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June 9, 2010

Via Hand Delivery

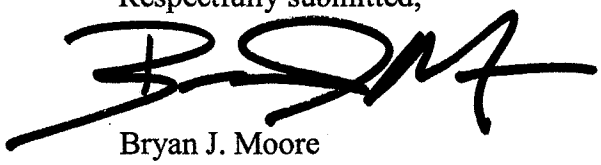
Jeffrey D. Kyle, Clerk
Third Court of Appeals
Price Daniel Sr. Building
209 W. 14th Street, Room 101
Austin, Texas 78701

Re: Court of Appeals No. 03-10-00016-CV;
Trial Court Case No. D-1-GN-08-004503 (Travis County District Court)
TJFA, L.P. and Concerned Citizens and Landowners, Appellants v. Texas Commission on Environmental Quality and Waste Management of Texas, Inc., Appellees

Dear Mr. Kyle:

Enclosed please find an original and eight copies of the Brief of Appellee Waste Management of Texas, Inc. to be filed in the above-referenced matter. Please file the original and seven copies among the papers of the cause and return the additional copy file-marked as received to our courier.

Respectfully submitted,



Bryan J. Moore

Enclosure

cc: Service List

US 423306v.1

No. 03-10-00016-CV

IN THE COURT OF APPEALS
FOR THE THIRD JUDICIAL DISTRICT
AUSTIN, TEXAS

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

Appellants,

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY AND WASTE MANAGEMENT OF TEXAS, INC.,

Appellees.

On Appeal from the 53rd District Court of Travis County, Texas
Hon. John K. Dietz, Judge Presiding
Cause No. D-1-GN-08-004503

BRIEF OF APPELLEE WASTE MANAGEMENT OF TEXAS, INC.

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June 9, 2010

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RECORD REFERENCES

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ABBREVIATIONS

ac-ft	Acre-feet
ALJ	Administrative Law Judge
cfs	Cubic feet per second
COL	Conclusion of Law
CCL	Concerned Citizens and Landowners
Commission	Texas Commission on Environmental
FEMA	Federal Emergency Management Agency
FOF	Finding of Fact
ft/s	Feet per second
MSW	Municipal solid waste
PFD	Proposal for Decision
SOAH	State Office of Administrative Hearings
TCEQ	Texas Commission on Environmental
TDSL	Texas Disposal Systems Landfill
TJFA	TJFA, L.P.
WMTX	Waste Management of Texas, Inc.

STATEMENT OF THE CASE

In this case, Appellants TJFA, L.P. ("***TJFA***") and Concerned Citizens and Landowners ("***CCL***") seek judicial review of an action of an administrative agency. The agency action at issue is the Texas Commission on Environmental Quality's ("***TCEQ's***" or the "***Commission's***") order granting Appellee Waste Management of Texas, Inc.'s ("***WMTX's***") application for Permit No. MSW-66B, which authorizes the expansion of the Comal County Landfill and renames it the Mesquite Creek Landfill.[1]

After a contested case hearing at the State Office of Administrative Hearings ("***SOAH***"), on March 18, 2008, Administrative Law Judge ("***ALJ***") Sarah Ramos issued her Proposal for Decision ("***PFD***") recommending that the Commission issue Permit No. MSW-66B.[2] The Commission issued Permit No. MSW-66B on November 24, 2008.[3] After briefing and oral argument to the Honorable John K. Dietz of the 53rd Judicial District, on December 9, 2009, Judge Dietz issued his Final Order affirming the Commission's order.[4] This appeal followed.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary. This case presents routine issues of substantial evidence review and a single legal issue that has been authoritatively decided. The facts and arguments are adequately presented in the briefs and the administrative record.

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1 *See* Appellants' Brief Appendix B at 1 (TCEQ's October 1, 2008, *Order Granting The Application For Permit No. MSW-66B To Waste Management Of Texas, Inc.*, TCEQ Docket No. 2006-1931-MSW, SOAH Docket No. 582-07-0863 ("***Mesquite Creek Order***")).

2 *See* Admin. R. Vol. 9 Doc. 49 at 1 (SOAH's March 18, 2008 PFD ("***Mesquite Creek PFD***")).

3 *See* Admin. R. Vol. 9 Doc. 66 (Permit No. MSW-66B).

4 *See* Clerk's R. Doc. 8216 at 1406 (also Appellants' Brief Appendix A).

Accordingly, the Court's decisional process would not be significantly aided by oral argument. Nevertheless, if granted to Appellants, WMTX requests the opportunity to participate in oral argument and be heard in response to Appellants' claims.

ISSUES PRESENTED

1. Is there substantial evidence in the administrative record to support TCEQ's finding that the Mesquite Creek Landfill is not within the 100-year floodplain?
2. Is there substantial evidence in the administrative record to support TCEQ's finding that natural drainage patterns will not be significantly altered as a result of development of the Mesquite Creek Landfill?
3. Is there substantial evidence in the administrative record to support TCEQ's findings regarding the geologic characteristics of the strata beneath the Mesquite Creek Landfill?
4. Did TCEQ err in acknowledging a regulatory distinction between waste acceptance hours and other hours of operation when considering a settlement agreement entered into between WMTX and a third party?

STATEMENT OF FACTS

I. THE MESQUITE CREEK LANDFILL

The existing Mesquite Creek Landfill is a municipal solid waste ("***MSW***") landfill consisting of approximately 79 acres of waste disposal area divided between two disposal units.[5] The landfill was initially owned by Comal County and began operations under Permit No. MSW-66 in 1975.[6] WMTX acquired the facility from Comal County in 1988.[7] In 2003, the facility was expanded vertically under Permit No. MSW-66A.[8]

The existing facility was nearing full capacity, with perhaps only two to three years of disposal space remaining.[9] Therefore, to ensure that the landfill continues to meet the waste disposal needs of the growing counties and communities in its service area, with the instant permit amendment, WMTX has expanded the facility laterally into Guadalupe County to add a third disposal unit, which has increased the total waste disposal area to approximately 164 acres.[10]

II. PROCEDURAL HISTORY

WMTX submitted its permit amendment application to TCEQ for review in November 2005;[11] therefore, TCEQ's rules in effect prior to March 27, 2006, apply to this

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5 *See* Appellants' Brief Appendix B at 2, Findings of Fact ("***FOF***") 6, 8 (Mesquite Creek Order).

6 *See* Admin. R. Vol. 1 Ex. APP-202 at 134.

7 *See* Admin. R. Vol. 9 Doc. 49 at 5 (Mesquite Creek PFD).

8 *See id.* at 6.

9 *See id.* at 5.

10 *See* Appellants' Brief Appendix B at 2, FOF 8 (Mesquite Creek Order).

11 *See id.* at 2, FOF 11.

proceeding.[12] In December 2005, the TCEQ Executive Director determined the application to be administratively complete, and in 2006, the application was declared technically complete.[13] Thereafter, in October 2006, WMTX requested that TCEQ directly refer the application to SOAH for a contested case hearing on whether the application complies with all applicable statutory and regulatory requirements.[14]

A preliminary hearing was held in April 2007. The contested case hearing was conducted October 22-29, 2007, in Austin and New Braunfels, Texas. ALJ Ramos issued her PFD in March 2008, concluding that WMTX had met its burden of demonstrating the application's compliance with all applicable statutory and regulatory requirements.[15] On October 1, 2008, with only a few changes to the PFD, the Commission issued an order granting the permit amendment.[16] Motions for rehearing were filed and overruled by operation of law; after which, an appeal to Travis County District Court followed.

Judge Dietz heard oral argument from plaintiffs, defendant TCEQ, and intervenor-defendant WMTX on December 9, 2010, and on the same day issued his Final Order affirming the Commission's order.[17] This appeal followed.

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12 *See* 31 TEX. REG. 2502, 2503-04 (Mar. 24, 2006) (discussing applicability of revisions to TCEQ's MSW rules promulgated in March 2006). The Chapter 330 rules in effect prior to March 27, 2006, are attached as Appendix A.

13 *See* Appellants' Brief Appendix B at 3, FOF 12 (Mesquite Creek Order).

14 *See* Admin. R. Vol. 9 Doc. 49 at 3 (Mesquite Creek PFD).

15 *See* Appellants' Brief Appendix B at 32, Conclusion of Law ("***COL***") 15 (Mesquite Creek Order).

16 *See id.* at 34.

17 Appellants' Brief Appendix A.

III. APPELLANT TJFA

In their brief, Appellants characterize themselves as local landowners. WMTX does not dispute that Appellant TJFA owns land in proximity to the Mesquite Creek Landfill; however, TJFA's interests in this case range far afield of the property that it owns. As established in the administrative proceedings below, TJFA's sole representative in this case, Mr. Bobby Gregory, owns the Texas Disposal Systems Landfill ("***TDSL***"), a MSW landfill located in southeastern Travis County that competes directly with the Mesquite Creek Landfill.[18]

TJFA is a Texas limited partnership that was formed on November 29, 2004.[19] Mr. Gregory has characterized TJFA as an investment corporation that invests in real estate located in close proximity to landfills.[20] All ten of the "investment properties" that TJFA owns are within one mile of a Central Texas landfill.[21] Mr. Gregory benefits financially if TDSL has less landfill competition in Central Texas, or if TDSL's competitors have to incur the significant expense of contested case proceedings in order to expand their facilities and continue their operations.[22] Given these facts, WMTX objected to TJFA's participation as a protestant in the administrative hearing. Ultimately, TJFA was granted party status in the contested case proceeding, but the ALJ cautioned against abusing the permitting processes to gain competitive advantage.[23]

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18 *See* Admin. R. Vol. 15 Ex. WM E-G at 30:6-8 (Gregory Dep.) (attached as Appendix B).

19 *See* Appendix C (Partnership filings).

20 *See* Appendix B at 24:22-24, 36:15-20, 37:1-8 (Gregory Dep.).

21 *See id.* at 36:10-20.

22 *See id.* at 73:18-23.

23 *See* Admin. R. Vol. 7 Doc. 6 at 2, n.3 (Order No. 3).

SUMMARY OF THE ARGUMENT

WMTX respectfully requests that this Court affirm TCEQ's decision to grant WMTX's application to expand its existing municipal solid waste ("***MSW***") landfill. The first three of Appellants' four points of error concern solely the sufficiency of the evidence supporting certain findings and conclusions of the Commission. These points of error are subject to substantial evidence review. Appellants' fourth point of error concerns Appellants' novel theory that TCEQ should be required to accept Appellants' interpretation of, and to enforce, a private-party agreement to which the agency and Appellants were not parties. Appellants offer no authority to support their theory that the Commission was arbitrary or capricious in enforcing its own regulations.

With respect to their substantial evidence claims – about the 100-year floodplain, natural drainage patterns, and the geology beneath the site – Appellants fail to overcome the presumption of substantial evidence and cannot show that there is no reasonable basis in the record for TCEQ's decision. Indeed, as set forth below, there is no lack of support in the administrative record for the Commission's order. The record is replete with evidence demonstrating that the agency's action is reasonable, rational, and based on substantial evidence.

For instance, with respect to Appellants' claims regarding the 100-year floodplain, the record includes a floodplain map prepared by an independent federal agency showing that the area of the landfill has been studied and that the landfill was determined to be located outside of all 100-year floodplains in the area. Regarding Appellants' drainage claims, the record includes calculations and expert witness testimony demonstrating that

stormwater drainage exiting the landfill will not alter natural drainage patterns or cause flooding. This demonstration is supported by TCEQ precedent and the agency's published guidance. Appellants' geology claims are contrary to the record evidence, which shows that WMTX's geological tests exceeded the applicable regulatory requirements and yielded reliable data.

STANDARD OF REVIEW

The purpose of a contested case hearing such as the proceeding below (i.e., one resulting from a direct referral to SOAH at the request of the applicant pursuant to Tex. Water Code § 5.557(a) and 30 Tex. Admin. Code § 55.210(b)) is to determine "whether the application complies with all applicable statutory and regulatory requirements." TCEQ's rules require the applicant to prove compliance with all applicable statutory and regulatory requirements "by a preponderance of the evidence."[24] Proof by a preponderance of the evidence "does not require the quality of absolute certainty nor does it require that [Applicant] preclude every other possibility. . . . All that is required is that the circumstances point to the ultimate fact sought to be established with that degree of certainty as to make the conclusion reasonably probable."[25] The preponderance of the evidence standard does not necessarily require that the party with the burden "explain or disprove the allegations of its opponent."[26]

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[24] 30 TEX. ADMIN. CODE § 80.17(a).

[25] *State Farm Mut. Ins. Co. v. Davis*, 576 S.W.2d 920, 921 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.) (internal citations omitted); *see also Bufkin v. Tex. Farm Bureau Mut. Ins. Co.*, 658 S.W.2d 317, 230 (Tex. App.—Tyler 1983, no writ) ; *First State Bank v. Md. Cas. Co.*, 918 F.2d 38 (5th Cir. 1990) .

