No. D-1-GN-08-004503

TJFA, L.P. and CONCERNED CITIZENS AND LANDOWNERS, Plaintiffs,	§	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Defendant.	§	53rd JUDICIAL DISTRICT

BRIEF ON THE MERITS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, DEFENDANT

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EXECUTIVE SUMMARY

Defendant, the Texas Commission on Environmental Quality (TCEQ), asks for affirmance of its decision to grant the application of Waste Management of Texas, Inc. (WMTX), for an amended municipal landfill permit in Comal and Guadalupe Counties. Most of the case turns on evidence. Does the administrative record, which includes testimony compiled at a hearing at the State Office of Administrative Hearings (SOAH), contain evidence supporting the decision? Plaintiffs quibble with the evidence — about the floodplain, drainage patterns, study of subsurface conditions, and leak detection monitoring — but do not come close to bearing their burden of negating existence of substantial evidence or showing a violation of applicable rules.

Plaintiffs emphasize a settlement agreement that a former protestant signed with WMTX. The agreement included limitations on landfill operating hours. Although plaintiffs were not parties to it (and neither was the TCEQ), plaintiffs argued to the agency that the agreement had a certain meaning, while WMTX argued for a different meaning. But the dispute was academic, because a private agreement does not bind a regulatory agency. Any contrary rule would impair the agency's sovereign powers, forcing it to let its duties be carried out by private parties.

Plaintiffs argue that WMTX did not seek a "lateral expansion" of its pre-existing landfill and that therefore one finding of fact is wrong, but acknowledge they are not seeking to reverse the agency order on this basis. A reviewing court lacks power to rewrite the finding.

STATEMENT OF THE NATURE OF THE CASE

This is an administrative appeal from an order of the TCEQ granting an application by WMTX for a permit under the Texas Solid Waste Disposal Act[1] for an expansion of its municipal solid waste landfill near New Braunfels, Texas. The agency issued the order after a contested case hearing conducted by an Administrative Law Judges (ALJ) with SOAH.

STATEMENT OF FACTS

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

A preliminary hearing was conducted in New Braunfels by an ALJ and plaintiffs were

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

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

3. *See* Volume 9 of the Administrative Record, Item 62, Finding of Fact No. 8. This record item, which is the order challenged in this case, will be referred to hereafter as Final Order. A copy of it is Appendix 1 to this brief.

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

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

admitted as parties.[5] The ALJ conducted a six-day contested case hearing.[6] Her proposal for decision (PFD) recommended that the TCEQ approve the permit amendment application to expand the landfill with some modifications. The Commission adopted the ALJ's recommendations with some modifications,[7] and issued its final order.[8] Plaintiffs filed a motion for rehearing[9] that was overruled by operation of law.[10] This suit for judicial review followed.

ARGUMENT

I. The TCEQ's finding that WMTX complied with the rule about identification of 100-year floodplains was reasonable and supported by substantial evidence.

(Responding to plaintiffs' Point of Error No. 1, beginning on page 14 of Plaintiffs' Initial Brief.)

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

30 Texas Administrative Code § 330.56(f)(4)(B)(i)[11] required WMTX to show whether the site is located within a 100-year floodplain. As contemplated by the rule,

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

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

7. Final Order.

8. *Id.*

9. 9 AR, Item 63.

10. 9 AR, Item 65.

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

Copies of all sections of the Texas Administrative Code cited herein are in Appendix 2 to this brief.

WMTX made the showing through a witness, Mr. Scott Graves, who referred to and relied on FEMA flood maps, which are customarily used in the industry.[12] One map, App-211,[13] depicted part of Comal County. Another depicted an adjoining part of Guadalupe County.[14] The evidence showed that the proposed landfill expansion was not in a 100-year floodplain.[15] Mr. Graves said, "[W]hen I looked at [a published FEMA floodplain] map, it indicated that no areas of the site, no areas of the property here at all are within the 100-year floodplain."[16] App-211 shows 100-year floodplain areas in black. It shows the general area of the landfill site in white, meaning with no shading, labeling it "Zone C." The map key explains that Zone C areas are "Areas of minimal flooding."

