CAUSE NO. D-1-GN-17-006632

ENVIRONMENTAL PROTECTION IN THE INTEREST OF CALDWELL COUNTY, JAMES ABSHIER, BYRON FRIEDRICH and TJFA, L.P., *Plaintiffs*	§	IN THE DISTRICT COURT OF
vs.	§	TRAVIS COUNTY, TEXAS
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, *Defendant*	§	
and	§	
130 ENVIRONMENTAL PARK, LLC, *Defendant/Intervenor*.	§	200TH JUDICIAL DISTRICT

PLAINTIFFS' INITIAL BRIEF

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STATEMENT OF THE CASE

This case is an administrative appeal of a decision by the Texas Commission on Environmental Quality ("TCEQ" or the "Commission"), granting an application by Intervenor-Defendant 130 Environmental Park, LLC ("130EP") for a permit authorizing the construction and operation of a 202-acre municipal solid waste landfill in Caldwell County, Texas.[1]

After TCEQ's Executive Director's ("ED") staff completed their review of 130EP's permit application, the application was referred to the State Office of Administrative Hearings ("SOAH") for a contested-case, evidentiary hearing and assigned to 2 administrative law judges ("ALJs"). Plaintiffs Environmental Protection in the Interest of Caldwell County ("EPICC"), James Abshier, Byron Friedrich, and TJFA, L.P (collectively, "Plaintiffs") were granted party status, along with several other Caldwell County residents and entities, including Caldwell County and Plum Creek Conservation District ("PCCD" or the "District").[2]

Following a two-week evidentiary hearing, the ALJs issued a Proposal for Decision ("PFD"), which noted some deficiencies with 130EP's application, but

[1] AR Vol. 33 Item 264.

[2] AR Vol. 18 Item 59.

nevertheless recommended issuing the requested permit, with certain revisions and special conditions.

The Commission considered the PFD at a public meeting on September 6, 2017.[3] The commissioners decided to issue 130EP a permit, but revised several findings and conclusions that had been proposed by the ALJs. Their decision was memorialized in an Order dated September 18, 2017.[4]

Following the issuance of the Commission's decision, Plaintiffs timely filed a Motion for Rehearing, complaining of several errors in the Final Order.[5] This Motion was overruled by operation of law. And Plaintiffs filed this lawsuit, seeking to reverse and remand TCEQ's decision.

[3] AR Vol. 76 Item CD-3.

[4] AR Vol. 33 Item 264.

[5] AR Vol. 33 Item 266.

ISSUES PRESENTED

1.) Where the Commission's rules require a landfill permit applicant to obtain a local floodplain development permit before submitting a permit application to TCEQ, if its proposed landfill facilities will be sited in a floodplain, and where the Commission grants the landfill permit even though the permit applicant never obtained the required local floodplain development permit, does this decision violate the Administrative Procedure Act ("APA") and TCEQ's own rules?

2.) Where a county has adopted a landfill siting ordinance that prohibits siting solid waste facilities in the area of the proposed landfill site, and where the permit applicant submitted its full landfill permit application *after* the adoption of the siting ordinance, was the Commission's decision to issue the landfill permit erroneous and contrary to law?

3.) Where no analysis was performed regarding the potential for the Landfill to endanger lives by increasing the likelihood that a downstream high hazard dam would breach, did the Commission act in a manner that was arbitrary and capricious in finding that the Landfill would not adversely alter drainage conditions?

4.) For a location included within the disaster declaration for Hurricane Harvey, was TCEQ's decision to issue a landfill permit erroneous and contrary to its rule requiring consideration of potential hurricane events?

5.) Where a landfill permit application includes a geology report replete with inconsistent, inaccurate, false, and unverifiable information, was the Commission's decision to grant the landfill permit in error and contrary to its own rules and legal standards?

6.) Were the Commission's findings and conclusions regarding compliance with TCEQ's geological requirements premised on incompetent evidence?

7.) Did the Commission act arbitrarily and capriciously by finding that a permit applicant improperly spoliated evidence but providing no remedy to the adversely affected parties?

8.) Did the Commission act arbitrarily and capriciously when finding that the proposed landfill is a compatible land use, without fully considering the potential impact of the landfill on a high-hazard downstream dam and reservoir?

9.) Did the Commission act contrary to its own rules in limiting the permit boundary and excluding the site access road and screening berm, so that there is no regulatory assurance that the applicable regulatory requirements will be enforceable during the life of the Landfill?

STATEMENT OF FACTS

Green Group Holdings, LLC—an out-of-state waste management company—decided to enter the solid waste disposal business in Texas. So, it formed 130 Environmental Park, LLC (Defendant/Intervenor), found a vacant site in northern Caldwell County, and submitted to TCEQ applications for 2 separate solid waste facilities: one for a transfer station and another for a landfill. Both are proposed to be sited on the same property in northern Caldwell County.

This case involves an administrative appeal of TCEQ's decision to grant one of 130EP's applications and issue a landfill disposal permit (MSW Permit No. 2383).[6] The permit authorizes 130EP to construct and operate a 202-acre municipal solid waste landfill on a site that is surrounded by floodplains on three sides, is located just upstream and adjacent to a reservoir and dam that has been designated as "high hazard," and is in close proximity to the Carrizo-Wilcox Aquifer outcrop.

The final decision was issued after a lengthy and somewhat torturous procedural process. This convoluted hearing process can be attributed to the multiple deficiencies with 130EP's application, the unsuitable location for the proposed landfill, and TCEQ's failure to enforce its rules—as discussed in more detail below. Indeed, the Final Permit was issued with "special conditions,"

[6] AR Vol. 33 Item 264.

allowing 130EP to demonstrate compliance with at least one of TCEQ's permitting requirements *after* the permit is issued.[7]

A. 130EP seeks authorization from TCEQ to operate a solid waste disposal facility.

130EP first submitted to TCEQ an application to operate a solid waste transfer station in September of 2013.

A short time later, on September 4, 2013, 130EP submitted to TCEQ a request seeking a determination regarding the land use compatibility of a solid waste disposal facility proposed for the same site as the proposed transfer station.[8] This land use compatibility application is sometimes referred to as "Parts I and II" of a landfill permit application, because it consists of only the first 2 parts of the 4-part application for a landfill permit. By filing only Parts I and II of the application, 130EP could only obtain from TCEQ a determination regarding land use compatibility. But it could not obtain a landfill permit authorizing the construction and operation of a landfill.

Meanwhile, on December 9, 2013, the Caldwell County Commissioners Court entered an Order to "Adopt Ordinance Prohibiting Solid Waste Disposal in Caldwell County" and enacted the Caldwell County Solid Waste Disposal

[7] AR Vol. 33 Item 269 at 14.

[8] AR Vols. 1-3 Item 1.

Ordinance, prohibiting the processing and disposal of solid waste in certain areas of Caldwell County.[9] *See* Tex. Health & Safety Code §§ 363.112 & 364.012. The site of 130EP's proposed landfill is among the areas wherein landfill facilities are prohibited under the County's Ordinance.

Several months later, in February 2014, while TCEQ staff was in the midst of reviewing 130EP's land use compatibility application and awaiting additional information that they had requested of 130EP, 130EP submitted a full landfill permit application, including Parts III and IV and a significantly revised Parts I and II.[10] About a month after that, on March 20, 2014, Plaintiffs' counsel sent 130EP and its consultants a preservation of evidence letter, advising that they intended to contest the permit application and therefore, all materials relevant to the permit application must be preserved.[11]

Staff commenced its technical review of the application and issued 130EP several Notice of Deficiency ("NOD") letters, detailing deficient information in the permit application and requiring 130EP to correct or address the noted deficiencies. Among the deficiencies identified in the NOD letters was 130EP's failure to include Plum Creek Conservation District ("PCCD" or the "District") on

[9] AR Vol. 58 Item Caldwell-3.

[10] AR Vols. 4-12 Item 17.

[11] AR Vol. 64 Item 36.

its list of potentially affected landowners and property owners within ¼-mile of the facility, as required by TCEQ rules, even though PCCD owns an easement for use of a reservoir and dam ("Site 21") on the proposed landfill property.[12] Another deficiency noted in at least 3 of the NOD letters to 130EP was its failure to obtain the required local floodplain development authorization, as required by TCEQ's rules, to allow construction of the landfill facilities, including the access road, in a floodplain.[13] In total, 194 deficiencies were noted in the various formal, written NOD letters.[14]

Ultimately, however, TCEQ staff completed the technical review of the landfill permit application, declared it technically complete, and on October 28, 2014, the Executive Director issued a draft permit, with special conditions, allowing 130EP to address at least 1 of the noted deficiencies *after* the permit is issued. 130EP was allowed to obtain the required floodplain development authorization from the County after the permit is issued.[15]

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[12] AR Vol. 14 Item 27.

[13] AR Vol. 58 Items ED-SO-4 at 5, ED-SO-5 at 2, and ED-SO-6.

[14] 31 deficiencies in ED-SO-3, 92 deficiencies in ED-SO-4, 20 deficiencies in ED-SO-5, and 4 deficiencies in ED-SO-6.

[15] AR Vol. 17 Item 39 at 11.

B. Nearby residents and local governmental entities seek a contested case hearing to oppose 130EP's requested permit, and the application is referred to SOAH.

Nearby residents formed an environmental organization and named it Environmental Protection in the Interest of Caldwell County, or "EPICC," and, along with several other individuals and entities, EPICC sought a contested case hearing to challenge 130EP's landfill permit application. The permit application was thereafter referred to SOAH, where a preliminary hearing was convened in March 2015. EPICC was admitted as a party at the hearing, along with several individual residents, TJFA, LP (another nearby property owner), Caldwell County, and Plum Creek Conservation District, the local water conservation district.[16]

C. SOAH convenes a contested case hearing, and Plaintiffs discover that 130EP has spoliated evidence.

The protesting parties raised a variety of issues, at SOAH, including the fact that the proposed landfill is surrounded by floodplains, is adjacent to a dam that has been designated "high hazard," as well as issues related to the subsurface geology at the site and the proximity of the site to the Carrizo-Wilcox Aquifer outcrop.

[16] AR Vol. 18 Item 59 at 1.

During the discovery phase of the hearing process, 130EP revealed that its consultants had discarded significant data regarding its subsurface, geological investigation. This was despite the fact that EPICC's counsel had sent 130EP a preservation of evidence letter shortly after 130EP submitted its landfill permit application to TCEQ.[17]

Among the data that was discarded were all soil samples collected from the 32 borings (as well as any soil samples that may have been collected from the 17 piezometers) drilled on the proposed landfill site. The borings and piezometers had been drilled, and the soil samples collected, as part of the subsurface investigation required by TCEQ rules, and the data had been used to prepare 130EP's geology report, for its permit application. Along with the soil samples, field notes from that site investigation and all initial boring logs had also been discarded. Essentially, the only data regarding the subsurface investigation that remained were the final logs included in the permit application. None of the data that was used to create the final logs, however, was preserved.