[26] *Gooch v. Davidson*, 245 S.W.2d 989, 991 (Tex. Civ. App.—Amarillo 1952, no writ) .

The standard of review for a final action of an administrative agency is whether the agency was arbitrary and capricious in its conclusions and findings.[27] Considerable deference is given to the agency's interpretation of its own regulations and the agency's construction of a statute it is charged with enforcing.[28] An "agency's construction of its rule is controlling unless it is plainly erroneous or inconsistent" with the statute.[29] "Because the interpretation represents the view of the regulatory body that drafted and administers the rule, the agency's interpretation, if reasonable, becomes a part of the rule itself."[30] Similarly, an agency's construction of a statute that it is charged with enforcing is entitled to deference in the courts, so long as the interpretation is reasonable and does not conflict with the statute's plain language.[31] Moreover, an agency's decision is arbitrary or results from an abuse of discretion only if the agency: "(1) failed to consider a factor *the legislature directs it to consider*; (2) considers an irrelevant factor; or (3) weighs only relevant factors that *the legislature directs it to consider* but still reaches a completely unreasonable result."[32]

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27 *See* TEX. GOVT. CODE ANN. § 2001.174.

28 *See Stark v. Geeslin,* 213 S.W.3d 406, 416 (Tex. App.—Austin 2006, pet. denied); *Buddy Gregg Motor Homes, Inc. v. Motor Vehicle Bd.*, 156 S.W.3d 91, 98-99 (Tex. App.—Austin 2004, pet. denied).

29 *Phillips Petrol. Co. v. TCEQ*, 121 S.W.3d 502, 507 (Tex. App.—Austin 2003, no pet.).

30 *Id.* at 508.

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

32 *City of El Paso v. PUC*, 883 S.W.2d 179, 184 (Tex. 1994) (citing *Gerst v. Nixon*, 411 S.W.2d 350, 360 n. 8 (Tex. 1966)) (emphasis added). Notably, Appellants failed to include in their reference to this axiom the fact that the Texas Supreme Court specifically qualified the "factors" as those required by the legislature to be considered. *See* Appellants' Brief at 22, 40.

The agency's factual determinations must be supported by "substantial evidence."[33] "[T]he evidence on the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence," because when a court applies the substantial evidence standard, it "gives significant deference to that agency in its field of expertise."[34] Texas courts have established the following parameters governing application of the substantial evidence rule:

- in its review, the court determines whether the evidence as a whole is such that reasonable minds could have reached the same conclusion as the agency;
- the court may not substitute its judgment for that of the agency;
- the court may only consider the record on which the agency based its decision;
- the issue for the reviewing court is not whether the agency reached the correct conclusion, but whether there is some reasonable basis in the record for its action;
- the findings, inferences, conclusions and decisions of the agency are presumed to be supported by substantial evidence; and
- the burden to prove otherwise is on the contestant.[35]

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33 *See* TEX. GOVT. CODE ANN. § 2001.174.

34 *RR Comm'n v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex. 1995) (citing *Tex. Health Facilities Comm'n v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446, 452 (Tex. 1984)).

35 *Coal. for Long Point Preservation v. TCEQ*, 106 S.W.3d 363, 366-67 (Tex. App.—Austin 2003, pet. denied) (citing TEX. GOVT. CODE § 2001.174, *Stratton v. AISD,* 8 S.W.3d 26, 30 (Tex. App.—Austin 1999, no pet.), and *City of El Paso v. PUC,* 883 S.W.2d 179, 185 (Tex. 1994)).

ARGUMENT

I. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT TCEQ'S FINDING THAT THE MESQUITE CREEK LANDFILL IS NOT WITHIN THE 100-YEAR FLOODPLAIN

A. In Accordance With TCEQ's Rules, The Floodplain Determination For The Mesquite Creek Landfill Was Based On The Relevant FEMA Floodplain Map

For purposes of preparing portions of WMTX's application and demonstrating compliance with TCEQ rules that require a determination of areas within the floodplain associated with a 100-year frequency flood,[36] the engineer who prepared and sealed the application, Mr. Scott Graves, relied upon a floodplain map produced by the Federal Emergency Management Agency ("***FEMA***") that demonstrates that the Mesquite Creek Landfill, including the proposed expansion area, is not located within a 100-year floodplain.[37] Per TCEQ's regulations and Commission precedent, such reliance was permissible and in compliance with all applicable statutory and regulatory requirements.

TCEQ's rules specifically provide that, to identify whether a site is located within a 100-year floodplain, an applicant must provide a copy of the relevant FEMA floodplain map, if a FEMA map of the area is available.[38] Calculations and other maps may be used for the floodplain determination only "where a FEMA map is *not* available."[39] In this

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36 *See, e.g.*, 30 TEX. ADMIN. CODE §§ 330.55(b)(7), (b)(7)(C), 330.56(c), (f)(3), (f)(4)(B), (g), 330.301.

37 *See* Admin. R. Vol. 10 T-3 at 149:10 to 150:20, 151:13-16, 154:13-25, 177:16-17, 177:24 to 178:6, and T-4 at 331:11 to 334:2 (Graves); Vol. 13 Ex. APP-200 at 48:25 to 49:8 (Graves); Vols. 1, 2, and 4 at 159, 182, 998 n.7, 1011 n.9 & 10, 1813-14 (Ex. APP-202); Vol. 13 Ex. APP-211; *see also* Admin. R. Vol. 12 T-7 at 993:3-9, 995:21 to 996:4, 998:17 to 999:1 (Prompuntagorn).

38 *See* 30 TEX. ADMIN. CODE § 330.56(f)(4)(B)(i).

39 *Id.* (emphasis added).

case, the relevant FEMA map was available and, as required by TCEQ's rules, was used to demonstrate that the Mesquite Creek Landfill is not located within a 100-year floodplain.[40]

The significance and role of a FEMA floodplain map in MSW permitting in Texas is further evidenced by the fact that TCEQ expressly prohibits solid waste disposal operations in FEMA-defined floodplains: "No solid waste disposal and treatment operations shall be permitted in areas that are located in a floodway *as defined by FEMA*."[41] Accordingly, if FEMA has defined a 100-year floodplain for the area at issue, TCEQ, by rule, relies upon that FEMA floodplain determination when determining whether to permit the facility. As set forth below, FEMA has defined the 100-year floodplain in the area of the Mesquite Creek Landfill and has determined that the landfill is in an area of minimal flooding, outside of the 100-year floodplain.

Consistent with the agency's regulations, TCEQ's permit reviewer, Mr. Pladej Prompuntagorn, testified regarding the role and importance of a FEMA floodplain delineation in the context of MSW permitting and in the context of the Mesquite Creek Landfill:

> Q: . . . Is it the practice of TCEQ to defer to FEMA in cases of floodplain analysis?
>
> A: Basically.
>
> . . .
>
> Q: . . . According to FEMA, is there a 100-year floodplain at the landfill site?
>
> A: No.[42]

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40 *See* Admin. R. Vol. 13 Ex. APP-211.

41 30 TEX. ADMIN. CODE § 330.56(f)(4)(B)(iii) (emphasis added).

42 Admin. R. Vol. 12 T-7 at 1051:6-17 (Prompuntagorn).

Mr. Graves also testified that it is standard practice in his profession to rely upon FEMA's floodplain delineations and that, in his experience, TCEQ relies upon FEMA's expertise in the area of flood analyses.[43]

Such testimony, and such reliance on FEMA floodplain maps, is not unique to this case. In the 2003 *North Texas Municipal Water District* case,[44] both the applicant and the TCEQ Executive Director relied upon the applicable FEMA floodplain map to demonstrate that the site was not within the 100-year floodplain.[45] In fact, in that proceeding, the then-Director of TCEQ's Waste Permits Division testified that the relevant FEMA map could be used to identify whether a site is located within a 100-year floodplain, per TCEQ's rules, and provided a list of 18 permitting actions over a three-year period where a FEMA map "was the sole source used to establish the 100-year floodplain."[46] Both the ALJ in that case and the Commission agreed that MSW applicants may rely upon FEMA maps to satisfy TCEQ's floodplain requirements and demonstrate that a site is not within the 100-year floodplain.[47]

Additionally, TCEQ's reliance on the work of other agencies in the context of MSW permitting is not limited to FEMA. For instance, in the context of a single MSW

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43 *See* Admin. R. Vol. 10 T-3 at 151:4-6 (Graves).

44 *See* Appendix H (*In re Application of North Texas Municipal Water District for Municipal Solid Waste Permit No. MSW-2294*, SOAH Docket No. 582-02-3386, TCEQ Docket No. 2002-0745-MSW, Proposal for Decision at 29 & n.98 (July 18, 2003) (emphasis added) [hereinafter *North Tex. Mun. Water Dist. PFD*]) and Appendix I (*An Order Approving the Application of North Texas Municipal Water District for Municipal Solid Waste Permit No. MSW-2294*, TCEQ Docket No. 2002-0745-MSW, SOAH Docket No. 582-02-3386, at 18 (FOF 105), 44 (COL 27) (Oct. 20, 2003) [hereinafter *North Tex. Mun. Water Dist. Order*]).

45 *See North Tex. Mun. Water Dist. PFD* at 49.

46 *Id.*

47 *See id.* at 50-52; *North Tex. Mun. Water Dist. Order* at 21 (FOF 126), 45 (COL 29).

permit, per the agency's rules, TCEQ may rely upon analyses performed by the Federal Aviation Administration, the United States Army Corps of Engineers, the Texas Parks and Wildlife Department, the United States Fish and Wildlife Service, the Texas Department of Transportation, and the Texas Historical Commission.[48]

B. The Relevant FEMA Floodplain Map Demonstrates That FEMA Has Studied And Mapped The Area Around The Mesquite Creek Landfill And Has Determined That The Landfill Is In An Area Of Minimal Flooding Outside Of The 100-Year Floodplain

In this case, FEMA has studied and mapped the area around the landfill, including Mesquite Creek.[49] Mesquite Creek is an intermittent, wet-weather stream, i.e., it only has water flowing in it following rainfall events and is dry when there is no rain.[50] The relevant FEMA map shows the areas that are within the 100-year floodplain, labels Mesquite Creek and depicts where it crosses through the landfill, and affirmatively shows that Mesquite Creek is *not* within the 100-year floodplain.[51] The FEMA map provides that the landfill is in "Zone C" – defined as "areas of minimal flooding" *outside of the 100-year floodplain*.[52] Additionally, the FEMA map also specifies zone designations for areas within the 100-year flood boundary ("Zone A") and "undetermined" areas ("Zone D")

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48 *See, e.g.,* 30 TEX. ADMIN. CODE §§ 330.51(b)(4)(C)-(D) , (6)(B)-(C) , (9); 330.53(b)(12)(B) , (13)(C).

49 *See* Admin. R. Vol. 13 Ex. APP-211.

50 *See* Admin. R. Vol. 1 Ex. APP-202 at 158; Admin. R. Vol. 10 T-4 at 385:15-22 (Graves).

51 *See* Admin. R. Vol. 13 Ex. APP-211.

52 *Id.*

where flooding conditions have yet to be studied or determined by FEMA.[53] The landfill is *not* within either of those two areas.[54]

Accordingly, any suggestion that FEMA did not analyze this area is baseless. As the FEMA map at issue demonstrates, FEMA studied the area around the landfill, including the Mesquite Creek crossing, and concluded that the landfill is in an area of "minimal flooding" and not within the 100-year floodplain. The applicable regulatory requirements are satisfied; there is nothing more to prove.

Appellants rely, in part, upon the cross-examination of Mr. Graves for their claim that FEMA did not study the area around the landfill.[55] While it is true that Mr. Graves, on cross-examination, testified that he was not certain whether FEMA had studied Mesquite Creek, when Mr. Graves gave that testimony, he did not have before him the FEMA map in Exhibit APP-211.[56] He did not have the relevant FEMA floodplain map in hand. Nevertheless, Mr. Graves did note that the very existence of a FEMA map for the area indicates that FEMA did study the area:

> Q: . . . Did FEMA study Mesquite Creek to determine that it has no floodplain?
>
> A: I'm not certain, 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. . . .[57]

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53 *Id.*

54 *See id.*

55 *See* Appellants' Brief at 4-5.

56 *Compare* Admin. R. Vol. 10 T-3 at 151:17-22 (Graves) *with* Admin. R. Vol. 10 T-4 at 331:8-9 (noting that Ex. APP-211 was marked), 334:8 (noting that Ex. APP-211 was admitted).

