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June 29, 2010

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

via Hand Delivery

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, Appellees

Dear Mr. Kyle:

Enclosed are an original and eight copies of the Reply Brief of Appellants 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-stamped to our messenger for return to our office.

We will hand deliver eight disks containing the Reply Brief of Appellants for the Court's use tomorrow morning, June 30, 2010.

Thank you for your assistance.

Sincerely,

GRAVES, DOUGHERTY, HEARON & MOODY
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Cause 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; Trial Court No. D-1-GN-08-004503

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June 29, 2010

ORAL ARGUMENT REQUESTED

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Note that citations to Chapter 30 of the Texas Administrative Code are to the version in effect for the permit amendment application at issue in this case. Relevant excerpts are attached as Apdx. K to Appellants' initial brief.

ARGUMENT IN REPLY

I. This Case Raises Serious Legal Questions; It is Not Based on "Quibbles with the Evidence," as the TCEQ and WMTX Wrongly Claim.

In an attempt to minimize the importance of the issues raised by Appellants, Appellees Texas Commission on Environmental Quality (TCEQ) and Waste Management of Texas (WMTX) mischaracterize this case using the identical phrase: they contend the case raises only "routine issues of substantial evidence review." TCEQ Brief at 1; WMTX Brief at 1; *see also* TCEQ Brief at 3 ("Plaintiffs quibble with the evidence"). Although it is certainly true that several of the TCEQ's findings are not supported by the evidence, the primary issues in this case raise serious and substantial *legal* questions. For example:

- There is no statute or rule that allows the TCEQ to accept a FEMA map as conclusive on the question of whether a floodplain exists on a landfill site. The TCEQ's policy of doing so – even when the undisputed evidence shows that the FEMA map used is unreliable – is unsupported by its own rules and is contrary to the statutory command that the agency protect the environment and public health and safety. This is an *issue of law*.
- The TCEQ's own rules require *analysis* and *demonstration* that the landfill design will not significantly alter natural drainage patterns. In this case, the TCEQ has clearly stated that it accepts the *ipse dixit* assurance of a WMTX-retained engineer that increased stormwater runoff volume will not alter drainage patterns in a way that is harmful to adjoining or nearby properties, in the complete absence of any

analysis or demonstration to support such a conclusion. This policy is contrary to the TCEQ's own rules and to the statutory command that the agency protect the environment and public health and safety. This is an *issue of law.*

- The TCEQ's own rules require the testing of soil "that will form the bottom and side of the proposed excavation." Rather than conducting this important test using soil from the "proposed excavation" (that is, soil under the proposed expansion site), WMTX relied on years-old tests using soil under a different location (that is, the *current* landfill site), and TCEQ approved that reliance. The TCEQ's action is contrary to the TCEQ's own rules and to the statutory command that the agency protect the environment and public health and safety. This is an *issue of law.*

Further, an agency abuses its discretion, and acts arbitrarily and capriciously, when it reaches a completely unreasonable result – even if there is enough evidence in the record to otherwise satisfy the "substantial evidence" standard of review.[1] An agency also abuses its discretion when it acts "without reference to any guiding rules or principles."[2] Whether an agency has abused its discretion is a *question of law* and is not a "substantial evidence" question.[3]

Thus, the issues before this Court are not limited to "quibbles with the evidence." The TCEQ has granted a permit amendment application without following its own rules,

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[1] *See, e.g., Texas Dept. of Ins. v. State Farm Lloyds*, 260 S.W.3d 233, 245-46 (Tex. App. – Austin 2008, no pet.).

[2] *TGS-NOPEC Geophysical Co. v. Combs*, 268 S.W.3d 637, 653 (Tex. App. – Austin 2008, pet. granted); *Dengler v. City of Groves*, 997 S.W.2d 418, 421 (Tex. App. – Beaumont 1999, pet. denied).

[3] *Dengler, supra*; *North Alamo Water Supply Corp. v. Texas Dep't of Health*, 839 S.W.2d 448, 454-55 (Tex. App. – Austin 1992, writ denied).

without ensuring environmental protection, and without requiring demonstrations of environmental protection. These errors of law require reversal.

II. The TCEQ Has No Discretion to "Defer" to a FEMA Floodplain Map that is Either Incomplete or Inaccurate, and is Therefore Unreliable.

WMTX touts testimony from a TCEQ representative that the agency's policy "basically" is to "defer to FEMA in cases of floodplain analysis." WMTX Brief at 11. That policy is arbitrary and capricious, an abuse of discretion, inconsistent with the TCEQ's own rules, and not "in harmony" with the statutory command of environmental protections, especially as implemented here – where it was conclusively established that FEMA either did not study the landfill area, or erred badly if the area was studied.

