CASE NO. 07-12-00457-CV

IN THE COURT OF APPEALS
FOR THE SEVENTH JUDICIAL DISTRICT
AMARILLO, TEXAS

TRAVIS COUNTY, T.J.F.A., L.P., and NORTHEAST NEIGHBORS COALITION,
Appellants
v.
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY and WASTE MANAGEMENT OF TEXAS, INC.,
Appellees

On Appeal from the 345th District Court of Travis County, Texas
Hon. Stephen Yelenosky, Judge Presiding
Trial Court No. D-1-GN-10-001826

REPLY BRIEF OF APPELLANT TRAVIS COUNTY

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March 19, 2013

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TEXAS AGENCY RULES

ABBREVIATIONS AND RECORD CITATIONS

The following abbreviations and notations are used in this Brief:

"ACL" means Austin Community Landfill.

"ALJ" means Administrative Law Judge.

"Apdx.___" references the Appendix to the Brief of Appellant Travis County.

"AR_____" references the Administrative Record, which was entered as the sole exhibit to the District Court hearing and is thus part of the Reporter's Record in this Court.

"CAPCOG" means the Capital Area Council of Governments.

"COA" means the City of Austin.

"COG" means Council of Governments.

"CR____" references the Clerk's Record.

"ED" means the Executive Director of the Texas Commission on Environmental Quality.

"IWU" refers to the Industrial Waste Unit that is located within the WMTX landfill.

"PFD" means the Proposal for Decision issued by Administrative Law Judge Roy Scudday in Waste Management of Texas, Inc.'s Application for Amendment to Permit No. 249D; SOAH Docket No.582-08-2186, TCEQ Docket No.2006-0612-MSW.

"RSWMP" refers to the Regional Solid Waste Management Plan of the area Council of Governments, which in this case is CAPCOG.

"SOAH" means the State Office of Administrative Hearings.

"TC" means Travis County.

"TCEQ" means the Texas Commission on Environmental Quality, including, where appropriate, its predecessor agencies.

"WMTX" means Waste Management of Texas, Inc., the Applicant for the permit amendment that is the subject of this suit, and an Appellee/Intervenor in this case.

ARGUMENT IN REPLY

I. WMTX's Mislabeling of the "Phase I Area" in its Application as the "(Closed) Travis County Landfill" Continues to Be Harmful to Travis County, and Mandates Denial of the Permit.

In its Initial Brief, Appellant Travis County showed that WMTX had incorrectly identified, labeled, drawn, and defined an existing area of its landfill as the "(Closed) Travis County Landfill" throughout its application. WMTX still does not admit that it incorrectly identified, defined, labeled and drew the Phase I area as the "(Closed) Travis County Landfill" throughout its application; rather its brief mentions "alleged errors in labeling."[1] In its brief, the TCEQ merely stated that "in parts of this application," WMTX incorrectly identified the Phase I area of the landfill as the "(Closed) Travis County Landfill."[2] These are not mere alleged errors of labeling that occurred in parts of the WMTX application; it happened over and over again, throughout the application, and not once in the 3000+ pages of the application, was the area ever identified correctly as the Phase I unit.[3]

[1] *See* Brief of Appellee Waste Management of Texas, Inc. at 60.

[2] *See* Brief of Appellee Texas Commission on Environmental Quality at 43.

[3] *See* A.R. Vol. 1, Item 1; A.R. Vol. 2, Item 1; A.R. Vol. 3, Item 1; A.R. Vol. 4, Item 1; A.R. Vol. 5, Item 1; and A.R. Vol. , Item 1. Specifically, the Phase I area is misidentified and mislabeled as the "(Closed) Travis County Landfill" on the following pages in WMTX's application: pp. 7, 22, 23, 47,112, 121, 123, 124, 126, 127, 133, 135, 137, 139, 141, 143, 443, 590, 934, 935, 937, 938, 939, 940, 941, 942, 943, 944, 950, 1464, 1479, 1481, 1483, 1484, 1485,