Plaintiffs, therefore, sought access to the proposed landfill site to drill a limited number of borings to attempt to verify the information included in the

[17] AR Vol. 64 Item Protestants 36.

geology section of the permit application.[18] Plaintiffs' request was granted, and in February 2016, their expert consultants drilled a limited number of borings, collected soil samples, conducted laboratory analyses of some of the samples, and prepared their own report regarding the inconsistencies between their subsurface investigation findings and the information included in the permit application.[19]

Based on these noted inconsistencies, Plaintiffs sought a spoliation instruction regarding the geology section of 130EP's permit application. That is, Plaintiffs requested that the ALJs presume that all information and data that was discarded by 130EP's consultants was unfavorable to 130EP. Plaintiffs alternatively sought to strike evidence submitted by 130EP regarding the geology section of the permit application.[20]

By Order dated August 11, 2016, the ALJs found that 130EP had a duty to preserve the discarded data, and 130EP breached that duty because it knew or should have known that there was a substantial chance that a hearing on its landfill permit application would take place and that documents in its possession or control would be material and relevant to the hearing. By discarding the initial geology data, 130EP precluded Plaintiffs from conducting the full discovery they were

[18] AR Vol. 27 Item 204.

[19] AR Vol. 62 Item Protestants 5R.

[20] AR Vols. 19-20 Items 88, 93.

entitled to, the ALJs found. Nevertheless, the ALJs overruled Plaintiffs' motion, reasoning that because Plaintiffs were allowed to drill their own borings on the site, no other action was necessary to remedy the prejudice caused by the destruction of evidence.[21]

An evidentiary contested case hearing was held on August 15 through 26, 2016. The evidence presented during the hearing covered several contested issues, including failure to obtain required local floodplain development authorizations, the existence of a siting ordinance that prohibits operation of a landfill at the proposed location, deficient and inaccurate subsurface geology information, surface water drainage issues, the absence of an access road within the permit boundary, and land use compatibility, among others.

Evidence presented at the hearing revealed that the proposed landfill would be surrounded by floodplains on three sides. Indeed, in some areas, the proposed facility boundary is coterminous with the floodplain boundary.[22] The evidence also revealed that there is no access road, within the permit boundary, that connects the proposed facility to a public roadway.[23] Moreover, 130EP never commenced the

[21] AR Vol. 28 Item 212.

[22] AR Vol. 62 Item Protestants 5-Y.

[23] AR Vol 1 Item 1, Vol. 1, Part II, App. IIA.

process for securing authorization from Caldwell County to construct an access road over a floodplain, as required by TCEQ rules.[24]

The evidence further revealed that the Plum Creek Conservation District Site 21 dam, located on the proposed landfill site, has been classified as a high hazard dam, meaning that should it fail or malfunction, TCEQ expects that it would result in the loss of seven or more lives, three or more habitable structures, or excessive economic loss.[25] Yet, neither 130EP nor TCEQ staff evaluated the impacts of the proposed landfill on the Site 21 dam and reservoir.

D. ALJs issue a PFD, acknowledging that 130EP failed to satisfy several TCEQ requirements and acknowledging that land use compatibility is an issue that requires attention, but nevertheless recommending approval of the requested permit.

At the conclusion of the hearing, and after the submission of the parties' closing briefs, the ALJs issued their Proposal for Decision (PFD). In that PFD, the ALJs noted that 130EP failed to comply with TCEQ's rules regarding some issues. More specifically, 130EP failed to list the District's easement on the landowner's list, as required by TCEQ rules; 130EP failed to obtain TCEQ approval of its soil

[24] AR Vol. 58 Item Caldwell-1 at 16.

[25] AR Vol. 60 Item PCCD 1.5 at 5.

boring plan before commencing its subsurface investigation; and 130EP failed to obtain a floodplain development permit from the County.[26]

But none of these deficiencies warranted denial of the permit, according to the ALJs. The failure to obtain a floodplain development permit from the County could be remedied by a special provision in the permit, requiring 130EP to obtain the required local floodplain development permit before commencing construction of the landfill, according to the ALJs. It should be noted that this proposed remedy is not contemplated in the solid waste rules, and the ALJs cited to no authority allowing 130EP to comply with this regulatory requirement after the landfill permit is issued.

In their PFD, the ALJs also noted that they had concerns regarding the compatibility of the proposed landfill with the Site 21 reservoir and dam and advised that the Commission must determine whether situating a landfill in close proximity to the 100-year floodplain, immediately upstream of a flood control structure needed to protect human life, is a compatible land use.[27]

Nevertheless, the ALJs concluded in their PFD that 130EP met "the objective requirements of the applicable TCEQ rules."[28] They recommended that if

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[26] AR Vol. 30 Item 248 at 2.

[27] *Id.*

[28] *Id*. at 12.

the Commission concludes that the noted deficiencies do not warrant denial of 130EP's landfill permit application, then the Commission should issue the draft permit with some recommended changes.[29]

Among the ALJs' recommended changes to the draft permit was that the permit boundary be extended to include the entire length of the proposed access road from the entrance of the facility to the public roadway—US183—and the entire screening berm.[30] The ALJs further recommended that 130EP's request for 24-hour operations be denied, and that the standard operating hours set out in TCEQ's solid waste rules be adopted.[31]

The matter was then submitted to the TCEQ Commissioners.

E. TCEQ convenes a public meeting and grants 130EP its requested landfill permit, without addressing the issues raised in the PFD by the ALJs.

The Commissioners held a public meeting on September 6, 2017.[32] During their deliberations, the Commissioners made no mention of the high hazard dam or the surrounding floodplains. Instead, the Commissioners' deliberations focused on whether it was appropriate to limit the operating hours, as proposed by the ALJs in

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[29] *Id.* at 2.

[30] *Id.*

[31] *Id.*

[32] AR Vol 64 Item CD-3

their PFD. As they discussed whether a remand was appropriate to allow 130EP another opportunity to present evidence to justify its request for extended operating hours, 130EP's counsel advised the Commissioners that 130EP would accept the limited operating hours proposed by the ALJs and dropped their request for 24-hour operations.[33]

The Commissioners also revised some of the findings and conclusions proposed by the ALJs. For instance, they revised the findings and conclusions that would have required 130EP to extend its permit boundary to include the entire length of the access road and the screening berm.[34]

The Commission's decision was memorialized in a written order dated September 18, 2017.[35] Plaintiffs timely filed their motion for rehearing, which was overruled by operation of law.[36] Plaintiffs now seek judicial review of the Commission's decision.

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[33] *Id.*

[34] AR Vol. 33 Item 264 at 39.

[35] *Id.*

[36] AR Vol. 33 Item 266.

SUMMARY OF ARGUMENT

Green Group Holdings—a company with no experience operating a solid waste facility in Texas—formed 130EP and submitted to TCEQ an application for a landfill permit to operate a landfill in Caldwell County. This was its second attempt at obtaining a landfill permit from TCEQ. Its first attempt—an application for a landfill permit in Waller County, submitted under the name Pintail—failed after it was discovered that the groundwater conditions were not as represented in the Pintail landfill application.

Here, as in Waller County, 130EP failed to conduct an adequate site investigation before selecting its proposed landfill site. And so the site it chose for its proposed landfill is replete with complications that render the site a risky and inappropriate one for a landfill. Among the features that render this site deficient for a landfill are the presence of multiple floodplains, the presence of a high-hazard dam and reservoir, complex geology with numerous preferential migration pathways, and lack of an access road into the proposed permit boundary. In addition, a local siting ordinance prohibits the chosen site from solid waste operations.

Instead of searching for another, more appropriate site, however, 130EP instead chose to disregard the risks that its proposed landfill presents to human health and the environment. And it (mis)represented to TCEQ staff, in its

application, an overly simplistic description of the site that simply did not correspond with the actual conditions that exist there.

The proposed landfill's unusual facility boundary, for instance, attempts to avoid the floodplain, but it fails to account for inevitable changes to the floodplain, as a result of increasing extreme climate events. The application simply ignores the high-hazard dam, providing no analysis of potential impacts caused by the proposed landfill and the increased drainage. The subsurface characterization presents an overly simplistic and implausible description of the geology, one that is inconsistent with publicly available sources and other subsurface investigations. The access road is not included in the application at all. And 130EP simply ignored the requirement that it obtain county approval for development of a facility in a floodplain—despite numerous requests, from TCEQ staff, to obtain this required local authorization. Ultimately, 130EP displayed a serious disrespect for applicable TCEQ requirements and for the Caldwell County community and its health and environment.

The ALJs, in their PFD, candidly admitted that they had concerns regarding the compatibility of a landfill sited in close proximity to a high hazard dam and reservoir, and they advised the Commission to determine whether situating a landfill in close proximity to the 100-year floodplain and immediately upstream of a flood control structure needed to protect human life is a compatible land use.

They also proposed adding the site access road and a screening berm to the permit boundary.

Yet, during their deliberations regarding 130EP's application, the Commissioners did not even mention the high hazard dam and reservoir, the floodplains, 130EP's failure to obtain local floodplain development approvals, or even the County's siting ordinance. Despite the poor location, the features that render the site a risky one for a landfill, the failure of 130EP to obtain local approvals, and 130EP's disregard for TCEQ's regulations, the Commission chose to grant the landfill permit, disregarding the ALJs' recommendations regarding the site access road, the screening berm, and the land use compatibility issue. In short, the Commission did not take a hard look at the salient problems that 130EP's permit application presents and did not genuinely engage in reasoned decision-making.

For the reasons described below, Plaintiffs maintain that the Commission's decision was an erroneous one, and that it must be reversed.

ARGUMENT

A. Standard of Review: This administrative appeal is governed by the Administrative Procedure Act ("APA") and by the Solid Waste Disposal Act.

This appeal is governed by the Administrative Procedure Act. Tex. Gov't Code §§ 2001.001-.902. Accordingly, this Court must reverse or remand the case for further proceedings if substantial rights of the plaintiff have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

> (A) in violation of a constitutional or statutory provision;
> (B) in excess of the agency's statutory authority;
> (C) made through unlawful procedure;
> (D) affected by other error of law;
> (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
> (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Tex. Gov't Code § 2001.174(2).

An agency decision is arbitrary if it denies the parties due process or fails to demonstrate a connection between the agency decision and the factors that are made relevant to the decision by the applicable statutes and regulations. *Occidental Permian, Ltd. v. Railroad Comm'n*, 47 S.W.3d 801 (Tex. App.—Austin 2001, no pet.).