A. FEMA maps have a role in the floodplain determination, but cannot be regarded as always conclusive.

The key TCEQ rule at issue provides that a permit expansion application must:

> **Identify whether the site is located within a 100-year floodplain.** Indicate **the source of all data** for such determination and include a copy of the relevant Federal Emergency Management Agency (FEMA) flood map, if used, or the calculations and maps used where a FEMA map is not available. Information shall also be provided identifying the 100-year flood level and any other special flooding factors (e.g., wave action) that must be considered in designing, constructing, operating, or maintaining the proposed facility to withstand washout from a 100-year flood. The boundaries of the proposed landfill facility should be shown on the floodplain map.[4]

Although the rule specifically refers to FEMA flood maps, it does *not* provide that such a map can be the sole, conclusive, unrebuttable source for determining whether there is a floodplain at a proposed landfill site. Rather, it requires that an applicant include "*all*

[4] 30 TEX. ADMIN. CODE § 330.56(f)(4)(B)(i) (emphases added). As with Appellants' initial brief, all references to the Texas Administrative Code are to the version applicable to WMTX's permit; relevant sections are included as appendices to Appellants' initial brief.

data" on which its floodplain determination was based. Though the rule arguably requires that the FEMA map be submitted as part of the application if such a map is available (although its terms only require inclusion of the map "if used"), its plain terms do *not require* that a FEMA map be used as *a* source – let alone *the* source – for the floodplain determination.

WMTX plainly mischaracterizes the regulation by claiming that sources other than a FEMA map "may be used for the floodplain determination ***only*** 'where a FEMA map is *not* available.'"[5] The rule says no such thing; it does not use the word "only" or embody that concept in any way. This is the crux of WMTX's argument, and it is built on a clear mischaracterization of the applicable rule.

Of course, in many cases a FEMA map can be important evidence on the floodplain issue. As it does all too frequently in its brief, WMTX badly mischaracterizes Appellants' position by wrongly claiming that Appellants argue that the agency must "summarily conclude that the area has not been studied and that the map is of no use" if a FEMA map does not show a floodplain.[6] Rather, Appellants argue that when *all* of the evidence (including that from witnesses for both WMTX and the TCEQ) confirms that there *is* a floodplain at the landfill site, while the FEMA map shows none, the TCEQ acts unreasonably – and thus abuses its discretion – by accepting the FEMA map as *per se* evidence of no floodplain.

WMTX also wrongly attempts to equate "floodplain" and "floodway," when in

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[5] WMTX Brief at 10 (first emphasis added; second emphasis added by WMTX's Brief).

[6] WMTX Brief at 16.

fact those terms represent different features. The TCEQ rules prohibit solid waste disposal and treatment in "areas that are located in a floodway as defined by FEMA."[7] WMTX erroneously asserts that this rule's reference to a FEMA-defined *floodway* means a FEMA floodplain map is conclusive evidence of the existence or non-existence of a *floodplain*. Rather, it is evidence of precisely the opposite.

The rules clearly state that a *floodway* is a feature that has been "defined by FEMA"; however, the rules do *not* include the same language or requirement for finding or determining a *floodplain*. Substantively, a "floodway" is a regulatory term that pertains to only a *portion* of a floodplain.[8] Appellants do not contend that there is a "floodway" at the Landfill site, because FEMA has not defined one at this site. The Landfill site *does*, however, include a "floodplain" – not based on the FEMA map, but based on all of the uncontradicted evidence presented at the hearing.

B. The FEMA floodplain map showing no floodplain is unreliable, and all other evidence shows there *is* a floodplain; thus, either FEMA did not study Mesquite Creek, or erred if it did study the creek.

Both the TCEQ and WMTX assert that there is evidence FEMA actually studied whether Mesquite Creek has a floodplain.[9] This is wrong. Appellees' reliance on the testimony of WMTX's engineer, Mr. Graves, as evidence that FEMA studied Mesquite Creek is unsupportable. Mr. Graves did not testify that he believed FEMA had actually determined that Mesquite Creek had no floodplain. This is no surprise, since he had

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[7] 30 TEX. ADMIN. CODE § 330.56(f)(4)(B)(iii).

[8] 44 CFR 59.1.

[9] *See, e.g.*, TCEQ Brief at 6; WMTX Brief at 6.

already testified that there *is*, in fact, a floodplain (as defined by the TCEQ rules) at the Landfill site.

Mr. Graves testified as follows during cross-examination by Mr. Dunbar, an attorney for Appellants:

> 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?
>
> A. Yes, I do.[10]
>
> ...
>
> Q. Okay. So your understanding is that because FEMA does not show a 100-year floodplain for Mesquite Creek, that, therefore, a 100-year floodplain doesn't exist for Mesquite Creek. Is that what you're telling us?
>
> A. Well, I don't know if that's the case. I just know that according to FEMA the area – this area is actually considered an area of minimal flooding, according to FEMA, and there is no 100-year floodplain designated.
>
> Q. Okay. 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. I don't know the level of detail that they did to determine that.
>
> Q. Is it possible that FEMA never studied Mesquite Creek to determine a floodplain?
>
> A. I'm not sure.
>
> Q. You're not sure.
>
> A. I'm not sure.[11]
>
> ....

