances of private ownership of land, the mineral interest cannot be severed from the ownership of the surface estate in mineral classified lands. *Holt v. Giles*, 240 S.W.2d 991 (Tex. 1951). To preserve ANB's mineral interest in Surveys 112 and 2366, its surface ownership had to be preserved – and not partitioned to or otherwise conveyed to the applicant. None of the transaction documents giving the applicant limited exclusive possession of these Surveys was intended to change that required ownership by ANB.

⁹ See further discussion of the hunting and grazing limitation in the surface use agreement in ANB's July 30, 2013, Request for Contested Case Hearing.

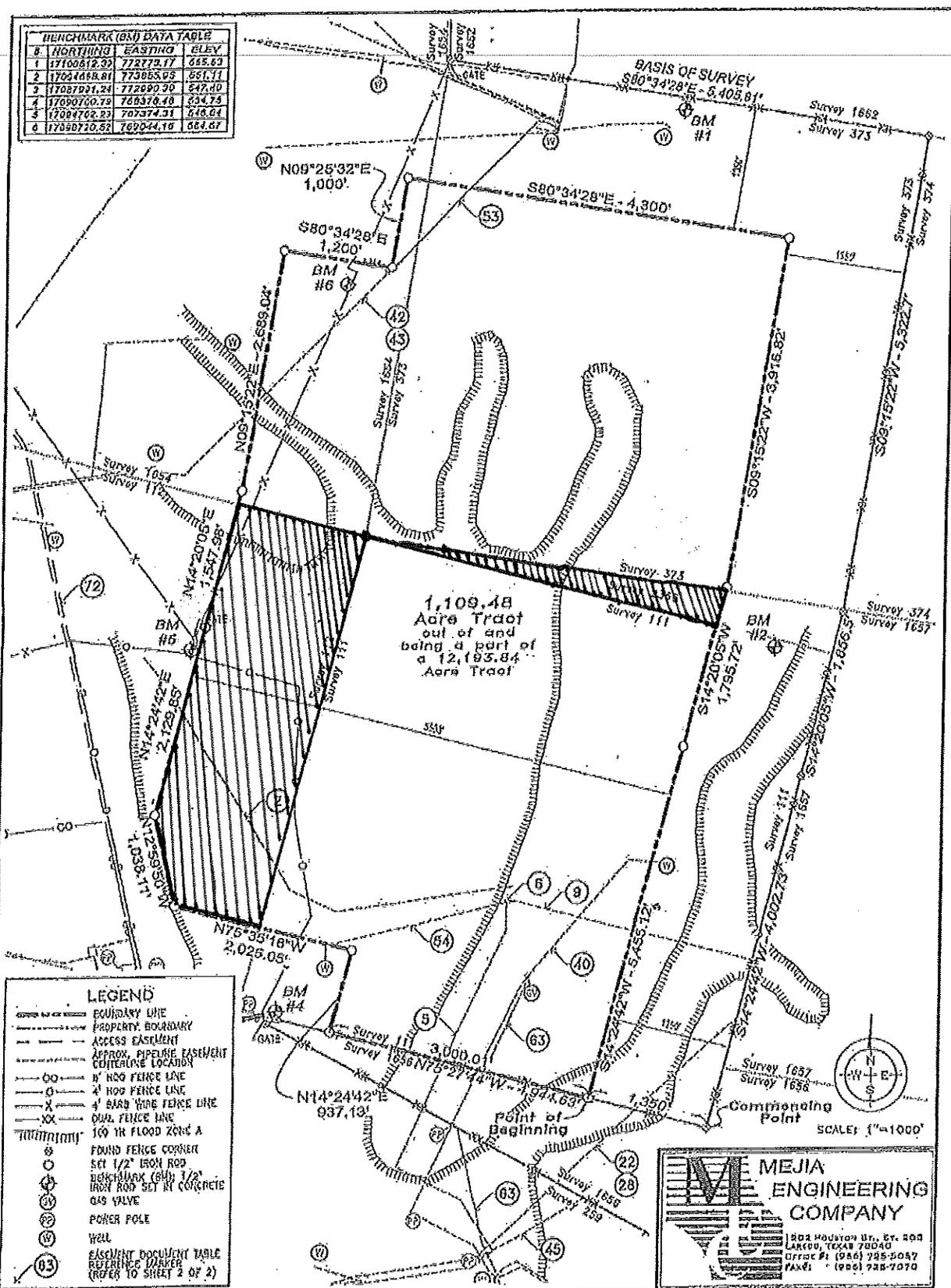
CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2013 a true and correct copy of the foregoing document was served on opposing counsel by method indicated:



John A. Cardwell

BENCHMARK (BM) DATA TABLE			
B.	NORTHING	EASTING	ELEV.
1	17106812.32	722178.17	668.63
2	17021468.81	773885.65	651.11
3	17087991.24	772990.30	642.40
4	17090760.79	768378.48	634.75
5	17087762.23	767374.31	648.04
6	17089720.82	769044.18	664.67



LEGEND	
	BOUNDARY LINE
	PROPERTY BOUNDARY
	ACCESS EASEMENT
	APPROX. PIPELINE EASEMENT
	CENTERLINE LOCATION
	6" HOE FENCE LINE
	4" HOE FENCE LINE
	4" BARB WIRE FENCE LINE
	0.5M FENCE LINE
	100 YR FLOOD ZONE A
	FOUND FENCE CORNER
	SET 1/2" IRON ROD
	BENCHMARK (BM) 1/2"
	IRON ROD SET BY CONCRETE
	GAS VALVE
	POWER POLE
	WELL
	EASEMENT DOCUMENT TABLE
	REFERENCE MARKER
	(REFER TO SHEET 2 OF 2)

CERTIFICATE OF SURVEYOR

STATE OF TEXAS,
COUNTY OF WEBB

I, **GRBERT L. CADE II**, A REGISTERED PROFESSIONAL LAND SURVEYOR, DO HEREBY CERTIFY THAT THE FOREGOING SURVEY WAS PREPARED FROM MAPS, RECORDS AND OTHER DOCUMENTS OF RECORD MADE AVAILABLE AND IS CORRECT TO MY KNOWLEDGE AND WAS PREPARED FROM AN ACTUAL SURVEY MADE ON THE GROUND UNDER MY DIRECTION.

Grbert L. Cade II
GRBERT L. CADE II, R.P.L.S. No. 6520

3/30/2011
DATE



MEJIA ENGINEERING COMPANY
202 Madison St., E. 200
Lubbock, TEXAS 79404
Office #: (806) 798-5087
Fax #: (806) 798-7070

BOUNDARY SURVEY
of a tract of land containing 1,109.48 acres, more or less, within Surveys 373, 111, 112, and 1054 and being out of and a part of a 12,193.84 acre tract as described and depicted as Tract 2 on a Survey Plat by John E. Foster, R.P.L.S. on a Subdivision Conforming Surface Ownership, Agreed Boundary Line and Roadway Access Instrument recorded in V. 704, p. 027-052, R.P.M.C.T., Webb County, Texas.

Checked By: E.B.	Sheet: 1 of 2
Checked By: A.A.	
Approved By: G.E.	

