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**RE: Cause No. 03-10-0016-CV, TJFA, LP, and Concerned Citizens and
Landowners, vs. Texas Commission on Environmental Quality.**

Dear Mr. Kyle:

Enclosed are the original and seven copies of **Brief of Appellee, Texas Commission on
Environmental Quality** in the above referenced case.

Please file and return an extra file-stamped copy.

Thank you for your attention to this matter.

Sincerely,

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Cause Number 03-10-0016-CV

IN THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS AT AUSTIN

TJFA, L.P. and CONCERNED CITIZENS AND LANDOWNERS,
Appellants,

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
Appellee.

**BRIEF OF APPELLEE, TEXAS COMMISSION
ON ENVIRONMENTAL QUALITY**

On Appeal From the 53rd Judicial District Court,
Travis County, Texas, Cause No. D-1-GN-08-004503

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Date: June 9, 2010

ORAL ARGUMENT CONDITIONALLY REQUESTED

TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF THE CASE	1
ISSUES PRESENTED	1
STATEMENT REGARDING ORAL ARGUMENT	1
STATEMENT OF FACTS	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT AND AUTHORITIES	4
I. Standard of Review.	4
II. The TCEQ’s findings and conclusions concerning the identification of 100-year floodplains were reasonable and supported by substantial evidence	6
A. The evidence proved that the landfill site is not in a 100-year floodplain.	6
B. TCEQ did not violate its own precedent.	8
C. The findings related to flooding are supported.	9
III. The TCEQ’s findings and conclusions concerning the non-significant alteration of natural drainage patterns were reasonable and supported by substantial evidence.	10
A. WMTX demonstrated that its landfill would not significantly alter natural drainage patterns.	10
B. No adverse impact on downstream land.	12
IV. The TCEQ’s findings and conclusions concerning the characterization of site geology and hydrogeology were reasonable and supported by substantial evidence	15
V. The TCEQ made an appropriate determination on site operating hours	18

TABLE OF CONTENTS
(Continued)

	<u>PAGE</u>
A. The narrowness of the difference between the permitted hours and the rule default hours.	19
B. The agreement between WMTX and Guadalupe County does not bind the TCEQ.	20
C. Substantial evidence supported the TCEQ's decision about heavy equipment operating hours.	24
CONCLUSION AND PRAYER	26
CERTIFICATE OF SERVICE	27

INDEX OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Berry v. State Farm Mut. Ins. Co.</i> , 9 S.W.3d 884 (Tex. App.–Austin 2000, no pet.)	5
<i>Borden, Inc. v. Sharp</i> , 888 S.W.2d 614 (Tex. App.–Austin 1994, writ denied).	4
<i>City of El Paso v. Public Utility Commission</i> , 883 S.W.2d 179 (Tex. 1994).	21, 22, 24
<i>City of Plano v. Public Utility Comm'n</i> , 953 S.W.2d 416 (Tex. App.–Austin 1997, no writ).	5
<i>In re Entergy Corp.</i> , 142 S.W.3d 316 (Tex. 2004)	23
<i>Gene Hamon Ford, Inc. v. David McDavid Nissan, Inc.</i> , 997 S.W.2d 298 (Tex. App.–Austin 1999, pet. denied)	5
<i>H.G. Sledge, Inc. v. Prospective Inv. & Trading Co.</i> , 36 S.W.3d 597 (Tex. App.–Austin 2000, pet. denied).	5
<i>McMillan v. Tex. Nat. Res. Conservation Comm'n</i> , 983 S.W.2d 359 (Tex. App.–Austin 1998, pet. denied).	5
<i>Meier Infinity Co. v. Motor Vehicle Bd.</i> , 918 S.W.2d 95 (Tex. App.–Austin 1996, writ denied)	23
<i>Mireles v. Texas Dep't of Public Safety</i> , 9 S.W.3d 128 (Tex. 1999).	4
<i>North Alamo Water Supply Corp. v. Tex. Dep't of Health</i> , 839 S.W.2d 448 (Tex. App.–Austin 1992, writ denied).	5
<i>Phillips Petroleum Co. v. Tex. Comm'n on Envtl. Quality</i> , 121 S.W. 3d 502 (Tex. App.–Austin 2003, no pet.)	5

INDEX OF AUTHORITIES
(Continued)

<u>CASES</u>	<u>PAGE</u>
<i>Railroad Comm'n of Texas v. Torch Operating Co.</i> , 912 S.W.2d 790 (Tex. 1995)	4
<i>Stanford v. Butler</i> , 142 Tex. 692, 181 S.W.2d 269 (1944)	4
<i>State v. Flag-Redfern Oil Co.</i> , 852 S.W.2d 480 (Tex. 1993)	23
<i>Tex. Dep't of Transp. v. T. Brown Constructors, Inc.</i> , 947 S.W.2d 655 (Tex. App.—Austin 1997, writ denied)	22

STATUTES

TEX. GOV'T CODE Ch. 2001 §175(e)	8
TEX. HEALTH & SAFETY CODE Ch. 382.	1
Texas Rules of Appellate Procedure Rule 38.1(g)	2

RULES

30 Texas Administrative Code	
§ 330.56(d)	15
§ 330.56(d)(5)(A)(I)	18
§ 330.56(f)(4)(A)(iv)	13
§ 330.56(f)(4)(B)(I)	6
§ 330.57.	18
§ 330.114.	18

INDEX OF AUTHORITIES
(Continued)

<u>RULES</u>	<u>PAGE</u>
§ 330.115.	18
§ 330.118.	19
§ 330.119.	18
§ 330.120.	18
<u>TEXAS CONSTITUTION</u>	
article II, § 1	22

STATEMENT OF THE CASE

This case is an appeal of a final order of the Texas Commission on Environmental Quality (TCEQ) granting an application by Waste Management of Texas (WMTX) for a permit under the Texas Solid Waste Disposal Act¹ for an expansion of its municipal solid waste landfill near New Braunfels, Texas. The agency issued the order after a contested case hearing conducted by an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). TJFA and Concerned Citizens and Landowners (collectively, Appellants) opposed the permit application at the agency proceeding

Appellants sought judicial review of the agency's order in Travis County District Court. The district court affirmed the agency's decision. Appellants now appeal.

ISSUES PRESENTED

1. The TCEQ's findings and conclusions concerning the identification of 100-year floodplains were reasonable and supported by substantial evidence.
2. The TCEQ's findings and conclusions concerning the non-significant alteration of natural drainage patterns were reasonable and supported by substantial evidence.
3. The TCEQ's findings and conclusions concerning the characterization of site geology and hydrogeology were reasonable and supported by substantial evidence.
4. The TCEQ made an appropriate determination on site operating hours.

STATEMENT REGARDING ORAL ARGUMENT

Because this case presents routine issues of substantial evidence review that have been adequately addressed in the briefs, the TCEQ does not believe that oral argument is

1. TEX. HEALTH & SAFETY CODE Ch. 382.

necessary. However, if the Court grants Appellants' request for oral argument, the TCEQ asks to be heard.

STATEMENT OF FACTS

The TCEQ objects to the argumentative nature of portions of Appellants' statement of facts. Rule 38.1(g), Texas Rules of Appellate Procedure, calls for a Statement of Facts that is "without argument."

WMTX applied for an amendment to expand the existing Comal County municipal solid waste (MSW) landfill facility,² proposing to change the property area from approximately 96 acres to 244 acres and to increase the waste disposal unit footprint from approximately 79 acres to 164 acres.³ The TCEQ staff reviewed the application and found it technically complete. Public notice was given.⁴

An ALJ conducted a preliminary hearing in New Braunfels. Appellants were admitted

2. WMTX also sought to rename it the "Mesquite Creek Landfill."

3. See Volume 9 of the Administrative Record, Item 62, Finding of Fact No. 8. This record item, which is the order challenged in this case, will be referred to hereafter as Final Order. A copy is attached as Exhibit B to brief of Appellants.

The Administrative Record compiled by the TCEQ consists of administrative pleadings and orders, transcripts of hearings, audio tapes of commission meetings, and hearing exhibits. Hereafter in this brief, the record will be cited in the following format: xxx AR Item yyy, in which xxx will be the volume number and yyy the item number. Often supplemental information will be given, for example, page and line number of transcript material.

4. Final Order, Findings of Fact Nos. 13 through 17.

as parties in opposition.⁵ After a a six-day contested case hearing,⁶ the ALJ issued a proposal for decision (PFD) recommending that the TCEQ approve the application with some modifications. The Commission adopted the ALJ's recommendations with some modifications,⁷ and issued its final order.⁸

SUMMARY OF THE ARGUMENT

Most of the case turns on evidence. Does the administrative record, which includes testimony compiled at a hearing at SOAH, contain evidence supporting the decision? Plaintiffs quibble with the evidence — about the floodplain, drainage patterns, study of subsurface conditions, and leak detection monitoring — but do not come close to bearing their burden of negating existence of substantial evidence or showing a violation of applicable rules.