[10] A.R. Vol. 10, T-4 p. 381-82.

[11] A.R. Vol. 10, T-3 p. 151-52.

Q. Okay. Does FEMA study every stream and creek in the country when it prepares those floodplain maps?

A. I really just don't know exactly the process that FEMA follows, so I can't answer that.[12]

....

Q. Okay. Did you calculate a 100-year floodplain for Mesquite Creek in this application?

A. No, I did not.[13]

The following points are clear from this testimony by the Applicant's witness:

- Mr. Graves believes that there is a "floodplain," as defined by the TCEQ,[14] associated with Mesquite Creek at the Landfill site.
- Mr. Graves did not do any independent calculation of the 100-year floodplain in the application, though the TCEQ rules require the application to identify whether the site is in a floodplain.[15]
- Mr. Graves could not testify that FEMA actually studied Mesquite Creek and made a floodplain determination about the creek.

Appellees rely on Mr. Graves' subsequent testimony on redirect examination as alleged evidence that FEMA *did* study Mesquite Creek and determined it had no floodplain. Tellingly, Mr. Graves did *not* give the testimony that Appellees wish he had. For example, in its brief, the TCEQ characterizes Mr. Graves as testifying that "it was reasonable to infer that FEMA had studied the area enough to determine the absence of a floodplain."[16] Such testimony, of course, would have been directly contrary to the above-

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[12] A.R. Vol. 10, T-3 p. 152.

[13] A.R. Vol. 10, T-3 p. 158.

[14] 30 TEX. ADMIN. CODE § 330.2(48) ("floodplain" is "[t]he lowland and relatively flat areas adjoining inland and coastal waters, including flood-prone areas of offshore islands, that are inundated by the 100-year flood").

[15] 30 TEX. ADMIN. CODE § 330.56(f)(4)(B)(i).

[16] TCEQ Brief at 6.

quoted testimony, where Mr. Graves admitted that he is "not sure" whether FEMA actually studied Mesquite Creek. And Mr. Graves' *actual* testimony on this point did *not* include the "reasonable inference" testimony that Appellees assert:

> Q. ... [D]o you find Mesquite Creek depicted on 211 [the FEMA map on which Mesquite Creek appears]?
>
> A. Yes, I do.
>
> ...
>
> Q. All right. 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.[17]

This testimony is *not* evidence that FEMA studied Mesquite Creek and subsequently made a floodplain determination for the creek, as Appellees have asserted. It is simply confirmation that FEMA has not identified a floodplain along Mesquite Creek, as reflected on the FEMA map in APP-211. Appellants do not contest this point.

The above-quoted, vague redirect testimony of Mr. Graves did *not* cause him to change his opinion on whether there *actually is* a floodplain at the site. *After* the above-quoted testimony, Mr. Graves reaffirmed his earlier-stated opinion:

> Q. Okay. I believe Mr. Riley also talked to you about the FEMA floodplain map, APP-211. Do you recall that?
>
> A. Yes, I do.
>
> Q. Okay. And is it your opinion that Mesquite Creek can contain within its banks the 100-year flood within – within the landfill permit boundary itself?

[17] A.R. Vol. 10, T-4 p. 333-34.

A. Well, I have analyzed a scenario like that in this application for the 100-year/24-hour storm and **found that the level would be predicted to rise above the banks of Mesquite Creek at the landfill facility.**

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**?

A. **Yes**, I do.[18]

This testimony is ***uncontradicted*** by any other evidence.[19]

Thus, the uncontradicted testimony allows only two reasonable conclusions:

1. FEMA never studied Mesquite Creek to determine whether it has a 100-year floodplain (thus the FEMA map cannot be used to make the requisite floodplain determination); or

2. FEMA studied Mesquite Creek (although no witness could confirm this) and erroneously determined that it has no 100-year floodplain (erroneous because the uncontradicted testimony established that the creek does have a 100-year floodplain).

Neither of these conclusions supports the finding by TCEQ that the Landfill is not located in a 100-year floodplain. Also, neither can support WMTX's failure to "provide information detailing the specific flooding levels and other events ... that impact the flood protection of the facility," as required by the TCEQ's own rules when a landfill is in a floodplain.[20] Thus, the TCEQ acted unreasonably, arbitrarily, and capriciously – erred *legally* – in its approval of the permit amendment application that was based on this erroneous and unsupported finding.

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[18] A.R. Vol. 10, T-4 p. 381-82 (emphases added).

[19] Appellants' quoting of testimony at length is not a "quibble over evidence." Rather, Appellants show what the *uncontradicted* evidence actually is, and demonstrate that Appellees' "spin" on the evidence is simply wrong. This is not a case of conflicting evidence of the "he said, she said" variety; it is a case in which the substantive evidence is uncontradicted, and in which the TCEQ *legally* erred by making unreasonable findings that are flatly contrary to the uncontradicted evidence.