Both WMTX and the TCEQ do concede in their briefs that WMTX accepts full responsibility for the Phase I area, and that despite its identification in the application, it is not part of the neighboring, closed Travis County landfill.[4]

However, WMTX argues that its inaccurate and false information was "harmless," and state that the incorrect labeling does not constitute grounds for reversal. This was no harmless error. The party most wronged by this error – Travis County – is an Appellant in this suit. Of significance, the area "mistakenly" identified by WMTX throughout its application is the Phase I section of the WMTX landfill – an area which borders the Industrial Waste Unit. Had Travis County not vehemently objected to this mislabeling by WMTX, liability for this area could very well have been shifted to Travis County. This is not a burden the taxpayers should have to take on, and for Appellees to claim that WMTX's misidentification of the Phase I area was harmless is an insult to Travis County and its taxpayers.

Furthermore, the TCEQ completely ignored the second prong of Travis County's argument in its opening brief, which is that 30 TAC 330.57(d) requires

1486, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3145, 3149, 3150, 3169, 3172, 3280, 3281, 3284, 3285, 3286, 3287, 3288, 3289, 3290, 3291, and 3292.

[4] *See* Brief of Appellee Texas Commission on Environmental Quality at 43-44; *see* also Brief of Appellee Waste Management of Texas, Inc. at 60-61.

an applicant of a municipal solid waste facility to be completely truthful and honest in its permit application, and that failure to do so requires denial of the permit.[5] The statute is clear and mandatory: **"Submission of false information shall constitute grounds for denial of the permit or registration application**."[6] It is impossible for the TCEQ to be assured that the WMTX expansion will not adversely affect the health, welfare, environment or physical property of nearby residents or landowners[7] with an application that does not clearly define and delineate the boundaries of the landfill. The false information regarding the boundaries of the landfill facilitated exclusion of the Phase I area from the groundwater monitoring system, the area which borders the Industrial Waste Unit, making it one of the first areas to detect any groundwater contaminants from the IWU. Thus it becomes a near impossibility for the TCEQ to be assured that WMTX's expansion will not cause adverse effects to the health, welfare, environment or physical property of nearby residents or property owners, and the TCEQ erred in adopting Findings of Fact Nos. 42, 29, 50, 73 – 76, 86, 87, 164, and 165, and proposed Conclusions of Law Nos. 5, 9, and 11.

[5] 30 TEX. ADMIN. CODE 330.57(d).

[6] *Id.*

[7] *Id.*

Finally, both WMTX and the TCEQ claim in their briefs that WMTX's mistake was corrected by the referral to this area as the Phase I area in the final TCEQ order. This is, simply, incorrect. The TCEQ Commissioners offered no explanation in their final order as to how the area continuously labeled as the "(Closed) Travis County Landfill" throughout WMTX's ten versions of its application is now known as the "Phase I" area.[8] Without the benefit of reading the transcript of the contested case hearing, where WMTX finally did verbally accept responsibility for the Phase I area of its landfill, there is no way to connect the Phase I unit to the incorrectly labeled "Closed" Travis County Landfill area described in the application. The WMTX application, complete with its incorrect references, remains a part of the permit, despite whatever changes were made in the final order. This mistake has not been corrected, and the harm to Appellant Travis County remains.

II. The Substantial Evidence Shows that the WMTX Landfill is Incompatible with Existing and Future Land Uses Surrounding the Landfill.

Appellee WMTX argues in its brief that because the information on land use required by the TCEQ rules was provided in its application, it has satisfied the land use requirements. Travis County has never claimed that WMTX did not

[8] *See* A.R. Vo. 27, Item 249.

provide the required information in its application; rather, Travis County argued that the evidence presented at the hearing did not show the WMTX landfill was compatible with its surrounding land use. Land use compatibility is not simply a technical requirement, a checklist for the Executive Director of the TCEQ to run through to make sure that Documents A-Z have been presented. In order for the TCEQ Commissioner to find that the WMTX landfill is a compatible land use, a careful examination of the land uses surrounding the area in question must occur, as well as a careful investigation into whether the landfill can prevent nuisances from odors, windblown trash, noise, or increased traffic, and whether the use of the land as a landfill will adversely affect human health, safety, or welfare.[9] Neither WMTX nor the TCEQ have offered any argument as to how this application is protective of human health, safety, or welfare.