57 Admin. R. Vol. 10 T-3 at 151:17-22 (Graves).

On redirect, Mr. Graves was handed a copy of the relevant FEMA floodplain map (Exhibit APP-211) and confirmed that the detail of the map and the map's zone designations demonstrated that FEMA had, in fact, studied the area of the landfill and determined it to be an area of minimal flooding:

> Q: . . . So Mr. Dunbar's questions about whether FEMA had identified a hundred-year floodplain around Mesquite Creek would seem to be answered by APP-211. Is that a fair statement?
>
> A: Yes, that's correct.[58]

The only reasonable conclusion to draw from the foregoing record evidence is that FEMA studied the area of the landfill and found it to be an area of minimal flooding outside of the 100-year floodplain. Had FEMA not studied the area, then FEMA would have designed the area to be in Zone D – areas where flooding conditions have yet to be determined by FEMA. Because FEMA had studied the area of the landfill, it designated that area to be within Zone C – areas of minimal flooding outside of the 100-year floodplain.

C. Appellants' Construction Of The Relevant FEMA Floodplain Map Would Lead To Untenable Results That Are Contrary To TCEQ's Rules

Appellants claim that a FEMA floodplain map cannot be relied on to determine whether an area is within the floodplain associated with a 100-year frequency flood unless the FEMA map expressly states whether the area is within or outside of the 100-year floodplain.[59] As Mr. Graves explained and as evidenced by the relevant FEMA floodplain map in this case (Exhibit APP-211), FEMA maps only depict the area within the 100-year

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58 *Id.* T-4 at 333:23 to 334:2 (Graves).

59 *See* Appellants' Brief at 25-26.

floodplain; everything outside of that area is either not within the floodplain (and is labeled an area of "minimal flooding") or is labeled as an area that has not yet been studied and is "undetermined."[60] Appellants' theory would lead to the absurd conclusion that a FEMA map can only be used to confirm that an area is within a 100-year floodplain. If the map does not depict an area to be within the 100-year floodplain, Appellants summarily conclude that the area has not been studied and that the map is of no use. Accordingly, following Appellants' reasoning, a FEMA map could *never* be used to demonstrate that an area is *not* within a 100-year floodplain. Such a theory is both illogical and directly at odds with TCEQ's rules.[61]

Appellants' reasoning would also lead to the equally illogical and legally unsupportable conclusion that every feature that conveys water must have a regulatory 100-year floodplain. TCEQ specifically defines a 100-year floodplain as the "lowland and relatively flat areas adjoining inland and coastal waters . . . that are inundated by the 100-year flood."[62] Thus, not every water course will have a 100-year floodplain *as defined by TCEQ's rules*. Although Appellants attempt to obfuscate this distinction by selectively quoting from the hearing transcript, Mr. Graves was aware of the distinction and noted it in his testimony at the hearing:

> Q: Okay. Would you agree with me then that Mesquite Creek, as it passes through the landfill facility, does have a floodplain associated with the hundred-year flood?

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60 *See* Admin. R. Vol. 10 T-3 at 157:9-14 (Graves); Admin. R. Vol. 13 Ex. APP-211.

61 *See* 30 TEX. ADMIN. CODE § 330.56(f)(4)(B)(i).

62 *Id.* § 330.2(48); *see also id.* § 330.2(1) (defining the "100-year flood" as "[a] flood that has a 1.0% or greater chance of recurring in any given year or a flood of a magnitude equalled or exceeded once in 100 years on the average over a significantly long period.").

A: Yes, I do.

Q: Okay. Even though FEMA hasn't shown a floodplain on its FEMA map?

A: I suppose to some extent every ditch and gutter has a level that water would rise during a hundred-year event. *That doesn't necessarily make it a floodplain*, but there is a level that water would rise.

Q: Okay. And does -- but Mesquite Creek, as you've indicated, does have a floodplain as it passes through the landfill site?

A: I would say the definition of a "floodplain" *to me* is water spilling out of its normal banks, and I believe that does occur.[63]

In their brief to this Court, Appellants quote the first question and answer listed above and go on to allege that Mr. Graves admitted that Mesquite Creek has a 100-year floodplain that meets TCEQ's floodplain definition.[64] However, it is clear from the subsequent questions and answers – testimony that Appellants omitted from their brief – that Mr. Graves qualified his testimony and was not applying TCEQ's floodplain definition.

As indicated by Mr. Graves in the line of testimony quoted above, under Appellants' approach to a floodplain determination, every rill, every gully, every ditch, every intermittent, wet-weather creek would have a 100-year floodplain. That approach does not square with TCEQ's rules.

D. The Facts Of The *Juliff Gardens* And *Tan Terra* Cases Are Distinguishable From The Facts Of This Case

Appellants assert that the relevant FEMA floodplain map in this case (Exhibit APP-211) is similar to the ones relied upon by the applicants in the *Juliff Gardens* and *Tan Terra* cases. The pertinent facts of those cases are demonstrably different than the record

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63 Admin. R. Vol. 10 T-4 at 318:25 to 382:17 (Graves) (emphasis added).

64 *See* Appellants' Brief at 4.

evidence in this case. In the *Juliff Gardens* case, the FEMA map at issue specifically indicated that the limit of the area studied by FEMA was some 3,000 feet away from the proposed site.[65] In other words, FEMA expressly stated on the map that it did not study the area at issue. There is no such statement or limitation on the FEMA map that WMTX used.

In the *Juliff Gardens* case there was also testimony from a county witness that the area in question had not, in fact, been studied by FEMA.[66] There was no such testimony in this case; Appellants presented no witness to testify regarding floodplains or FEMA maps. Furthermore, the area of the proposed *Juliff Gardens* site was not marked on the FEMA map with any zone designation to demonstrate that the area was outside of the floodplain.[67] By contrast, as discussed above, the FEMA map in this case unequivocally specifies that the Mesquite Creek Landfill is in "Zone C" – an area of "minimal flooding" outside of the 100-year floodplain.[68]

The facts of the *Tan Terra* case are equally distinguishable. In that case, the applicant sought to rely upon a "map index," not a true FEMA floodplain map.[69] That is not the case here; there is no allegation that WMTX relied upon a map index or anything

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65 *See* Appendix F (*In the Matter of the Application of Juliff Gardens, L.L.C., for a New Permit to Operate a Type IV Municipal Solid Waste Landfill Facility (Permit No. MSW-2282)*, SOAH Docket No. 582-02-1595, TCEQ Docket No. 2002-0117-MSW, Proposal for Decision at 20 (June 24, 2004)) .

66 *See id.* at 21.

67 *See id.* at 20-21.

68 Admin. R. Vol. 13 Ex. APP-211.

69 *See* Appendix G (*In the Matter of the Application of Tan Terra Environmental Services, Inc., for MSW Permit No. 2305*, SOAH Docket No. 582-05-0868, TCEQ Docket No. 2004-0743-MSW, Proposal for Decision at 40-41 (Jan. 17, 2006)); Appellants' Brief Appendix M (*An Order Regarding the Application of Tan Terra Environmental Services, Inc., for a Permit to Operate a Type I Municipal Solid Waste Facility (Permit No. MSW-2305)*, TCEQ Docket No. 2004-0743-MSW, SOAH Docket No. 582-05-0868 at 14-14 (Explanation of Changes, ¶ 2) (Apr. 20, 2006)).

other than a true FEMA floodplain map. In this case, one of Appellants' counsel is Mr. Lawrence Dunbar.[70] Mr. Dunbar is also an engineer and he testified as such in the *Tan Terra* case.[71] In that case, Mr. Dunbar testified that a FEMA map index does not delineate floodplains, whereas a FEMA floodplain map does.[72]

Additionally, in this case the ALJ in the administrative hearing below – Judge Ramos – was the same ALJ that presided over the *Tan Terra* contested case hearing.[73] Judge Ramos determined that the FEMA map at issue in the *Tan Terra* was no map at all; it was just a map index.[74] Judge Ramos applied her experience in the *Tan Terra* case to the facts of this case and determined that WMTX's FEMA floodplain map was a reliable floodplain map that demonstrated that FEMA had studied the area of the Mesquite Creek Landfill and determined it to be outside of any 100-year floodplain.[75]

E. WMTX Not Only Met The Regulatory Requirements For Identifying Areas Within The 100-Year Floodplain, But Also Went Beyond The Applicable Requirements And Conducted Additional Flooding Analyses

Although a FEMA floodplain map alone is sufficient to demonstrate compliance with the applicable regulatory requirements, in this case the flooding analysis did not end there. As discussed above, TCEQ's rules prohibit solid waste disposal in a 100-year floodplain.[76] TCEQ's rules do not, however, prohibit other areas of a landfill from being located in a 100-year floodplain, if those areas are not areas of the landfill where waste

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70 *See* Appellants' Brief at 50.

71 *See* Appendix G at 27 (Tan Terra PFD) .

72 *See id.* at 40-41.

73 *See* Appellants' Brief Appendix M at 1.

74 *See* Appendix G at 42 (Tan Terra PFD) .

75 *See* Admin. R. Vol. 49 at 51 (Mesquite Creek PFD).

76 *See* 30 TEX. ADMIN. CODE § 330.56(f)(4)(B)(iii) .

will be disposed (e.g., internal facility roads, buffer zones, etc.). If any such non-waste-disposal area of the landfill will be located in the 100-year floodplain, then TCEQ's rules require the applicant to demonstrate that (1) the flow of the 100-year flood will not be restricted, (2) the temporary water storage capacity of the floodplain will not be reduced, and (3) waste will not be washed out of the landfill by floodwaters.[77]

Although no portion of the facility is or will be located within the 100-year floodplain, Mr. Graves also conducted an analysis demonstrating that the Mesquite Creek Landfill, when constructed as proposed in WMTX's application, would comply with requirements applicable to portions of a landfill that are permitted to be constructed within the 100-year floodplain. Indeed, these calculations demonstrate that the landfill will not restrict the flow of the 100-year storm as it passes through the landfill via Mesquite Creek, reduce Mesquite Creek's flood storage capacity, or result in a washout of solid waste from the landfill.[78] Thus, even assuming that a portion of the Mesquite Creek Landfill is located in the 100-year floodplain – which it is not – the applicable regulatory requirements for siting a portion of the landfill in a floodplain have been met.

Additionally, because the central portion of the site, where Mesquite Creek flows, is within the flood pool of the downstream Freedom Lake, Mr. Graves also ensured that the landfill would not reduce the storage capacity of the Freedom Lake flood pool; that the perimeter of the disposal areas – both existing and proposed – had sufficient freeboard

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[77] *See id.* § 330.301 (by its terms, this regulation applies only to sites "located in 100-year floodplains").

[78] *See* Admin. R. Vol. 10 T-3 at 158:8 to 159:14, 161:10 to 165:9, 169:18-22, 172:13-16 (Graves); Vol. 13 Ex. APP-200 at 49:10 to 50:4, 51:11-26 (Graves); Vols. 1, 4, and 5 at 159, 1813-14, 2108-10 (Ex. APP-202); *see also* Admin. R. Vol. 9 Doc. 49 at 51 (PFD).

extending above the flood pool; and that no waste disposal operations will occur within the flood pool.[79] Appellants suggest that the flood pool of Freedom Lake extends onto portions of the waste disposal area of the existing landfill.[80] However, Appellants fail to acknowledge the berm constructed along the perimeter of the existing landfill, adjacent to the edge of the waste disposal limits. As Mr. Graves discussed extensively in his testimony, this berm has been designed specifically to provide at least three feet of freeboard above the elevation of the Freedom Lake flood pool, ensuring that the flood pool will not encroach on any waste disposal area.[81]

Accordingly, WMTX not only met the regulatory requirements for a determination of areas within the floodplain associated with a 100-year frequency flood, but also went beyond the applicable requirements by conducting additional flooding analyses. Therefore, Findings of Fact 26.c, 33.b, 74, and 79, and Conclusions of Law 4, 6, 7, and 15 are legally correct, supported by substantial evidence, and are not arbitrary or capricious.

II. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT TCEQ'S FINDING THAT NATURAL DRAINAGE PATTERNS WILL NOT BE SIGNIFICANTLY ALTERED AS A RESULT OF DEVELOPMENT OF THE MESQUITE CREEK LANDFILL

TCEQ rules require an applicant to include in its application "analyses to demonstrate that natural drainage patterns will not be significantly altered as a result of the

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79 *See* Admin. R. Vol. 10 T-3 at 185:1-5, 195:11-14, 200:19 to 207:22 (Graves); Vol. 13 Ex. APP-200 at 49:6-23, 50:5 to 51:6, 51:11 to 52:7 (Graves); Vols. 1, 2, and 4 at 159, 998 n.7, 1011 n.10, 1813-14 (Ex. APP-202).

80 *See* Appellants' Brief at 5-6, 26.