[20] 30 TEX. ADMIN. CODE § 330.56(f)(4)(B)(ii).

Faced with the challenge of having to defend and somehow explain TCEQ's finding as being something other than what it is – arbitrary and capricious –WMTX vainly attempts to argue that Mr. Graves' testimony was somehow based on his own idiosyncratic definition of "floodplain," and that his definition was substantially different than the applicable TCEQ definition. This is wholly unsupported by the evidence. Mr. Graves testified that "the definition of a 'floodplain' to me is water spilling out of its normal banks" during a 100-year flood.[21] Though WMTX asserts, without support, that this definition differs from the TCEQ's definition of "floodplain," it is virtually the *same*; the rule's definition is: "areas adjoining inland and coastal waters ... that are inundated by the 100-year flood." WMTX's argument is specious.

WMTX then appears to argue that *even if* there is a floodplain at the Landfill, its application in fact complied with all regulatory requirements for ensuring protection in case of a 100-year flood, and indeed asserts that it "went beyond" regulatory requirements by conducting "additional flooding analyses."[22] Again, WMTX's argument is contrary to the clear testimony of its own engineer, who stated that the "analysis" at issue was *not* the analysis required by the rules when a landfill site is in the 100-year floodplain.[23] Mr. Graves' study did *not* encompass all the issues required by the rules for landfills located in a floodplain. For example, he admitted that he did *not* take into consideration the effects that downstream obstructions or structural features might have

[21] WMTX Brief at 17, quoting A.R. Vol. 10, T-4 p. 382.

[22] WMTX Brief at 19-21.

[23] A.R. Vol. 10, T-3 p. 177.

on flood levels at the Landfill.[24] And even Mr. Graves' limited flooding analysis demonstrated that the Landfill site is, in fact, inundated by floodwaters from the 100-year flood.[25] WMTX's claim to have exceeded all requirements of the rules – when its engineer admitted that the minimum requirements were not even *met*, let alone exceeded – is wholly without merit.

C. TCEQ's deference to an unreliable FEMA map is a departure from its own rules and precedent, is unreasonable, and is an abuse of discretion; therefore, this deference is legally improper.

As shown above, TCEQ's blind acceptance of a FEMA map without any evidence of its reliability is unreasonable and legally erroneous. It is also contrary to the TCEQ's own precedent.

Appellants demonstrated in their opening brief that in two previous landfill cases, the TCEQ took the (reasonable and correct) position that when a FEMA map does not provide sufficient information regarding whether a particular area has been subject to a FEMA floodplain analysis, an applicant cannot rely on or use such a map to make the requisite floodplain determination.[26] Appellees have attempted to distinguish those two previous cases (*Tan Terra* and *Juliff Gardens*) by arguing that in those prior cases, the FEMA maps (or map indexes, an immaterial difference) either affirmatively demonstrated that the area in question had not been studied, or was ambiguous as to that

[24] A.R. Vol. 10, T-3 p. 158-63, 172-73.

[25] A.R. Vol. 10, T-4 p. 382.

[26] Appellants' Brief at 28-30 (discussing the *Tan Terra* and *Juliff Gardens* cases).

issue.[27] Even assuming this is true, that fact does not support Appellees' argument. Rather, it favors Appellants.

The important point of the *Tan Terra* and *Juliff Gardens* cases was that an unreliable FEMA map or map index cannot be used to meet the floodplain requirements of the TCEQ rules. Instead, the applicant must supply additional data or information from a reliable source sufficient to make the requisite floodplain determination. In fact, this was the very argument that the TCEQ made in its *Tan Terra* briefing (which involved a map index); in that case, the TCEQ argued:

> The TCEQ has interpreted this rule to require more than a FEMA map index **where the evidence indicates the FEMA map index does not actually show the area in question has been evaluated by FEMA and where there is evidence that the area does, in fact, flood.** Tan Terra disagrees with this interpretation. However, the rule does not state simply that "the Applicant must submit a FEMA map or map index." ***It requires more.***[28]

Just as in *Tan Terra*, here the FEMA map does not show that FEMA actually performed a floodplain analysis or evaluation, while at the same time "there is evidence that the area does, in fact, flood." TCEQ in *Tan Terra* argued that its rules require the landfill permit application provide more than just the FEMA map, when the map cannot be relied upon in making the floodplain determination. Yet now, the TCEQ makes precisely the opposite argument – that it is acceptable to simply provide a FEMA map, without determining its reliability, to make the requisite floodplain determination. This contradictory position now being taken by the TCEQ for this application further

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[27] TCEQ Brief at 8; WMTX Brief at 17-19.

[28] CR6 at 1373 (Exhibit M to Plaintiffs' Reply Brief in District Court, TCEQ *Tan Terra* Brief at 15) (emphases added).

illustrates the arbitrary and capricious nature of the TCEQ's grant of WMTX's permit amendment application.