Plaintiffs emphasize a settlement agreement that a former protestant signed with WMTX. The agreement included limitations on landfill operating hours. Although plaintiffs were not parties to it (and neither was the TCEQ), plaintiffs argued to the agency that the agreement had a certain meaning, while WMTX argued for a different meaning. But the dispute was academic, because a private agreement does not bind a regulatory agency. Any

5. Final Order, Findings of Fact Nos. 18 and 19. Guadalupe County also was admitted as a party but withdrew its party status during the hearing, after reaching a settlement agreement with WMTX.

6. Final Order, Finding of Fact No. 20.

7. Final Order.

8. *Id.*

contrary rule would impair the agency's sovereign powers, forcing it to let its duties be carried out by private parties.

ARGUMENT AND AUTHORITIES

I. Standard of Review

The proper standard of review of the agency's order is substantial evidence. The substantial evidence hurdle is a difficult one for a party challenging an agency order to clear.

The Texas Supreme Court has described the test as follows:

The issue for the reviewing court is not whether the agency reached the correct conclusion, but rather whether there is some reasonable basis in the record for the action taken by the agency. . . . Substantial evidence requires only more than a mere scintilla, and the evidence on the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence.⁹

On legal issues involving statutory construction, an agency's construction of a statute that it is charged with enforcing should be given deference, so long as the interpretation is reasonable and does not contradict the plain language of the statute.¹⁰ “[I]f the statute can reasonably be read as the agency has ruled, and that reading is in harmony with the rest of the statute, then the court is bound to accept that interpretation even if other reasonable

9. *Railroad Comm'n of Texas v. Torch Operating Co.*, 912 S.W.2d 790, 792-93 (Tex. 1995) (internal citations and quotation marks omitted). *Mireles v. Texas Dep't of Public Safety*, 9 S.W.3d 128, 131 (Tex. 1999).

10. *Stanford v. Butler*, 142 Tex. 692, 700, 181 S.W.2d 269, 273 (1944), *Borden, Inc. v. Sharp*, 888 S.W.2d 614, 620 (Tex. App.—Austin 1994, writ denied).

interpretations exist.”¹¹

Deference should also be accorded to an agency’s interpretation of its rules unless it is plainly erroneous or inconsistent with the language of the rules.¹² A court should accept the agency’s reasonable interpretation, even if another reasonable interpretation exists.¹³ That is especially true when the agency has special, relevant expertise.¹⁴ “[T]he agency interpretation becomes a part of the rule itself and represents the view of a regulatory body that must deal with the practicalities of administering the rule.”¹⁵ A court should “determine whether an agency’s decision is based on a permissible interpretation of its statutory scheme”¹⁶ and should affirm the agency’s interpretation unless the agency abused its discretion.¹⁷

11. *City of Plano v. Public Utility Comm’n*, 953 S.W.2d 416, 421 (Tex. App.–Austin 1997, no writ).

12. *H.G. Sledge, Inc. v. Prospective Inv. & Trading Co.*, 36 S.W.3d 597, 604 (Tex. App.–Austin 2000, pet. denied).

13. *Gene Hamon Ford, Inc. v. David McDavid Nissan, Inc.*, 997 S.W.2d 298, 305 (Tex. App.–Austin 1999, pet. denied).

14. *Berry v. State Farm Mut. Ins. Co.*, 9 S.W.3d 884, 890 (Tex. App.–Austin 2000, no pet.); see also *Phillips Petroleum Co. v. Tex. Comm’n on Env’tl. Quality*, 121 S.W.3d 502, 507 (Tex. App.–Austin 2003, no pet.) (“We recognize that the legislature intends an agency created to centralize expertise in a certain regulatory area ‘be given a large degree of latitude in the methods it uses to accomplish its regulatory function.’”).

15. *McMillan v. Tex. Nat. Res. Conservation Comm’n*, 983 S.W.2d 359, 362 (Tex. App.–Austin 1998, pet. denied).

16. *Phillips Petroleum Co.*, 121 S.W.3d at 508.

17. *North Alamo Water Supply Corp. v. Tex. Dep’t of Health*, 839 S.W.2d 448, 454-55 (Tex. App.–Austin 1992, writ denied).

II. The TCEQ's findings and conclusions concerning the identification of 100-year floodplains were reasonable and supported by substantial evidence. (Responding to Appellants' Issue I, pages 24-31 of Brief of Appellants.)

A. The evidence proved that the landfill site is not in a 100-year floodplain.

30 Texas Administrative Code § 330.56(f)(4)(B)(I)¹⁸ required WMTX to show whether the site is located within a 100-year floodplain. As contemplated by the rule, WMTX made the showing through a witness, Mr. Scott Graves, who referred to and relied on FEMA flood maps, which are customarily used in the industry.¹⁹ One map, App-211,²⁰ depicted part of Comal County. Another depicted an adjoining part of Guadalupe County.²¹ Evidence showed that the proposed landfill expansion was not in a 100-year floodplain.²² Mr. Graves said, “[W]hen I looked at [a published FEMA floodplain] map, it indicated that no areas of the site, no areas of the property here at all are within the 100-year floodplain.”²³ App-211 shows 100-year floodplain areas in black. It shows the general area of the landfill site in white, meaning with no shading, labeling it “Zone C.” The map key explains that

18. Unless otherwise noted, all citations to 30 Texas Administrative Code, chapter 330, are to the version of the chapter that was in effect before 2006 (the date of a substantial reshuffling that included some substantive changes). This was the version that governed consideration of WMTX's application.

Copies of all sections of the Texas Administrative Code cited herein are in the Appendix to this brief.

19. 10 AR Item T-3, page 151.

20. 13 AR Item App-211.

21. This map was referred to in Mr. Graves's testimony. See 10 AR Item T-4, page 333.

22. 10 AR Item T-3, page 150, lines 9-11.

23. *Id.*

Zone C areas are “Areas of minimal flooding.”

Appellants strain to undermine this testimony by arguing lack of evidence that FEMA, when it did its mapping, studied the landfill area sufficiently to determine if it was in a floodplain. In this effort, they use selective quotations. For example, they write about an exchange between their counsel and Mr. Graves, but they cut off Mr. Graves’s response in mid-sentence:

Q. Okay. Did FEMA study Mesquite Creek to determine that it has no floodplain?

A. I’m not certain²⁴

In the testimony for which Appellants substitute ellipses, Mr. Graves elaborated: “but given that the map has been published including the Mesquite Creek area, that tells me that they must have come to some conclusion about it.”²⁵ He added, “I don’t know the level of detail that they did to determine that.”²⁶ At the time he said this, he had no FEMA flood maps in front of him. Later, when he was looking at App-211 (which he had used in preparing the application), he pointed out a degree of detail on it from which it was reasonable to infer that FEMA had studied the area enough to determine absence of a floodplain.²⁷

24. Brief of Appellants, page 4, lines 22-24 (ellipses in original).

25. 10 AR Item T-3, page 151, lines 19-22.

26. *Id.* at 22-23.

27. 10 AR Item T-4, page 333, line 4, through page 334, line 2.

B. TCEQ did not violate its own precedent.

Referring to two prior agency-level proceedings — *Juliff Gardens* and *Tan Terra* — Appellants erroneously claim that “[t]he TCEQ arbitrarily failed to follow its own precedent.” First, Appellants do not show that the records of those proceedings are in the present administrative record, and thus, a proper matter for the Court to consider.²⁸ Second, these agency decisions are distinguishable.

In *Juliff Gardens* the applicant relied on a FEMA Flood Insurance Rate Map in an effort to show that the landfill site was not in the 100-year floodplain of Hayes Creek. The map itself showed that FEMA had not studied the Hayes Creek area closest to the proposed landfill. Even the applicant’s own evidence showed that the 100-year flood level was higher than parts of the landfill; other evidence showed it potentially was significantly higher. The applicant failed to carry its burden of proof because, inter alia, its evidence did not show the extent of the 100-year flood plain at the *Juliff Gardens* site.

In *Tan Terra*, the applicant relied on a FEMA floodplain index, not a map. The TCEQ found that the map did not show whether the site was or wasn’t in a floodplain and other evidence showed the site may flood.

In the present case, the level of detail in the FEMA map supports Mr. Graves’ testimony and the reasonable inference that FEMA actually studied the landfill area.

