D-1-GN-17-006632

ENVIRONMENTAL PROTECTION IN THE INTEREST OF CALDWELL COUNTY, JAMES ABSHIER, BYRON FRIEDRICH, AND TJFA, L.P.,	§	**IN THE DISTRICT COURT**
Plaintiffs,	§	
v.	§	**TRAVIS COUNTY, TEXAS**
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,	§	
Defendant,	§	
And	§	
130 ENVIRONMENTAL PARK, LLC,	§	
Intervenor-Defendant.	§	**459TH JUDICIAL DISTRICT**

130 ENVIRONMENTAL PARK, LLC'S RESPONSE BRIEF

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REFERENCES TO ADMINISTRATIVE RECORD ON APPEAL

Consistent with the "Notice of Filing of Administrative Record" filed by the Texas Commission on Environmental Quality on September 18, 2018, the Administrative Record in this case is comprised of nine boxes containing seventy-eight binders of filings. References to the items cited herein will conform to the convention for designation set forth in the index accompanying that notice by citing to volume number of the Administrative Record, the item number or abbreviated item title, as appropriate, and any applicable page number(s) (*e.g.*, "33AR264"; "53AR,Ex.Worrall-1,p.4"; "67AR,Tr.2,pp.12-14").

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STATEMENT OF CASE

Nature of the Case: This is an administrative appeal of a Texas Commission on Environmental Quality ("TCEQ") Final Order granting to Intervenor 130 Environmental Park, LLC ("130EP") a permit to construct and operate a municipal solid waste landfill.[1]

Course of Proceedings: After completing a technical review of 130EP's permit application, the TCEQ Executive Director prepared a Draft Permit and issued the Preliminary Decision that the Draft Permit "meets all statutory and regulatory requirements."[2] After a two and a half year contested-case proceeding, including a two-week evidentiary hearing conducted before the State Office of Administrative Hearings, Administrative Law Judges Kerrie Jo Qualtrough and Casey A. Bell issued their Proposal for Decision recommending the issuance of a permit with three modifications to the Draft Permit prepared by the TCEQ Executive Director (or, the "ED"): (1) the permit boundary would be expanded to include the entirety of the facility access road, (2) the permit boundary would be expanded to include the entirety of the screening berm, and (3) the facility operating hours would be limited to the standard hours set out in TCEQ's rules.[3]

Disposition: The TCEQ Commissioners considered the Proposal for Decision at a public meeting where they voted unanimously to grant 130EP's permit application and issue a permit, with several changes to the order proposed by the ALJs and with only one modification to the Draft Permit issued by the Executive Director: the facility operating hours are limited to the standard hours set out in TCEQ's rules.[4] The TCEQ's written Final Order was issued on September 18, 2017.[5]

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[1] *See* 33AR264.
[2] 17AR39.
[3] 30AR248.
[4] 76AR,CD-3.
[5] 33AR264.

TO THE HONORABLE COURT:

Intervenor-Defendant 130 Environmental Park, LLC ("130EP") files this Response Brief in opposition to the opening brief filed on behalf of Plaintiffs Environmental Protection in the Interest of Caldwell County ("EPICC"), James Abshier, Byron Friedrich, and TJFA, L.P., sometimes collectively referred to as "Plaintiffs".

INTRODUCTION

This case is an appeal complaining of the issuance by the Texas Commission on Environmental Quality ("TCEQ" or "Commission") of a permit for a new municipal solid waste landfill to 130EP. Plaintiffs in this court and other persons who are not parties to this appeal ("protestants"), opposed the landfill permit application and participated in the TCEQ's administrative agency contested case proceedings at every step. Plaintiffs now raise various complaints about the Commission's action in issuing the permit to 130EP.

The challenges raised by this appeal should be rejected, and the Commission's decision should be affirmed. As a threshold matter, Plaintiffs do not establish, or even assert, that any of the issues raised on appeal involve errors that prejudiced any of Plaintiffs' substantial rights during the contested case proceeding or otherwise. Without a showing of such prejudice, the decision of the Commission may not be reversed. And, as to the merit of the errors alleged, the

decision of the Commission is fully supported by substantial evidence and is consistent with applicable law and within the discretion afforded to the agency.

STATEMENT OF FACTS

On September 4, 2013, 130EP separately filed with TCEQ a registration application for the 130 Environmental Park Transfer Station (a proposed new municipal solid waste processing facility)[6] and Parts I and II of an application for a permit to construct and operate a new Type I municipal solid waste landfill facility, both to be located on a 519+ acre tract of land ("the Site") in Caldwell County, Texas.[7]

On December 9, 2013, three months after 130EP filed its applications with TCEQ, the Caldwell County Commissioner's Court enacted an ordinance purporting to authorize the disposal of solid waste in one location (property owned by the County) and to prohibit the disposal of solid waste in all other portions of Caldwell County.[8]

[6] TCEQ issued the transfer station registration to 130EP on February 5, 2015. 51AR,Ex.130EP-8.