Troublingly, it appears that, in this case, the TCEQ has in effect "rubber-stamped" WMTX's application without requiring the adherence to the rules that the TCEQ has demanded in the past from other applicants. This is unreasonable, arbitrary, and capricious agency action, and is an abuse of the agency's discretion. These are legal errors requiring that TCEQ's approval be vacated and this matter remanded.

III. The TCEQ Cannot Find "No Significant Alteration" of Natural Drainage Patterns Where, as Here, There Has Been *No Analysis* or *Demonstration* of the Impact of Increased Runoff Volume on the "Downstream Receiving Water Body."

Both the TCEQ and WMTX assert that an applicant's burden to *demonstrate* "no significant alteration" of stormwater runoff drainage patterns is satisfied simply by an engineer's *ipse dixit* testimony that he is "confident" there will be no downstream impact from greatly increased stormwater runoff volume.[29] This is contrary to the TCEQ's own rules, which state that an application is required to include:

> *discussion* and *analyses* to *demonstrate* that natural drainage patterns will not be significantly altered as a result of the proposed landfill development.[30]

WMTX's application did not discuss, analyze, or demonstrate whether a 75 percent increase in discharge volume at Discharge Point E would significantly alter natural drainage patterns through impact to the "downstream receiving water body," as required by the rules and by the TCEQ's own guidance document.

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[29] TCEQ Brief at 12-14; WMTX Brief at 34-35.

[30] 30 TEX. ADMIN. CODE § 330.56(f)(4)(A)(iv) (emphases added).

A. Showing only a reduction in *peak* flow rate, with no analyses or demonstrations regarding downstream impact due to increased overall runoff volume, is not sufficient to show "no significant alteration."

WMTX's design of the drainage system for the expanded Landfill greatly increases the *total amount* of stormwater running off of the Landfill site (runoff volume) at Discharge Point E during a 25-year storm, as compared to how much ran off naturally without the Landfill. The proposed drainage system will discharge this increased runoff volume over a longer period of time through the use of detention ponds. These ponds only serve to decrease the *peak* flow rate (versus the natural *peak* flow rate), but do nothing to reduce the total amount of stormwater leaving the site. WMTX argues that reducing the *peak* flow rate, standing on its own, is sufficient to show that the greatly increased runoff volume is not a significant alteration of natural drainage patterns and will not adversely impact the adjoining properties. The TCEQ accepted this argument. This is another illogical and unreasonable conclusion that is unsound as a matter of law.

As Appellees assert, WMTX's engineer, Mr. Graves, testified that he was "confident" the decrease in *peak* discharge (flow) rate ensures no adverse impact from the increase in runoff volume. But his expressed "confidence" is wholly unsupported by any evidence, other than the mere fact of the *peak* flow rate being reduced. Mr. Graves himself frankly admitted that he had done no analysis whatsoever of the watercourse immediately downstream from Discharge Point E to determine whether the increased total runoff volume would significantly alter drainage patterns.[31] The TCEQ's Mr.

[31] Appellants' Brief at 8-9 (citing and quoting Graves testimony).

Prompuntagorn admitted that the agency had no idea how the increased total runoff volume might affect the immediately adjoining properties.[32]

Thus, the record is void of *any* analysis or demonstration regarding the potential significance of the alteration of natural drainage patterns due to this increased runoff volume, when the TCEQ's own rules *require* such analysis and demonstration.

The TCEQ's drainage guidance document provides that one method of demonstrating that increased runoff volume 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."[33] WMTX argues that it complied by the simple showing that the *peak* discharge rate was decreased.[34] However, this is only one of the flow rates that is discharged from the detention pond. Obviously, there are other flow rates leaving the pond and the site at Discharge Point E that are greater than what was leaving the site at that location naturally (because the landfill design *increases* overall runoff volume). Thus, to simply say that a reduction in the *peak* flow rate means no increased flooding will occur anywhere downstream, regardless of the increase in runoff volume, is illogical and wrong. WMTX failed to demonstrate how the greatly increased runoff volume will potentially impact the downstream receiving water body.

Reducing the *peak* flow rate at the permit boundary does not guarantee that there will be no downstream impact from the increase in the total amount of water leaving the site. While it may be *possible* that the increased runoff volume will not have a significant

[32] Appellants' Brief at 9-10 (citing and quoting Prompuntagorn testimony).

[33] Apdx. G to Appellants' Brief at 4.

[34] WMTX Brief at 27.

impact on flooding downstream anywhere along the receiving water body, WMTX argues that this is *inevitable* so long as the *peak* flow rate at the permit boundary is reduced. Simple logic shows that it is not, which is why the TCEQ's rules require a *demonstration* and *analysis*, not an unsupported assertion that a decrease in peak discharge rate at the permit boundary is *per se* proof of no significant impact from increased overall volume anywhere downstream.