28. See TEX. GOV’T CODE § 2001.175(e).
TCEQ’s Brief of Appellee

C. The findings related to flooding are supported.

WMTX's engineer, Mr. Graves, acknowledged that the creek level sometimes rises enough to flood portions of a nearby road.²⁹ He performed an additional analysis to determine whether the construction or operation of the landfill expansion would significantly restrict flow during a 100-year/24-hour storm event.³⁰ The ALJ, and ultimately the Commission, found that this analysis demonstrated that "the landfill design will not restrict the flow of the 100-year flood, reduce the temporary water storage capacity of the floodplain, or result in the washout of solid waste so as to pose a hazard to human health and the environment."³¹

Mr. Graves considered "two opposite extremes that could happen with respect to 100-year, 24-hour flooding of Mesquite Creek."³² In the first scenario, a downstream lake (Freedom Lake) is relatively empty when the hypothetical flood event occurs, such that the event in Mesquite Creek passes through the facility area without being impeded by the downstream lake.³³ Mr. Graves calculated the limits of the 100-year, 24-hour flood event for Mesquite Creek as it hypothetically spilled out of its normal banks. His calculations showed that the 100-year, 24-hour storm would rise to an elevation of approximately 600 to 602 feet

29. 10 AR Item T-3, page 188, line 5, through page 190, line 3; 10 AR Item T-4, page 382, lines 5-17.

30. 10 AR Item T-3, pages 159-62.

31. 9 AR Item 49, page 50.

32. 13 AR Item App-200, page 49.

33. *Id.*

above mean sea level. He concluded that, since “this is well below the elevations of the expansion related embankments . . . the expansion will not restrict flow of this flood event, nor will the flood encroach on the waste disposal areas.”³⁴

In the second scenario considered by Mr. Graves, the 100-year, 24-hour storm would cause the waters in the lake to back up onto the facility property. In this scenario, water would backflow into the two stormwater ponds through their principal spillway pipes. In addition to the two stormwater ponds, the design calls for the construction of an expansion area stormwater pond designated as Pond 1 which would create flood storage capacity for the lake’s flood pool. Mr. Graves testified that, “Although portions of the earthen berms surrounding Pond 1 will slightly reduce the Freedom Lake flood storage volume, excavating to create the pond itself will add even more flood storage volume, with the net effect being an increase in Freedom Lake’s flood storage capacity.”³⁵

III. The TCEQ’s findings and conclusions concerning the non-significant alteration of natural drainage patterns were reasonable and supported by substantial evidence. (Responding to Appellants’ Issue II, pages 32-41 of Brief of Appellants.)

A. WMTX demonstrated that its landfill would not significantly alter natural drainage patterns.

TCEQ has issued “Guidelines for Preparing a Surface Water Drainage Plan for a Municipal Solid Waste Facility” (Guidelines) to assist applicants in preparing a compliant

34. *Id.*, pages 49-50

35. 13 AR Item App-200, page 50.
TCEQ’s Brief of Appellee

surface water drainage plan.³⁶ The Guidelines recognize that the development of a landfill will result in an increase of stormwater runoff, saying that, in some circumstances, “the expected volume increase could vary from 5 percent to 60 percent.”³⁷ They explain that “a goal of the surface water drainage plan is to show that the development of the MSW facility will not adversely alter to *any significant degree* the natural drainage patterns of the watershed that will be affected by the proposed development.”³⁸ They say “[t]here is no clear-cut number or percentage of change that can be set to indicate a ‘significant’ change,” elaborating that “[w]hat is considered ‘significant’ is a subjective term that cannot be defined as a specific, objective criterion.”³⁹

Applicants are charged to “demonstrate that drainage patterns will not be significantly altered because of the effect of the site development on (1) peak flows, (2) volumes, and (3) velocities from each permit boundary discharge point.”⁴⁰

In regard to a change in volume, the Guidelines provide:

As an applicant, it is your responsibility to demonstrate that any volume increase (or decrease) is not “significant.” Typical methods for addressing this issue are listed below:

- Demonstrate that there is no increase in volume at a discharge point.
- *Demonstrate that the additional volume will be released at a rate that*

36. 13 AR Item App-209. (A copy is attached as Exhibit G to the Appendix to Brief of Appellants.)

37. *Id.*, page 4.

38. *Id.*, page 2 (emphasis added).

39. *Id.*, page 3.

40. *Id.*

will not significantly affect the downstream receiving water body. For example, the total volume increase may be 30 percent more for the postdevelopment condition, compared to the predevelopment condition. However, this increase may be demonstrated to be “not significant” if it can be shown that the additional volume of water will be released at a rate that will not adversely affect the downstream receiving water body.

- *Use storm water retention ponds.*
- Demonstrate that any change in the volumes of water discharged from the permit boundary discharge points will not have a significant adverse effect on downstream water rights and uses.⁴¹

WMTX’s drainage plan demonstrates that it will control the increase in storm water volume by holding storm water in detention ponds and controlling the rate of discharge.⁴² The plan says the peak discharge rate at Discharge Point E will *decrease* from a pre-development rate of 43 cubic feet per second to 21 cubic feet per second post-development.⁴³ WMTX’s engineer, Mr. Graves, said he was confident that the increased volume of stormwater would have no significant impact,⁴⁴ since the peak discharge leaving the site at Discharge Point E post-development will be less than in pre-development conditions.

B. No adverse impact on downstream land.

41. *Id.*, page 4 (emphasis added). On page 38 of their brief, Appellants paraphrase this section of the Guidelines. Their paraphrasing omits the second bullet point in the Guidelines that allows for a demonstration “that the additional volume will be released at a rate that will not significantly affect the downstream receiving water body.” This omission is misleading, since this particular method was one of the ways WMTX demonstrated that drainage patterns would not be significantly altered.

42. 4 AR continuation of Item 1, App-202, pages 1815-21.

43. *Id.*, page 1820, Table 3.5.1-2.

44. 10 AR Item T-4, page 348, lines 9-15.

The evidence indicated that there would be no adverse impact on downstream land.⁴⁵

On pages 6 and 7 of their brief, Appellants quote from Mr. Graves' testimony regarding the increase in stormwater volume at Discharge Point E. Appellants cut off Mr. Graves' testimony on this point, omitting the following:

Q: Okay. And because the peak discharge that you've calculated leaving the site at Discharge Point E is less than pre-development conditions, you're confident that, therefore, this additional volume of water will have no impact whatsoever downstream?

A: *No significant impact. Yes, I'm confident.*

Q: Okay. All right. What if you were to have increased the volume of runoff leaving Discharge Point E instead of close to doubling maybe you quadrupled it, but the peak rate flow was the same as you've calculated in this application, would your opinion change any?

A: I would say in this particular instance, no, it would not.⁴⁶

Also omitted by Appellants is Mr. Graves' explanation of *why* there would not be a significant impact downstream:

Q: Okay. And does the values of volume of stormwater being discharged at any of your points along the permit boundary change significantly?

45. The TCEQ notes that even though there is substantial evidence in the record showing that there will be no adverse impact downstream, the agency's rules require that the demonstration that natural drainage patterns will not be significantly altered by construction or operation of a landfill be made at the permit boundary, not at points offsite.

In the PFD the ALJ discussed two prior MSW landfill permit proceedings, in which the TCEQ considered where the determination of lack of significant alteration should be made. She quoted the Commission's ruling in one of them, *Blue Flats Disposal, L.L.C.*, that "Commission rules and precedent require that the determination of significant alteration be made at the permit boundary, not off site." She noted that issue was "revisited and confirmed by the TCEQ" in the *North Texas Municipal Water District* proceeding. In considering WMTX's application, the Commission applied this interpretation of its own rule, which requires the applicant to demonstrate that "natural drainage patterns will not be significantly altered *as a result of the proposed landfill development.*" 30 TEX. ADMIN CODE § 330.56(f)(4)(A)(iv) (emphasis added).

46. 10 AR Item T-4, page 348, lines 9-23 (emphasis added).

- A: Did you ask if the volumes –
Q: Yes.
A: – changed significantly?
Q: Yes.
A: No, they do not.
Q: Okay. And why do you say that?
A: Because although what we’ve talked about for the last day and a half, there are places where the volume on my post-development condition does exceed the natural conditions, in my opinion that is not a significant exceedance.
Q: And why is it not a significant exceedance?
A: Because as I have also talked about earlier, *the peak flow rate has been substantially reduced compared to the natural conditions, and that is what has the most impact on the immediate and downstream areas.*⁴⁷

On page 34 of their brief, Appellants say that WMTX did “virtually no analysis” to assess risks to downstream property owners and they try to support this claim by referring to Mr. Graves’ testimony regarding downstream water flow. Omitted, however, is the following:

- Q: Okay. If it does flood property of those people that it crosses, would adding more water to that watercourse help that flooding situation or hurt that flooding situation?
A: It would neither help nor hurt. The way I have designed this would have no – no effect.
Q: And how do you know that?
A: Actually the effect in terms of the level of flood would rise I believe would be beneficial, meaning the water elevation would rise to a smaller level under our design because I have limited our peak flows to be – if you’ll notice on the page of the application that I got my last answer from, *I have reduced the peak flows almost in half from the natural conditions to the post-development conditions. And the behavior of a channel is governed by the peak discharge rate that flows through it in terms of the highest water level that a rain event would*

47. 10 AR Item T-4, page 346, line 14, through page 347, line 8 (emphasis added).