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

> Q. Okay. Did FEMA study Mesquite Creek to determine that it has no floodplain?
>
> A. I'm not certain . . . .[17]

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12. 10 AR, Item T-3, page 151.
13. 13 AR, Item App-211.
14. This map was referred to in Mr. Graves's testimony. *See* 10 AR, Item T-4, page 333.
15. 10 AR, Item T-3, page 150, lines 9-11.
16. *Id.*.
17. Plaintiffs' Initial Brief, page 16, lines 7-8 (ellipses in original).

In the testimony for which plaintiffs substitute ellipses, Mr. Graves elaborated: "but given that the map has been published including the Mesquite Creek area, that tells me that they must have come to some conclusion about it."[18] He added, "I don't know the level of detail that they did to determine that."[19] At the time he said this, he had no FEMA flood maps in front of him. Later, when he was looking at App-211 (which he had used in preparing the application), he pointed out a degree of detail on it from which it was reasonable to infer that FEMA had studied the area enough to determine absence of a floodplain.[20]

B. TCEQ did not violate its own precedent.

Plaintiffs erroneously claim[21] that the present case "presents the exact same situation" as in two prior agency-level cases — *Juliff Gardens, L.L.C.* and *Tan Terra Environmental Services, Inc.* — and that the TCEQ "failed to follow [those precedents]." But plaintiffs have not shown that those decisions are in the present administrative record. If they are not, it would be improper for the Court to consider them. Even if cognizable, the agency decisions there were inapposite. In *Tan Terra* the TCEQ found that the applicant relied on a FEMA floodplain *index* rather than a map, and that the index did not clearly delineate whether the facility was located in a floodplain. This finding was supported by testimony that, if FEMA has calculated and mapped a floodplain area, a panel of the FEMA map will show the floodplain. Conversely, if an area has not been studied by FEMA, no panel will be printed

18. 10 AR, Item T-3, page 151, lines 19-23.
19. *Id.*
20. 10 AR, Item T-4, page 333, line 4, through page 334, line 2.
21. Plaintiffs' Initial Brief, page 21.

for that area. In *Tan Terra*, the absence of a FEMA floodplain map for the area of the proposed landfill indicated that FEMA had not studied the area.

As to *Juliff Gardens,* it also involved an applicant's use of a FEMA floodplain map index in an effort to demonstrate that a site was not in a floodplain. There was evidence in the record that the FEMA map index did not show that the landfill site had been analyzed. Separately, there was evidence that FEMA had never actually studied the area in question. The PFD said that reliance upon FEMA maps is appropriate, if they are shown to actually address the area in issue.

Unlike in *Tan Terra* and *Juliff Gardens*, the floodplain maps relied upon by WMTX in preparing the application show that the landfill is not in a 100-year floodplain.

C. The findings related to flooding are supported.

WMTX's engineer, Mr. Graves, acknowledged that the creek level sometimes rises enough to flood portions of a nearby lane.[22] He performed an additional analysis to determine whether the construction or operation of the landfill expansion would significantly restrict flow during a 100-year/24-hour storm event.[23] The ALJ, and ultimately the Commission, found that this analysis demonstrated that "the landfill design will not restrict the flow of the 100-year flood, reduce the temporary water storage capacity of the floodplain, or result in the washout of solid waste so as to pose a hazard to human health and the

22. 10 AR, Item T-3, page 188, line 5, through page 190, line 3; 10 AR, Item T-4, page 382, lines 5-17.

23. 10 AR, Item T-3, pages 159-62.

environment."[24] These findings are supported by substantial evidence.

Mr. Graves considered "two opposite extremes that could happen with respect to 100-year, 24-hour flooding of Mesquite Creek."[25] In the first scenario, a downstream lake (Freedom Lake) is relatively empty when the hypothetical flood event occurs, such that the event in Mesquite Creek passes through the facility area without being impeded by the downstream lake.[26] Mr. Graves calculated the limits of the 100-year, 24-hour flood event for Mesquite Creek as it hypothetically spilled out of its normal banks. His calculations showed that the 100-year, 24-hour storm would rise to an elevation of approximately 600 to 602 feet above mean sea level. He concluded that, since "this is well below the elevations of the expansion related embankments . . . the expansion will not restrict flow of this flood event, nor will the flood encroach on the waste disposal areas."[27]

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

24. PFD, page 50.
25. 13 AR, Item App-200, page 49.
26. *Id*.
27. *Id*., pages 49-50

to create the pond itself will add even more flood storage volume, with the net effect being an increase in Freedom Lake's flood storage capacity."[28]

II. Non-alteration of natural drainage patterns. (Responding to plaintiffs' Point of Error No. 2, beginning on page 24 of Plaintiffs' Initial Brief.)