Essentially, WMTX told the TCEQ, "because the peak flow rate was reduced at the boundary of the Landfill, we don't think the increased volume will significantly impact any downstream property, even though we haven't looked at any downstream property." TCEQ's acceptance of this unsupported "proof" is another "rubber-stamp" approval that is inconsistent with its own rules requiring analysis and demonstration, and is unreasonable, arbitrary, and capricious, and thus error as a matter of law.

B. TCEQ's policy that "significant alteration" will be assessed only at the permit boundary, without any required demonstration or analysis regarding downstream effect, is contrary to its own rules and the Legislative command of environmental protection, and thus is *legally* erroneous.

WMTX correctly states that the TCEQ "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 the TCEQ's own rules.[35] It is precisely this TCEQ policy that Appellants challenge as inconsistent with the language of its own rules and its

[35] WMTX Brief at 30.

subsequent guidance, and as not "in harmony"[36] with the statutory command that the agency "safeguard the health, welfare, and physical property of the people and ... protect the environment."[37]

As discussed above, the TCEQ's rule requires discussion, analysis, and demonstration that natural drainage patterns will not be significantly altered. WMTX provided no such discussion, analysis, or demonstration with regard to the increased total volume at Discharge Point E and how that might affect natural drainage patterns on the off-site receiving water body (as required by the TCEQ's own guidance document, and as acknowledged by WMTX). Merely pointing to a decrease in the peak discharge rate does not constitute the required discussion, analysis, or demonstration in the face of a large increase in runoff volume. The TCEQ's failure to follow its own rules is arbitrary, capricious, an abuse of its discretion, and constitutes legal error.[38]

By steadfastly refusing to consider off-site impact of changed drainage patterns, the TCEQ acts in a manner not "'in harmony' with the general objectives of the legislation involved," and thus in a manner that is legally improper.[39] It is simply impossible to safeguard the environment while turning a blind eye to the impact a landfill may have on the environment. The policy is also flatly inconsistent with the TCEQ's Drainage Guidance document, which specifically calls for analysis of impact on the

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[36] *Texas Orthopaedic Ass'n v. Texas State Bd. of Podiatric Medical Examiners*, 254 S.W.3d 714, 719 (Tex. App. – Austin 2008, pet. denied).

[37] TEX. HEALTH & SAFETY CODE § 361.002(a).

[38] *See, e.g., Flores v. Employees Retirement System*, 74 S.W.3d 532, 545 (Tex. App. – Austin 2003, pet. denied).

[39] *Gulf Coast Coalition of Cities v. Public Utility Comm'n*, 161 S.W.3d 706, 711-12 (Tex. App. –Austin 2005, no pet.).

"downstream receiving water body."[40] Tellingly, while WMTX defends the TCEQ's policy, the TCEQ itself does not, instead only arguing that the evidence was sufficient to conclude that there would be no significant alteration of natural drainage patterns.[41]

WMTX argues against a strawman by wrongly contending that Appellants claim the 75 percent increase in volume at Discharge Point E *always* must be considered a *per se* "significant alteration."[42] Appellants do not claim this. If WMTX had provided actual analyses and demonstrations that this increase would not adversely affect the downstream receiving water body, then the increase would not be "significant," regardless of its size. But if the TCEQ's refusal to look downstream for any impacts is upheld, then it must have some reasonable criteria to assess when an alteration of one of the natural drainage pattern components (such as peak flow rate or runoff volume) at the permit boundary is to be considered as "significant." However, the TCEQ has never articulated any such criteria nor explained why a 75 percent increase in runoff volume at the permit boundary is not "significant." Apparently WMTX is attempting here to take the focus away from a real issue: the TCEQ's policy of making *ad hoc*, unguided judgments about what increases are or are not "significant" without reference to any guiding rules or principles, and without requiring compliance with its own rules. This is arbitrary and capricious agency action.[43]

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[40] Apdx. G to Appellants' Brief at 4.

[41] TCEQ Brief at 10-15.

[42] WMTX Brief at 22-23.

[43] *See, e.g., General Motors Corp. v. Bray*, 243 S.W.3d 678, 684 (Tex. App. – Austin 2007, no pet.).

Finally, WMTX frivolously argues that Appellants are precluded from challenging the TCEQ's policy of not considering downstream effects because such a challenge is a "collateral attack" on the earlier administrative proceedings in the *Blue Flats* and *North Texas Municipal Water District* cases.[44] This meritless argument is pure sophistry. Those proceedings involved different landfills in different locations, and Appellants were not parties to those proceedings (and indeed most likely lacked standing to be parties). WMTX's suggestion that Appellants should have filed motions for rehearing in the earlier cases – again, when Appellants were not parties – is, frankly, ridiculous. This baseless argument does, however, provide evidence of the lengths to which WMTX will go to desperately, but futilely, attempt to find a ground on which the TCEQ's erroneous decision may be upheld.