*rise in that channel.*⁴⁸

IV. The TCEQ's findings and conclusions concerning the characterization of site geology and hydrogeology were reasonable and supported by substantial evidence. (Responding to Appellants' Issue III, pages 42-47 of Brief of Appellants.)

In their third issue, Appellants overlook the totality of the evidence and testimony. WMTX's expert on geological and hydrogeology issues was Ms. Janet Meaux, a professional geologist with over eighteen years of experience in geologic and hydrogeologic investigations and eleven years of experience with MSW landfill projects.⁴⁹ She prepared the geology report required by the rules.⁵⁰ She testified that the subsurface investigation included consideration of data derived from a total of 32 borings (eight prior borings in the existing landfill and 24 new borings in the expansion area), all extending down to five feet below the deepest planned excavation of the landfill.⁵¹ She said she was "able to establish the subsurface stratigraphy and geotechnical properties of the soils beneath the site."⁵² She determined that Stratum IV — on which Appellants' brief focuses — is an aquitard, meaning a layer of low-permeability soils that would restrict the movement of groundwater from one zone to another. In this case, the movement-restricting stratum is estimated to be 200-foot

48. 10 AR Item T-4, page 352, line 10, through page 353, line 3 (emphasis added).

49. 14 AR Item App-401.

50. See 30 TEX. ADMIN. CODE § 330.56(d); 14 AR Item App-400, page 9, lines 22-25; pages 37-38.

51. 14 AR Item App-400, page 24, lines 23-25.

52. 14 AR Item App-400, page 25, lines 21-24.

thick.

Most of the landfill will be dug down only as far as Stratum III, which is much more permeable than Stratum IV. Stratum III, said Ms. Meaux, was the most likely lateral pollution-migration pathway and therefore the place where release-detection monitoring would be most needed and effective. This stratum, she said, would be closely monitored via strategically positioned wells.⁵³

In contrast with Stratum III, Ms. Meaux said none of the 24 new soil borings gave her any reason to conclude Stratum IV was transmitting groundwater. She characterized Stratum IV as dry,⁵⁴ and mentioned the corroborating observations of her colleague, made during excavation of a nearby existing landfill cell, that Stratum IV in that location was dry.⁵⁵ Ms. Meaux justified not having studied the stratum via water-detecting devices called piezometers by explaining that there was no evidence of water movement needing study.⁵⁶

Ms. Meaux spoke directly to the few areas where the base of the landfill would be in

53. Any liquid released from the landfill would percolate vertically until Stratum IV was encountered and then it would flow out along the Stratum III/Stratum IV interface. 14 AR Item App-400, pages 35-36; 11 AR Item T-5, page 520, line 8 through page 521, line 6; page 535, lines 11-23; page 555, lines 11-13; 11 AR Item T-6, page 669, lines 17-23.

54. 11 AR Item T-5, page 513, lines 15-16.

55. 11 AR Item T-6, page 672, line 7 through page 673, line 13. The colleague, Dr. Beth Gross, was the geotechnical engineer for the landfill expansion project. She said on the witness stand that she saw no water during the excavation and that the stratum was “hard” and “dry.” *Id.*, page 810, lines 10-15.

56. 11 AR Item T-6, page 671, line 24, through page 672, line 1; *see also* 11 AR Item T-5, page 513, lines 11-20.

Stratum IV and concluded there “would be little potential for migration, due to the low hydraulic conductivity of Stratum IV, which is a confining bed.”⁵⁷ As to fracturing she testified that the investigation detected no water bearing fractures in Stratum IV.⁵⁸ The TCEQ’s staff geologist, John Williamson, having reviewed the portions of the WMTX application that addressed geological issues,⁵⁹ agreed that the presence of fractures in Stratum IV does not mean that groundwater moves between the fractures, noting that “all the boring logs showed everything being dry in Stratum IV.”⁶⁰

One of Ms. Meaux’s major conclusions was that if there were a release of contaminants from the deepest parts of the landfill excavation — which she added was unlikely — they would take 3,000 to 4,000 years to reach the uppermost aquifer, because of the low permeability of the Stratum IV soils lying between the facility and the aquifer.

Appellants’ point-picking focus on supposed departure from TCEQ rules overlooks

57. 14 AR Item App-400, page 36.

58. Q: Okay. Does groundwater move through the fractures in Stratum IV?

A: In our investigation we found no water bearing fractures in Stratum IV.

Q: So is the answer to my question that, no, groundwater does not move through any of the fractures in Stratum IV underneath this site?

A: I didn’t see any evidence of that.

11 AR Item T-5, page 512, lines 10-17.

59. 15 AR Item ED-8, page 2.

60. 12 AR Item T-8, page 1098, lines 3-17.

that fact that those rules provide specifics in some instances and leave to the expert judgment of geoscientists, sometimes in consultation with the regulators, many of the details of how to study subsurface conditions. For example, a rule speaks of a duty to perform a “*sufficient* number of borings . . . to establish subsurface stratigraphy and . . . geotechnical properties”⁶¹ The italicized word reflects the commonsense fact that there is a practical limit on how closely something can be studied. Must borings be at six inch intervals? One foot? A thousand feet? To some extent, such questions are — must be — left to professionals. In this case, WMTX hired a geoscientist who brought her long-experienced judgment to bear; who relied on the work of other experienced professionals; and who concluded that the site, including as WMTX will monitor it for possible releases, was suitable. This evidence supports the TCEQ order with room to spare.

V. The TCEQ made an appropriate determination on site operating hours.
(Responding to Appellants’ Issue IV, pages 47- 49 of Brief of Appellants.)

TCEQ rules required WMTX to include in its application a proposed site operating plan (SOP) covering a long, prescribed laundry list of topics, for example, personnel functions and training, equipment, procedures for screening out prohibited wastes, fire protection, control of windblown wastes, signage, and hours of operation.⁶² When the agency grants an application, the approved operation hours (and other representations) in the SOP become in effect permit conditions.

61. 30 TEX. ADMIN. CODE § 330.56(d)(5)(A)(I) (emphasis added).

62. See 30 TEX. ADMIN. CODE §§ 330.57, -.114, -.115, -.120, -.119.

A. The narrowness of the difference between the permitted hours and the rule default hours.

In contending the TCEQ erred in approving certain operation hours, Appellants gloss over the fact that, against the backdrop of the relevant rule, they are presenting a narrow issue in their fourth point of error. The following rule subsection applies. (This brief inserts line breaks and bracketed sentence numbers in the text for ease of back-reference.)

§ 330.118. Facility Operating Hours.

(a)

[1] The site operating plan must specify the waste acceptance hours and the operating hours when materials will be transported on or off site, and the hours when heavy equipment may operate.

[2] The waste acceptance hours of a municipal solid waste facility may be any time between the hours of 7:00 a.m. and 7:00 p.m., Monday through Friday, unless otherwise approved in the authorization for the facility.

[3] Waste acceptance hours within the 7:00 a.m. to 7:00 p.m. weekday span do not require other specific approval.

[4] Transportation of materials and heavy equipment operation must not be conducted between the hours of 9:00 p.m. to 5:00 a.m., unless otherwise approved in the authorization for the facility.

[5] Operating hours for other activities do not require other specific approval.

Sentence [2] in the rule identifies waste acceptance as one operational category. Sentence [4] identifies another: transportation of materials on or off site and heavy equipment operation. (This brief will use “heavy equipment” as shorthand for the sentence [4] category.) Sentence [5] identifies a third category: other activities. The rule text shows that each category is distinct from each other category.

Appellants are not arguing that the TCEQ erred in the waste acceptance hours (the sentence [2] category) or “other activities” hours (the sentence [5] category) it authorized. They allege error only in the setting of heavy equipment hours. The permit allows heavy equipment to be operated in a given week during merely six hours more than the rule default would allow. The following table illustrates this point.

TCEQ’s Table 1

	Rule default	Permit
Transportation of materials on or off the site and operation of heavy equipment	5 A.M. to 9 P.M. (M.-Su.)	4 A.M. to 9 P.M. M.-Sa.; 5 A.M. to 9 P.M. Su.