Furthermore, the Commission is required to follow its own rules and procedures. *See City of Waco v. Texas Natural Res. Conservation Comm'n*, 83 S.W.3d 169, 179 (Tex. App.—Austin 2002, pet. denied) ("The commission shall follow its rules as adopted until it changes them in accordance with the Act."). An agency's failure to follow the clear and unambiguous language of its own rules is

arbitrary and capricious. *Rodriguez v. Service Lloyds Ins. Co*., 997 S.W.2d 248, 254-55 (Tex. 1999).

An agency's development of rules of general applicability by rulemaking places the public and affected parties on notice of the rules to be applied by an agency and allows comment on those rules. *Id.* at 255. This objective of the rulemaking process is relevant to a determination of whether an agency decision is arbitrary and capricious. As the Austin Court of Appeals has noted, "The major factor that runs throughout arbitrary-capricious review cases is that parties must be able to know what is expected of them in the administrative process." *Starr County v. Starr Industrial Services,* 584 S.W.2d 352, 355 (Tex. App.—Austin 1979, writ ref'd n.r.e.).

Furthermore, the degree to which deference is given to an agency's rules is limited. Texas standards for deference to administrative agencies are analogous to those employed by the federal courts, and thus, Texas courts look to federal caselaw in considering issues of deference. *See, e.g., First American Title Ins. Co. v. Combs,* 258 S.W.3d 627, 645 (Tex. 2008) (citing *Watt v. Alaska*, 451 U.S. 259 (1981); *Pauley v. BethEnergy Mines, Inc.,* 501 U.S. 680 (1991); and *Rust v. Sullivan,* 500 U.S. 173 (1991), on issues of judicial deference to agency action). While concurring in the U.S. Supreme Court case of *Perez v. Mortgage Bankers Association,* Justice Thomas wrote:

> [T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws. . . It is undoubtedly true that the other branches of Government have the authority and obligation to interpret the law, but only the judicial interpretation would be considered authoritative in a judicial proceeding. . . **Interpreting agency regulations calls for that exercise of independent judgment.** Substantive regulations have the force and effect of law. . . . **Just as it is critical for judges to exercise independent judgment in applying statutes, it is critical for judges to exercise independent judgment in determining that a regulation properly covers the conduct of regulated parties.** Defining the legal meaning of the regulation is one aspect of that determination.[37]

Perez v. Mortgage Bankers Association, 135 S. Ct. 1199, 1217-19 (2015) (Thomas, J., concurring in judgment).

In line with this approach, Texas courts will only defer to an agency's interpretation of its own rule when that interpretation is "reasonable," and it is for the courts to decide whether an interpretation is reasonable. *Perry Homes v. Strayhorn,* 108 S.W.3d 444, 448 (Tex. App.--Austin 2008, no pet.), *Combined Specialty Ins. Co. v. Deese,* 266 S.W.3d. 653, 660 (Tex. App.—Dallas 2008, no pet.)

Furthermore, the Commission is constrained in its review and revision of the ALJs' PFD, by Texas Health and Safety Code section 361.0832.[38] That section provides that in considering an ALJ's proposal for decision:

> (c) The commission may overturn an underlying finding of fact that serves as the basis for a decision in a contested case only if the commission finds that the finding was not supported by the great weight of the evidence.
>
> (d) The commission may overturn a conclusion of law in a contested case only on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules.
>
> (e) If a decision in a contested case involves an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgment of the commission by law, the commission may reject a proposal for decision as to the ultimate finding for reasons of policy only.

Tex. Health & Safety Code § 361.0832; *see also Hunter Industrial Facilities, Inc. v. Texas Natural Resource Conservation Commission,* 910 S.W.2d 96, 102 (Tex. App.—Austin 1995, writ denied) (holding that the Legislature intended to restrict TCEQ's discretion to reject an ALJ's underlying findings of fact, so that it cannot do so simply because it would have reached a different conclusion). Furthermore, a conclusion of law is "clearly erroneous," for purposes of subsection (d), "when the reviewing body is left with the definite and firm conviction that a mistake has

[38] Chapters 2001 and 2003 of the Government Code also govern the proceedings and the Order at issue here. Plaintiffs maintain that the Final Order violated provisions in these two chapters as well as the cited provisions of the Health and Safety Code.

been committed." *Hunter Industrial Fac.*, 910 S.W.2d at 102 (citation & internal quotations omitted); *see also Southwest Public Serv. Co. v. Public Util. Comm'n*, 962 S.W.2d 207, 213-14 (Tex. App.—Austin 1998, pet. denied).

B. <u>The Commission's findings and conclusions regarding 130EP's failure to obtain local approvals are in violation of the APA.</u>

1. *The Commission failed to follow its own rules by issuing 130EP a landfill permit even though 130EP failed to obtain the required local floodplain development permit.*

TCEQ Rule 330.63(c) dictates that for construction in a floodplain, "applications" for landfill units "shall include . . . a floodplain development permit from the city, county, or other agency with jurisdiction over the proposed improvements."[39] Yet, 130EP did not obtain the required floodplain development permit from the County and did not submit the floodplain development permit with its application.[40]

In FOF 330, of the Final Order, this failure was recognized as a "deficiency" in the application. In fact, the Order includes a COL acknowledging that TCEQ Rule 330.63(c)(2)(D)(ii) has *not* been met.[41] The ED's proposed resolution to this

[39] 30 Tex. Admin. Code § 330.63(c).

[40] AR Vol. 33 Item 264 at 35.

[41] AR Vol. 33 Item 264 at pp. 35 (COL 7), 37 (COL 39), & 38 (COL 53).

deficiency was to include a special provision in the proposed permit. The Commission erroneously adopted this approach and approved the permit with the special provision.

Allowing submission of this local authorization *after* issuance of the TCEQ permit violates the plain language of the rules. In fact, the Commission should not have even considered 130EP's permit application until after it had obtained the required local floodplain authorization. Accordingly, TCEQ failed to follow its own rules when issuing the permit.

Finding of Fact 330 and Conclusions of Law 4, 5, 10, 11, 12, 39 are thus contrary to evidence in the record; arbitrary and capricious; made through unlawful procedure; and affected by other error of law.[42]

2. *The Commission erred in issuing a landfill permit for a site that was prohibited by County Ordinance.*

130EP initially sought from TCEQ a land-use-compatibility determination and filed only Parts I and II of the Application on September 4, 2013. By filing only Parts I and II of the application, 130EP could only obtain, from TCEQ, a determination regarding land-use compatibility. Under no circumstance could 130EP obtain a landfill permit with the filing of only Parts I and II.

[42] For brevity, throughout the rest of the Argument in this Brief, the basis for the alleged errors will refer to Section 2001.174(2) of the APA.

On December 9, 2013, the Caldwell County Commissioners Court adopted its Solid Waste Disposal Ordinance, prohibiting waste disposal facilities from certain areas of the County, including the site of 130EP's proposed landfill.

On February 18, 2014, almost two months after the County enacted its Ordinance, 130EP filed a full landfill permit application, including Parts III and IV and a significantly revised Parts I and II.

Texas Health and Safety Code Sections 363.112 and 364.012 both authorize counties to enact landfill siting ordinances that prohibit solid waste management and disposal activities in certain areas of the county. Tex. Health & Safety Code §§ 363.112(a), 364.012(b). Both statutes provide that the Commission may not grant an application for a permit to process or dispose of solid waste in an area in which the processing or disposal of such waste is prohibited by a county ordinance. *See id*. §§ 363.112(d), 364.012(f).

When Caldwell County's Ordinance was enacted, it is undisputed that 130EP had not filed a full landfill permit application with the TCEQ. 130EP did not have an application filed and pending before the Commission until the entire permit application, including Parts III and IV, were submitted. *See* Tex. Admin. Code § 330.57(requiring Parts I-IV of the application to be filed before declared technically complete).

Thus, 130EP had no application pending before the Commission when the Ordinance became effective. Therefore, TCEQ's ED should have refused to continue reviewing and processing 130EP's application and the Commission should have denied the application, as required by applicable statutes.

For the above reasons, FOF 317, 319, 325, 326, 327 and COL 41 were in violation of Section 2001.174(2)(C)(D)(E) & (F) of the APA. Tex. Gov't Code § 2001.174.

C. The Commission's findings and conclusions that the landfill will not have adverse impacts on drainage, or on the downstream Site 21 reservoir are erroneous.

As noted elsewhere in this brief, the dam associated with the Site 21 reservoir downstream of the proposed landfill has been designated as a "high hazard" dam.[43] This designation acknowledges that the failure of the dam at Site 21 would be anticipated to result in the loss of seven or more lives and excessive economic loss.[44]

130EP's modeling demonstrated that after a 25-year/24-hour rainfall event, the landfill will cause a 30.4 acre-feet increase in the volume of water entering the

[43] AR Vol. 60 Item PCCD 1.0 at 16.

[44] 30 TAC 299.14(3).

reservoir.[45] Johnie Halliburton, the Executive Manager for PCCD, which operates the downstream reservoir, testified that an increase in the volume entering above a dam can cause the water to flow over the dam's emergency spillway, resulting in severe erosion.[46]

Under TCEQ's rules, a high hazard dam is required to contain 75% to 100% of the "probable maximum flood."[47] The "probable maximum flood" is "[t]he flood magnitude that may be expected from the most critical combination of meteorologic and hydrologic conditions that are reasonably possible for a given watershed."[48] Yet, in this case, 130EP made no analysis of how the landfill would impact the probable maximum flood,[49] and made no analysis of whether the landfill would alter the likelihood of a breach of the downstream reservoir under probable maximum flood conditions.[50]

In short, the evidence demonstrates—via 130EP's own modeling—that the landfill will cause a 30.4 acre-feet increase of the volume of water entering the downstream reservoir, and yet, no analysis was performed as to whether the

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[45] AR Vol. 1-2 Item 130EP-2 at 79. (1 acre-foot is that amount of water that would cover one acre to the depth of one foot, or 9,905,870 gallons).

[46] AR Vol. 60 Item PCCD 1.0 at 21.

[47] 30 Tex. Admin. Code 299.15(a)(1)(A).

[48] 30 Tex. Admin. Code 299.2(47).

[49] AR Vol. 68 Item Tr. 3 at 678, 679.

[50] AR Vol. 74 Item Tr. 9 at 2140.

alteration of drainage patterns will increase the chance of a breach of the dam under the relevant conditions for a breach analysis. Considering the risk that a breach of the dam would cause to human life, and the excessive economic impacts of a breach, any increase in the likelihood of a breach would be significant.