WMTX alleges that the past nuisances committed by WMTX which concern Travis County are moot, stating they occurred over a decade ago. While many of the concerns raised by Travis County in the contested case hearing, and in its opening brief, were raised ten years ago, the evidence also shows that witnesses intentionally stopped complaining to the TCEQ because they were instructed not to do so by TCEQ staff.[10] The evidence also shows that

[9] 30 TEX. ADMIN. CODE §330.57 (d) and 30 TEX. ADMIN. CODE §330.61.

[10] A.R. Vol. 37, Item JW-1, TR p. 2245, l. 23 - p. 2246, l. 18, TR p. 1942, l. 18 - p. 1943, l. 19.

these nuisance concerns were so great and so voluminous that they were received by numerous governmental agencies, and not just by the TCEQ.[11] It is true that WMTX has been careful to operate its landfill according to TCEQ rules since it filed its permit application in 2005, but the period prior to the application being filed is the timeframe that truly captures how a municipal solid-waste facility will act, and it is this timeframe which causes the greatest concern for WMTX's future behavior and ability to follow the TCEQ's rules and regulations. It is also important to note that WMTX first filed the subject expansion application in August 2005. Its application was revised ten times, and the contested case hearing process began five years ago. The mere fact that the expansion permit process itself has taken almost a decade does not make the nuisances which concern Travis County moot. These complaints, enforcement orders, and hundreds of thousands of dollars in fines paid by WMTX are absolutely relevant, and render it impossible to make a finding of land use compatibility.

WMTX's paid expert, John Worrall, prepared a land use analysis to attempt to demonstrate that the WMTX landfill was compatible with its surrounding land uses. Yet the land use officials for both the City of Austin and

[11] A.R. Vol. 37, Item JW-1, TR p. 2245, l. 23 - p. 2246, l. 18.

Travis County reviewed the exact same information as Mr. Worrall, and they arrived at a completely different conclusion than Mr. Worrall. Both Jon White, Travis County's expert in this matter, and Greg Guernsey, the City of Austin's expert in this matter, strongly disagreed with Mr. Worrall's conclusions.[12] Both testified that the continued operation of this landfill is incompatible with existing and future land use in this area.[13] Their testimony, combined with the testimony from neighboring landowners John Wilkins,[14] Delmer Rogers,[15] Evan Williams,[16] and Mark McAfee,[17] clearly shows that the TCEQ committed substantial error in accepting WMTX's land use analysis.

In its brief, the TCEQ cites portions of the ALJ's PFD which they argue discredit the expert opinions of Mr. White and Mr. Guernsey, claiming they "primarily questioned compatibility of the Facility on the basis that it will

[12] A.R. Vol. 37, Item JW-1, p. 10, l. 18 - p. 11, l. 14; A.R. Vol. 33, Item GG-1, p. 3, ll. 16-27 and p. 5, l. 22 - p. 6, l. 15.

[13] A.R. Vol. 37, Item JW-1, p. 10, l. 18 - p. 11, l. 14; A.R. Vol. 33, Item GG-1, p. 3, ll. 16-27 and p. 5, l. 22 - p. 6, l. 15.

[14] A.R. Vol. 34, Item JW-1-2.

[15] A.R. Vol. 34, Item DR-1-2.

[16] A.R. Vol. 34, Item EW-1-9.