Again, WMTX gained permission from the TCEQ to begin heavy equipment operation at 4 A.M. Monday through Saturday, which is only an hour earlier than the rule default. (Quitting time in the permit is the same as quitting time in the rule.) As to Sunday, the company accepted the rule default.⁶³

B. The agreement between WMTX and Guadalupe County does not bind the TCEQ.

Straining to magnify the dispute between them and the regulatory agency (and to present a technical point supposedly justifying reversal), Appellants place great weight on an agreement that WMTX entered into with Guadalupe County. (The county started out being a party protestant, but, based on the agreement, withdrew its opposition.) Although

63. Initially WMTX had requested seven days a week, 24 hours a day, for heavy equipment operating hours, but later narrowed its request.

neither the agency nor Appellants were parties to the agreement, Appellants urge that the agency had to act, regulatorily, as though it were bound. Appellants' argument, moreover, turns on a certain reading, one that was disputed: that the WMTX-Guadalupe County agreement addressed (and thus contractually limited) heavy equipment operation.

The TCEQ offers the following table to illustrate the facts and some of the contentions. (The table is the same as Table 1, above, but with an added column in the middle.)

TCEQ's Table 2

	Rule default	Agreement between WMTX and Guadalupe County	Permit
Transportation of materials on or off the site and operation of heavy equipment	5 A.M. to 9 P.M. (M.-Su.)	According to Appellants' hypothesis, which is factually disputed, 4 A.M. to 8 P.M. M.-F.; 4 A.M. to 3 P.M. Sa.; no Su. hours	4 A.M. to 9 P.M. M.-Sa.; 5 A.M. to 9 P.M. Su.

The law does not support Appellants' theory that the TCEQ was bound to adopt, as its order, an agreement that it was not a party to. In *City of El Paso v. Public Utility Commission*,⁶⁴ parties to a rate proceeding challenged the agency's decisional use of a non-unanimous, private agreement. The challengers argued that for the PUC to have relied on the agreement at all was arbitrary, capricious, and contrary to law. The Court disagreed,

64. 883 S.W.2d 179 (Tex. 1994).

noting that the agency had taken the agreement into account only after convening a special hearing at which all parties could present evidence and argument about whether it would be a proper basis for resolving contested issues in the case. The case shows that, at least when it affords procedural protections, a Texas agency does not err by taking into account a private party settlement agreement.

The other side of the *City of El Paso* coin, however, should be that an agency does not act arbitrarily or capriciously in *rejecting* an agreement, or some of its terms, as the basis of the agency's order.⁶⁵ That this is a reasonable reverse inference from the Supreme Court's holding becomes clear when one considers the ramifications of an hypothetical opposite rule. Requiring the TCEQ to adopt a term in a private settlement agreement would force abdication of a key agency decisional role. The permit-application-consideration function was granted to the TCEQ by the Legislature. In the present context, at least, where health and safety are at stake, the agency would err by handing over the regulatory reins to private parties.⁶⁶ Very likely, a court order forcing such a transfer of authority would violate separation of powers principles under article II, § 1, in the Texas Constitution.⁶⁷

Moreover, the WMTX-Guadalupe County agreement's meaning was disputed.

65. Naturally the order must be supported by substantial evidence in the record.

66. In writing "private parties," the TCEQ means to emphasize that *it* was not a party. The agency is aware that Guadalupe County is governmental.

67. *Cf. Tex. Dep't of Transp. v. T. Brown Constructors, Inc.*, 947 S.W.2d 655, 659 (Tex. App.—Austin 1997, writ denied) (when courts review agency decisions, separation of powers doctrine insures that discretionary functions delegated to the agencies are not usurped by the judicial branch).

WMTX argued the agreement concerned only waste acceptance hours.⁶⁸ Appellants, though not parties to the agreement, argued it also addressed hours for heavy equipment operation and for “other activities.” Apart from the document itself, no evidence was offered or admitted on what the agreement’s parties mutually meant. The issues formed by the WMTX’s and Appellants’ opposing contentions are interesting. It is by no means plain that the agency had power to resolve them,⁶⁹ but certainly it was not *required* to.⁷⁰ Ultimately the issues concerning the agreement’s meaning are academic, but the existence of a dispute over them provides still a further illustration of the unwisdom of binding the TCEQ to an agreement between an applicant and a private party.⁷¹

Appellants’ policy argument about possible discouragement of settlements among parties not including the agency⁷² cannot withstand analysis. No party contemplating a

68. 9 AR Item 46, page 42, lines 5-9.

69. For example, *State v. Flag-Redfern Oil Co.*, 852 S.W.2d 480 (Tex. 1993), held that while a state agency may assess its own rights under a contract it is a party to, only courts (*semble*) can adjudicate contract rights of third parties. On the other hand, if a term in a stipulation is made part of an agency order, it has administrative effect. *See, e.g., In re Entergy Corp.*, 142 S.W.3d 316, 323-24 (Tex. 2004) (non-unanimous settlement agreement had assumed character of administrative order when adopted by PUC; court rejected claim that agreement was a mere private contract that could be construed by a court as a matter of law).

70. *Cf. Meier Infinity Co. v. Motor Vehicle Bd.*, 918 S.W.2d 95, 99-100 (Tex. App.—Austin 1996, writ denied) (agency need not include findings on evidence that it does not find persuasive or on which it does not rely for support of its ultimate decision).

71. Contrary to the hypothesis on page 48 of Appellants’ brief, at lines 12-13, the TCEQ in Finding of Fact 99 did not purport to resolve any dispute over the agreement’s meaning (and therefore cannot have committed error in such a supposed resolution).

72. Brief of Appellants, page 49, lines 3-5.

private settlement could reasonably believe that it would bind a state regulatory agency with sovereign powers. Had Guadalupe County remained a party to the agency proceeding, and had it wanted the TCEQ to enshrine Guadalupe County's bargain as the agency's final order, it could have asked the agency to follow a procedure like the one in the *City of El Paso* case discussed above. But far from doing that, the county withdrew its opposition and ceased being a party to the agency proceeding, while, of course, remaining an obligee under the agreement with WMTX. Presumably the county got all the settlement-incentive it wanted from the settlement agreement itself. The county presumably would have a court remedy if in the future it believes WMTX is violating it, but this possibility would not affect the validity of the TCEQ's regulatory exercise of its delegated share of the state's sovereign powers.

An irony in this case is that if Guadalupe County and WMTX had agreed that all three kinds of operations could be done 24/7, Appellants likely would be opposing the notion that such an agreement would bind the TCEQ or them. They might be urging (correctly) that the agency must remain free to bring its independent judgment to bear, because the TCEQ is legally obliged to watch out for the public interest, whereas the agreement concerns the necessarily narrower interests of its signatories.

C. Substantial evidence supported the TCEQ's decision about heavy equipment operating hours.

WMTX applied for permission to transport materials on and off site and to operate

heavy equipment at any time during the week — in other words, 24/7.⁷³ It supported the request with evidence, showing that 24/7 authorization is not unusual in the industry, and that the company and the community benefit from the authorization, which allows for quick response to regional and local emergency situations.⁷⁴ Comal County Commissioner Jan Kennady, whose precinct contains the Comal County part of the WMTX landfill, testified.⁷⁵ She stressed that residents in her precinct and in the rest of the county rely on the landfill.⁷⁶ She testified how helpful it can be, after a storm, for the landfill to be available so that people promptly can clear their property of debris.⁷⁷

The WMTX vice president and general manager's testimony touted hours-of-operation flexibility for another reason: clean air concerns may bring future regulation curbing heavy equipment use during ozone-formation hours. With longer hours, the company will be positioned to adjust to such regulation.⁷⁸

While the evidence outlined above was presented at a time when WMTX's pending request was for a 24/7 authorization, it provided support for the lesser-included authorization

73. 6 AR Item App-202, page 02847.

74. *See generally* 10 AR Item T-3, pages 12-48; 12 AR Item T-8, pages 1146-58.

75. 12 AR Item T-8, page 1150, line 23, though page 1151, line 1.

76. *Id.*, page 1155, lines 4-7.

77. *Id.*, page 1156, lines 3-8.

78. 10 AR Item T-3, page 39, lines 17-22.

that actually was given after WMTX acquiesced.⁷⁹

CONCLUSION AND PRAYER

For the reasons in this brief, the TCEQ requests this Court to affirm the decision below.

Respectfully submitted,

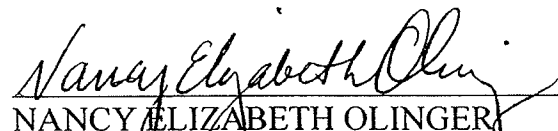
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79. See 9 AR Item 52, page 3 (Applicant Waste Management of Texas, Inc.'s Brief in Response to the Administrative Law Judge's Proposal For Decision).

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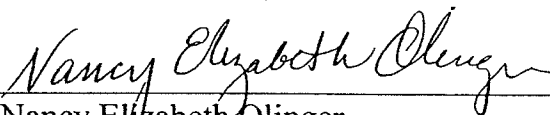
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ATTORNEYS FOR TEXAS COMMISSION ON
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been sent by certified mail, return-receipt requested on June 9th, 2010 to the persons listed below:

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Nancy Elizabeth Olinger

APPENDIX

grading, excavation, and/or filling operations on the site. Appropriate vertical contour intervals shall be selected so that contours are not further apart than 100 feet as measured horizontally on the ground. Wider spacing may be used when approved by the executive director. The map should show the location and quantities of surface drainage entering, exiting, or internal to the site and the area subject to flooding by a 100-year frequency flood.