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

TCEQ has issued "Guidelines for Preparing a Surface Water Drainage Plan for a Municipal Solid Waste Facility" (Guidelines) to assist applicants in preparing a compliant surface water drainage plan.[29] The Guidelines recognize that the development of a landfill will result in an increase of stormwater runoff, saying that, in some circumstances, "the expected volume increase could vary from 5 percent to 60 percent."[30] They explain that "a goal of the surface water drainage plan is to show that the development of the MSW facility will not adversely alter to *any significant degree* the natural drainage patterns of the watershed that will be affected by the proposed development."[31] They say "[t]here is no clear-cut number or percentage of change that can be set to indicate a 'significant' change" elaborating that "[w]hat is considered 'significant' is a subjective term that cannot be defined as a specific, objective criterion."[32]

Applicants are charged to "demonstrate that drainage patterns will not be significantly

28. 13 AR, Item App-200, page 50.
29. 13 AR, Item App-209.
30. *Id.*
31. *Id.*, page 2 (emphasis added).
32. *Id.*, page 3.

altered because of the effect of the site development on (1) peak flows, (2) volumes, and (3) velocities from each permit boundary discharge point."[33]

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

> As an applicant, it is your responsibility to demonstrate that any volume increase (or decrease) is not "significant." Typical methods for addressing this issue are listed below:
>
> • Demonstrate that there is no increase in volume at a discharge point.
> • *Demonstrate that the additional volume will be released at a rate that will not significantly affect the downstream receiving water body.* For example, the total volume increase may be 30 percent more for the postdevelopment condition, compared to the predevelopment condition. However, this increase may be demonstrated to be "not significant" if it can be shown that the additional volume of water will be released at a rate that will not adversely affect the downstream receiving water body.
> • *Use storm water retention ponds.*
> • Demonstrate that any change in the volumes of water discharged from the permit boundary discharge points will not have a significant adverse effect on downstream water rights and uses.[34]

WMTX's drainage plan demonstrates that it will control the increase in storm water volume by holding storm water in detention ponds and controlling the rate of discharge.[35] The plan says the peak discharge rate at Discharge Point E will *decrease* from a pre-development rate of 65 cubic feet per second to 37 cubic feet per second post-development.[36] WMTX's engineer, Mr. Graves, said he was confident that the increased volume of stormwater would have no significant impact,[37] since the peak discharge leaving the site at Discharge Point E

33. *Id.*
34. *Id.*, page 4 (emphasis added).
35. 4 AR, continuation of Item 1, App-202, pages 1815-21.
36. *Id.*, page 1820, Table 3.5.1-2.
37. 10 AR, Item T-4, page 348, lines 9-15.

post-development will be less than in pre-development conditions.

B. No adverse impact on downstream land.

The demonstration that natural drainage patterns will not be significantly altered by construction or operation of a landfill is made at the permit boundary, not at points offsite. The ALJ discussed in her PFD two prior MSW landfill permit proceedings, in which the TCEQ considered where the determination of lack of significant alteration should be made. She quoted the Commission's ruling in one of them, *Blue Flats Disposal, L.L.C.,* that "Commission rules and precedent require that the determination of significant alteration be made at the permit boundary, not off site."[38] She noted that issue was "revisited and confirmed by the TCEQ"[39] in the *North Texas Municipal Water District* proceeding. In considering WMTX's application, the Commission applied this interpretation of its own rule, which requires the applicant to demonstrate that" natural drainage patterns will not be significantly altered *as a result of the proposed landfill development*."[40]

Deference should be afforded to an agency's interpretation of its rules unless it is plainly erroneous or inconsistent with the language of the rules.[41] A court should accept the agency's reasonable interpretation, even if another reasonable interpretation exists.[42] That

38. PFD, page 44.

39. *Id.*

40. 30 TEX. ADMIN. CODE § 330.56(f)(4)(A)(iv) (emphasis added).