[17] A.R. Vol. 34, Item MM 1-2.

adversely affect development in the area."[18] This is a gross mischaracterization of these witnesses' testimony. Both of these witnesses were highly concerned with the proximity of the landfill to thousands of residents.[19] This is one of the fastest growing residential areas in Travis County and the City of Austin, and their opinions and their testimony centered on ensuring that the land use in this area becomes compatible with the homes, schools, daycares, and businesses nearby.[20]

The TCEQ also argues in its brief that ALJ Scudday quoted from another PFD in another landfill case, that of BFI's Sunset Farms, stating that the land use analysis of the Sunset Farms landfill is equally applicable to the WMTX landfill. This was an incorrect analogy made by ALJ Scudday, and it is error for the TCEQ to equate the land use analysis for the two landfills. While the WMTX landfill may be geographically adjacent to the BFI landfill, the land use analysis prepared for the BFI landfill, and the PFD from which ALJ Scudday quoted, were both written with the explicit knowledge and understanding that the BFI landfill would cease to accept waste in 2015. BFI understood that Travis County and the City of Austin no longer believed the

[18] *See* Brief of Appellee Texas Commission on Environmental Quality at 50.

[19] A.R. Vol. 37, Item JW-1. pp. 11-14.

[20] A.R. Vol. 37, Item JW-1 pp. 11-14.

area containing the BFI and WMTX landfills were compatible with current and future land use. Significantly, *BFI was only seeking a permit through 2015*. The agreement to close the BFI landfill in 2015 was explicitly based on the understanding that *its operation was no longer compatible with its surround land use*[21] - the same surrounding land use of the WMTX landfill.

Because the agreement was reached prior to the hearing, all evidence presented at the hearing regarding compatibility related solely to this very limited time frame. WMTX is seeking a permit through approximately 2025, an entire decade beyond the finding that its neighboring landfill would no longer be compatible with its surrounding land use. These two situations are not comparable, and for the ALJ and the TCEQ to imply that the land use analysis prepared for a landfill permanently closing in 2015 is equally applicable to a landfill operating until 2025 is clear substantial error.

III. The TCEQ Committed Reversible Error in Remanding this Matter Back to SOAH to Hear Additional Evidence on the Operating Hours Issue, and when it Instructed the ALJ to Make Substantive Changes to his Proposal for Decision.

A. The Remand Was Improper

[21] A.R. Vol. 37, Item JW-1 pp. 16-18.

First, the TCEQ alleged in its brief that Travis County argued this issue in its brief without stating a related issue presented.[22] This is not true. On page five of its brief, on the "Issues Presented" page, the third issue presented states: "Did the TCEQ err when it instructed ALJ Scudday to make substantive revisions to his proposed order ***and when it remanded the matter back to SOAH to take additional evidence on the issue of operating hours***."[23] (emph. added) Accordingly, this issue was properly pled by Travis County.

WMTX argues in its brief that "confusion" is not a prerequisite for remand, and it's not. However, "confusion" was the one and only explanation provided by the TCEQ Commissioners to the parties when they issued their Interim Order remanding the operating hours issue.

As Appellant Travis County demonstrated in its opening brief, neither the parties nor the ALJ had any confusion as to whether or not the Applicant had met its burden on the issue of operating hours. In fact, ALJ Scudday stated in both his July 21, 2009, Proposal for Decision ("PFD") and his September 8, 2009, letter that not only had Applicant failed to meet its burden, but that the

[22] *See* Brief of Appellee Texas Commission on Environmental Quality at 44.
[23] *See* Brief of Appellant Travis County at 5.

evidence was so strongly in favor of the Protestants on this matter that even if the Protestants had carried the burden, they had met that high burden.[24]

Of note, the TCEQ admits that WMTX failed to introduce enough evidence at the original contested case hearing to meet its burden of proof on the issue of operating hours.[25] WMTX argues otherwise, that it did meet its burden. And both WMTX and the TCEQ argue there is confusion concerning the burden on operating hours, specifically as to who holds the burden of proof when the proposed operating hours differ from the default hours listed in the rules.