The ED, however, determined that that the increased volume into the Site 21 reservoir did not constitute an "adverse" alteration of drainage patterns, reasoning that the change in volume was "insignificant."[51] Yet, TCEQ rules prohibit *any* adverse alteration of drainage patterns, without reference to a subjective determination of whether the alteration is *significant.* Furthermore, no analysis was provided to address the significant consequences of a dam failure as a result of the landfill's alteration of drainage patterns.

In sum, 130EP failed to demonstrate that the landfill will not have an adverse impact on drainage patterns, and therefore, FOF 259, 263 and 264 and COL 36 and 37 are in violation of Section 2001.174(2)(C)(D)(E) & (F) of the APA.

D. <u>The Commission's findings and conclusions regarding flooding are erroneous.</u>

[51] AR Vol. ED-SO-4 at 26.

1. *TCEQ failed to require submission of information identified by TCEQ rules as necessary for sites proposed to be located within the 100-year floodplain.*

The site is located within the 100 year floodplain.[52] Thus, Rule 330.63(c)(2)(C) applies here. This rule requires an applicant to provide information detailing the specific flooding levels and other events that impact flood protection at the facility, specifically including the design hurricane projected by the Corps of Engineers.

Recently, in this case, Caldwell County was included within the recent disaster declaration issued as a result of the flooding Hurricane Harvey caused in Caldwell County.[53] Thus, the impact of events such as a hurricane is not simply speculative; it has recently happened. Yet, 130EP was not required to comply with Rule 330.63(c)(2)(C); TCEQ did not require submission of the information mandated by the Rule.

This failure not only constitutes a violation of TCEQ's rules, but also endangers public safety. Governor Abbott's Commission to Rebuild Texas has noted that in light of Hurricane Harvey, Texas needs to "[put] a premium on strategies that can help avoid, resist and accommodate the worst nature can throw

[52] AR Vol. 62 Item Protestants 5-Y.

[53] AR Vol. 33 Item 266 at 93.

at our state."[54] Texas must "plan ahead and prepare for the inevitable emergencies of the future."[55] TCEQ's approach of not requiring the submission of information related to potential hurricanes—information required by its own rules—is directly contrary to the Governor's directive to take measures to protect the state from the consequences of future flooding.

The dam at Site 21 has been classified as "high hazard," meaning that should it fail or malfunction, TCEQ expects that it would result in the loss of seven or more lives, three or more habitable structures, and excessive economic loss.[56] As such, the dam must be protected against a flood event equaling 75% of the "probable maximum flood."[57] Yet, 130EP wholly ignored the probable maximum flood in its evaluation of the impacts of the landfill upon the downstream reservoir and dam. By not requiring the submission and evaluation of the information required by Rule 330.63(c)(2)(C), such as potential hurricane impacts and the impacts resulting from the probable maximum flood, TCEQ failed to fully

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[54] "Eye of the Storm," Report of the Governor's Commission to Rebuild Texas, November 2018, p. 154, at https://www.rebuildtexas.today/wp-content/uploads/sites/52/2018/12/12-11-18-EYE-OF-THE-STORM-digital.pdf.

[55] *Id.*

[56] 30 Tex. Admin. Code § 299.14(3).

[57] 30 Tex. Admin. Code § 299.15(a)(1)(A) (setting hydrological criteria for high hazard, medium-sized dams as "PMF" or probable maximum flood). Reservoir 21 is considered a medium size dam. AR Vol. 60 Item PCCD 1.4.

implement and enforce its rules regarding the protection of facilities from flooding, including rules related to flooding as the result of hurricanes.

2. *Impact of potential flooding was improperly ignored.*

The Commission improperly excused 130EP from addressing flooding conditions that are likely to exist in the future.

The evidence, presented at the hearing, established that the extent of the floodplain is not static, but is constantly changing as a result of changes within a watershed.[58] As Tracy Bratton, P.E. (engineer and drainage expert for Caldwell County) testified, it is likely that development will occur upstream of the landfill, and such upstream development will potentially raise the level of the floodplain within the landfill.[59] Mr. Robert Harden, P.E. (engineer for Plaintiffs) also stressed this potential, noting that "the upstream watersheds will assuredly undergo additional urbanization with increases in impervious cover and land use changes that will increase flood flows in receiving streams directly adjacent to the Facility."[60] 130EP did not dispute this potential expansion of the floodplain at the site.

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[58] AR Vol. 63 Item Protestants 9 at 19-20.

[59] AR Vol. 73 Item Tr. 8 at 1813.

[60] AR Vol. 63 Item Protestants 9 at 16-17.

Notably, this raises precisely the issue presented by recent flooding at the Addicks and Barker Reservoirs. In those cases, the potential for future development was ignored in floodplain planning, just as 130EP ignored and asked TCEQ to ignore the potential for future development in the consideration of its landfill application. 130EP did not dispute that future development will occur; nor did it dispute that this development may alter the floodplain. But 130EP has done nothing to address this foreseeable development. By accepting 130EP's invitation to ignore this foreseeable impact, TCEQ is endangering the lives of persons downstream of the landfill, just as the developers near the Barker and Addicks reservoirs endangered the lives and properties of persons downstream of the reservoirs by ignoring future development.

Considering that the Commission did not fully evaluate flooding impacts and did not require and consider the full scope of information required to be submitted by rule, FOF 276, 278, 279, 280, 281, 286, 287, 288, 289, and COL 9, 10, 11, 12, 17, 18, 39, 53, 55 are in violation of Section 2001.174(2)(C)(D)(E) & (F) of the APA.

E. <u>130EP's subsurface characterization was unreliable, incompetent, and constituted no evidence. The Commission's findings and conclusions regarding subsurface characterization were therefore erroneous.</u>

1. TCEQ subsurface investigation requirements are detailed and specific.

The investigation of the subsurface of a proposed landfill site and the preparation of a geology report is not simply an academic exercise. TCEQ's rules include specific and detailed requirements regarding the subsurface investigation that a landfill permit applicant must conduct and the geology report that it must prepare based on the subsurface investigation. The rules describe not only the required substantive information required for the report, but they also describe the procedures that must be followed to collect that information.

Indeed, even before a landfill permit application can be prepared and submitted, an applicant must first submit a soil boring plan to TCEQ for approval. TCEQ rules provide detailed guidance regarding the objectives of the soil boring plan and how the soil borings are to be conducted. Importantly, the "soil boring plan, including locations and depths of all proposed borings, shall be approved by the executive director prior to initiation of work."[61] Even modifications to the soil boring plan must be approved by the Executive Director.[62]

The rules also dictate that once the soil boring plan is approved, the borings must be conducted in accordance with established field exploration methods, and

[61] 30 Tex. Admin. Code § 330.63(e)(4).

[62] 30 Tex. Admin. Code § 330.63(e)(4)(E).

they include recommendations for preferred boring methods: hollow stem auger for softer materials and coring for harder rocks.[63] .

The rules further dictate the type of information that should be recorded in the geology report. All investigation procedures must be discussed in the geology report.[64] The report must describe all borings drilled on site to test soils and characterize groundwater.[65] It must include a site map, drawn to scale, that shows the surveyed locations and elevations of the borings.[66]

Logs of the borings must include a detailed description of the soils or materials encountered and extruded from the borings. The description must include discontinuities in the soil samples, such as fractures, fissures, slickensides, lenses, or seams (otherwise known as "secondary features"). The boring log must also include, at minimum, surface elevation and location coordinates; the elevation of the contact between soil and rock layers; and a description of each soil/subsurface material layer.[67]

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[63] 30 Tex. Admin. Code § 330.63(e)(4)(C).

[64] *Id.*

[65] 30 Tex. Admin. Code § 330.63(e)(4).

[66] *Id.*

[67] *Id.*

The rules go on to describe a variety of other soil testing requirements that must be conducted. Permeability tests must be performed, for example, on "undisturbed soil samples."[68]

And finally, a narrative must be included in the geology report, describing the "investigator's interpretations" of the subsurface based on the field investigation.[69]

In sum, TCEQ's rules leave the applicant little discretion regarding how it conducts its subsurface investigation and how the results of that investigation are to be presented in the geology report and landfill permit application. The rules are detailed, and they require a detailed geology report, with detailed data.

TCEQ's rules also require "retention of application data."[70] That is, all records of data used to complete the final application and any other supplemental information must be maintained throughout the term of the permit, if the permit is granted.[71] Note that this rule goes beyond requiring that the application materials be maintained throughout the term of the permit. Indeed, the application is generally considered to be incorporated into and made a part of the permit. This

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[68] *Id.* § 330.63(e)(5)(B) (describing geotechnical data that must be included in the application).

[69] *Id.* § 330.63(e)(4)(H).

[70] 30 Tex. Admin. Code § 305.47.

[71] *Id.*

rule requires maintenance of records of data that were used to create the permit application.

2. 130EP failed to comply with TCEQ rules during every step of the subsurface investigation, and its geology report does not satisfy the TCEQ rules.

The evidence presented during the SOAH hearing revealed that 130EP failed to comply with TCEQ's rules regarding the subsurface investigation, every step of the way.

First, 130EP and its consultants drilled the borings before TCEQ staff approved the soil boring plan.[72] The initial soil boring plan prepared by Mr. Snyder (130EP's geologist, responsible for the geology report in the application) was dated August 30, 2013, and was received by TCEQ's ED on September 4, 2013.[73] After a series of modifications to the plan, the ED's staff finally approved the soil boring plan on October 10, 2013.[74] Yet, by the time the soil boring plan was approved, 130EP had already drilled all of the borings it intended to drill on the proposed landfill site.[75] In fact, 130EP had already commenced drilling before the

[72] AR Vol. 30 Item 248 at 65.

[73] AR Vol. 67 Item Tr. 2 at 362.

[74] AR Vol. 48 Item 130EP-4 at 35.

[75] AR Vol. 67 Item Tr. 2 at 365:16-20.

soil boring plan had even been submitted to TCEQ.[76] Snyder, however, failed to mention this fact in the various communications—dated August 30, 2013; September 16, 2013; September 23, 2013; and September 25, 2013—to the ED, before the boring plan was approved.

Nevertheless, in his Geology Report, Snyder stated that the borings "were drilled in accordance with the TCEQ-approved boring plan and established field exploration methods."[77] And he sealed this document with his PG seal.[78]

In the soil boring plan, Snyder committed, on behalf of 130EP, to conduct slug tests (an on-site hydraulic conductivity or permeability test) in selected piezometers.[79] According to Snyder, the slug test data was intended to be used "to provide the hydrogeologic characterization of the site and to provide an analysis of the most likely pathways for pollutant migration," and "to facilitate the design of an appropriate groundwater monitoring plan."[80] And TCEQ's rules require permeability tests on undisturbed soil samples, such as slug tests.[81] Yet, Mr. Snyder never performed these slug tests. Nor did he seek to modify the soil boring

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[76] *Id.* at 341.