(d) Attachment 4—geology report. This portion of the application applies to owners or operators of municipal solid waste (MSW) facilities that store, process, or dispose of MSW in landfills. If the municipal solid waste landfill (MSWLF) facility contains two or more MSWLF units, the information requested pertaining to regional geology and regional aquifers need only be provided once. The geology report shall be prepared and signed by a qualified groundwater scientist except that the reports required under paragraph (5) of this subsection shall be signed and sealed, where appropriate, as required by the Texas Engineering Practice Act. Previously prepared documents may be submitted but must be supplemented as necessary to provide the requested information. Sources and references for information must be provided. The geology report must contain the information in paragraphs (1)—(6) of this subsection.

(1) The owner or operator shall provide a discussion of the regional physiography and topography in the vicinity of the facility. The discussion shall include, at a minimum, the distance to local surface water bodies and drainage features, the slope of the land surface (direction and rate), and the maximum and minimum elevations of the facility. Any limitation of the facility due to unfavorable topography (e.g., cliffs, floodplains) shall be discussed.

(2) The owner or operator shall provide a description of the regional geology of the area. This section shall include:

(A) a geologic map of the region with text describing the stratigraphy and lithology of the map units. An appropriate section of a published map series such as the Geologic Atlas of Texas prepared by the Bureau of Economic Geology is acceptable;

(B) a description of the generalized stratigraphic column in the facility area from the base of the lowermost aquifer capable of providing usable groundwater, or from a depth of 1,000 feet, whichever is less, to the land surface. The geologic age, lithology, variations in lithology, thickness, depth, geometry, hydraulic conductivity, and depositional history of each geologic unit should be described

based upon available geologic information. Regional stratigraphic cross-sections should be provided.

(3) The owner or operator shall provide a description of the geologic processes active in the vicinity of the facility. This description shall include:

(A) an identification of any faults and subsidence in the area of the facility. The information about faulting and subsidence shall include at least that required in §330.303(b) and §330.305 of this title (relating to Fault Areas and Unstable Areas, respectively);

(B) a discussion of the degree to which the facility is subject to erosion. The potential for erosion due to surface water processes such as overland flow, channeling, gullying, and fluvial processes such as meandering streams and undercut banks shall be evaluated. If the facility is located in a low-lying coastal area, historical rates of shoreline erosion shall also be provided; and

(C) an identification of wetlands located within the facility boundary.

(4) The owner or operator shall provide a description of the regional aquifers in the vicinity of the facility based upon published and open-file sources. The section shall provide:

(A) aquifer names and their association with geologic units described in paragraph (2) of this subsection;

(B) a description of the composition of the aquifer(s);

(C) a description of the hydraulic properties of the aquifer(s);

(D) information on whether the aquifers are under water table or artesian conditions;

(E) information on whether the aquifers are hydraulically connected;

(F) a regional water-table contour map or potentiometric surface map for each aquifer, if available;

(G) an estimate of the rate of groundwater flow;

(H) typical values or a range of values for total dissolved solids content of groundwater from the aquifers;

(I) identification of areas of recharge to the aquifers within five miles of the site; and

(J) the present use of groundwater withdrawn from aquifers in the vicinity of the facility. The identification, location, and aquifer of all water wells within one mile of the property boundaries of the facility shall be provided.

DRILLED OR MINED SHAFTS

(5) The owner or operator shall provide the results of investigations of subsurface conditions at a particular waste management unit in the following reports.

(A) Subsurface investigation report. This report must describe all borings drilled on-site to test soils and characterize groundwater and must include a site map drawn to scale showing the surveyed locations and elevations of the borings. Boring logs must include a detailed description of materials encountered including any discontinuities such as fractures, fissures, slickensides, lenses, or seams. Geophysical logs of the boreholes may be useful in evaluating the stratigraphy. Each boring must be presented in the form of a log that contains, at a minimum, the boring number; surface elevation and location coordinates; and a columnar section with text showing the elevation of all contacts between soil and rock layers, description of each layer using the unified soil classification, color, degree of compaction, and moisture content. A key explaining the symbols used on the boring logs and the classification terminology for soil type, consistency, and structure must be provided.

(i) A sufficient number of borings shall be performed to establish subsurface stratigraphy and to determine geotechnical properties of the soils and rocks beneath the facility. Other types of samples may also be taken to provide geologic and geotechnical data. The number of borings necessary can only be determined after the general characteristics of a site are analyzed and will vary depending on the heterogeneity of subsurface materials. Locations with stratigraphic complexities such as non-uniform beds that pinch out, vary significantly in thickness, coalesce, or grade into other units, will require a significantly greater degree of subsurface investigation than areas with simple geologic frameworks.

(ii) Borings shall be sufficiently deep to allow identification of the uppermost aquifer and underlying hydraulically interconnected aquifers. Borings shall penetrate the uppermost aquifer and all deeper hydraulically interconnected aquifers and be deep enough to identify the aquiclude at the lower boundary. All the borings shall be at least five feet deeper than the elevation of the deepest excavation. In addition, at least the number of borings shown on the Table of Borings shall be drilled to a depth at least 30 feet below the deepest excavation planned at the waste management unit, unless the executive director approves a different depth. If no aquifers exist within 50 feet of the elevation of the deepest excavation, at least one test hole shall be drilled to

30 TAC § 330.56

the top of the first perennial aquifer beneath the site, if sufficient data does not exist to accurately locate it. The executive director may accept data equivalent to a deep boring on the site to determine information for aquifers more than 50 feet below the site. Aquifers more than 300 feet below the lowest excavation and where the estimated travel times for constituents to the aquifer are in excess of 30 years plus the estimated life of the site need not be identified through borings.

TABLE OF BORINGS

Size of Area in Acres	Number of Borings	Min. No. of Borings 30 Feet below the Elev. of Deepest Excavation
5 or less	2-4	2
5-10	4-6	3
10-20	6-10	5
20-50	10-15	7
50-100	15-20	7-12
More than 100	Determined in consultation with the executive director	

* The executive director may approve different boring depths if site specific conditions justify variances.

(iii) All borings shall be conducted in accordance with established field exploration methods. The hollow-stem auger boring method is recommended for softer materials; coring may be required for harder rocks. Other methods shall be used as necessary to obtain adequate samples for soil testing required in this paragraph. Investigation procedures shall be discussed in the report.

(iv) The boring plan, including locations and depths of all proposed borings, shall be approved by the executive director prior to initiation of the work.

(v) Installation, abandonment, and plugging of the borings shall be in accordance with the rules of the commission.

(vi) Both the number and depth of borings may be modified because of site conditions with prior approval of the executive director.

(vii) Geophysical methods, such as electrical resistivity, may be used with authorization of the executive director to reduce the number of borings that may be necessary or to provide additional information between borings.

(viii) Cross-sections must be prepared from the borings depicting the generalized strata at the facility. For small waste management units two perpendicular cross-sections will normally suffice.

(ix) A narrative that describes the investigator's interpretations of the subsurface stratigraphy based upon the field investigation shall be provided.

(B) Geotechnical report. This report shall include engineering data that describes the geotechnical properties of the subsurface soil materials and a discussion with conclusions about the suitability of

30 TAC § 330.56

(1) A drawing(s) showing the drainage areas and drainage calculations shall be provided.

(2) Cross-sections or elevations of levees should be shown tied into contours. Natural drainage patterns shall not be significantly altered.

(3) The 100-year floodplain shall be shown on this attachment.

(4) As part of the attachment, the following information and analyses must be submitted for review, as applicable.

(A) Drainage and run-off control analyses:

(i) a description of the hydrologic method and calculations used to estimate peak flow rates and run-off volumes including justification of necessary assumptions;

(ii) the 25-year rainfall intensity used for facility design including the source of the data; all other data and necessary input parameters used in conjunction with the selected hydrologic method and their sources should be documented and described;

(iii) hydraulic calculations and designs for sizing the necessary collection, drainage, and/or detention facilities shall be provided.

(iv) discussion and analyses to demonstrate that natural drainage patterns will not be significantly altered as a result of the proposed landfill development;

(v) structural designs of the collection, drainage, and/or storage facilities, and results of all field tests to ensure compatibility with soils;

(vi) a maintenance plan for ensuring the continued operation of the collection, drainage, and/or storage facilities, as designed along with the plan for restoration and repair in the event of a washout or failure; and

(vii) erosion and sedimentation control plan, including interim controls for phased development.

(B) Flood control and analyses.