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

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

is especially true when the agency has special, relevant expertise.[43] "[T]he agency interpretation becomes a part of the rule itself and represents the view of a regulatory body that must deal with the practicalities of administering the rule."[44] A court should "determine whether an agency's decision is based on a permissible interpretation of its statutory scheme"[45] and should affirm the agency's interpretation unless the agency abused its discretion.[46]

Finally, even if downstream impacts were considered, the evidence indicated that there would be no adverse impact. On pages 26 and 27 of their brief, plaintiffs quote from Mr. Graves' testimony regarding the increase in stormwater volume at Discharge Point E. Plaintiffs omit part of his testimony on this point:

> Q: Okay. And because the peak discharge that you've calculated leaving the site at Discharge Point E is less than pre-development conditions, you're confident that, therefore, this additional volume of water will have no impact whatsoever downstream?
> A: *No significant impact. Yes, I'm confident.*
> Q: Okay. All right. What if you were to have increased the volume of runoff leaving Discharge Point E instead of close to doubling maybe you quadrupled it, but the peak flow was the same as you've calculated in this application, would your opinion change any?

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

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

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

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

A: I would say in this particular instance, no, it would not.[47]

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

Q: Okay. And does the values of volume of stormwater being discharged at any of your points along the permit boundary change significantly?
A: Did you ask if the volumes –
Q: Yes.
A: – changed significantly?
Q: Yes.
A: No, they do not.
Q: Okay. And why do you say that?
A: Because although what we've talked about for the last day and a half, there are places where the volume on my post-development condition does not exceed the natural conditions, in my opinion that is not a significant exceedance.
Q: And why is it not a significant exceedance?
A: *Because as I have also talked about earlier, the peak flow rate has been substantially reduced compared to the natural conditions, and that is what has the most impact on the immediate and downstream areas.*[48]

Similarly, on page 28 of their brief, plaintiffs say that WMTX did "virtually nothing" to assess risks to downstream property owners and they support this claim by quoting part Mr. Graves' testimony regarding downstreamwater flow. Omitted, however, is the following:

Q: Okay. If it does flood property of those people that it crosses, would adding more water to that watercourse help that flooding situation or hurt that flooding situation?
A: It would neither help nor hurt. The way I have designed this would have no – no effect.
Q: And how do you know that?
A: *Actually the effect in terms of the level of the flood would rise I believe*

47. 10 AR, Item T-4, page 348, lines 9-23 (emphasis added).
48. 10 AR, Item T-4, page 346, line 14, through page 347, line 8 (emphasis added).

> *would be beneficial, meaning the water elevation would rise to a smaller level under our design because I have limited our peak flows to be – if you'll notice on the page of the application that I got my last answer from, I have reduced the peak flows almost in half from the natural conditions to the post-development conditions. And the behavior of a channel is governed by the peak discharge rate that flows through it in terms of the highest water level that a rain event would rise in that channel.*[49]

III. WMTX properly characterized site geology and hydrogeology. (Responding to plaintiffs' Point of Error No. 3, beginning on page 36 of Plaintiffs' Initial Brief.)

In their third issue, plaintiffs overlook the totality of the evidence and testimony. WMTX's expert on geological and hydrogeology issues was Janet Meaux, a professional geologist with over eighteen years of experience in geologic and hydrogeologic investigations and eleven years of experience with MSW landfill projects.[50] She prepared the geology report required by the rules.[51] She testified that the subsurface investigation included consideration of data derived from a total of 32 borings (eight prior borings in the existing landfill and 24 new borings in the expansion area), all extending down to five feet below the deepest planned excavation of the landfill.[52] She said she was "able to establish the subsurface stratigraphy and geotechnical properties of the soils beneath the site."[53] She determined that Stratum IV — on which plaintiffs' brief focuses — is an aquitard, meaning a layer of low-permeability soils that would restrict the movement of groundwater from one

49. 10 AR, Item T-4, page 352, line 10, through page 353, line 3 (emphasis added).

50. 14 A. R., Item App-401.

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

52. 14 A. R., Item App-400, page 24, lines 23-25.

53. 14 A. R., Item App-400, page 25, lines 21-24.

zone to another. In this case, the movement-restricting stratum is estimated to be 200-feet thick.