[77] AR Vol. 1-3 Item 1, Part II-13.

[78] *Id.* at 1.

[79] AR Vol. 64 Item P-33.

[80] *Id.*

[81] 30 Tex. Admin. Code § 330.63 (e)(5)(B).

plan or otherwise advise the ED that he no longer planned to conduct any slug tests.[82]

To be clear, TCEQ staff was not aware that 130EP drilled its borings before the soil boring plan was approved. In his response to comments, the ED admitted that this was a violation of the rules.[83]

This was not Snyder's only violation of the TCEQ rules regarding the subsurface investigation and geology report; this was just one of many. In addition, the drilling methods used to conduct the subsurface investigation remain ambiguous, at least in part because they were not documented, and the testimony and evidence presented by 130EP's witnesses were contradictory, unreliable and inconsistent.

Snyder also did not supervise the drilling of the borings, as he represented in the geology report that he signed and sealed. If anyone should have been familiar with the drilling methods employed by 130EP, it should have been the field supervisor, in charge of the drilling operations. According to the Geology Report, "all drilling operations were supervised by John Michael Snyder, P.G., a

[82] That a slug test could be successfully performed is undisputed, as Protestants' expert performed a slug test during her 2016 site visit. AR Vol. 62 Item Protestants 5-R.

[83] AR Vol. 18 Item 54; *see also* AR Vol 74 Item Tr. 9 at 1996-1997.

professional geoscientist."[84] And ultimately, Snyder was responsible for preparing a narrative that describes the "investigator's interpretations of the subsurface stratigraphy based upon the field investigation."[85]

According to Snyder's testimony, however, he was only on the site 2 or 3 times during the drilling of the borings (which occurred over the course of over 20 days, not counting the drilling of piezometers), and even then, he was not out on the site all day.[86] So, it's no wonder that he was unsure of the drilling methods employed to drill the borings. It's not clear that Snyder observed *any* drilling. It's not clear that he even knew the drilling methods used or provided instruction regarding the methods to be used. Yet, this type of detail is required by the rules.

Although he did not observe much, if any, of the subsurface investigation, Snyder ultimately prepared and sealed the boring logs and geology report that were submitted to TCEQ. These documents reflect his expert opinions regarding the subsurface geology. Here, again, however, his failure to comply with TCEQ regulations and with professional standards rendered his opinions legally insufficient.

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[84] *Id.* at 20. It appears that Snyder did not initially identify himself as the geoscientist who supervised the drilling operations. This statement was added in response to an NOD, instructing Applicant to identify the geoscientist responsible for supervising drilling operations. AR Vol. 13 Item 27 at 8.

[85] 30 Tex. Admin. Code § 330.63(e)(4)(H).

[86] AR Vol. 67 Item Tr. 2 at 368, ll. 21-25; 369, ll. 1-5.

The driller who was on site when the borings were drilled—Mr. Stamoulis—is the person who observed the drilling operations and the subsurface materials that were extruded from the subsurface. He is the person who would have documented his observations of the drilling and of the subsurface materials, among other details, in his field notes, original logs, or via photos. Whatever documentation Stamoulis prepared, however, no longer exists, because Snyder discarded it all. The only documents that remain regarding the subsurface investigation are the ones included in the application, that were signed and sealed by Snyder, after he revised them.

The boring logs in the application include descriptions of the soils and their features. TCEQ rules require this type of information in the logs: "Boring logs must include a detailed description of materials encountered including any discontinuities such as fractures, fissures, slickensides, lenses, or seams."[87] Thus, the rules contemplate that the information included in the logs should be based on visual observations.

Again, Snyder did not observe much, if any, of the drilling of the borings and did not observe all of the subsurface materials that are described in the logs. Yet, Snyder's geology report included an implausibly simplistic description of the

[87] 30 Tex. Admin. Code § 330.63(e)(4).

subsurface. Essentially, Snyder concluded that Strata I and II (the top 2 strata or the shallowest strata at the site) consisted of fat clay. He acknowledged that in the upper stratum, Stratum I, "occasional discontinuous occurrence of cobbles, pebbles, and some gravel" were present up to about 6 feet, but he explained that these pebbles and gravels were embedded in the clay. Stratum II was described as hard and dense, and every boring log classified the soils in this stratum as "CH" or fat clay.[88] Further, "evidence of fracturing" was not observed in this fat clay, and only one slickenside was observed in a single boring.[89]

Here, it's worth noting that the initial version of the geology report—the version that was included in the initial submission to TCEQ—indicated that "there was very little evidence" of fractures or slickensides in Stratum II.[90] TCEQ staff directed Snyder to revise the description to clarify whether fractures and slickensides exist in the stratum at the site; in other words, TCEQ staff requested the type of explicit detail required by the rules.[91] In response to this NOD letter, Snyder revised the statement to state that "no evidence of fractures was observed," and "evidence of slickensides was observed in only one boring, BME-24."[92]

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[88] AR Vol. 49 Item 130EP-4 at 55-126.

[89] *Id.* at 23.

[90] AR Vol. 49 Item P-22 at 19; *see also id.*, at 5.

[91] *Id.*

[92] *Id.*

But, by the time TCEQ staff sent its NOD letter to 130EP, on May 6, 2014, Snyder had already discarded all soil samples, field notes, and original logs that were collected and created by the driller.[93] So, he could not refer back to this data to review or verify the presence or absence of secondary features, as necessary to respond to the NODs. Nevertheless, Snyder noted no fractures and only one slickenside, and signed and sealed this representation.

Interestingly, that same NOD instructed 130EP to provide boring logs for the piezometers or wells that had been installed by 130EP to investigate hydrogeology at the site. In response, 130EP submitted logs for the 17 completed piezometers and added a narrative discussion regarding the piezometer borings. According to this narrative, "the piezometer borings were drilled and samples were observed to confirm consistency with the original boring lithologies."[94] What is not noted, however, is when, how, or by whom the samples were observed. Snyder was not out in the field when the piezometers were drilled.[95] The samples were not preserved and returned to Snyder's office. In fact, many, if not all, of the samples

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[93] AR Vol. 67 Item Tr. 2 at 393, ll. 7-16. To be clear, Snyder testified that by the time he received Plaintiffs' counsel's preservation of evidence letter, which was sent in March 2014, *see* AR Vol. 64 Item P-36, the field logs had been destroyed. He could not recall when the soil samples were destroyed, but according to Snyder, after he received the preservation of evidence letter, he checked on the samples, and they were no longer in existence. AR Vol. 67 Item Tr. 2, at 393, ll. 10-16.

[94] AR Vol. 49 Item 130EP-4 at 20.

[95] AR Vol. 67 Item Tr. 2 at 387, ll. 4-6.

consisted only of "cuttings,"[96] or bits of soil material churned up by the drilling. So, it would have been impossible to observe secondary features or other unique soil features from those bits of soil material.

In any event, the piezometer logs that were submitted to TCEQ, in response to the NOD, were logs that documented the original soil borings, not the piezometers that were drilled separately, and several feet away, from the soil borings. The piezometer logs are not what they purport to be; they are simply duplicates of the logs for the soil borings. In other words, the piezometer logs do not reflect observations of soil samples from the piezometer borings; they reflect observations of soils from the soil borings, which had already been documented in the soil boring logs included in the application.[97] Yet, this is not explained in the narrative of the geology report, or anywhere in the geology report. One is thus led to believe that the piezometer logs reflect observations of soils from the piezometer borings. This cannot be what TCEQ's geologist intended when he requested logs for the piezometers.

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[96] *Id.* at 386, ll. 7-13 (explaining that Snyder used soil boring logs to create piezometer logs because borings were actually sampled, in contrast to piezometers); p. 388, ll. 6-25 (explaining that Snyder relied on soil boring logs to create piezometer logs because piezometers resulted in cuttings, as opposed to actual soil samples); *Id.* at 389, ll. 1-11 (same).

[97] AR Vol. 67 Item Tr. 2 at 390, ll. 3-14 (explaining that description of "silt partings" in log for piezometer P-7 reflects observation from soil boring BME-07, not from piezometer).

130EP, via Snyder, at least admitted that the piezometer logs contained false information regarding the top-of-casing elevations, bottom elevation, and screened intervals. That this required information was inaccurate was thus undisputed. And the ED's geologist, Mr. Avakian, correctly explained under oath, during the hearing, that such a discrepancy in elevations would invalidate any analysis based upon them. (This is discussed in more detail elsewhere in this brief.)

It's worth noting that while 130EP attempted to correct the location and elevation information in the logs, 130EP did not (and could not) correct the inaccurate soil data included in the logs, because their consultants no longer possessed the field notes, logs, and samples from those piezometers. In other words, even with the corrected elevation data, the logs remained unreliable.

Finally, there is no dispute in this case that 130EP and its consultants spoliated, or discarded, all soil samples, field notes, and field logs from its subsurface investigation. Indeed, 130EP's consultants destroyed the soil samples and logs before the ED had completed the technical review of the application, before TCEQ staff had even issued its first NOD regarding the application.

So, in sum, 130EP's geology report was flawed from beginning to end:

--borings were drilled before a soil boring plan had been approved;

--the subsurface investigation did not comply with the soil boring plan, and 130EP never sought to modify the soil boring plan;

--no in situ permeability or slug tests were performed;

--Snyder did not actually supervise, or even observe, the subsurface investigation;

--the geology report did not accurately describe drilling methods used for the subsurface investigation, and in particular, did not accurately explain whether fluids or water was introduced during the drilling of the borings;

--the description of the subsurface soils was implausibly simplistic, describing the subsurface as consisting of only fat clay with virtually no secondary features, even though Snyder did not observe all soil samples collected;

--elevation data in the well logs was inaccurate;

--piezometer logs were inaccurate;

--130EP spoliated all evidence before TCEQ finished its technical review—before the well/piezometer logs were even submitted to TCEQ.

3. *ALJs' PFD and the Commission's decision regarding subsurface geology relied on conclusory and incompetent evidence that failed to satisfy TCEQ's rules*.

Despite the lack of reliable evidence, as detailed above, the ALJs and the Commission concluded that 130EP's geology report and subsurface investigation complied with TCEQ rules. The Order acknowledges 130EP's failure to obtain approval of its soil boring plan before drilling its borings, but dismisses this failure as inconsequential. As explained above, however, the failure to obtain approval of the soil boring plan before commencing its subsurface investigation is only one

example of 130EP's failure to submit a geology report that complies with TCEQ rules, industry standards, and legal standards. And it's only one reason that TCEQ's decision to issue 130EP a permit was arbitrary and capricious and erroneous.