81 *See* Vol. 13 Ex. APP-200 at 49:6-23, 50:5 to 51:6 (Graves)

proposed landfill development."[82] The requisite analyses are included in WMTX's application and demonstrate that natural drainage patterns will not be altered as a result of development of the Mesquite Creek Landfill.[83] In fact, the analyses demonstrate that the drainage features that WMTX will install around the landfill will lessen the potential for erosion and other alterations of drainage features as compared to the natural state existing prior to development of the landfill.[84]

In their second point of error, Appellants summarily and incorrectly claim that increasing the volume of stormwater runoff discharging at a single discharge point, point E, from 6.9 acre-feet ("***ac-ft***") to 12.1 ac-ft is *per se* significant and may result in a significant alteration of drainage patterns at some point downstream of the facility.[85] The proposed increase in stormwater runoff volume discharging from point E in the post-developed condition is an increase of 5.2 ac-ft above the 6.9 ac-ft discharging from that point in the natural condition. That is an increase of 75%. However, of the five discharge points proposed for the Mesquite Creek Landfill (points A through E), discharge point E will be discharging the *second smallest volume of water.*[86] For purposes of context and

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82 30 TEX. ADMIN. CODE § 330.56(f)(4)(A)(iv). Natural drainage patterns are the drainage patterns that existed before development of the landfill.

83 *See* Vol. 4 Ex. APP-200 at 1806-1973.

84 *See* Admin. R. Vol. 13 Ex. APP-200 at 48:6-12 (Graves); *see also* Vol. 10 T-4 at 293:23 to 294:6, 345:20 to 346:7, 346:14 to 347:8, 348:9-15, 352:10 to 353:3 (Graves).

85 The pre- and post-development runoff volumes for discharge point E are provided in Admin. R. Vol. 4 at 1820 (APP-202, Table 3.5.1-3).

86 *See* Admin. R. Vol. 4 at 1820 (Ex. APP-202, Table 3.5.1-3).

comparison, discharge point B will discharge 1,182 ac-ft, and discharge point A will discharge 400 ac-ft.[87]

Appellants' position – that the percentage increase in runoff volume at a single discharge point alone should be determinative of whether natural drainage patterns will be significantly altered – fails to recognize that runoff volume is one of many considerations that inform a stormwater analysis and that informed the analyses in WMTX's application. Moreover, applying Appellants' myopic position – that a 75% increase in the discharge volume at a single point is *per se* significant – doubling a volume even as small as a cup would constitute a significant alteration of natural drainage patterns under any circumstances, even if the rate and velocity of the increased discharge have been substantially reduced.

Not surprisingly, Appellants' approach is directly at odds with TCEQ's *Guidelines for Preparing a Surface Water Drainage Plan for a Municipal Solid Waste Facility* ("***Surface Water Guidelines***").[88] In its *Surface Water Guidelines*, TCEQ expressly recognizes that "[t]here is no clear-cut number *or percentage* of change that can be set to indicate a 'significant' change."[89] Rather, what constitutes a "significant alteration" is "a subjective term that cannot be defined as a specific, objective criterion."[90] Nevertheless, despite this clear guidance, Appellants maintain the additional 5.2 ac-ft of runoff that will

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87 *See id.*

88 Appellants' Brief Appendix G (also Admin. R. Vol. 13, Ex. APP-209).

89 *Id.* at 3, § 2.1 (emphasis added).

90 *Id.* at 3, § 2.1.1.

discharge from discharge point E is *per se* significant.[91] For the reasons set forth below, this increased volume of stormwater runoff is not significant and will not significantly alter natural drainage patterns.

A. The Increased Volume Of Stormwater Discharged From Point E Will Be Discharged At Rates And Velocities That Are *Less* Than Those That Occur Under Natural Drainage Conditions

Increased volumes of stormwater runoff resulting from the development of a landfill are not exceptional, given that the natural ground surface is being replaced by the above-grade portions of the landfill, which have elevated sidewalls and slopes and a nearly impermeable final cover that is designed to prevent the infiltration of precipitation.[92] Indeed, TCEQ's *Surface Water Guidelines* specifically recognize that, if the area draining stormwater to a specific discharge point is not reduced by developing the site as a landfill, then the volume of stormwater runoff discharging from that point would be expected to increase by 5% to 60% in the developed condition.[93] By extension, if the area draining to a specific discharge point is increased by developing the site as a landfill (which is not prohibited), then the volume discharging from that point in the developed condition may be expected to increase by greater than 60%.[94]

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91 *See, e.g.*, Appellants' Brief at 40.

92 *See, e.g.*, Admin. R. Vol. 10 T-3 at 71:22-25, 72:15-19 (Graves).

93 *See* Appellants' Brief Appendix G at 4, § 2.1.2 (also Admin. R. Vol. 13 Ex. APP-209); *see also id.* at 4 (noting that volumes "are a function of the area draining to a discharge point, as well as the amount of precipitation losses").

94 For this reason, Appellants' reliance on the range of expected volume increase provided in the *Surface Water Guidelines* is misplaced. The *Surface Water Guidelines* clearly note that the expected volume increase range of 5% to 60% is applicable only "*if* the drainage subarea *does not change* for a specific discharge point." *Id.* (emphasis added). The drainage subarea area for discharge point E is greater in the post-development condition. *See* Admin. R. Vol. 4 Ex. APP-202 at 1819, 1858.

Thus, the question is not whether stormwater runoff will increase as a result of landfill development, but how will the facility manage the increased stormwater volumes to ensure that "natural drainage patterns will not be significantly altered as a result of the proposed landfill development."[95] At the Mesquite Creek Landfill, increased volumes of stormwater runoff resulting from development of the expanded landfill will be managed through the use of detention ponds.[96] The facility's detention ponds have been designed to accommodate the calculated increases in stormwater runoff volumes – to detain those volumes and discharge them, via the site's drainage points, in a controlled, attenuated manner that will not significantly alter natural drainage patterns.[97]

Specifically with respect to discharge point E, the increased volume of stormwater discharged from the developed site will be discharged at a peak discharge rate and a maximum flow velocity that are *less* than those that occur at discharge point E under natural drainage conditions. In the natural (i.e., pre-landfill development) condition,[98] stormwater is being discharged at point E at a peak discharge rate of 43 cubic feet per second ("***cfs***").[99] The design of the detention ponds and other stormwater management features proposed for the expanded landfill will reduce this peak discharge rate by more

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95 30 TEX. ADMIN. CODE § 330.56(f)(4)(A)(iv).

96 *See* Admin. R. Vol. 10 T-3 at 75:5-24, 83:17 to 84:25, 99:5-25 (Graves); *id.* T-4 at 273:1 to 274:9, 294:7-17, 295:10-15, 297:3-16 (Graves).

97 *See id.* T-4 at 345:20 to 346:7 (Graves).

98 *See* Admin. R. Vol. 13 Ex. APP-200 at 47:13-26 (Graves) (explaining what constitutes "natural," "pre-development," and "post-development" drainage conditions); *see also* Admin. R. Vol. 10 T-3 74:17 to 75:4 (Graves).

99 *See* Admin. R. Vol. 4 at 1820 (Ex. APP-202, Table 3.5.1-2).

than half – from 43 cfs to 21 cfs.[100] Similarly, the maximum flow velocity for stormwater discharging from point E will be significantly reduced, from 4.25 feet per second ("***ft/s***") to 3.55 ft/s.[101] In terms of percentages, the peak discharge rate at point E will be reduced by 105% and the maximum flow velocity will be reduced by 20%.

Thus, while the volume of stormwater discharging at point E will increase following development of the expansion area, that increased stormwater will be detained by the facility's detention ponds and released at the facility boundary at attenuated rates and velocities that are substantially less than those that are occurring today and that have historically occurred in the natural drainage condition.[102] Contrary to Appellants' assertions, the use of detention ponds in this manner – to control stormwater runoff volumes and maintain or improve natural drainage conditions – is entirely consistent with the guidance provided by TCEQ in the agency's *Surface Water Guidelines*:

> A focus of a storm water management system design for a MSW facility should be to return the storm water flow to its predevelopment condition before it leaves the permit boundary—a goal that is also consistent with maintaining natural drainage patterns. *To achieve this goal, locate detention pond outlet structures and other velocity-dissipation devices upstream from the storm water discharge point to allow flow to return to the predevelopment condition at the permit boundary.*[103]

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100 *See id.*; *see also* Admin. R. Vol. 10 T-4 at 297:20 to 297:7 (Graves) (explaining that the rate of discharge leaving the facility at the discharge point is "the primary concern" when designing a stormwater drainage system for a landfill); *id.* at 346:14 to 347:8 (Graves) ("[T]he peak flow rate has been substantially reduced compared to the natural conditions."); *id.* at 352:22-24 (Graves) ("I have reduced the peak flows almost in half from the natural conditions to the post-development conditions."); *id.* T-7 at 981:6-23, 983:15-23 (Prompuntagorn).

101 *See* Admin. R. Vol. 5 at 1821 (Ex. APP-202, Table 3.5.1-5).

102 *See* Admin. R. Vol. 10 T-4 at 346:14 to 347:8 (Graves).

103 Appellants' Brief Appendix G at 5, § 2.1.3 (emphasis added).

As stated in the *Surface Water Guidelines*, "[t]he purpose of detention ponds in landfill drainage design is to accommodate and attenuate excess rainfall, and to provide a controlled release of that rainfall."[104]

Specifically with respect to increases in stormwater discharge volumes, the *Surface Water Guidelines* explicitly provide that one "[t]ypical method" for demonstrating "that *any* volume increase . . . is not 'significant'" is to "[d]emonstrate that the additional volume will be released at a *rate* that will not significantly affect the downstream receiving water body."[105] That is exactly what WMTX's application demonstrates. In their brief to this Court, Appellants disingenuously paraphrase this method of compliance as a demonstration "that any volume increase will not have significant downstream effect," selectively omitting the express provision that compliance may be achieved solely by reducing the rate of discharge.[106] The *Surface Water Guidelines* are clear that the use of detention ponds to accommodate increases in discharge volumes and to release those volumes at attenuated rates and velocities is an accepted method of demonstrating that natural drainage patterns will not be significantly altered as a result of development of the landfill.

Accordingly, by utilizing detention ponds to lessen discharge rates and velocities and improve the natural drainage condition at discharge point E, WMTX has demonstrated that the proposed increase in stormwater runoff volume discharging at point E will not

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104 *Id.* at 13, § 7.

105 *Id.* at 4, § 2.1.2 (emphasis added).

106 Appellants' Brief at 38.

significantly alter natural drainage patterns.[107] Mr. Graves's testimony on this issue was unequivocal: "*No significant impact. Yes, I'm confident.*"[108] Appellants fail to cite any evidence (and offered no witness of their own) to explain how discharging at rates and velocities that are substantially *lower* than those occurring in the natural drainage condition could significantly alter natural drainage patterns – drainage patterns that, in their natural state, are receiving waters at rates and velocities substantially *higher* than what will be discharged from point E following development of the landfill.

TCEQ's *Surface Water Guidelines* also provide that "the 'significantly altered' issue is best determined on a case-by-case basis and is one of professional judgment."[109] Appellants attempt to fault Mr. Graves for his use of engineering judgment in responding to certain of the questions and hypothetical scenarios posed by counsel for Appellants on cross-examination. While Appellants assert that various factors should inform Mr. Graves's professional judgment, it is clear that Appellants are seeking additional engineering calculations, not more informed engineering judgment. As the ALJ and Commission found, Attachment 6 to Part III of WMTX's application contains the requisite engineering calculations to demonstrate that natural drainage patterns will not be significantly altered as a result of the proposed landfill development.[110] For the reasons set

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107 *See* Admin. R. Vol. 13 Ex. APP-200 at 48:6-12 (Graves); *see also* Admin. R. Vol. 10 T-4 at 293:23 to 294:6, 346:14 to 347:8, 348:9-15, 352:10 to 353:3 (Graves); Appellants' Brief Appendix G at 4, § 2.1.2.

108 Admin. R. Vol. 10 T-4 at 347:9 to 348:15 (Graves); *see also id.* T-3 at 99:5-25 (Graves) (testifying that he has no concerns regarding the discharge of additional volume at point E); *id.* T-4 at 352:10 to 353:3 (Graves) (testifying that the discharge of additional volume at point E would have "no effect" on drainage patterns, and that the reduction in peak flows "would be beneficial").

109 Appellants' Brief Appendix G at 3, § 2.2.1.

110 *See* Admin. R. Vol. 9 Doc. 49 at 44-45 (PFD).

forth below, the additional engineering calculations that Appellants claim are lacking are not required for, nor properly part of, a demonstration of no significant drainage alterations.

B. TCEQ Rules And Precedent Require That The Determination Of Significant Alterations To Natural Drainage Patterns Be Made At The Permit Boundary, Not Off-Site

Appellants attempt to discredit WMTX's stormwater drainage analysis under a misguided theory that the analysis should have analyzed stormwater discharges from discharge point E at any given number of undetermined points at some undisclosed distance off-site and downstream of the facility's permit boundary. However, Appellants fail to offer any authority to support their theory.