Most of the landfill will be dug down only as far as Stratum III, which is much more permeable than Stratum IV. Stratum III, said Ms. Meaux, was the most likely lateral pollution-migration pathway and therefore the place where release-detection monitoring would be most needed and effective. This stratum, she said, would be closely monitored via strategically positioned wells.[54]

In contrast with Stratum III, Ms. Meaux said none of the 24 new soil borings gave her any reason to conclude Stratum IV was transmitting groundwater. She characterized Stratum IV as dry,[55] and mentioned the corroborating observations of her colleague, made during excavation of a nearby existing landfill cell, that Stratum IV in that location was dry.[56] Ms. Meaux justified not having studied the stratum via water-detecting devices called piezometers by explaining that there was no evidence of water movement needing study.[57]

Ms. Meaux spoke directly to the few areas where the base of the landfill would be in Stratum IV and concluded there "would be little potential for migration due to the low

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

55. 11 AR, Item T-5, page 513, lines 15-16.

56. 11 AR, Item T-6, page 672, line 7 through page 673, line 13. The colleague, Dr. Beth Gross, was the geotechnical engineer for the landfill expansion project. She said on the witness stand that she saw no water during the excavation and that the stratum was "hard" and "dry." *Id.*, page 810, lines 10-15.

57. 11 AR, Item T-6, page 671, line 24, through page 672, line 1; *see also* 11 AR, Item T-5, page 513, lines 11-20.

hydraulic connectivity of Stratum IV, which is a confining bed."[58] As to fracturing — a subject on which much ink is spilled in plaintiffs' brief — she testified that the investigation detected no water bearing fractures in Stratum IV.[59] The TCEQ's staff geologist, John Williamson, having reviewed the portions of the WMTX application that addressed geological issues,[60] agreed that the presence of fractures in Stratum IV does not mean that groundwater moves between the fractures, noting that "all the boring logs showed everything being dry in Stratum IV."[61]

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

Plaintiffs' point-picking focus on supposed departure from TCEQ rules overlooks that fact that those rules provide specifics in some instances and leave to the expert judgment of geoscientists, sometimes in consultation with the regulators, many of the details of how to

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58. 14 AR, Item App-400, pages 35-36.

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

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

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

A: I didn't see any evidence of that.

11 AR, Item T-5, page 512, lines 10-16.

60. 15 AR, Item ED-8, page 2.

61. 12 AR, Item T-8, page 1098, lines 3-17.

study subsurface conditions. For example, a rule speaks of a duty to perform a "*sufficient* number of borings . . . to establish subsurface stratigraphy and . . . geotechnical properties . . . ."[62] The italicized word reflects the commonsense fact that there is a practical limit on how closely something can be studied. Must borings be at six inch intervals? One foot? A thousand feet? To some extent, such questions are — must be — left to professionals. In this case, WMTX hired a geoscientist who brought her long-experienced judgment to bear; who relied on the work of other experienced professionals; and who concluded that the site, including as WMTX will monitor it for possible releases, was suitable. This evidence supports the TCEQ order with room to spare.

IV. The TCEQ made an appropriate determination on site operating hours.

(Responding to plaintiffs' Point of Error No. 4, beginning on page 45 of Plaintiffs' Initial Brief.)

TCEQ rules required WMTX to include in its application a proposed site operating plan (SOP) covering a long, prescribed laundry list of topics, for example, personnel functions and training, equipment, procedures for screening out prohibited wastes, fire protection, control of windblown wastes, signage, and hours of operation.[63] When the agency grants an application, the approved operation hours in the SOP become in effect a permit condition.

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

In contending the TCEQ erred in approving certain operation hours, plaintiffs gloss

62. 30 TEX. ADMIN. CODE § 330.56(d)(5)(A)(i) (emphasis added).

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

over the fact that, against the backdrop of the relevant rule, they are presenting a narrow issue in their fourth point of error. The following rule subsection applied. (This brief inserts line breaks and bracketed sentence numbers in the text for ease of back-reference.)

> **§ 330.118. Facility Operating Hours.**
>
> (a)
>
> [1] The site operating plan must specify the waste acceptance hours and the operating hours when materials will be transported on or off site, and the hours when heavy equipment may operate.
> [2] The waste acceptance hours of a municipal solid waste facility may be any time between the hours of 7:00 a.m. and 7:00 p.m., Monday through Friday, unless otherwise approved in the authorization for the facility.
> [3] Waste acceptance hours within the 7:00 a.m. to 7:00 p.m. weekday span do not require other specific approval.
> [4] Transportation of materials and heavy equipment operation must not be conducted between the hours of 9:00 p.m. to 5:00 a.m., unless otherwise approved in the authorization for the facility.
> [5] Operating hours for other activities do not require other specific approval.