Under the APA, findings of fact are intended to resolve legitimate factual disagreements. A mere "recital of evidence is inadequate." *Tex. Health Facilities Comm'n v. Charter Med.—Dallas, Inc.*, 665 S.W.2d 446, 451 (Tex. 1984); Tex. Gov't Code § 2001.141. It's not enough for TCEQ to simply find that the requisite information was included in the Geology Report, for instance; that information must be vetted for accuracy and competency. *Charter Med.—Dallas*, 665 S.W.2d at 451.

The findings of fact related to 130EP's Geology Report in the Commission's Order include mere recitations of the evidence presented or conclusory findings. For instance, FOF 86 recites that the Geology Report "includes boring logs, maps, and tables that provide detailed information for all of the 2013 borings and the piezometers." FOF 87 concludes that the boring logs in the Report "contain all of the information required by 30 TAC § 330.64(e)(4)." FOF 106 concludes that "[s]ilty, fat, high plasticity clay was the dominant material encountered in all of the Soil Borings." FOF 112 states that BME's methodology "was adequate for the work performed, and did not result in unreliable or inaccurate findings or

conclusions." FOF 113 states that the findings and conclusions in the Geology Report "are sufficiently complete, accurate, and reliable." And FOF 114 states that 130EP did not submit false information in the Geology Report.

But these findings are based on incompetent evidence or no evidence. The only thing that can be said about the geology report included in the application, based on the evidence presented, is that there is nothing consistent or reliable about it, and there is no factual basis—no verifiable evidence—to support the assumptions and opinions included in the geology report. These findings were therefore in error.[98]

The Texas Supreme Court has held that there must be some basis for an expert's opinion offered to show its reliability. The data underlying an expert's opinion should be "independently evaluated in determining if the opinion itself is reliable." *Merrell Dow Pharmaceuticals, Inc. v. Havne*r, 953 S.W.2d 706, 713 (Tex. 1997); *accord Gammill v. Jack Williams Chevrolet, Inc*., 972 S.W.2d 717, 728 (Tex. 1998). It is the basis of an expert's opinion, and not the opinion itself, that holds probative value. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009) (quoting *Coastal Transportation Co. v. Crown Central Petroleum Corp*., 136 S.W.3d 227, 232 (Tex. 2004)). A mere conclusory opinion is not

[98] For the same reasons, FOF 73 through 80, 82, 83, 84, 86 through 90, 92, 93, 107, 108, 109, 111, 116, and 123 are also in violation of Section 2001.174(2)(C)(D)(E) & (F) of the APA.

relevant evidence, because it fails to make the existence of a material fact more or less probable. *Id*. (quoting *Cas. Underwriters v. Rhone*, 132 S.W.2d 97, 99 (1939)). "If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable." *Havner*, 953 S.W.2d at 713.

When expert testimony is involved, courts are to rigorously examine the validity of facts and assumptions on which the testimony is based. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002). An expert's opinion is unreliable if it is based on assumed facts that vary from the actual facts, *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995), or if it is based on tests or data that do not support the conclusions reached. *Pollock*, 284 S.W.3d at 818. In either instance, the opinion is not probative evidence. Thus, evidence that might be "some evidence" when considered in isolation is nevertheless rendered "no evidence" when contrary evidence shows it to be incompetent. *Keller v. Wilson*, 168 S.W.3d 802, 812-13 (Tex. 2005). Where an expert's opinions are based upon unreliable underlying data, they are inadmissible and, thus, no evidence at all. *Pollock*, 284 S.W.3d at 816.

130EP's evidence regarding subsurface geology, including the Geology Report, failed to satisfy the standards described above. They also failed to satisfy the detailed and rigorous standards set out in TCEQ's regulations—regulations that

are intended to assist TCEQ staff in determining whether the application representations are reliable and competent. Indeed, evidence presented by 130EP in support of its subsurface characterization was so flawed as to constitute no evidence or legally insufficient evidence. *See Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999)*; Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004); *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002)*; Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713, 726 (Tex. 1998).

The opinions of 130EP's expert geologist, Snyder, are reflected in the Geology Report that he signed and sealed. Yet, his opinions, as reflected in that report and in his testimony, constitute the only evidence submitted by 130EP in support of its subsurface characterization in the application. There was no "foundational data" to support Snyder's opinions. Snyder was not even present during the drilling of the borings or piezometers that presumably provided the data for the Geology Report, except on a few occasions. He did not personally observe the soils as they came out of the ground and did not prepare the initial field notes or original logs; nor did he observe all of the samples that were collected and sent to the lab for analysis. This, alone, renders his opinions suspect.

In addition, Snyder's opinions regarding the subsurface geology, as reflected in his Geology Report included in the application, have not been and cannot be

tested. Without the original logs and samples, there is no way to determine whether his opinions are based on reliable observations, information, factual data, or assumptions. 130EP's experts did not even take photos of the samples or retain electronic images of the field logs—a simple process that would have provided some evidence of the factual bases for Snyder's opinions.

In fact, there was no way for the ED's staff, the ALJs, the Commission, or the parties to test the reliability of the basis for 130EP's experts' opinions, because all of the data had been destroyed. Consequently, 130EP's evidence cannot satisfy the *Havner* analysis and cannot be considered reliable, admissible evidence. It is worth noting that there is no indication in the PFD or the Final Order that the *Havner* analysis was even applied to the expert testimony. There are no findings stating that the foundational data supporting Snyder's opinions in the geology report were reliable, and no conclusions that his opinions were based on reliable, probative, and sound data—likely, because there is no evidence in the record to support such findings and conclusions. *See* Tex. Gov't Code § 2001.141(c).

Moreover, the evidence clearly established that 130EP submitted false information in the Geology Report; or put another way, the actual facts varied from the assumed facts. *But see* Finding of Fact 114. 130EP admitted, in testimony and via written corrections (dated May 2016) to its initial Geology Report, that at least the piezometer logs contained false information regarding the top-of-casing

elevations, bottom elevation, and screened intervals. This alone rendered Snyder's opinions and his Geology Report unreliable and false. To be sure, the ED's geologist, Mr. Avakian, stated under oath, during the hearing, that such a discrepancy in elevations would invalidate any analysis based upon them.[99]

Similarly, the results of the subsurface investigation, as represented in the Geology Report, were implausibly simplistic. *See* 30 Tex. Admin. Code § 330.63(e)(4) (requiring detailed descriptions in boring logs). Other evidence revealed that this implausibly simplistic representation of the subsurface was unreliable and incompetent. Essentially, according to the Geology Report, 130EP's experts determined that the two upper strata at the site consisted of fat clay with no secondary features other than a single slickenside.[100]

The evidence in the record, however—evidence presented by both 130EP and Plaintiffs—demonstrated that the representations included in the Geology Report are not supported by reliable factual data. The only reliable evidence presented regarding secondary features revealed that fractures absolutely exist in the subsurface of the proposed site.

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[99] AR Vol 74 Item Tr.9 at 2004-2005.

[100] Based on these overly simplistic representations, Finding of Fact 106 states: "Silty, fat, highly plastic clay was the dominant material encountered in all of the Soil Borings." There are no findings regarding the presence (or absence) of secondary features.

Because 130EP spoliated its evidence—evidence that would have shown the extent of secondary features in the soil materials—Plaintiffs sought access to the site to drill their own borings and collect their own soils. When the ALJs granted Plaintiffs' request to access the site, 130EP's consultants elected to drill additional borings as well. In 2016, 130EP's consultant drilled 11 additional borings (without submitting a soil boring plan for approval to the TCEQ staff, and well after TCEQ staff even had jurisdiction to conduct a review of the additional information)[101] and collected additional soil samples. Those additional borings revealed that 130EP's consultants encountered 19 fractures, basically impeaching its own earlier Geology Report, which reported no fractures. As Plaintiffs' expert, Dr. Ross, explained via her testimony, the likelihood of finding 19 fractures in 2016 and 0 in 2013 is miniscule: 1×10^{-40}.[102] This not only demonstrates that 130EP's expert's opinions were unreliable, but also that FOF 114 is not accurate and not supported by the evidence.

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[101] AR Vol 74 Item Tr. 9 p. 1991, ll. 7-11; *see also* Tr. 9, p. 2003, ll. 7-14. 130EP submitted the results of its additional investigation via a "supplemental" report, AR Vol. 51 Item 130EP-7, which was admitted into evidence over Plaintiffs' objections. Plaintiffs maintain that the admission of this report into evidence was an abuse of discretion and constituted error, and all findings and conclusions based on this evidence were also in error. In particular, Plaintiffs maintain that FOF 22 is inaccurate. 130EP did not and could not have submitted its supplemental geology report to the ED's staff for review because the ED no longer had jurisdiction to review the application after it was sent to SOAH. TCEQ's witnesses testified to this, and the ED's attorney explained this to the ALJs.

[102] AR Vol. 62 Item Protestants 5 at 26.

Furthermore, the evidence presented did not support the characterization in the geology report of every soil layer as a fat clay or "CH." Even 130EP's own laboratory analyses contradicted this overly simplistic description of the subsurface soils.

Another example of an absence of reliable or competent data to support 130EP's experts' opinions can be found in the piezometer data. As described above, these logs were not based on actual data or observations. In fact, the piezometer logs are simply duplicates of the log for the soil borings, even though they were not at the same location. These logs basically misrepresent facts; they provide no useful information, and provide yet another example of why FOF 113 and 114 are not supported by the evidence and are arbitrary and capricious.

TCEQ rules make clear that "[a]ll borings shall be conducted in accordance with established field exploration methods."[103] Similarly, preparation of the application must conform with the Texas Engineering Practice Act and the Texas Geoscience Practice Act.[104] The Code of Professional Conduct adopted by the Texas Board of Professional Geoscientists imposes a duty to preserve evidence arising from the subsurface investigations. The rules make clear that geoscientists are expected to comply with a professional industry standard, including

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[103] 30 Tex. Admin. Code § 330.63(e)(4)(C).

[104] *See* 30 Tex. Admin. Code § 330.57(f).

establishing, maintaining, and conforming to specific and formal standard procedures to ensure the accuracy and reliability of their work.

TCEQ Rule 305.47 also imposes a duty on a permittee (and thus an applicant) to retain all data used to complete the final application and any supplemental information.