The stormwater analysis in Attachment 6 to Part III of WMTX's application complies with all applicable regulatory requirements.[111] Extending the stormwater analysis beyond the scope of the analysis included in the application is not required by law or regulation and would not provide additional information that is of any use or reliability in determining compliance with the applicable regulatory requirement. Extending the analysis to some undefined point or points extending indefinitely downstream of the permit boundary opens the analysis up to influence by far too many variables – variables unrelated to the discharge from the facility – which renders the analysis virtually useless in answering the regulatory question at issue: Will natural drainage patterns "be significantly altered *as a result of the proposed landfill development*"?[112] Appellants contend that

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111 *See* Admin. R. Vol. 13 Ex. APP-200 at 43:1-10 (Graves).

112 30 TEX. ADMIN. CODE § 330.56(f)(4)(A)(iv) (emphasis added).

TCEQ cannot conclude that downstream natural drainage patterns will not be significantly altered if the analysis is limited to the characteristics of the discharge at the facility discharge point. However, as TCEQ has correctly determined, assessing the discharge at the discharge point is the most conservative (i.e., stringent) approach to determining whether downstream natural drainage patterns will be significantly altered. TCEQ requires the applicant to analyze its stormwater discharges at the facility's boundary, because it is at that point where the facility's discharges are at their peak rate and maximum velocity. Downstream, the capability of the discharge to alter the natural drainage pattern is mitigated by the flow dissipating over distance and commingling with downstream waters.

Additionally, prior determinations of TCEQ and SOAH hold that an analysis of stormwater discharges downstream of the facility's permit boundary (as opposed to at the permit boundary) is not relevant to any statutory or regulatory requirement applicable to WMTX's application. Specifically, as set forth below and as determined by the ALJ, the Commission has previously ruled that downstream, off-site analyses of stormwater drainage are not part of, nor relevant to, the "no significant alteration" demonstration required by 30 Tex. Admin. Code § 330.56(f)(4)(A)(iv).[113] That ruling has subsequently been recognized by SOAH and reaffirmed by the TCEQ Commissioners.

In their PFD in the *Blue Flats* case, the ALJs concluded that it may be appropriate to examine the potential off-site impacts to natural drainage patterns "beyond the permit

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113 *See* Admin. R. Vol. 9 Doc. 49 at 44 (PFD).

boundary" of a landfill.[114] When the TCEQ Commissioners considered the *Blue Flats* PFD, they specifically rejected the ALJs' proposed findings related to off-site analyses of stormwater drainage "because *Commission rules and precedent require that the determination of significant alteration be made at the permit boundary, not off site.*"[115]

SOAH later revisited the issue of off-site drainage analyses following the Commission's order in *Blue Flats*. In his PFD in the *North Texas Municipal Water District* case, the ALJ reviewed the *Blue Flats Order* and concluded that, in light of that order, "*calculations and analyses of off-site drainage patterns are wasted motion.*"[116] The ALJ's exclusion of off-site drainage analyses was affirmed by the TCEQ Commissioners when they considered the ALJ's PFD.[117] Notably, counsel for Appellants in this case, Mr. Dunbar, also testified as an expert engineer in the *North Texas Municipal Water District*

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114 Appendix J (*In the Matter of the Application of Blue Flats Disposal, L.L.C., for Proposed Permit No. MSW-2262*, SOAH Docket No. 582-98-1390, TNRCC Docket No. 98-0415-MSW, Proposal for Decision at 31 (Oct. 2, 2000) [hereinafter *Blue Flats PFD*]).

115 Appendix K (*An Order Denying the Application of Blue Flats Disposal, L.L.C., for Permit No. MSW-2262*, TNRCC Docket No. 98-0415-MSW, SOAH Docket No. 582-98-1390, at 8 ("Explanation of Changes to the ALJs' Proposed Findings of Fact and Conclusions of Law") (Jan. 2, 2001) (emphasis added) [hereinafter *Blue Flats Order*]).

116 *North Tex. Mun. Water Dist. PFD* at 29 & n.98 (emphasis added). Additionally, as explained by the ALJ in *North Texas Municipal Water District*, "[t]he *Blue Flats* Order, which requires demonstrations to be made at the permit boundary, can be understood in the context of the TCEQ's jurisdiction. The Commission has authority over the *permitted* area, and can require modifications of a proposed landfill to assure elimination of adverse impacts." *North Tex. Mun. Water Dist. PFD* at 31 (emphasis added). Requiring drainage assessments off-site at unknown or indeterminate locations would exceed the Commission's authority to "issue permits authorizing and governing the construction, operation, and maintenance of the solid waste facilities used to . . . dispose of solid waste under [Chapter 361]." TEX. HEALTH & SAFETY CODE § 361.061. *See also Blue Flats PFD* at 30 (Protestant, who retained Appellants' counsel in this case, Mr. Dunbar, as its expert, "argued that the effects of drainage beyond the permit boundary should not be considered, because the [TCEQ] has no enforcement authority beyond the boundary").

117 *See North Tex. Mun. Water Dist. Order* at 18 (FOF 105), 44 (COL 27).

case, taking the position that the applicant failed to make the no significant alteration demonstrations at the permit boundary, as required.[118]

Appellants now attempt to collaterally attack the Commission's longstanding precedent in *Blue Flats* and *North Texas Municipal Water District*, but the appropriate time to challenge the validity of these decisions was at the time the decisions were made, not in a contested case hearing regarding a different permit application almost ten years later.[119] Likewise, the appropriate time to challenge the no significant alterations rule itself has long passed.[120] In any event, as discussed above, "[a]n agency's interpretation of its own rules is entitled to deference unless it is plainly erroneous."[121] Additionally, an agency's construction of a statute that it is charged with enforcing is entitled to deference in the courts, so long as the interpretation is reasonable and does not conflict with the statute's plain language.[122] Appellants offer no evidence that the rule as promulgated and interpreted by TCEQ is unreasonable or in conflict with any statute's plain language.

Furthermore, Appellants' arguments that the Commission's *Surface Water Guidelines* represent a departure from the Commission's holding in *Blue Flats* and *North Texas Municipal Water District* – that the demonstration of no significant drainage

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118 *See North Tex. Mun. Water Dist. PFD* at 29-30.

119 *See* 30 TEX. ADMIN. CODE §§ 80.272 (requiring the filing of a motion for rehearing as a prerequisite for appeal within 20 days after receiving notice of the decision or order), 80.275 ("A person affected by a final decision or order of the commission may file a petition for judicial review within 30 days after the decision or order is final and appealable."). In fact, even the case relied on by Appellants for the proposition that the *Blue Flats* and *North Texas Municipal Water District* decisions are not "in harmony" with the relevant statute is a direct appeal of an agency *rulemaking*. *See* Appellants' Brief at 40 (quoting *Gulf Coast Coal. of Cities v. PUC*, 161 S.W.3d 706, 711 (Tex. App.—Austin 2005, no pet.)).

120 *See* 30 TEX. ADMIN. CODE § 20.3; TEX. GOV'T CODE § 2001.035.

121 *Gulf Coast Coal. of Cities*, 161 S.W.3d at 712.

122 *See Stanford v. Butler*, 181 S.W.2d at 273; *Borden, Inc. v. Sharp*, 888 S.W.2d at 620.

alterations is to be made at the facility's permit boundary (not off-site) – are not supported by any authority. First and foremost, it must be recognized that the *Surface Water Guidelines* expressly provide that the agency's guidance "is *not* intended to be used as rules or policy and does *not* include all acceptable practices."[123] The agency's guidance was developed to expound on Commission precedent, not to change it (which non-binding guidance could not accomplish in any event). Moreover, the agency's *Surface Water Guidelines* in no way purport to depart from the Commission's holding that the demonstration of no significant drainage alterations is to be made at the facility's permit boundary, not downstream from the facility. Indeed, the guidelines provide additional support for the conclusion that the point of discharge from the facility to the downstream receiving channel *at the facility's permit boundary* is the critical point for purposes of determining whether a facility's stormwater discharge will significantly alter natural drainage patterns.[124]

For the foregoing reasons, an analysis of stormwater discharges downstream of the facility's permit boundary is not relevant to any statutory or regulatory requirement applicable to WMTX's application. Accordingly, such an analysis is not required to

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[123] Appellants' Brief Appendix G at 2, § 1.1 (emphasis added); *see also* 30 TEX. ADMIN. CODE § 330.6 (providing that MSW technical guidelines "are not mandatory" and "shall not be used to extend the scope or increase the stringency" of TCEQ's rules in Chapter 330).

[124] *See* Appellants' Brief Appendix G at 5, § 2.1.3 ("Another important way to show that there is no significant alteration of natural drainage patterns is to demonstrate that the velocity of the flow exiting the site *at the discharge point along the permit boundary* does not cause an increase in erosion. . . . Typically, the postdevelopment geometry of the drainage way *at the permit boundary* . . . should be consistent with the predevelopment condition. Therefore, if the postdevelopment flow rate is equal to or less than the predevelopment flow rate *at the discharge point*, the postdevelopment velocity will also be less. . . . A focus of a storm water management system design for a MSW facility should be to return the storm water flow to its predevelopment condition before it leaves *the permit boundary* . . . . To achieve this goal, . . . allow flow to return to the predevelopment condition *at the permit boundary*.") (emphasis added).

demonstrate that WMTX's application "complies with all applicable statutory and regulatory requirements."[125]

C. WMTX's Demonstration Of No Significant Alterations To Natural Drainage Patterns Included Multiple Discharge Factors

Appellants erroneously contend that WMTX's demonstration that natural drainage patterns will not be significantly altered is flawed because it purportedly relies on a "single 'peak' discharge rate."[126] As proved by the record evidence, there is simply no support for Appellants' repeated misrepresentations that peak discharge rates were the sole factor in WMTX's demonstration that natural drainage patterns will not be significantly altered by expansion of the Mesquite Creek Landfill. It is undisputed that, in addition to peak discharge rates, WMTX's application contains calculations and analyses of runoff volumes, flow velocities, and the timing of peak runoff conditions in the natural, pre-development, and post-development drainage conditions.[127]

As Mr. Graves testified, he considered runoff volumes, velocities, and timing, in addition to peak discharge rates and other factors, in reaching his expert determination that expansion of the landfill, as proposed in WMTX's application, would not significantly alter natural drainage patterns.[128] The TCEQ Executive Director's expert agreed with this

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125 30 TEX. ADMIN. CODE § 55.210(b).

126 Appellants' Brief at 34.

127 *See* Admin. R. Vol. 4 at 1820-21 (Ex. APP-202).

128 *See* Admin. R. Vol. 13 Ex. APP-200 at 47:6-11, 48:6-12 (Graves); Admin. R. Vol. 10 T-3 at 100:8-14 (Graves).

determination.[129] The ALJ agreed with this determination.[130] There is no testimony in the record to the contrary.

Furthermore, while WMTX unquestionably analyzed parameters other than discharge rates to demonstrate that natural drainage patterns will not be significantly altered, Appellants' claims in this regard are contrary to TCEQ's *Surface Water Guidelines*. As noted above, that guidance specifically states that one of the "[t]ypical methods" for demonstrating that an increase in stormwater runoff is not "significant" is to design the landfill such that the additional stormwater volume will be released from the landfill at a rate that will not significantly alter natural drainage patterns.[131] As set forth above, WMTX's proposed design for the expanded Mesquite Creek Landfill utilizes this "typical method" for controlling increased stormwater volumes by designing detention ponds to accommodate such volumes, routing stormwater runoff through those detention ponds, attenuating the runoff, and releasing that runoff at the facility boundary at rates – *and velocities* – that are lower than those occurring in the natural drainage condition.

For the foregoing reasons, Findings of Fact 75, 83.c, and 84, and Conclusions of Law 6, 7, and 15 are supported by substantial evidence and are not arbitrary or capricious.

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129 *See* Admin. R. Vol. 15 Ex. ED-3 at 21:22-31, 22:19-23 (Prompuntagorn).

130 *See* Admin. R. Vol. 9 Doc. 49 at 44-45 (PFD).

131 Admin. R. Vol. 13 Ex. APP-209 at 4, § 2.1.2.

III. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT TCEQ'S FINDINGS REGARDING THE GEOLOGIC CHARACTERISTICS OF THE STRATA BENEATH THE MESQUITE CREEK LANDFILL

A. The Horizontal Hydraulic Conductivity Of Stratum IV Has Been Tested And Those Test Results Are Reliable

Despite their prior attempts in the proceedings below to rely upon the horizontal hydraulic conductivity of Stratum IV to support their misconception of the uppermost aquifer, Appellants assert on appeal a contradictory claim that the horizontal hydraulic conductivity of Stratum IV is unknown. That claim, too, lacks merit.