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

Plaintiffs are not arguing that the TCEQ erred in the waste acceptance hours (the sentence [2] category) or "other activities" hours (the sentence [5] category) it authorized.

They allege error only in the setting of heavy equipment hours. The permit allows heavy equipment to be operated in a given week during merely six hours more than the rule default would allow. The following table illustrates this point.

TCEQ's Table 1

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

Again, WMTX gained permission from the TCEQ to begin heavy equipment operation at 4 A.M. Monday through Saturday, which is only an hour earlier than the rule default. (Quitting time in the permit is the same as quitting time in the rule.) As to Sunday, the company accepted the rule default.[64]

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

Straining to magnify the dispute between them and the regulatory agency (and to present a technical point supposedly justifying reversal), plaintiffs place great weight on an agreement that WMTX entered into with Guadalupe County. (The county started out being a party protestant, but, based on the agreement, withdrew its opposition.) Although neither the agency nor plaintiffs were parties to the agreement, plaintiffs urge that the agency had to act, regulatorily, as though it were bound. Plaintiffs' argument, moreover, turns on a certain reading, one that was disputed: that the WMTX-Guadalupe County agreement

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

addressed (and thus contractually limited) heavy equipment operation.

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

TCEQ's Table 2

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

The law does not support plaintiffs' theory that the TCEQ was bound to adopt, as its order, an agreement that it was not a party to. In *City of El Paso v. Public Utility Commission*,[65] parties to a rate proceeding challenged the agency's decisional use of a non-unanimous, private agreement. The challengers argued that for the PUC to have relied on the agreement at all was arbitrary, capricious, and contrary to law. The Court disagreed, noting that the agency had taken the agreement into account only after convening a special hearing at which all parties could present evidence and argument about whether it would be a proper basis for resolving contested issues in the case. The case shows that, at least when it affords procedural protections, a Texas agency does not err by taking into account a private party settlement agreement.

The other side of the *City of El Paso* coin, however, should be that an agency does not

65. 883 S.W.2d 179 (Tex. 1994).

act arbitrarily or capriciously in *rejecting* an agreement, or some of its terms, as the basis of the agency's order.[66] That this is a reasonable reverse inference from the Supreme Court's holding becomes clear when one considers the ramifications of an hypothetical opposite rule. Requiring the TCEQ to adopt a term in a private settlement agreement would force abdication of a key agency decisional role. The permit-application-consideration function was granted to the TCEQ by the Legislature. In the present context, at least, where health and safety are at stake, the agency would err by handing over the regulatory reins to private parties.[67] Very likely, a court order forcing such a transfer of authority would violate separation of powers principles under article II, § 1, in the Texas Constitution.[68]

Moreover, the WMTX-Guadalupe County agreement's meaning was disputed. WMTX argued the agreement concerned only waste acceptance hours. Plaintiffs, though not parties to the agreement, argued it also addressed hours for heavy equipment operation and for "other activities." Apart from the document itself, no evidence was offered or admitted on what the agreement's parties mutually meant. The issues formed by the WMTX's and plaintiffs' opposing contentions are interesting. It is by no means plain that the agency had power to resolve them,[69] but certainly it was not *required* to. [70] Ultimately the issues

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

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

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

69. For example, *State v. Flag-Redfern Oil Co.*, 852 S.W.2d 480 (Tex. 1993), held that while a state agency may assess its own rights under a contract it is a party to, only courts (*semble*) can

concerning the agreement's meaning are academic, but the existence of a dispute over them provides still a further illustration of the unwisdom of binding the TCEQ to an agreement between an applicant and a private party.[71]

Plaintiffs' policy argument about possible discouragement of settlements among parties not including the agency[72] cannot withstand analysis. No party contemplating a private settlement could reasonably believe that it would bind a state regulatory agency with sovereign powers. Had Guadalupe County remained a party to the agency proceeding, and had it wanted the TCEQ to enshrine Guadalupe County's bargain as the agency's final order, it could have asked the agency to follow a procedure like the one in the *City of El Paso* case discussed above. But far from doing that, the county withdrew its opposition and ceased being a party to the agency proceeding, while, of course, remaining an obligee under the agreement with WMTX. Presumably the county got all the settlement-incentive it wanted from the settlement agreement itself. The county presumably would have a court remedy if in future it believes WMTX is violating it, but this possibility would not affect the validity