Although the TCEQ's decision on the drainage issue may also be reversed under the substantial evidence standard, Appellants' primary challenge is to the TCEQ's policy and failure to follow its own rules – which are issues of law.

IV. The TCEQ's Failure to Require WMTX to Follow the Rules Regarding Soil Testing Was Legal Error Requiring Reversal.

Appellants showed that WMTX failed to test the deep soil at the expansion site for its ability to transmit water horizontally, and that such tests are required under the TCEQ's rules.[45] Appellees do not contest this; rather, they proffer excuses why it was acceptable for the TCEQ to approve WMTX's application in the absence of such

[44] WMTX Brief at 32.

[45] Appellants' Brief at 42-47.

required tests.[46] There can be no excuse sufficient to justify the TCEQ's legal error in failing to follow its own rules.

A WMTX witness testified that the bottom layer (Stratum IV) of the soil in place at the existing landfill (which was tested years ago) is sufficiently similar to Stratum IV at the expansion site, across Mesquite Creek, for the testing of the former to adequately substitute for the testing of the latter. The TCEQ claims that this is a matter of the "expert judgment of scientists" to which it can properly defer.[47] The TCEQ criticizes Appellants' insistence that the agency actually follow its own rules as "point-picking."[48] This argument is revealing: it demonstrates the extent to which TCEQ served as a mere "rubber-stamp" for WMTX's application. An agency is not free to decide to suspend its rules for certain applicants. A failure to follow the rules is legal error requiring reversal.

WMTX makes the erroneous claim that the rules do not require testing "of any particular area of the landfill."[49] That simply cannot be reconciled with the language of the rule, which provides:

> A laboratory report of soil characteristics **shall** be determined from at least one sample from each soil layer or stratum **that will form the bottom and side of the proposed excavation** and from those that are less than 30 feet below the lowest elevation of the lowest excavation ...[50]

The rule's plain language requires testing of at least one sample from the soil layers at the proposed excavation of the new landfill, not from another location at the existing landfill

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[46] TCEQ Brief at 15-18; WMTX Brief at 36-49.

[47] TCEQ Brief at 18.

[48] TCEQ Brief at 17.

[49] WMTX Brief at 41.

[50] 30 TEX. ADMIN. CODE § 330.56(d)(5)(B)(i) (emphases added).

that was excavated years ago.

WMTX again mischaracterizes Appellants' arguments by claiming "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 ... that Stratum IV is not a water-bearing unit."[51] Appellants' argument is that due to WMTX's failure to adequately test Stratum IV's ability to transmit groundwater, WMTX's groundwater monitoring system – which does not monitor Stratum IV based on the unproven assumption that it will not transmit groundwater – is inadequate. Appellants do not contend that the appropriate remedy is simply to place monitoring wells somewhere in Stratum IV. Rather, the appropriate remedy is to force WMTX and the TCEQ to *follow the rules,* by requiring all soil layers or strata at the bottom or sides of *the proposed excavation* to be adequately tested and characterized by WMTX, like any other applicant is required to do.

The TCEQ's *ad hoc* decision to exempt WMTX from complying with clear rules is unreasonable, arbitrary, and capricious agency action constituting legal error.

V. The TCEQ Erred by Allowing WMTX Operating Hours Beyond Those to Which WMTX Had Agreed.

In justifying the extension of operating hours to WMTX beyond those to which it agreed in a settlement agreement with Guadalupe County, Appellees argue primarily that state agencies cannot be bound by settlements by private parties. The TCEQ additionally argues that the extended hours it granted to WMTX are essentially *de minimis*. Neither argument is persuasive.

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[51] WMTX Brief at 43.

WMTX wrongly argues that this Court's holding in *Citizens Against Landfill Location v. Texas Comm'n on Environmental Quality*, 169 S.W.3d 258 (Tex. App. – Austin 2005, pet. denied), essentially bars the TCEQ in this case from incorporating the operating hours from the settlement agreement into WMTX's permit. But that prior case did not address an agency's authority to incorporate terms of a settlement agreement into an order when those terms do not contradict the terms of any agency rule.

In the *Citizens* case, the landfill operator settled a civil suit over the initial approval of its permit by agreeing to construct a detention feature capable of collecting and controlling the runoff from a 100-year storm.[52] This was a higher standard that required by the agency's rules, which only mandated the ability to control runoff from a 25-year storm.[53] Years later, the landfill sought an expansion permit. Opponents argued that the expansion would render the landfill unable to control the 100-year storm's runoff, and that this alleged violation of the settlement agreement was grounds to deny the permit. This Court disagreed, holding that as long as the landfill operator met the rules' requirement of controlling runoff from a 25-year storm, the landfill met the rules' requirements, and that a settlement agreement could not operate to impose more stringent requirements than those in the rules. The Court agreed with the ALJ's recommendation in the *Citizens* case that "[e]nforcement of the settlement agreement is more appropriately left to the civil court system that generated it."[54]

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[52] *Citizens*, 169 S.W.3d at 272.