30 Tex. Admin. Code §330.135(a) reads simply:

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

It could not be clearer that the hours during which a landfill may accept waste are Monday through Friday, 7:00 a.m. through 7:00 p.m., unless the facility obtains specific approval from the TCEQ in its permit to operate during other hours. The TCEQ writes in its brief that WMTX is an incredibly

[24] A.R. Vol. 21, Item 168 and A.R. Vol. 23, Item 186.

[25] S*ee* Brief of Appellee Texas Commission on Environmental Quality at 56.

"sophisticated applicant."[26] Indeed, WMTX is a sophisticated applicant, and it does not admit to being confused on this matter. In fact, WMTX attempts to cite an example in its brief of how it did present evidence on this issue at the original hearing. The ALJ believed otherwise, and stated multiple times that WMTX presented absolutely no evidence to justify a deviation from the default hours prescribed in Rule 330.135(a). ALJ Scudday wrote in his September 8, 2009 letter, "WMTX presented neither evidence to demonstrate the necessity for current hours or why the change in hours should not be made nor any evidence to refute that of Protestants regarding the operating hours."[27] Even the TCEQ admits in its brief that WMTX "did not introduce evidence to justify the longer than default hours."[28] And if the TCEQ Commissioners believed WMTX had met its burden, they would have had no reason to remand this matter back to the ALJ, since the remand was done solely to give the Applicant a second chance to prove its case.

Travis County argues that the caselaw cited by Appellee TCEQ does not support the Commissioner's remand based on confusion. Defendant cites *Madden v. Texas Board of Chiropractic Examiners* as precedence for remand

[26] S*ee* Brief of Appellee Texas Commission on Environmental Quality at 56.

[27] A.R. Vol. 23, Item 185.

[28] *See* Brief of Appellee Texas Commission on Environmental Quality at 56.

because the term "bona fide chiropractic school" was not defined by the state agency until the hearing at which the Board denied Madden's license. However, a closer reading of this case distinguishes the differences between Mr. Madden's situation and WMTX. The Court writes in *Madden*, "To be meaningful, 'notice' and 'hearing' require *previous* notice and a hearing *relative* to the issues of fact and law which *control the result* to be reached by the administrative tribunal."[29] WMTX voluntarily chose to amend its application and refiled under the new MSW rules, and they had notice prior to the hearing that the new MSW rules limited the hours of waste acceptance. Significantly, there was no new "term" which had yet to be defined for Waste Management, the way that "bona fide reputable chiropractic school" had not been defined for Mr. Madden. The court in *Madden* further writes that Madden "was entitled to test by cross-examination any contrary evidence to make objections to its admissibility if that were dictated by the nature of the evidence and the context made by the controlling issues. 'Opportunity must be afforded all parties to respond and present evidence and argument on all issues involved.' APTRA §13(d)"[30] In this matter, WMTX and all parties were given an opportunity to present evidence on the issue of operating hours. That

[29] *Madden v. Texas Board of Chiropractic Examiners,* 663 S.W.2d 622, 626-7 (Tex. App. 1983, writ ref'd n.r.e.).

[30] *Id.*, at 628.

definition was never changed or clarified. All parties understood how to define the words "operating hours." The Protestants put on evidence concerning operating hours, but WMTX failed to do so. WMTX also had an opportunity to cross-examine Protestant witnesses, but WMTX failed to do so.

The TCEQ also cites *Texas State Board of Pharmacy v. Seely* in its brief. *Seely* follows the line of thought in *Madden*, and it is equally distinguishable from this matter. In *Seely*, the Court held that no statute or rule established or defined the limitations of "unprofessional," not in "the usual course of professional practice," not "consistent with the public health or welfare," and not acceptable conduct "consistent with the public health and welfare."[31] The Board had used new definitions of these limitations to revoke Mr. Seely's pharmacy license, and the Court found that, like Madden, Mr. Seely had not been given notice of how these terms would be defined before he was able to present evidence and cross-examine witnesses on these definitions.[32] Again, no definitions were missing in the matter before this Court, and WMTX had notice of the legal standards to which they were being held.