It is undisputed that the Geology Report in the application includes the results of "slug tests" that were conducted beneath the existing facility to determine the horizontal hydraulic conductivity of Stratum IV, a geologic layer that runs beneath the existing landfill and the adjacent expansion area.[132] Contrary to Appellants' assertions, the data from those tests is reliable and can be applied equally to the existing site and the proposed expansion area.

To the extent that there were unresolved questions regarding the reliability of any testing of Stratum IV, those questions ultimately concerned groundwater elevation measurements, not measurements of hydraulic conductivity.[133] Those questions concerned the source of the water in certain piezometers installed prior to WMTX's previous application for Permit No. MSW-66A; specifically, whether the water in the piezometers came from a source other than Stratum IV (e.g., infiltration from Stratum III or from the

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[132] *See* Admin. R. Vol. 2 at 1052-53, Vol. 3 at 1085, 1426-29, 1438-45 (Ex. APP-202); Admin. R. Vol. 11 T-5 and T-6 at 529:9-22, 677:2-6 (Meaux); *see also* Admin. R. Vol. 4 at 1733 (Ex. APP-202); Admin. R. Vol. 14 Ex. APP-500 at 12:4-11 (Gross).

[133] *See* Admin. R. Vol. 11 T-6 at 677:7-21 (Meaux); Admin. R. Vol. 12 T-7 at 906:18 to 909:8 (Clark).

surface) due to improper construction of the piezometers or damage to the above-ground portions of the piezometers.[134] Obviously, water that does not come from Stratum IV should not be relied upon to determine whether there is any water in Stratum IV.[135] Because the source of the water in these Stratum IV piezometers is unknown, the water in the piezometer borehole is not a reliable measure of the *presence or elevation* of groundwater in Stratum IV.

However, as WMTX's expert geologist, Janet Meaux, testified, *any* source of water may be used for purposes of determining the horizontal hydraulic conductivity of Stratum IV.[136] The source of the water does not affect the reliability of the measurement.[137] A "slug test" is simply a mechanical means of placing water in a borehole under pressure and forcing that water out of the borehole and into the surrounding stratum.[138] The resulting measure of the stratum's horizontal hydraulic conductivity is wholly unrelated to the source of the water or whether the stratum naturally contains any water at all. As Ms. Meaux testified, "[w]ater is water" for purposes of conducting slug tests and measuring horizontal hydraulic conductivity.[139] A dry stratum containing no groundwater, such as Stratum IV, can be tested for its horizontal hydraulic conductivity simply by adding water to a borehole advanced into the stratum and conducting a slug

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134 *See, e.g.*, Admin. R. Vol. 11 T-5 at 533:11-21, 538:16 to 540:22, 553:1-9 (Meaux); *see also id.* at 509:17 to 511:17, 571:3 to 572:15 (Meaux); Admin. R. Vol. 12 T-7 at 908:11 to 909:8 (Clark).

135 *See* Admin. R. Vol. 11 T-6 at 677:7-21 (Meaux); Admin. R. Vol. 12 T-7 at 908:11 to 909:8 (Clark).

136 *See* Admin. R. Vol. 11 T-6 at 675:24 to 676:16 (Meaux) (testifying that the source of the water used to conduct a slug test for horizontal hydraulic conductivity does not matter); *id.* T-5 at 571:3 to 572:1 (Meaux) (testifying that, for purposes of measuring hydraulic conductivity, "[w]ater is water").

137 *See id.* T-6 at 676:17 to 677:1 (Meaux).

138 *See id.* T-6 at 653:3-25 (Meaux); Admin. R. Vol. 12 T-7 at 879:3-10 (Clark).

139 Admin. R. Vol. 11 T-5 at 571:3 to 572:1 (Meaux); *see also id.* T-6 at 675:24 to 677:1 (Meaux).

test.[140] All other testifying expert geologists (including Appellants') agreed that the Stratum IV slug tests were properly performed in accordance with TCEQ's rules.[141]

Because Ms. Meaux questioned the source of water found in the piezometers that were previously installed, at least partially, within Stratum IV, she did not rely upon groundwater elevation data obtained from those piezometers.[142] She did, however, properly rely on horizontal hydraulic conductivity data obtained from slug tests conducted in those same piezometers, because the source of the water used to conduct the slug tests is immaterial to the reliability of the test data.[143]

In an effort to support their claim that the Stratum IV hydraulic conductivity data are unreliable, Appellants selectively quote the cross-examination testimony of Ms. Meaux. Initially in her cross-examination, Ms. Meaux admittedly confused the concepts of groundwater elevation measurements and measurements of hydraulic conductivity. And if all one were to read was the few snippets of her testimony that Appellants quote in their brief, then one may have questions regarding the degree to which the Stratum IV hydraulic conductivity data are reliable. However, while Ms. Meaux may have misspoke a time or two early on in cross-examination, she corrected herself later in her testimony on cross:

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140 *See id.* T-6 at 675:24 to 677:1 (Meaux).

141 *See* Admin. R. Vol. 12 T-8 at 1100:9-14 (Williamson) (testifying that the slug tests "meet the rules – the methods that are outlined in the rules"); Admin. R. Vol. 11 T-6 at 830:5-10 (Clark) (testifying that the slug tests "were properly performed").

142 *See id.* T-5 at 509:17 to 511:17 (Meaux).

143 *See id.* T-6 at 677:2-6 (Meaux) (testifying that the slug tests that were conducted in Stratum IV tested the horizontal hydraulic conductivity of only Stratum IV beneath the Mesquite Creek Landfill); *see also id.* T-5 at 533:11-21, 538:16 to 540:22, 571:3 to 572:1 (Meaux) (testifying that the horizontal hydraulic conductivities for Stratum IV listed in the application "do represent . . . the transmissivity of the sediments").

A: . . . I think *the slug test[s] of those three piezometers, they represent the connectivity of the unit.* The question is where the water came from that was slug tested. Is it from Stratum IV?

. . .

A: I said that *the slug test[s] did give us the hydraulic connectivity of the unit tested.* The question is where the water came from that was used for the slug test.

. . .

Q: . . . We are not now sure whether horizontal hydraulic conductivities for Stratum IV were determined. Correct?

A: Well, *I said that the test identified the hydraulic conductivity.* The question is where the water came from.

. . .

Q: . . . So all of the horizontal hydraulic conductivity numbers in this application that are assigned to Stratum IV, we should consider as unreliable. Correct?

A: Well, again, *they do represent the transmissivity of the sediments.* We just don't know where the water came from that was used in the tests.[144]

The foregoing cross-examination testimony of Ms. Meaux was also consistent with her subsequent rebuttal testimony.[145] Accordingly, whereas Appellants attempt to prevail through selective quotations and omissions, when the relevant testimony of Ms. Meaux is considered in its entirety, her expert opinion is clear: The horizontal hydraulic conductivity test results from Stratum IV are reliable. Furthermore, under substantial evidence review, even if the Court were to find Ms. Meaux's testimony conflicting, the Court still should affirm the relevant TCEQ findings.[146]

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144 Admin. R. Vol. 11 T-5 at 533:11-21, 539:1-9, 540:15-22 (Meaux) (emphasis added); *see also id.* at 571:3 to 572:1 (Meaux).

145 *See id.* T-6 at 676:22 to 677:6 (Meaux).

146 *See Office of Pub. Util. Counsel v. PUC*, 185 S.W.3d 555, 568 (Tex. App.—Austin 2006, pet denied) ; *see also H.G. Sledge, Inc. v. Prospective Inv. & Trading Co.*, 36 S.W.3d 597, 602 (Tex. App.—Austin 2000, pet denied) ("[T]he proper test is whether the evidence in its entirety is sufficient that reasonable minds could have reached the conclusion that the agency must have reached . . . . The evidence

Moreover, when considering Appellants' arguments regarding the Stratum IV horizontal hydraulic conductivity data, it should be remembered that in their brief Appellants rely upon *Citizens Against Landfill Location* for the proposition that

> the purpose of a contested-case hearing is not to verify whether the application is administratively and technically complete, but rather to determine whether the substance of the information provided in the application can fulfill the statutory purpose of safeguarding the health, welfare, and physical property of the people and protecting the environment.[147]

Yet, as they pertain to horizontal hydraulic conductivity, Appellants arguments concern one subsection of one rule that requires one geologic test on one sample from one geologic stratum.[148] Appellants fail to account for the countless other geologic tests that were conducted, the reams of geologic data in WMTX's application, and the remainder of Ms. Meaux's testimony, all of which demonstrate unequivocally that the geology beneath the site was properly characterized and that the groundwater monitoring system designed for the landfill will be protective of human health and the environment.[149] Even assuming, *arguendo*, that the application fails to contain a reliable test of Stratum IV's horizontal hydraulic conductivity, Appellants cannot reasonably claim that the absence of this single test result negates WMTX's demonstrative of protectiveness. Indeed, Ms. Meaux testified

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in the record may actually weigh by a preponderance against the agency's decision, yet satisfy the substantial evidence standard."); *Collins v. Tex. Nat. Res. Conserv. Comm'n*, 94 S.W.3d 876, 882 (Tex. App.—Austin 2002, no pet.) (holding that a court should affirm the agency's decision "if there is substantial evidence in the record of any permissible ground" for the decision).

147 *Citizens Against Landfill Location v. TCEQ*, 169 S.W.3d 258, 272 (Tex. App.—Austin 2005, pet. denied); *see* Appellants' Brief at 23; *cf. Office of Pub. Util. Counsel*, 185 S.W.3d at 567 ("'At its core, the substantial evidence rule is a reasonableness test or a rational basis test'; if the order is reasonable, we do not concern ourselves with its correctness.") (quoting *City of El Paso v. PUC,* 883 S.W.2d at 185) .

148 *See* 30 TEX. ADMIN. CODE § 330.56(d)(5)(B)(i) .

149 *See, e.g.*, Admin. R. Vol. 2 at 1012-58, Vol. 3 at 1064-1725 (Ex. APP-202); Admin. R. Vol. 14 Ex. APP-400 at 8-36 (Meaux); Admin. R. Vol. 11 T-6 at 678:14-24 (Meaux).

that a measure of Stratum IV's horizontal hydraulic conductivity is immaterial when determining whether any portion of the uppermost aquifer extends into Stratum IV, as Appellants contend.[150]

B. Samples Of Stratum IV Beneath The Existing Facility Are Representative Of Stratum IV Beneath The Expansion Area

Appellants contend that, even if the horizontal hydraulic conductivity data in the application is reliable – which it is – WMTX should have also tested the horizontal hydraulic conductivity of Stratum IV beneath the proposed expansion area. Additional testing of Stratum IV was neither necessary nor required by the applicable rules or sound geologic principles.

While the Stratum IV horizontal hydraulic conductivity data in the application were derived from testing beneath the site of the existing landfill, the record demonstrates that the characteristics of Stratum IV are consistent across the entire site, from the existing facility to the proposed expansion area.[151] Indeed, Appellants' own witness, Dr. Clark, testified that he would not expect the unweathered portion of the Lower Taylor Group (i.e., Stratum IV)[152] to change from one location to another.[153] Furthermore, the applicable regulatory requirement requires testing only of the geologic "soil layer or *stratum*" itself, not any particular area of the landfill, and requires only "*one sample* from each soil layer

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150 *See* Admin. R. Vol. 11 T-6 at 674:12 to 675:23 (Meaux).

151 *See* Admin. R. Vol. 2 at 1036-37, 1043, 1044 (Ex. APP-202); Vol. 14 Ex. APP-400 at 23:19-27, 25:16-27, 26:15 to 27:2 (Meaux); *id.* Ex. APP-500 at 10:24 to 11:2 (Gross).

152 *See* Admin. R. Vol. 11 T-5 at 470:5-7 (Meaux); *id.* T-6 at 838:16-19 (Clark).

153 *See* Admin. R. Vol. 11 T-6 at 855:22 to 856:4, 860:11-17 (Clark).

or stratum that will form the bottom and side of the proposed excavation."[154] Specifically for purposes of horizontal hydraulic conductivity – the only geologic test at issue – the tested sample must only "*represent* the sidewall" of the excavation.[155]

In parts of the expansion area, Stratum IV will form the bottom and side of the proposed excavation and, as set forth above, Stratum IV was tested. Indeed, WMTX's application exceeds the applicable regulatory requirement in that it includes horizontal hydraulic conductivity test results from not one, but three slug tests conducted in three separate Stratum IV piezometers.[156] That the tests were conducted on Stratum IV samples obtained from the site of the existing facility is immaterial given the undisputed record evidence noted above that samples of Stratum IV obtained from the site of the existing facility would be representative of Stratum IV beneath the adjacent expansion area. Additionally, TCEQ's rules provide that "[p]reviously prepared documents may be submitted" to demonstrate that the requisite geologic testing has been conducted.[157]

C. No Portion Of Stratum IV Should Be Considered Part Of The Uppermost Aquifer

Appellants also claim that the "upper portion" of Stratum IV beneath the Mesquite Creek Landfill may be part of the uppermost aquifer at the site. No portion of Stratum IV, however, is part of the uppermost aquifer beneath the Mesquite Creek Landfill. There is no evidence in the record to suggest that Stratum IV, or any portion thereof, meets the regulatory definition of an "aquifer" – that it is "capable of yielding *significant quantities*

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154 30 TEX. ADMIN. CODE § 330.56(d)(5)(B)(i) (emphasis added).