[53] *Id.* at 273.

[54] *Id.*

Important differences of both law and policy distinguish this case from *Citizens*. First, the settlement agreement in this case was not "generated" by the civil court system, but instead was entered into during these very administrative proceedings, for the express purpose of resolving an issue raised by a protestant, and resulting in the withdrawal of that protestant from the proceedings. That protestant – Guadalupe County – cannot seek redress in "the civil court system that generated" the settlement agreement, because there *is* no separate civil proceeding that generated the settlement. Because the County withdrew as a party, it was not able to file a motion for rehearing after WMTX and the TCEQ refused to honor the settlement agreement, and was not able to participate in this appeal. Acceptance of WMTX's and the TCEQ's argument would appear to leave the County without a remedy. Even more importantly, it would encourage applicants to "agree" to settle contested cases with protestants in exchange for the protestants' withdrawal, and then allow applicants to ignore the settlement agreement with impunity – precisely the result for which WMTX and the TCEQ argue here.

Secondly, there is a significant difference between the subject matter of the settlement in *Citizens* and here. In *Citizens*, the settlement agreement imposed more stringent requirements than those plainly stated in the rule. This Court rightly held that the TCEQ lacks the authority to impose such a requirement that conflicted with the rules. Here, there is no TCEQ rule that mandates specific operating hours, which is the subject matter of the settlement. Rather, the TCEQ has *discretion* to incorporate into a permit the

operating hours it finds appropriate.[55] Enforcement of the settlement agreement, thus, would not conflict with any rule. Appellants contend that the agency abuses its discretion to set operating hours when it ignores the plain terms of a settlement agreement that was entered into during the process of a contested case hearing on the permit, and which induced the protesting party to withdraw from such hearing – thus leaving the protesting party to the agreement to seek its own remedy (which may not exist) for WMTX's clear breach (a breach that was knowingly adopted by the TCEQ).

The TCEQ argues that the departure from the settlement agreement hours is trivial;[56] this is wrong. The agency begins with a faulty premise: comparing the permit hours to the "presumptive" hours in the rules. This is irrelevant, because WMTX agreed to operating hours more restrictive than the "presumptive" hours. A comparison between the "agreed hours" and the "permit hours" shows that the TCEQ is allowing operation of heavy equipment until 9:00 p.m. on Saturday nights when the settlement agreement would call for operations to cease at 3:00 p.m., and that WMTX agreed to *no* Sunday operations, but the TCEQ allowed heavy equipment to be operated on Sundays from 5:00 a.m. to 9:00 p.m. These are significant differences to residents near the Landfill.

Upholding the TCEQ's decision to ignore the agreed hours of operation would provide great disincentive to the voluntary settlement of disputed issues. Such settlements would become virtually unenforceable.

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[55] 30 TEX. ADMIN. CODE § 330.118(a) (operating hours "may" be between 7 a.m. and 7 p.m. Monday through Friday, "unless otherwise approved in the authorization for the facility").

[56] TCEQ Brief at 19-21.

VI. WMTX's Attack on TJFA and Bob Gregory is Offensive and Irrelevant, and Should Be Ignored by the Court.

Waste Management devotes an entire page of its brief to an *ad hominem* attack on not just Plaintiff TJFA – which is one of the multiple landowner plaintiffs in this lawsuit – but also on Bob Gregory personally, who is not a party, but holds an ownership interest in TJFA as well as two companies in the waste business, Texas Disposal Systems, Inc. and Texas Disposal Systems Landfill, Inc.[57] WMTX apparently argues that decisions on permit applications should be made based on the identity of the parties rather than the strength of their arguments. This, of course, is entirely improper.

Completely omitted from WMTX's attack is the ALJ's explicit finding that Appellants (including TJFA) "raised reasonable concerns" regarding WMTX's application.[58] Indeed, the neutral Office of Public Interest Counsel agreed with several of Appellants' grounds of opposition, including the groundwater monitoring argument. Contrary to WMTX's false implications, there has never been any finding whatsoever that TJFA's participation in this matter was anything other than legitimate.

CONCLUSION AND PRAYER

For the reasons stated above and in Appellants' initial brief, Appellants respectfully pray that this Court vacate the permit issued by the Texas Commission on Environmental Quality to WMTX, remand the matter to the TCEQ for further proceedings, and award Appellants costs incurred together with all other relief to which Appellants may show themselves entitled.

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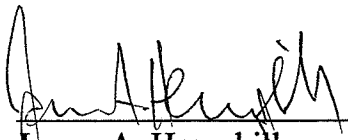
[57] WMTX Brief at 5.

[58] PFD at 71.

Respectfully submitted,



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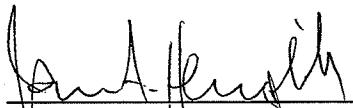

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