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adjudicate contract rights of third parties. On the other hand, if a term in a stipulation is made part of an agency order, it has administrative effect. *See, e.g.*, *In re Entergy Corp.*, 142 S.W.3d 316, 323-24 (Tex. 2004) (non-unanimous settlement agreement had assumed character of administrative order when adopted by PUC; court rejected claim that agreement was a mere private contract that could be construed by a court as a matter of law).

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

71. Contrary to the hypothesis on page 47 of plaintiffs' brief, at lines 8-11, the TCEQ in Finding of Fact 99 did not purport to resolve any dispute over the agreement's meaning (and therefore cannot have committed error in such a supposed resolution).

72. Plaintiffs' Initial Brief, page 47, lines 18-20.

of the TCEQ's regulatory exercise of its delegated share of the state's sovereign powers.

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

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

WMTX applied for permission to transport materials on and off site and to operate heavy equipment at any time during the week — in other words, 24/7.[73] It supported the request with evidence, showing that 24/7 authorization is not unusual in the industry, and that the company and the community benefit from the authorization, which allows for quick response to regional and local emergency situations.[74] Comal County Commissioner Jan Kennady, whose precinct contains the Comal County part of the WMTX landfill, testified.[75] She stressed that residents in her precinct and in the rest of the county rely on the landfill.[76] She testified how helpful it can be, after a storm, for the landfill to be available so that people promptly can clear their property of debris.[77]

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73. 6 AR, Item App-202, page 02847.
74. *See generally* 10 AR, Item T-3, pages 12-48; 12 AR, Item T-8, pages 1146-58.
75. 12 AR, Item T-8, page 1150, line 23, though page 1150, line 1.
76. *Id.*, page 1155, lines 4-7.
77. *Id.*, page 1156, lines 3-8.

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

While the evidence outlined above was presented at a time when WMTX's pending request was for a 24/7 authorization, it provided support for the lesser-included authorization that actually was given after WMTX acquiesced.[79]

V. Plaintiffs' argument about "lateral expansion" is not a genuine point of error and in all events is meritless. (Responding to plaintiffs' Point of Error No. 5, beginning on page 48 of Plaintiffs' Initial Brief.)

Plaintiffs' fifth point of error seems like an afterthought. It attacks just one finding of fact, number 8.[80] Indeed, it attacks just one word in that finding. The finding said, in pertinent part (and with emphasis added): "Applicant filed [an application] which requests an amendment of [a pre-existing permit] to *laterally* expand the existing 96-acre facility to approximately 244 acres and into Guadalupe County. . . ." Plaintiffs emphasize a rule that defines "lateral expansion" as a horizontal expansion of an existing landfill unit — that is, of a disposal pit. But the finding of fact does not appear to have been using the phrase "laterally expand" as a term of art, as shown by its speaking of a *facility* rather than a landfill unit. The finding was accurate. WMTX was applying to expand its facility. Early in the

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

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

80. Plaintiffs' Initial Brief, page 49, line 13.

process, the company wrote a letter transmitting its application to the TCEQ. The letter's subject box contained the phrase, "Proposed Lateral Expansion."[81]

In any event, plaintiffs' fifth point does not claim prejudice to substantial rights. Nor does it ask for the TCEQ's order to be set aside on the basis of the supposed — but, as shown above, not actual — inaccuracy of the finding. If plaintiffs are asking the Court to re-write the finding, the Court should say no, because the Texas Administrative Procedure Act, buttressed by the separation of powers principle in article II, § 1, of the Texas Constitution, limits it to either affirming or reversing and remanding.[82]

CONCLUSION AND PRAYER

For the reasons set out above, the TCEQ asks the Court to affirm its decision.

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81. 1 AR, Item App-202, page 00001.

82. TEX. GOV'T CODE § 2001.174(1)-(2).

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CERTIFICATE OF SERVICE

On September 28, 2009, I served a copy of the above and forgoing brief on each person listed below, by the method shown.

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