Travis County does not deny that the TCEQ has the statutory power to remand cases back to SOAH. Clearly, the Government Code grants this power

[31] *Texas State Bd. Of Pharmacy v. Seely*, 764 S.W.2d 806, 815 (Tex. App.-Austin 1988, writ denied).

[32] *Id.*

to the TCEQ. But with that power comes certain responsibilities, and for the TCEQ to give a sophisticated applicant like Waste Management of Texas, Inc., a virtual do-over to correct its evidentiary failure is an arbitrary and capricious decision that severely penalized Travis County and its fellow Appellants.

B. The TCEQ Overstepped Its Authority when It Instructed the Administrative Law Judge to Make Substantive Revisions to His Proposal for Decision.

When the Commissioners of the TCEQ decide to overturn a finding of fact or a conclusion of law made by an Administrative Law Judge, they must fully explain, in writing, not only that ruling, but also their reasoning and grounds for overturning the ALJ's recommendation.[33] The TCEQ violated this law by instructing ALJ Scudday to ignore his own recommendation and re-write his PFD according to their specifications.

Administrative convenience, as suggested by the TCEQ in its brief, does not justify the TCEQ's refusal to follow the law. ALJ Scudday wrote in the cover letter accompanying his revised PFD that he had followed the instructions of the TCEQ to disregard the additional groundwater monitoring requirement, and that he did so as a "convenience to the Commission" and not

[33] TEXAS HEALTH AND SAFETY CODE §361.0832(f).

as "part of my recommendation."[34] Yet the Commissioners, in issuing their Final Order in this matter, did not distinguish between their recommendations and the ALJ's recommendations, and gave no explanation in writing as to why they were overturning the ALJ's recommendation.[35] This violates the laws of the State of Texas. It is not, as argued by the TCEQ in its brief, a reasonable interpretation of the law.

WMTX argues that this point is moot, because WMTX believes the final decision of the TCEQ would have been the same, regardless of whether or not the ALJ changed his PFD to reflect the Commission's orders. We do not know that, and we have no way of knowing that. If the Commissioners had followed the law, we would have had an explanation, in writing. But they did not follow the law. Not having the four additional monitoring wells covering the Industrial Waste Unit included in the ACL groundwater monitoring plan as recommended by the ALJ, without written reason or explanation, absolutely prejudices the substantial rights of Plaintiff Travis County, and therefore, this Court is well within its power under the Texas Administrative Procedure Act to find that the TCEQ Commissioners committed substantial error in this matter.

[34] A.R. Vol. 26, Item 233.
[35] A.R. Vol. 27, Item 250.

Finally, the TCEQ alleges in its brief that neither Appellant Travis County nor Appellant TJFA properly preserved this issue for appeal. TCEQ attempts to assert that the parties did not claim any harm when both parties pled that the TCEQ erred by directing the ALJ to modify his September 8, 2009 proposed order. This is completely false, and a misrepresentation of the suit at the District Court level. In fact, both Travis County and TJFA have continuously alleged, at all levels, that the TCEQ's instruction to the ALJ was error, and that they were harmed by the actions of the TCEQ. This issue drew a great deal of attention from Judge Yelenosky, and was discussed in detail during the proceeding in his court. His July 25, 2012 order made two findings, one of which specifically addressed this exact issue.[36] Furthermore, even assuming, *arguendo*, that Travis County and TJFA had failed to plead, brief, and argue this issue, caselaw holds that "disposing of appeals for harmless procedural defects is disfavored."[37] Harm is an essential element in Travis County and TJFA's complaints of legal error committed by the TCEQ, and there is certainly no dispute that Travis County and TJFA argued, and Judge Yelonsky decided, this very issue at the District Court level.

[36] Final Judgment, *TJFA, LP, Travis County and NNC v. Texas Comm'n on Envtl. Quality*, Cause No. D-1-GN-10-001826, 126th Jud. Dist., Travis County (Aug. 8, 2012).