In addition to the standards cited above, Plaintiffs presented various types of evidence demonstrating that professional standards require geoscientists to maintain the data upon which they base their opinions. And Plaintiffs offered testimony by various witnesses during the hearing, who explained a geoscientist's duty to preserve information that forms the basis for his or her opinion, including testimony from some of 130EP's own witnesses and the District's expert geologist.[105]

130EP, however, violated every one of these professional and industry standards in collecting its data and preparing its Geology Report. 130EP discarded all data relied on to develop its Report and its expert's opinions. Even the ALJs acknowledged this, in a ruling regarding Plaintiffs' motion to strike and for other sanctions. There, the ALJs ruled that 130EP had a legal duty to preserve the field

[105] *See, e.g.,* AR Vol. 66 Item Tr. 1 at 222, ll. 223-27 (130EP's archaeological expert testified that he retains field notes indefinitely & revisits them and soil samples to prepare for testimony); AR Vol. 63 Item Protestants 8 at pp. 30-32 & 69-70 (PCCD's expert geologist testified that he keeps field notes indefinitely and revisits soil samples to prepare for testimony).

logs and soil samples and 130EP breached that duty without reasonable excuse.[106] Thus, in addition to the professional standards that required Snyder and Adams to preserve field logs and soil samples, legal standards imposed a similar obligation, as acknowledged by the ALJs.

FOF 112 states that 130EP's consultants' methodology in maintaining (or rather, failure to maintain) its subsurface investigation data "did not result in unreliable or inaccurate findings or conclusions." But this is simply not supported by the evidence or by the regulatory, industry, and legal standards. Moreover, 130EP's "methodology"—to the extent it can be described as a methodology—of discarding subsurface investigation data renders Snyder's "findings and conclusions" unreliable, as a matter of law. 130EP's evidence simply failed to comply with any professional, industry, regulatory, or legal standards. This rendered 130EP's Geology Report inaccurate and unreliable. *But see* FOF 113. The Commission's failure to conclude otherwise was arbitrary and capricious, an abuse of discretion, contrary to the evidence, made through unlawful procedure, and affected by error of law.[107]

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[106] AR Vol. 28 Item 212.

[107] For the same reasons, the Commission's FOF 73 through 80, 82, 83, 84, 86 through 90, 92, 93, 106, 107, 108, 109, 111, 112, 113, 114, 116, and 123 are also in violation of Section 2001.174(2)(C)(D)(E) & (F) of the APA.

F. The ALJs' failure to provide an adequate remedy for 130EP's spoliation of evidence resulted in an arbitrary and capricious decision and one characterized by an abuse of discretion and a denial of due process.

There is no dispute in this case that 130EP spoliated, or discarded, all soil samples, field notes, and field logs from its subsurface investigation. In response to a motion filed by Plaintiffs, the ALJs ruled that 130EP had a duty to preserve the field logs and samples and that it breached that duty without reasonable excuse. But the ALJs ruled that no remedy was necessary because Plaintiffs had the opportunity to drill their own borings on the site and collect their own soil samples. According to the ALJs, Plaintiffs had the ability to "double-check" the representations made in the Geology Report.

While accessing the property and obtaining soil samples provided Plaintiffs with the opportunity to demonstrate that 130EP's representations in the Geology Report were erroneous and unreliable, this access did not "remedy" the 130EP's discarding or spoliation of evidence. Indeed, Plaintiffs arguably had the right to enter and inspect the proposed landfill site and collect samples, even if 130EP had not destroyed its evidence.[108] In any event, Plaintiffs could not recreate the

[108] Plaintiffs dispute that access to the site and drilling of borings was a remedy at all. First Plaintiffs had to expend considerable resources to conduct the investigation and collect

evidence that 130EP destroyed, and was not required to do so, as a remedy for 130EP's breach of its duty.

Plaintiffs' site investigation was simply no substitute for the evidence that 130EP discarded. Plaintiffs' investigation instead effectively demonstrated why that discarded evidence was essential: because actual conditions at the site were not consistent with what was reflected in the Geology Report. Borings drilled by Plaintiffs' consultants, in close proximity to 130EP's borings, revealed lithologically different material.[109] Plaintiffs also dug trenches, which revealed the presence of significant pockets of gravel, consistent with a geological formation known as the Leona, which 130EP claimed was no longer present on the site. Laboratory analyses of soil samples collected by Plaintiffs revealed the presence of soils other than fat clay. Numerous secondary features were observed in the borings, including fractures and fissures. And Plaintiffs' expert geologist observed a rapid loss of a substantial volume of drilling fluids, during the drilling of one of 130EP's borings, indicating that a lithological feature with sufficient permeability to accommodate this volume of water and rate of evacuation was present about 30 feet below ground level. This evidence was not intended to replace or substitute the

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evidence that should have been required of 130EP. Second, access to the site and collection of evidence for sampling and testing are a permissible form of discovery under the Texas Rules of Civil Procedure and TCEQ rules. Tex. R. Civ. P. 196.7; 30 Tex. Admin. Code § 80.151.

[109] AR Vol. 62 Item Protestants 5S (chart showing differences in lithology between Plaintiffs' borings and 130EP's nearby borings).

evidence that 130EP failed to preserve. This evidence established why 130EP's spoliation of its own evidence was prejudicial and demonstrated that 130EP's opinions regarding the subsurface at the site were unreliable.

The supreme court has held that in determining what remedy is appropriate when a party has spoliated evidence, the court should weigh the spoliating party's culpability and the prejudice to the nonspoliating party. *Petroleum Sols., Inc. v. Head*, 454 S.W.3d 482, 488–89 (Tex. 2014). Prejudice is evaluated based on the spoliated evidence's relevancy to key issues in the case, whether the evidence would have been harmful to the spoliating party's case (or, conversely, helpful to the nonspoliating party's case), and whether the spoliated evidence was cumulative of other competent evidence that may be used in its stead. *Id.*

The evidence collected by Plaintiffs during their site investigation established that they were prejudiced by the spoliation of evidence. Evidence they collected revealed that substantial discrepancies existed between what was reflected in 130EP's Geology Report and what was observed at the site. Soils other than fat clay, including material classified as gravel, were observed on the site, and numerous secondary features were observed in the soil samples. This alone renders the Geology Report unreliable. This also demonstrates that the evidence that was discarded would have been harmful to 130EP's case. Plaintiffs were thus entitled

to a spoliation instruction. But Plaintiffs were provided no remedy at all for 130EP's knowing breach of its duty to preserve evidence. This was error.

The ALJs abused their discretion when they found that 130EP knowingly breached or violated its duty to preserve evidence, but provided no remedy for this breach. The Commission's findings regarding the Geology Report were based on spoliated evidence and the failure to provide a remedy for this spoliation. They are thus affected by error of law, based on improper procedure, and constitute an abuse of discretion. For the reasons described above, FOF 25 was also erroneous.

G. The Commission's findings and conclusions regarding the hydrogeology and groundwater monitoring were based on incompentent and unreliable evidence.

As with the geology portions of the Commission's Order, the findings and conclusions regarding hydrogeology are devoid of any substantive analysis. Rather, they simply recount what 130EP included in the application without taking a hard look at whether the evidence supports those representations. In fact, there is no evidence to support several of the findings regarding hydrogeology. And for the reasons described above, the representations included in the application are not based on reliable and competent evidence.

It is undisputed that the piezometer logs that were relied on by 130EP to prepare its groundwater and hydrogeology reports were unreliable and contained

information that was inaccurate. Thus, findings that relied on this information in the application were based on incompetent, unreliable evidence.

Because the groundwater monitoring plan relied on the incompetent and unreliable evidence presented by 130EP, the groundwater monitoring plan was also based on legally insufficient evidence.

TCEQ Rule 330.63(e)(5)(F) requires a permit applicant to include groundwater flow direction and rate, and the basis for such identification.[110] The application states that groundwater occurs at the interface between Strata II and III.[111] 130EP relied on a surface contour map to estimate groundwater flow directions and velocity; the interface between Strata II and III was assumed to strongly resemble the surface topography.[112] But 130EP's (unreliable) piezometer data did not support this description. In fact, the evidence was to the contrary. 130EP did not satisfy its burden of proof in this regard.

First, there was no evidence to support 130EP's expert opinion regarding surface topography or the Stratum II-Stratum III interface as a basis for estimating either groundwater flow or velocity; this was a conclusory opinion offered by 130EP's expert with no sound basis or reasoning. In fact, the uncontroverted

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[110] 30 Tex. Admin. Code § 330.63(e)(5)(F).

[111] AR Vol. 49 Item 130EP-4 at E-16 & E-19.

[112] *Id.*

evidence that was presented during the hearing demonstrated that 130EP's assumptions regarding groundwater flow are not accurate.

The evidence established that 130EP's opinions regarding hydrogeology relied on 3 flawed assumptions. First, the Strata II-III interface contours do not resemble the surface topography as represented by the surface contour map in the application. Second, 130EP's errors regarding the piezometer elevations were not minor; they significantly affected assumptions regarding both flow direction and velocity in material ways. And third, 130EP failed to account for the secondary features present in the subsurface lithology.

Inaccuracies in the weathered/unweathered interface and the groundwater gradient evaluation are not simple typographical errors; these inaccuracies affected the assumptions and representations regarding groundwater flow. Mr. Avakian, TCEQ's geologist, made this point clear in his testimony during the hearing: if the top of casing elevations are wrong, then, the screened intervals are also wrong, which means that the recorded potentiometric levels are also wrong.[113] In other words, 130EP did not screen the piezometers at the appropriate elevation, and therefore, did not collect accurate data regarding the presence or absence of groundwater. The TCEQ rules also highlight the importance of accurate boring

[113] AR Vol. 74 Item Tr. 9 at 2005.

surface elevations, piezometer top-of-casing elevations, and location coordinates.[114] Yet, it is undisputed that 130EP got this most basic information wrong in its application. This alone renders it unreliable and legally insufficient.

Moreover, the evidence presented established that groundwater migrates via secondary features, which 130EP failed to account for. These secondary features were not described in the geology report or its boring logs, even though TCEQ rules require applicants to identify secondary features because they provide a significant migration pathway. These are the same secondary features whose hydraulic conductivity were not measured because in-situ slug tests that were required by the boring plan were not performed by 130EP. Their hydraulic conductivity cannot be measured by laboratory tests, which is the only type of permeability test conducted by 130EP.

In summary, the evidence presented clearly contradicts 130EP's theory of groundwater movement and potential leachate migration from the proposed landfill. Since 130EP's theory of groundwater movement and potential leachate migration is not supported by the evidence, 130EP's estimates of the directions and velocities of groundwater and potential leachate migration from the proposed landfill are also unsupported and contradicted by the clear evidence. These

[114] 30 Tex. Admin. Code § 330.63(e)(4).

groundwater estimates are also, therefore, an inadequate basis for design of a groundwater monitoring system, assessing the risk of groundwater contamination, and an inadequate basis for issuance of a permit.