155 *Id.* § 330.56(d)(5)(B)(ii) (emphasis added).

156 *See* Admin. R. Vol. 2 at 1052, Vol. 3 Ex. App-at 1085 (Ex. APP-202).

157 30 TEX. ADMIN. CODE § 330.56(d) .

of groundwater to wells or springs."[158] The record evidence demonstrates just the opposite – that Stratum IV is not an aquifer per the applicable regulatory definition, or any reasonable definition of the term "aquifer."[159] Stratum IV is not capable of yielding *any* groundwater, much less *significant quantities* of groundwater.

Appellants contend that it was necessary to install monitoring wells screened in Stratum IV beneath the expansion site in order to further confirm the conclusion reached by WMTX's expert geologist, Ms. Meaux, and other geologists before her, that Stratum IV is not a water-bearing unit.[160] Such an assertion is patently false and contrary to the overwhelming evidence in the record and fundamental principles of groundwater science.

There is nothing to gain – no scientific uncertainty to resolve – from additional investigations of Stratum IV. There is no need to install piezometers or monitoring wells in Stratum IV to demonstrate what the record already shows: Stratum IV does not transmit groundwater.[161] With one limited and minor exception, all 24 soil borings that were advanced into Stratum IV in the course of the subsurface investigation of the proposed expansion area showed no indication of *any* water in Stratum IV, or *any* evidence that

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158 *Id.* § 330.2(6) (emphasis added) .

159 *See, e.g.,* Admin. R. Vol. 2 at 1051, Vol. 4 at 1733 (Ex. APP-202); Vol. 15, Ex. ED-8 at 4:7-10 (Williamson); Admin. R. Vol. 12 T-8 at 1105:5-10 (Williamson).

160 *See* Appellants' Brief at 46-47.

161 *See* Admin. R. Vol. 11 T-6 at 671:16 to 672:1 (Meaux) ("We had no indications that [Stratum IV] would yield groundwater whatsoever, so I would not install piezometers" in that stratum.); *id.* T-5 at 509:1-16 (Meaux) ("There was no indication of water flowing in Stratum IV or any indications of water movement in Stratum IV."); *id.* at 512:10-17 (Meaux) (testifying that GeoSyntec's geologic investigation of the proposed expansion area did not show any evidence of water-bearing fractures in Stratum IV); *id.* at 513:15-16 (Meaux) ("There was no evidence of water movement in Stratum IV."); *id.* at 552:12-13 (Meaux) (testifying that there was no water noted in the boring logs for any of the fractures identified in Stratum IV); *id.* at 552:25 to 556:3 (Meaux) (explaining that it was "pretty clear" from the boring logs that Stratum IV would not convey groundwater).

Stratum IV would transmit groundwater.[162] In order for groundwater to exist in Stratum IV, even in theory, groundwater must travel vertically downward, past the interface of Stratum III and Stratum IV, where groundwater is monitored at the facility and known to exist, and into Stratum IV.[163] If movement of groundwater from Stratum III into Stratum IV were occurring, one would reasonably expect to find evidence of it in the boring logs, which penetrated through Stratum III and into Stratum IV. However, none of the 24 borings showed evidence of such groundwater movement.[164]

The 24 borings also showed "a very, very small amount" of fractures in Stratum IV, indicating that Stratum IV has little, if any, ability to transmit groundwater.[165] Moreover, none of the fractures identified in Stratum IV yielded any evidence of groundwater movement, further confirming that Stratum IV would not be expected to yield *any*

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[162] *See id.* T-5 at 509:1-16 (Meaux) ("There was no indication of water flowing in Stratum IV or any indications of water movement in Stratum IV."); *id.* at 513:15-16 (Meaux) ("There was no evidence of water movement in Stratum IV."); *id.* at 552:25 to 556:3 (Meaux) (explaining that it was "pretty clear" from the boring logs that Stratum IV would not convey groundwater); *id.* T-6 at 670:21 to 671:3 (Meaux) (testifying that the 24 borings yielded "no evidence" that Stratum IV may be transmitting groundwater); Admin. R. Vol. 12 T-8 at 1100:15-20 (Williamson).

The lone exception was a single boring that indicated one six-inch wet spot in the Stratum IV bedrock, approximately 72.5 feet below the interface of Stratum III and Stratum IV. *See id.* T-7 at 881:17-20, 915:12 to 917:13 (Clark); *id.* T-8 at 1100:15-20 (Williamson); Admin. R. Vol. 3 at 1282 (Ex. APP-202). A review of the log for that boring proves that the identified wet spot was isolated from above by 72.5 feet of dry bedrock that showed no evidence of groundwater. *See* Admin. R. Vol. 3 at 1280-82 (Ex. APP-202). A single, isolated occurrence of a six-inch wet spot 72.5 feet below dry bedrock in Stratum IV provides no support for Appellants' claim that Stratum IV may transmit groundwater. *See, e.g.*, Admin. R. Vol. 12 T-8 at 1098:9-10 (Williamson) ("[T]here's no communication between Stratum III and Stratum IV."); *id.* at 1110:7-14 (Williamson) (testifying that groundwater does not appear to be moving from Stratum III into Stratum IV); Admin. R. Vol. 11 T-6 at 844:15-25 (Clark) (agreeing that fractures that are isolated in a geologic unit would not be expected to transmit water).

[163] *See* Admin. R. Vol. 11 T-5 at 505:17-19, 520:8-15, 534:15 to 535:3, 555:4-17, 557:20-23, 562:20-21 (Meaux); *id.* T-6 at 668:11-17, 669:19-23, 674:12 to 675:23 (Meaux); Admin. R. Vol. 12 T-8 at 1110:7-14 (Williamson); Admin. R. Vol. 11 T-6 at 842:25 to 843:16 (Clark).

[164] *See* sources cited *supra* note 162.

[165] Admin. R. Vol. 11 T-5 at 473:23-25 (Meaux); *see also id.* at 474:3-6, 474:24-25 (Meaux); Admin. R. Vol. 2 at 1037 (APP-202); *cf.* Admin. R. Vol. 11 T-6 at 667:13-14, 668:4-6 (Meaux) (testifying that the geologic investigation revealed "a lot of vertical to high-angle fractures in Stratum III").

groundwater to wells or piezometers.[166] Additionally, the samples of Stratum IV obtained from the geological investigation showed no signs of oxidation or coloring that would indicate that groundwater has historically moved through this stratum.[167]

Appellants' demand for piezometers in Stratum IV indicates a fundamental misunderstanding of the stepwise process of a groundwater investigation. The first step in that process is to conduct a soil boring investigation. If, and only if, the soil borings reveal evidence of groundwater or the potential for groundwater movement should the next step be taken, which is to install piezometers in an effort to confirm the presence of groundwater.[168] With respect to the subsurface investigations conducted for purposes of WMTX's application, whereas the soil borings advanced at the site showed evidence of groundwater or the hallmarks of groundwater movement in Stratum III, those same borings showed *no* evidence of groundwater or groundwater transmittal in Stratum IV.[169]

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166 *See id.* T-5 at 512:10-17 (Meaux) (testifying that the geologic investigation "found no water bearing fractures in Stratum IV"); *id.* at 552:12-13, 23-25 (Meaux) (explaining that, while there are fractures in Stratum IV, "there was no indication of water at all" in those fractures); Admin. R. Vol. 12 T-8 at 1088:4-11, 1098:12-17 (Williamson) (testifying that he knows that groundwater doesn't move in the fractures in Stratum IV "[b]ecause none of the boring logs showed any water" in Stratum IV); *see also id.* at 1098:10-11 (Williamson) ("There may be fractures [in Stratum IV], but that doesn't mean that groundwater moves through them.").

167 *See* Admin. R. Vol. 11 T-5 at 489:25 to 490:1-8, 16-23 (Meaux) (explaining that color changes are evidence of oxidation – that the stratum was exposed to water or air – and that "there was no color change observed [in Stratum IV], indicating that there was no oxygen or air that was in contact" with Stratum IV); *see also id.* at 485:6-8 (Meaux) ("There was much less evidence of weathering in the Stratum IV samples we observed than the Stratum III [samples].").

168 *See id.* at 528:24 to 529:4 (Meaux).

169 *See id.* T-6 at 670:21 to 671:7 (Meaux) (testifying that GeoSyntec's geologic investigation yielded "no evidence" that Stratum IV may be transmitting groundwater, but did yield "clear evidence" that Stratum III was transmitting groundwater); *id.* T-5 at 560:24 to 561:7, 562:25 to 563:3 (Meaux) (testifying that Stratum III had indications of groundwater, whereas "Stratum IV was dry"); Admin. R. Vol. 12 T-8 at 1088:4-11, 1098:21-22 (Williamson) ("It appears that groundwater prefers to move through Stratum III.").

Because the soil borings indicated the presence of groundwater in Stratum III, WMTX's experts took the second step in the groundwater investigation process and installed piezometers in that stratum where the borings indicated that groundwater was or may be present.[170] By contrast, the soil borings did not indicate the presence of groundwater in Stratum IV. Therefore, the investigation for groundwater in this stratum properly ended at step one. Whereas the evidence indicated that, if piezometers were installed in Stratum III, those piezometers would ultimately yield water, the evidence for Stratum IV indicated that the installation of piezometers in that stratum would be a futile exercise. Indeed, even TJFA's own witness, Dr. Clark, appeared to view the installation of piezometers in Stratum IV as more of an experiment than a necessity: "I'd put them in . . . just to give it a try."[171]

WMTX does not dispute that a few of its boring logs indicate that some fractures were encountered at depth within Stratum IV. However, the presence alone of such deep fractures – isolated from above by a significant expanse of dry bedrock showing no evidence of groundwater – does not render Stratum IV an aquifer.[172] Futhermore, such

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170 *See* Admin. R. Vol. 11 T-5 at 561:24 to 562:4, 563:2-3, 563:12-13 (Meaux) ("I screened [the Stratum III piezometers] with my best indication where I would encounter groundwater."); *see also id.* at 505:17-19, 514:14-16, 535:11-13, 565:2-15 (Meaux) (explaining that some Stratum III borings had no indications of water when they were drilled, but piezometers were installed in those locations and screened at the base of Stratum III where the boring logs indicated water would be moving).

171 Admin. R. Vol. 12 T-7 at 906:9-10 (Clark); *see also id.* at 895:13-20 (Clark) (testifying that he would put one monitoring well in Stratum IV to "just give something in Stratum IV here a chance, give it a try and see if it works"); Admin. R. Vol. 11 T-6 at 823:12-18, Vol. 12, T-7 at 906:2-17 (Clark) (confirming that, no matter what the project is, or what the regulations require, Dr. Clark always wants more information).

172 *See, e.g.*, Admin. R. Vol. 11 T-6 at 844:15-25 (Clark) (agreeing that fractures that are isolated in a geologic unit would not be expected to transmit water).

deep fractures provide no support for Appellants' claim that the *upper* portion of Stratum IV is part of the uppermost aquifer at the site.

Regarding this very claim, the testimony of the TCEQ Executive Director's expert geologist, Mr. Williamson, was unequivocal and unmistakable. Responding to a question from counsel for TJFA inquiring whether any portions of Stratum IV should be considered part of the uppermost aquifer, Mr. Williamson explained, as follows, that no portion of Stratum IV comprises any part of the uppermost aquifer beneath the Mesquite Creek Landfill: "[T]here's no communication between Stratum III and Stratum IV. There may be fractures, but that doesn't mean groundwater moves between them."[173]

Because bedding planes, fractures, and seams are prevalent at the base of Stratum III, the lower reaches of Stratum III are orders of magnitude more permeable in the horizontal direction than Stratum IV is in the vertical direction.[174] Because of this difference in permeability, and because the Stratum III/IV contact is at a gradient beneath the site, groundwater will *always* travel laterally above and along the Stratum III/IV contact rather than vertically across the contact and into Stratum IV.[175] In fact, even

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[173] Admin. R. Vol. 12 T-8 at 1098:9-11 (Williamson); *see also id.* at 1110:7-14 (Williamson) (testifying that groundwater does not appear to be moving from Stratum III into Stratum IV). Even if Stratum IV or any portion thereof were to be considered an aquifer – a claim which is entirely without support – Stratum IV would also have to be "hydraulically interconnected" with Stratum III to be considered part of the "uppermost aquifer." 30 TEX. ADMIN. CODE § 330.2(158); *see also* Admin. R. Vol. 14 Ex. APP-400 at 27:22 to 28:3 (Meaux) (testifying that Stratum III is not hydraulically interconnected to any underlying aquifer).