(i) Identify whether the site is located within a 100-year floodplain. Indicate the source of all data for such determination and include a copy of the relevant Federal Emergency Management Agency (FEMA) flood map, if used, or the calculations and maps used where a FEMA map is not available. Information shall also be provided identifying the 100-year flood level and any other special flooding factors (e. g., wave action) that must be considered in designing, constructing, operating, or maintaining the proposed facility to withstand washout from a 100-year flood. The boundaries of the proposed landfill facility should be shown on the floodplain map.

COMMISSION ON ENVIRONMENTAL QUALITY

(ii) If the site is located within the 100-year floodplain, the applicant shall provide information detailing the specific flooding levels and other events (e.g., design hurricane projected by Corps of Engineers) that impact the flood protection of the facility. Data should be that required by §§301.33—301.36 of this title (relating to Approval of Levees and Other Improvements).

(iii) No solid waste disposal and treatment operations shall be permitted in areas that are located in a floodway as defined by FEMA.

(g) Attachment 7—final contour map. This is a constructed map showing the final contour of the entire landfill to include internal drainage and side slopes plus accommodation of surface drainage entering and departing the completed fill area plus areas subject to flooding due to a 100-year frequency flood. Cross-sections shall be provided.

(h) Attachment 8—cost estimate for closure and post-closure care. The applicant shall submit a cost estimate for closure and post-closure care costs in accordance with Subchapter K of this chapter (relating to Closure, Post-Closure, and Corrective Action).

(i) Attachment 9—Applicant's statement. The applicant, or the authorized representative empowered to make commitments for the applicant, shall provide a statement that he is familiar with the site development plan and is aware of all commitments represented in the plan, that he is also familiar with all pertinent requirements in this chapter, and that he agrees to develop and operate the site in accordance with the plan, the regulations, and any permit special provisions that may be imposed.

(j) Attachment 10—soil and liner quality control plan. The soil and liner quality control plan must be prepared in accordance with §§330.200—330.206 of this title (relating to Groundwater Protection Design and Operation).

(k) Attachment 11—groundwater sampling and analysis plan. The groundwater sampling and analysis plan must be prepared in accordance with §§330.230, 330.231, and 330.233—330.242 of this title (relating to Groundwater Monitoring and Corrective Action) or §330.239 of this title (relating to Groundwater Monitoring at Type IV Landfills).

(l) Attachment 12—final closure plan. The final closure plan shall be prepared in accordance with §§330.250—330.256 of this title (relating to Closure and Post-Closure).

(m) Attachment 13—post-closure care plan. The post-closure care plan shall be prepared in accor-

30 TAC § 330.56

ing, but not limited to, buildings, subsurface vaults, utilities, or any other areas where potential gas buildup would be of concern.

(10) All monitoring probes and on-site structures shall be sampled for methane during the monitoring period. Sampling for specified trace gases may be required by the executive director when there is a possibility of acute or chronic exposure due to carcinogenic or toxic compounds.

(11) Monitoring frequency shall be determined as follows.

(A) As a minimum, quarterly monitoring is required. The executive director may require more frequent monitoring based upon the factors listed in this section. When more frequent monitoring is necessary, the executive director shall notify the owner or operator.

(B) More frequent monitoring shall also be required at those locations where results of monitoring indicate that landfill gas migration is occurring or is accumulating in structures.

(c) Attachment 15—leachate and contaminated water plan.

(1) The plan shall provide the details of the storage, collection, treatment and disposal of the contaminated water, leachate and/or gas condensate from the leachate collection system and/or the gas monitoring and collection system, where used. Contaminated water is water which has come into contact with waste, leachate or gas condensate. This plan shall include the following information:

- (A) estimated rate of leachate removal;
- (B) capacity of sumps;
- (C) pipe material and strength;
- (D) pipe network spacing and grading;
- (E) collection sump materials and strength;
- (F) drainage media specifications and performance; and

(G) demonstration that pipes and perforations will be resistant to clogging and can be cleaned or rehabilitated.

(2) Leachate and gas condensate may be disposed of in a MSWLF unit that is designed and constructed with a composite liner system and a leachate collection system that meets the requirements of §330.200(a)(2) of this title (relating to Design Criteria). Contaminated surface water and groundwater may not be placed in or on the MSWLF unit.

(3) Leachate, gas condensate, contaminated surface water, and contaminated groundwater shall be disposed of at an authorized facility or as authorized

COMMISSION ON ENVIRONMENTAL QUALITY

by a National Pollutant Discharge Elimination System permit.

(4) On-site collection ponds and impoundments for contaminated water shall be lined with an approved liner.

Source: The provisions of this §330.56 adopted to be effective October 9, 1993, 18 TexReg 4023; amended to be effective March 21, 2000, 25 TexReg 2380; amended to be effective September 1, 2003, 28 TexReg 6890.

§ 330.57. Technical Requirements of Part IV of the Application

The site operating plan shall contain the information required by §330.114 of this title (relating to Site Operating Plan).

Source: The provisions of this §330.57 adopted to be effective October 9, 1993, 18 TexReg 4023.

§ 330.58. Technical Requirements of Part V of the Application

Construction plans and specifications of the proposed or modified facility shall be prepared and one copy maintained at the facility at all times during construction. After completion of construction, an as-built set of construction plans and specifications shall be submitted to the executive director and maintained at the facility and/or at the owner or operator's main office. These plans shall be made available for inspection by TWC and successors' representatives or other interested parties. Part V is not required for permit approval.

Source: The provisions of this §330.58 adopted to be effective October 9, 1993, 18 TexReg 4023.

§ 330.59. Additional Technical Requirements of the Application for Solid Waste Processing and Experimental Sites (Types V and VI)

(a) This section applies to all Type V sites that require a permit and all Type VI sites not involving land disposal, in addition to §§330.51-330.58 of this title (relating to Permit Procedures).

(b) The site development plan shall include the following additional information.

(1) Process description.

(A) A description shall be provided of the process to be used, including details of all planned on-site facilities. Sufficient narrative and graphic details shall be provided to enable an evaluation of the operational capabilities, the design safety features, pollution control devices, and other health and environmental protective measures.

(B) A plan shall be provided for alternate processing or disposal of solid waste in the event that the

30 TAC § 330.113

(6) closure and post-closure care plans and any monitoring, testing, or analytical data relating to post-closure requirements;

(7) any and all cost estimates and financial assurance documentation relating to financial assurance for closure and post-closure;

(8) any and all information demonstrating compliance with the small community exemption criteria;

(9) copies of all correspondence and responses relating to the operation of the facility, modifications to the permit, approvals, and other matters pertaining to technical assistance;

(10) any and all documents, manifests, trip tickets, etc., involving special waste; and

(11) any other document(s) as specified by the approved permit or by the executive director.

(c) The owner or operator shall provide written notification annually to the executive director for each occurrence that documents from subsection (b) of this section are placed into or added to the operating record. All information contained in the operating record must be furnished upon request to the executive director and must be made available for inspection by the executive director.

(d) The owner or operator shall retain all information contained within the operating record and the different plans required for the facility for the life of the facility including the post-closure care period.

(e) The owner or operator shall maintain training records in accordance with §335.586(d) and (e) of this title (relating to Personnel Training).

(f) The owner or operator shall maintain personnel operator licenses issued in accordance with Chapter 30, Subchapter F of this title (relating to Municipal Solid Waste Facility Supervisors), as required.

(g) The executive director may set alternative schedules for recordkeeping and notification requirements as specified in subsections (a)—(f) of this section, except for notification requirements contained in Subchapter L of this chapter (relating to Location Restrictions) for any proposed lateral expansion located within a five-mile radius of any airport runway end used by turbojet or piston-type aircraft or notification relating to landowners whose property overlies any part of the plume of contamination, if contaminants have migrated off site as indicated by groundwater sampling.

(h) The owner or operator shall maintain records to document the annual waste acceptance rate for

COMMISSION ON ENVIRONMENTAL QUALITY

the facility. Documentation must include maintaining the quarterly solid waste summary reports and the annual solid waste summary reports required by §330.603 of this title (relating to Reports) in the operating record. After an updated site operating plan permit modification under §330.111(b) of this title (relating to General) is approved, if the annual waste acceptance rate exceeds the rate estimated in the landfill permit application and the waste increase is not due to a temporary occurrence, the owner or operator shall file an application to modify the permit application, including the revised estimated waste acceptance rate, in accordance with §305.70(k) of this title (relating to Municipal Solid Waste Permit and Registration Modifications), within 90 days of the exceedance as established by the sum of the previous four quarterly summary reports. The application must propose any needed changes in the site operating plan to manage the increased waste acceptance rate to protect public health and the environment. The increased waste acceptance rate may justify requiring permit conditions that are different from or absent in the existing permit. This subsection is not intended to make an estimated waste acceptance rate a limiting parameter of a landfill permit.