[37] *Weeks Marine, Inc. v. Garza*, 371 S.W.3d 157, 162(Tex. 2012).

IV. The WMTX Landfill was Denied Conformance with CAPCOG's Regional Solid Waste Management Plan

The record is clear that the Capital Area Council of Governments ("CAPCOG") made a finding that WMTX's expansion application failed to conform to its Regional Solid Waste Management Plan ("RSWMP")[38]–and that conformance with a RSWMP is required under both Section 330.641(d) of the Texas Administrative Code and Section 363.066 of the Texas Health and Safety Code.

Both WMTX and the TCEQ dismiss Travis County's arguments on this matter, claiming that many of CAPCOG's guidelines were addressed by the TCEQ in its decision-making process. For the TCEQ to not accept the findings of CAPCOG's Solid Waste Committee – a committee comprised of representatives of the elected officials of the regions served by this landfill – is outrageous. This Committee spent months and months evaluating the application, and its members clearly know what is best for their constituents. The evidence is clear that the Capital Area Council of Governments does not believe the WMTX expansion conforms with its RSWMP, and the TCEQ's refusal to honor CAPCOG's determination is insulting and contrary to the evidence presented at the hearing.

[38] A.R. Vol. 43, Item T-5, ll. 15-19; A.R. Vol. 37, Item JW-1; A.R. Vol. 33, Item GG-1.

If an agency fails to consider a factor that the legislature intended it to consider in the circumstances, or reached a completely unreasonable result after weighing only relevant factors, then an agency decision is arbitrary and an abuse of discretion.[39] TCEQ's complete disregard of CAPCOG's findings constitutes a failure to follow the clear, unambiguous language of its own statutes, and TCEQ's failure to make a finding of non-conformance is legal error.

V. The TCEQ Failed to Consider the Entirety of WMTX's Compliance History for the WMTX Landfill.

Both WMTX and the TCEQ argue in their briefs that because the TCEQ eventually awarded WMTX an "average" rating, that there is no legal basis for denying the application based on WMTX's compliance history, simply because it avoided a "poor" rating by the TCEQ.

The Texas Administrative Code requires that the Executive Director of the TCEQ calculate the compliance history of an applicant when a permit is requested, and that WMTX's entire compliance history be taken into consideration when that classification is made. The TCEQ Commissioners failed to consider the entirety of the evidence presented at the hearing regarding

[39] *Reliant Energy, Inc. v. PUC*, 153 S.W.3d, 174, 194 (Tex.App. – Austin 2004, no pet.)

WMTX's numerous instances of non-compliance with agency rules, state laws, orders, and permits, as well as the hundreds of complaints submitted to Travis County and the City of Austin.[40]

CONCLUSION AND PRAYER

For the reasons stated herein and for all the reasons stated in the Reply Briefs filed by Appellants NNC and TJFA, Travis County prays this Court vacate the permit issued by the Texas Commission on Environmental Quality to WMTX and remand the matter to the TCEQ for further proceedings, together with all other relief to which Appellants may show themselves entitled.

Respectfully submitted,

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[40] A.R. Vol. 38, Item TC-6; A.R. Vol. 36, Item TJFA-27; A.R. Vol. 37, Item JW-1; A.R. Vol. 49, Item T-11, p. 2246, ll. 6-18; A.R. Vol. 48, Item T-10, p. 1936, l. 21 – p. 1937, l. 21; and A.R. Vol. 33, Item JW-1, p. 6, ll. 122-124.

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I hereby certify that on March 19, 2013, a true and correct copy of the foregoing document has been electronically served on the following parties:

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CERTIFICATE OF COMPLIANCE

Pursuant to TRAP 9.4(i)(3), I hereby certify that this document was prepared with Microsoft Word 2010, and that, according to that program's word-count function, this document contains 5,262 words, per TRAP 9.4(i)(1).

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