For the reasons explained above, FOF 118, 119, 123, 128, 129, 131 through 134, 138, 139, 140, 142, 146, 149, 150, 151, 152, 154, 155, and COL 24 through 27 are in violation of Section 2001.174(2)(C)(D)(E) & (F) of the APA.

H. <u>The Commission's findings and conclusions[115] that the proposed landfill is compatible with surrounding land uses were arbitrary and capricious and contrary to the evidence and the law.</u>

The ALJs, in their PFD, candidly stated that they had concerns regarding the compatibility of a landfill with the Site 21 high hazard dam and reservoir, and they advised the Commission to determine whether situating a landfill in close proximity to the 100-year floodplain, immediately upstream of a flood control structure needed to protect human life is a compatible land use. However, the Commission failed to take a hard look at these salient features determining that the proposed landfill was compatible with surrounding land uses. In fact, the Land Use Compatibility findings in the Order fail to even mention several of the salient factors that were raised by the parties and included in the PFD. This was error, in

[115] FOF 308, 311, 313, 315, 317, 319, 320 and COL 17 and 18.

that it failed to include all underlying findings to support the ultimate finding of compatibility. Also, the findings failed to resolve contested fact issues raised by the parties.

The language in TCEQ Rule 330.61(h) makes clear that a primary concern of the rule is that "the use of any land for a municipal solid waste facility not adversely impact human health or the environment."[116] To address this concern, the rule requires an applicant to provide information regarding "the likely impacts of the facility on cities, communities, groups of property owners, or individuals" by analyzing a number of factors, including "the compatibility of land use" and "other factors associated with the public interest."[117] The rule is written in broad language, requiring an applicant to include any type of information that may assist the ED in conducting a land use compatibility analysis.

In this case, the existence of a high hazard dam and reservoir on the proposed site is a land use that must be addressed as part of the land use compatibility analysis. But 130EP failed to do so.

130EP's land use expert, Mr. Worrall, admitted that he did not take into account how the proposed landfill might impact the District's use of the reservoir or impacts on the dam. The reservoir and dam were simply not part of his land use

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[116] 30 Tex. Admin. Code § 330.61(h).

[117] 30 Tex. Admin. Code § 330.61(h).

compatibility analysis. Having failed to include the reservoir and dam in the land use compatibility section of the application, 130EP also failed to provide the Commission with the information necessary to analyze the compatibility of the proposed landfill with the existing Site 21 structure, contrary to TCEQ's Rule 330.61(h).

Moreover, the land use compatibility analysis failed to account for the fact that the Site 21 dam and reservoir were constructed to manage flood waters from upgradient farms and ranches, not intense development such as a landfill. Nor did the land use compatibility analysis sufficiently address the fact that the dam at Site 21 has been re-classified as high hazard, and its failure potential is judged to be high. These factors render the landfill *incompatible* with the District's easement and Site 21.

The Final Order does not adequately address the impacts of the proposed landfill on a dam that has been classified as high hazard. Instead, the Order states that any future rehabilitation of the Site 21 Dam "will consider the then-existing upstream land uses, including the Facility should it exist."[118] But it is not at all certain when the dam improvements will be made or even *if* they will occur. Even if the proposed improvements were funded, it is not clear that the improvements

[118] AR Vol. 30 Item 248 at 171; AR Vol. 33 Item 264 at 26.

would achieve the design standards required for high-hazard dams. In fact, the preliminary design for the Site 21 improvements fails to account for construction of the proposed landfill and supporting facilities within the Site 21 contributing watershed.[119]

The land use compatibility analysis also fails to give effect to the County's siting Ordinance. This is discussed elsewhere in this Brief and will not be repeated here.

For the reasons cited above, the findings and conclusions regarding the land use compatibility analysis were arbitrary and capricious and unsupported by the evidence.

I. The Commission erred in failing to include the site access road in the landfill permit and in revising the ALJs' proposed findings and conclusions on this issue.

TCEQ improperly reversed the ALJs' recommendation that the permit boundary should include the entire length of the access road from the entrance at US183 to the entrance of the facility at the permit boundary. The permit boundary in the draft permit issued by the ED did not include over one mile of the entrance road that crosses private property. Yet, the permit provides:

[119] AR Vol. 62 Item Protestants 5 at 40.

> All waste disposal activities authorized by this permit are to be confined to **the Type I landfill** which **shall include** security fencing, a gatehouse, scales, **a paved entrance road to the site, all-weather access roads**, soil stockpiles, landfill gas monitoring and collection system, leachate collection system, groundwater monitoring system, liner system, solid waste disposal area, and other improvements.[120]

Ensuring that the entrance road and all-weather access roads are properly maintained is important. Overlapping regulatory requirements apply to both the private entrance road, and the all-weather access road. TCEQ imposes certain requirements regarding wet weather, dust, and litter as they pertain to site access roads, and requires that the site operating plan contain the precise methods for achieving those requirements.[121]

Other requirements are also applicable to the private access road. TCEQ Rule 330.67 instructs that it is the responsibility of the owner or operator of a landfill to possess or acquire a sufficient interest in or right to use the access route to the proposed landfill site.[122] The owner or operator shall retain the right of entry to the facility until the end of the post-closure period.[123] The permit issued by the Commission also provides that the facility design, construction, and operation must

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[120] AR Vol 33 Item 264 at 46.

[121] 30 Tex. Admin. Code § 330.63

[122] 30 Tex. Admin. Code § 330.67(a).

[123] *Id.* (b).

comply with all representations contained in the Permit Application, including representations as to the location, design, and operation of the access road.[124]

However, the Commission has no ability to enforce these regulations and requirements if the access road is on private property and not included in the Permit Boundary. Maintenance of private roadway conditions is achieved via permit requirements. TCEQ does not possess inherent authority to regulate private roadways on private property, unless they are part of a permitted facility. *See, e.g.,* Atty. Gen. Op. JC-0016 (explaining that counties have no authority over private roads).

Furthermore, under the TCEQ rules a permit is issued *in personam.*[125] Accordingly, **a permit establishes the rights and obligations of the permittee**, **and TCEQ lacks authority to enforce the requirements of a permit as against someone who is not the permittee**. TCEQ Rules require that the permittee, "acquire a sufficient interest in or right to the use of the surface estate of the property for which a permit is issued, including the access route."[126] By including all facilities, including the access road, within the permit boundary, TCEQ has assurance that it its regulatory jurisdiction over the permittee will allow it to

[124] AR Vol. 33 Item 264 at 46.

[125] 30 Tex. Admin. Code § 305.64(a).

[126] 30 Tex. Admin. Code § 330.67(a).

enforce all requirements of the permit. That is not the case for an area for which the permittee has no property interest.

Thus, unless the private access road is included within the permit boundary, 130EP is not bound to maintain ownership of the private access road, and there is no requirement that the future owner of the private access road construct that road where proposed or to maintain it in accordance with TCEQ rules or representations included in the application. TCEQ has no assurance that it can even access the landfill property, particularly if the access road is not adequately and safely maintained.

The ALJs recognized the importance of including the access road within the permit boundary.[127] Accordingly, the ALJs proposed FOF 69 and 70 and COL 21, requiring the entire length of the access road (part of the landfill facility) be included within the Permit Boundary to ensure consistency with and enforceability of the permit's requirements.[128]

Yet, the Commission deleted recommended FOF 69 and 70[129] and COL 21[130] and issued the Permit without including the private access road within the Permit Boundary.[131]

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[127] AR Vol 30 Item 248 at 28-29.

[128] *Id.* at 7, 35.

[129] AR Vol. 33 Item 264 at 7.

The Commission erred in reversing or deleting the ALJs' findings of fact and conclusions of law regarding inclusion of the private access road within the Permit Boundary and Ordering Provision 1.a., which directed 130EP to submit to the ED a revised permit boundary that included the entire access road. The Legislature intended to restrict TCEQ's discretion to reject an ALJ's underlying findings of fact, so that it cannot do so simply because it would have reached a different conclusion. *Hunter Industrial Fac.*, 910 S.W.2d at 102. Furthermore, a conclusion of law is "clearly erroneous," under Section 361.0832(d), "when the reviewing body is left with the definite and firm conviction that a mistake has been committed." *Hunter Industrial Fac.*, 910 S.W.2d at 102; *see also Southwest Public Serv.*, 962 S.W.2d at 213-14.

In reversing the ALJs, the Commission asserted that:

> Texas Water Code § 7.002 gives the Commission the authority to enforce provisions of the Texas Water Code, the Texas Health & Safety Code, and any rules adopted under those provisions. That statutory authority is not limited to the confines of a permit boundary. *See also Texas Health & Safety Code § 361.032*.

This reasoning does not address the concerns at issue. The obligations related to the access road are derived from the *permit***,** rather than the applicable statutes. In order to enforce the permit, the TCEQ must have jurisdiction over not

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[130] AR Vol. 33 Item 264 at 36.

[131] *Id.* at 46.

only the *area* involved, but also the *person* involved. Since there is no requirement that the permittee maintain ownership of the property upon which the private access road is located, there is no assurance that the TCEQ will have personal jurisdiction to force compliance with the permit by the future owner of the area where the private roadway is represented to be located. Thus, TCEQ's reasoning for reversal of the decision of the ALJs to include the private access road within the permit boundary was not justified under the applicable standard of review.

For these reasons, Finding of Fact No. 49, 50, 51, 65, 66, 176 through 179, and Conclusions of Law Nos. 4, 9, 10, 11, 14, 19 and 20 are in violation of Section 2001.174(2)(C)(D)(E) & (F) of the APA. Similarly, FOF 31 and COL 14—which relate to the adequacy of 130EP's property rights—are erroneous for the same reasons.

J. The Commission erred in reversing the ALJs' findings and conclusions regarding the screening berm.

For the reasons described above regarding the site access road, the TCEQ erred in reversing the ALJs' recommendation that the Permit Boundary include the screening berm at the facility. The design, construction, and maintenance of the screening berm is necessary to ensure compliance with TCEQ regulations regarding visual screening. 30 Tex. Admin. Code § 330.175. Without inclusion of

the berm within the Permit Boundary, there is no regulatory assurance that this regulation will be met in the construction and operation of the facility.

CONCLUSION AND PRAYER

For the reasons described above, Plaintiffs request that this Court reverse and remand the Commission's decision issuing a permit to 130EP.

CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9

By my signature below, I, Marisa Perales, certify that the preceding document contains 14,926 words, exclusive of the caption, identity of parties, table of contents, index of authorities, statement of the nature of the case, and signature.

/s/ Marisa Perales
Marisa Perales

CERTIFICATE OF SERVICE

By my signature below, I certify that on this 29th day of March 2019, a copy of the foregoing document was served upon the parties identified on the following service list via electronic service.

/s/ Marisa Perales
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APPENDIX A

APPENDIX B