Source: The provisions of this §330.113 adopted to be effective October 9, 1993, 18 TexReg 4023; amended to be effective December 2, 2004, 29 TexReg 11054.

§ 330.114. Site Operating Plan

The site operating plan must include provisions for site management and the site operating personnel to meet the general and site-specific requirements of this subchapter. The site operating plan must be retained during the active life of the site and throughout the post-closure care maintenance period. The site operating plan must include the following:

(1) a description of functions and minimum qualifications for each category of key personnel to be employed at the facility and for the supervisory personnel in the chain-of-command;

(2) a description, including the minimum number, size, type, and function, of the equipment to be utilized at the facility based on the estimated waste acceptance rate and other operational requirements, and a description of the provisions for back-up equipment during periods of breakdown or maintenance of this listed equipment;

(3) a description of the general instructions that the operating personnel shall follow concerning the operational requirements of this subchapter;

(4) identification of applicable training requirements under §335.586(a) and (c) of this title (relat-

DRILLED OR MINED SHAFTS

ing to Personnel Training) which shall be followed;

(5) procedures for the detection and prevention of the disposal of prohibited wastes, including regulated hazardous waste as defined in 40 Code of Federal Regulations (CFR) Part 261, and of polychlorinated biphenyls (PCB) wastes as defined in accordance with 40 CFR Part 761 unless authorized by the United States Environmental Protection Agency. The detection and prevention program must include the following:

(A) procedures to be used by the owner or operator to control the receipt of prohibited waste. The procedures must include the random inspections of incoming loads and must include the inspection of compactor vehicles. In addition to the random inspections, trained staff shall observe each load that is disposed at the landfill;

(B) records of all inspections;

(C) training for appropriate facility personnel responsible for inspecting or observing loads to recognize prohibited waste;

(D) notification to the executive director of any incident involving the receipt or disposal of regulated hazardous waste or PCB waste at the landfill;

(E) provisions for the remediation of the incident; and

(6) general instructions required to be included in the site operating plan by other sections of this subchapter.

Source: The provisions of this §330.114 adopted to be effective October 9, 1993, 18 TexReg 4023; amended to be effective December 2, 2004, 29 TexReg 11054.

§ 330.115. Fire Protection

The owner or operator shall maintain a source of earthen material in such a manner that it is available at all times to extinguish any fires. The source must be sized to cover any waste received for disposal not covered with six inches of earthen material. Sufficient on-site equipment must be provided to place a six-inch layer of earthen material to cover any waste not already covered with six inches of earthen material within one hour of detecting a fire. The site operating plan must contain calculations demonstrating the adequacy of the earthen material. The executive director may approve alternate methods of fire protection. The potential for accidental fires must be minimized by use of proper compaction and earthen material cover. The site operating plan must contain a fire protection plan that identifies the fire protection standards to be used at the facility and how personnel are trained. The operator must initiate procedures in accordance with the fire protec-

30 TAC § 330.117

tion plan upon detection of a fire. For any municipal solid waste activity on a landfill that stores or processes combustible materials, such as solidification basins, brush collection areas, construction waste and demolition waste areas, composting areas, mulching areas, shredding areas, and used oil storage areas, the site operating plan must address fire protection measures specific to each individual activity. If a fire occurs that is not extinguished within ten minutes of detection, the commission's regional office must be contacted immediately after detection, but no later than four hours by telephone, and in writing within 14 days with a description of the fire and the resulting response.

Source: The provisions of this §330.115 adopted to be effective October 9, 1993, 18 TexReg 4023; amended to be effective December 2, 2004, 29 TexReg 11054.

§ 330.116. Access Control

Public access to all municipal solid waste facilities must be controlled by means of artificial barriers, natural barriers, or a combination of both, appropriate to protect human health and safety and the environment. Uncontrolled access to other operations located at a municipal solid waste facility must be prevented. The provisions for access control must be specified in the site operating plan. The preferred method of landfill access control is fences and gates. Regardless of the access control method, the site operating plan must include an inspection and maintenance schedule, notification to the commission's regional office of a breach, provisions for temporary and permanent repairs, and notification to the commission's regional office when a permanent access control breach repair is completed. The commission's regional office must be notified of the breach within 24 hours of detection. The breach must be temporarily repaired within 24 hours of detection and must be permanently repaired by the time specified to the commission's regional office when it was reported in the initial breach report. If a permanent repair can be made within eight hours of detection, no notice to the commission's regional office is required.

Source: The provisions of this §330.116 adopted to be effective October 9, 1993, 18 TexReg 4023; amended to be effective December 2, 2004, 29 TexReg 11054.

§ 330.117. Unloading of Waste

(a) The unloading of solid waste must be confined to as small an area as practical. The maximum size of the unloading area must be specified in the site operating plan. The number and types of unloading areas must be identified. A trained staff person shall be provided at all facilities to monitor all incoming

DRILLED OR MINED SHAFTS

facility. Waste acceptance hours within the 7:00 a.m. to 7:00 p.m. weekday span do not require other specific approval. Transportation of materials and heavy equipment operation must not be conducted between the hours of 9:00 p.m. to 5:00 a.m., unless otherwise approved in the authorization for the facility. Operating hours for other activities do not require other specific approval.

(b) In addition to the requirements of subsection (a) of this section, the executive director may approve alternate operating hours of up to five days in a calendar-year period to accommodate special occasions, special purpose events, holidays, or other special occurrences as specified in §305.70 of this title (relating to Municipal Solid Waste Permit and Registration Modifications).

(c) The commission's regional offices may allow additional temporary operating hours to address disaster or other emergency situations, or other unforeseen circumstances that could result in the disruption of waste receipt at the facility.

(d) The facility must record in the site operating record the dates and times when any alternate or additional operating hours are utilized.

Source: The provisions of this §330.118 adopted to be effective December 2, 2004, 29 TexReg 11054.

§ 330.119. Site Sign

Each facility must conspicuously display at all entrances through which wastes are received, a sign measuring at least four feet by four feet with letters at least three inches in height stating the type of site, the hours and days of operation, an emergency 24-hour contact phone number(s) that reaches an individual with the authority to obligate the facility at all times that the facility is closed, the local emergency fire department phone number, and the permit number or facility number. The facility sign must be readable from the facility entrance. The posting of erroneous or misleading information constitutes a violation of this section.

Source: The provisions of this §330.119 adopted to be effective October 9, 1993, 18 TexReg 4023; amended to be effective December 2, 2004, 29 TexReg 11054.

§ 330.120. Control of Windblown Solid Waste and Litter

The working face must be maintained and operated in a manner to control windblown solid waste. Windblown material and litter must be collected and properly managed in accordance with paragraphs (1) and (2) of this section to control unhealthy, unsafe, or unsightly conditions.

(1) Windblown waste and litter at the working face must be controlled by using engineering meth-

30 TAC § 330.122

ods or measures, including portable panels, temporary fencing, and perimeter fencing or comparable engineering controls. The site operating plan must specify the means for confining windblown waste and litter.

(2) Litter scattered throughout the site, along fences and access roads, and at the gate must be picked up once a day on the days the facility is in operation and properly managed. The site operating plan must specify the means for complying with this requirement.

Source: The provisions of this §330.120 adopted to be effective October 9, 1993, 18 TexReg 4023; amended to be effective December 2, 2004, 29 TexReg 11054.

§ 330.121. Easements and Buffer Zones

(a) Easement protection. No solid waste unloading, storage, disposal, or processing operations shall occur within any easement, buffer zone, or right-of-way that crosses the site. No solid waste disposal shall occur within 25 feet of the center line of any utility line or pipeline easement, unless otherwise authorized by the executive director. All pipeline and utility easements must be clearly marked with posts which extend at least six feet above ground level, spaced at intervals no greater than 300 feet.

(b) Buffer zones. A minimum separating distance of 50 feet shall be maintained between solid waste processing and disposal activities and the boundary of the facility, or as determined by the requirements of §330.56 of this title (relating to Attachments to the Site Development Plan). The buffer zone must provide for safe passage for fire-fighting and other emergency vehicles.

Source: The provisions of this §330.121 adopted to be effective October 9, 1993, 18 TexReg 4023; amended to be effective December 2, 2004, 29 TexReg 11054.

§ 330.122. Landfill Markers and Benchmark

All required landfill markers and the benchmark must be maintained so that they are visible during operating hours. Markers that are removed or destroyed must be replaced within 15 days of the removal or destruction. All markers must be maintained to retain visibility. Landfill markers must be inspected on a monthly basis to ensure that they are installed and maintained in compliance with the site operating plan. Records of all inspections must be maintained at the facility. Landfill markers must be repaired or replaced within 15 days of discovering a marker does not meet regulatory requirements.

Source: The provisions of this §330.122 adopted to be effective October 9, 1993, 18 TexReg 4023; amended to be effective December 2, 2004, 29 TexReg 11054.