[174] *See* Admin. R. Vol. 2 at 1037, 1052-53, Vol. 3 at 1188-289 (Ex. APP-202); Admin. R. Vol. 11 T-5 at 514:4-23 , 535:11-15, 541:14-20, 561:3-7 (Meaux).

[175] *See* Admin. R. Vol. 11 T-6 at 669:4-23 (Meaux) (explaining that "gradient will take [groundwater] along the Stratum III/IV contact, which is typically at a slope"); *id.* at 675:11-23 (Meaux) (testifying that groundwater will always choose to flow along the interface of Stratum III and IV instead of across it); *see also* Admin. R. Vol. 12 T-8 at 1098:21-22 (Williamson) ("It appears that groundwater prefers to move through Stratum III.").

TJFA's geologist, Dr. Clark, testified that it was his understanding that groundwater moves laterally along the Stratum III/IV contact beneath the landfill.[176]

D. The Installation Of Groundwater Monitoring Wells Into Stratum IV Is Neither Required Nor Necessary

For the reasons set forth in the preceding discussion, groundwater monitoring wells screened in Stratum IV, as Appellants propose,[177] would serve no useful purpose. Obviously, the purpose of groundwater monitoring wells is to monitor *groundwater*. There is no legitimate reason to install groundwater monitoring wells in a geologic unit that does not transmit groundwater – there is nothing for the wells to monitor. Indeed, the one monitoring well that was previously installed into Stratum IV at the existing facility was decommissioned because it was *always dry*.[178]

WMTX recognizes that a portion of the existing landfill has been excavated into the top of Stratum IV, per the facility's then-current permit, and that a portion of the expansion area is proposed to be excavated a few feet into this stratum as well.[179] However, such excavations are not cause for installing monitoring wells in Stratum IV. TCEQ's rules require monitoring only of the uppermost aquifer beneath the site,[180] and, as noted above,

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176 *See* Admin. R. Vol. 11 T-6 at 843:10-16 (Clark).

177 *See* Appellants' Brief at 46-47.

178 *See* Admin. R. Vol. 2 at 1051 (Ex. APP-202, discussion at § 8.3.4.); Admin R. Vol. 3 at 1084 (indicating that monitoring well MW-5 was installed in Stratum IV); Admin R. Vol. 4 at 1736 (discussing monitoring well MW-5); Admin. R. Vol. 12 T-7 at 911:21 to 912:25 (Clark) (same); *id.* T-8 at 1129:3-9 (Williamson) (same).

179 *See* Admin. R. Vol. 11 T-5 at 566:19 to 569:8 (Meaux).

180 *See* 30 TEX. ADMIN. CODE § 330.231(a), (a)(2), (c); *see also id.* § 330.230(b) (providing that groundwater monitoring requirements may be suspended by TCEQ if the facility "can demonstrate that there is no potential for migration of hazardous constituents from [the facility] to the uppermost aquifer").

the rules define an aquifer as a unit "capable of yielding significant quantities of groundwater to wells or springs."[181]

As demonstrated above, Stratum IV is certainly not an aquifer by TCEQ's definition, or any reasonable definition of the word. Even TJFA's own witness, Dr. Clark, considered Stratum IV an aquitard – at least he did during his deposition[182] – and at the hearing seemed less than optimistic regarding the success of a monitoring well in that stratum: "I would put one monitor well in Stratum IV . . . just give something in Stratum IV here a chance, give it a try and see if it works."[183] As noted above, a monitoring well was previously installed in Stratum IV, and it failed to produce water. Thus, Dr. Clark's experiment has already been performed and the results confirmed that there is no reason to repeat that experiment again.

For the foregoing reasons, Findings of Fact 46.c, 48.a and c, 49, 59, 61, and Conclusions of Law 6, 7, and 15 are supported by substantial evidence and are not arbitrary or capricious.

IV. TCEQ DID NOT ERR IN ACKNOWLEDGING A REGULATORY DISTINCTION BETWEEN WASTE ACCEPTANCE HOURS AND OTHER HOURS OF OPERATION

The settlement agreement between Guadalupe County and WMTX defines the "operation hours" of the landfill as "4:00 a.m. to 8:00 p.m., Monday through Friday and

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181 *Id.* § 330.2(6); *see also id.* § 330.2(158) (defining "uppermost aquifer" to include "lower aquifers that are hydraulically interconnected with" the uppermost aquifer); Admin. R. Vol. 12 T-8 at 1098:9-10 (Williamson) ("[T]here's no communication between Stratum III and Stratum IV.").

182 *See* Admin. R. Vol. 11 T-6 at 839:8 to 840:19 (Clark); *see also id.* at 840:20 to 841:9 (Clark) (defining an aquitard as a geologic unit that "would not significantly permit water to move beneath it").

183 Admin. R. Vol. 12 T-7 at 895:13-20 (Clark).

4:00 a.m. through 3:00 p.m. on Saturday,"[184] but does not prescribe the activities that may be conducted during such "operation hours." TCEQ was not a party to this settlement agreement. Nor were Appellants. While the agency has promulgated rules to protect permit provisions that are included in the permit by the TCEQ Executive Director as a result of negotiations between the applicant and interested persons during the permitting process,[185] until those negotiated terms become part of the permit at the request of the parties, the negotiations cannot bind TCEQ and the agency cannot enforce the agreement.[186] Neither Guadalupe County nor WMTX sought to have the terms of their settlement agreement incorporated into the permit amendment for the landfill. Indeed, it is clear on the face of the settlement agreement that no such incorporation was intended, as the settlement agreement expressly allows WMTX to change the landfill's "operation hours" upon notice to and approval from Guadalupe County, which approval "shall not be unreasonably withheld."[187]

Although Appellants claim in their brief to this Court that they "are unaware of any binding precedent addressing this issue," such precedent appears on page 23 of Appellants' own brief.[188] In *Citizens Against Landfill Location*, on which Appellants rely, this Court held that "the Commission's authority is limited by the scope of its own duly promulgated

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184 Appellants' Brief Appendix J at ¶ 2.2.

185 *See* 30 TEX. ADMIN. CODE § 305.70(a).

186 *See* 29 TEX. REG. 11,054, 11,070 (Nov. 24, 2004) (commenting that if an agreement with an interested person is not incorporated in the permit, the Commission does not have the authority to enforce the agreement).

187 Appellants' Brief Appendix J at ¶ 2.2.

188 Appellants' Brief at 48.

rules."[189] In so holding, the Court agreed with the reasoning of the ALJs in the contested case proceeding "that, '[e]nforcement of the settlement agreement is more appropriately left to the civil court system that generated it.'"[190] The Court should reach the same holding here and "conclude that the Commission did not err by failing to enforce" the settlement agreement between WMTX and Guadalupe County.

The Court should also find that TCEQ properly applied its rules to recognize the regulatory distinction between different types of landfill operating hours. TCEQ's rules applicable to landfill operating hours expressly distinguish between (1) waste acceptance hours, (2) hours for transportation of materials on- or off-site and operation of heavy equipment, and (3) operating hours for other activities.[191] The third category of operating hours – hours for "other activities" – does not require specific approval from TCEQ, thus the relevant distinction is between waste acceptance hours and hours for transportation of materials on- or off-site and operation of heavy equipment.[192] The Commission's order recognizes this regulatory distinction and clarifies the hours that the Mesquite Creek Landfill may accept waste and transport materials on- or off-site and operate heavy equipment.

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189 *Citizens Against Landfill Location*, 169 S.W.3d at 273.

190 *Id.*

191 *See* 30 TEX. ADMIN. CODE § 330.118(a) (distinguishing between "waste acceptance hours and the hours when materials will be transported on or off site, and the hours when heavy equipment may operate," as well as "[o]perating hours for other activities").

192 *See id.* ("Operating hours for other activities do not require other specific approval."); *see also* 29 Tex. Reg. at 11,069 ("[F]acility operating hours include waste acceptance hours, hours when materials may be transported on or off site, and hours when heavy equipment may operate.").

These clarifications (1) properly distinguish between waste acceptance hours and other hours of operation, in accordance with the regulatory distinction in TCEQ's rules;[193] (2) honor and effectuate the intent of the settlement agreement with Guadalupe County, which was intended to address only waste acceptance hours; (3) allow the facility to make full use of its waste acceptance hours, and safely transport non-waste materials and operate equipment for purposes other than waste acceptance outside of waste acceptance hours when the facility is less busy and personnel are available and not tasked with managing disposal activities;[194] and (4) effectuate, at least in part, WMTX's stated intentions regarding operation of the facility.[195]

Therefore, Finding of Fact 99, Conclusion of Law 14, and the Ordering Provisions of the Commission's Order are supported by substantial evidence and are not arbitrary or capricious.

REQUEST FOR RELIEF

For the foregoing reasons, WMTX respectfully prays that the Court enter judgment denying all of Appellants' claims and affirming and upholding the agency action at issue – TCEQ's issuance of Permit No. MSW-66B – and grant WMTX such other and further relief, both legal and equitable, to which it may show itself to be justly entitled.

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193 *See* 30 TEX. ADMIN. CODE § 330.118(a); *see also* 29 Tex. Reg. at 11,069.

194 *See* 29 TEX. REG. at 11,069 ("The standard operating hours for when materials may be transported on or off site, and when heavy equipment may operate have been adopted in consideration of comments requesting flexibility and extended operating hours."); *id.* ("The extended operating hours for when materials may be transported on or off site, and hours when heavy equipment may operate enables a facility to make full use of its waste acceptance hours. A facility can use those hours outside of its waste acceptance hours so it can be ready to receive waste upon opening the gates and can continue to receive waste up until closing its gate.").

195 *See* Admin. R. Vol. 9, Doc. 49 at 55-56 (PFD).

Respectfully submitted,

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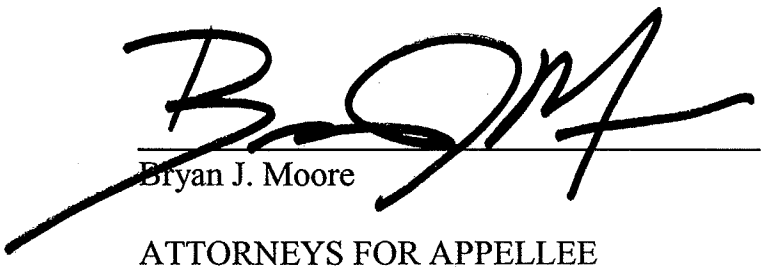

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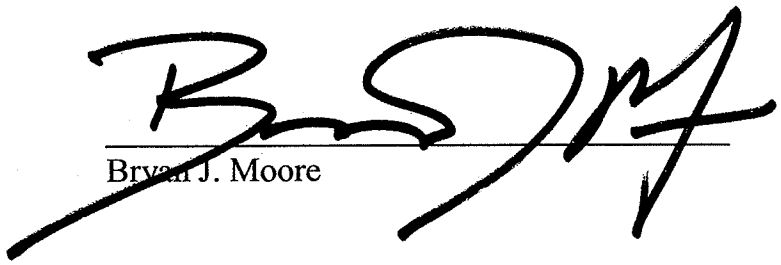
CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitation of Tex. R. App. P. 38.4 because this brief contains 50 pages, exclusive of the pages containing the statement regarding oral argument, the table of contents, the index of authorities, the statement of the case, the issues presented, the signature page, the proof of service, and the appendices.

2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because this brief has been prepared in a 13-point proportionally spaced typeface, with footnotes printed in 11-point proportionally spaced typeface.



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on the following by first class mail, on this the 9th day of June 2010, pursuant to Tex. R. App. P. 9.5:

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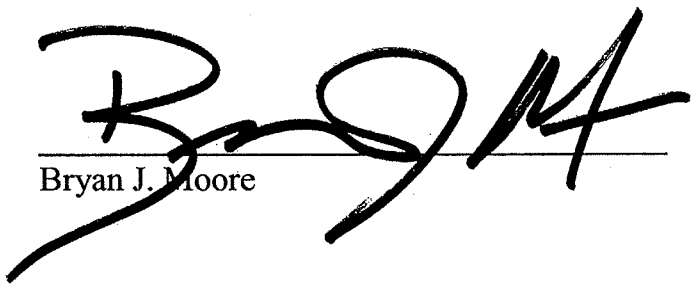

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