[7] 1AR1; 30AR264,pp.1,2(findings1-3,6-8). The Site is part of the 1,229-acre Hunter Tract (also referred to in the Application as "the Property"), which 130EP will purchase prior to development and operation of the landfill facility. 33AR264,Findings3-4,28-30.

[8] 58AR,Ex.Caldwell-3; 30AR264,pp.26 (Findings316,317).

In February 2014, 130EP submitted to TCEQ Parts III and IV of its landfill permit application, including geological studies and other supporting materials.[9] After conducting a technical review, TCEQ's Executive Director declared the application for the landfill permit technically complete, issued a Draft Permit (including special provisions requiring that 130EP (1) obtain a local government floodplain development permit before commencing construction, and (2) implement the public roadway improvements specified in 130EP's permit application), and issued a Preliminary Decision that the Draft Permit "meets all statutory and regulatory requirements".[10] (The technically complete application will be referred to hereafter as the "Application".)

In March and April of 2015, Administrative Law Judges ("ALJs") Casey A. Bell and Sharon Cloninger, from the State Office of Administrative Hearings ("SOAH"), conducted a preliminary hearing regarding the Application, adopted a schedule, and addressed procedures governing the contested case hearing process.[11] Thereafter, the matter proceeded as a contested case before SOAH, with ALJ Kerry Jo Qualtrough replacing Judge Cloninger prior to September 18, 2015.[12]

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[9] 4-12AR17; 30AR264,pp.2 (finding9).
[10] 17AR39.
[11] 18AR59.
[12] *See* 19AR70.

From November 2015 until February 2016, TJFA and EPICC moved to compel access to the Site or, in the alternative, moved for sanctions against 130EP, asserting that 130EP's consultants had spoliated certain evidence concerning their initial geological investigation of the Site in 2013.[13] In Order No. 14, the ALJs granted the motion and directed the parties to confer regarding the form of an order.[14] After 130EP afforded TFJA and EPICC access to the Site, counsel for TJFA/EPICC announced at a February 26, 2016 prehearing conference that they no longer sought an order on their motion and the ALJs determined, in Order No. 16, that the motion was moot.[15] Then, in a July 26, 2016 motion, TJFA and EPICC again raised the same issue of spoliation of evidence and sought sanctions against 130EP.[16] In their Order No. 26 (as also discussed in their Proposal for Decision), the ALJs found that 130EP spoliated evidence by not maintaining field logs prepared and soil samples collected during 130EP's 2013 geologic investigation of the landfill site. But the ALJs overruled TJFA/EPICC's motion, determining that a remedy, if any, must be proportionate to any prejudice suffered as a result of any destruction of discoverable material, and should restore the parties to their position had the evidence been maintained[17] and that, because TJFA/EPICC were allowed

[13] 19AR88; 21AR93; 23AR119.
[14] 24AR138.
[15] 25AR155.
[16] 27AR204.
[17] *Brookshire Brothers, Ltd. v. Aldridge*, 438 S.W.3d 9, 21 (Tex. 2014).

to conduct their own geologic investigation at the Site in response to their prior spoliation assertions and outside of the discovery period, no other action was necessary to remedy the prejudice caused by the destruction of possible evidence.[18]

After the completion of discovery, all parties prefiled written direct case evidence. And, after objections to the prefiled evidence were resolved[19], the ALJs conducted an evidentiary hearing on the Application from August 15-26, 2016.[20] At the hearing, the ALJs admitted evidence into the record, including 130EP's Application.[21] The Application is contained in five large 3-ring binders and consists of more than 2,000 pages with information about the Site and the surrounding area, data and analyses of land uses in the vicinity, information on roadways and traffic (including 130EP's proposed improvements to public roadways near the Site), geology and groundwater data and analyses, drainage and floodplain data and analyses, wetlands information, endangered and threatened species information, landfill design and construction drawings and analyses, and plans for the development, operation, and closure of the landfill facility.[22] The ALJs received and admitted prefiled written testimony and exhibits from 25

[18] 28AR212,pp.1-4; 30AR248,pp.3-5.
[19] *See* Order No.26,28AR212.
[20] 30AR248,pp.5.
[21] 63AR,Tr.1,pp.10-12; 44-50AR,Exs.130EP-1-130EP-5.
[22] 44-50AR,Exs.130EP1-5; Table of Contents,44AR,Ex.130EP-1,pp.7-15.

witnesses, 20 of whom testified as experts, and heard live testimony from 23 of them.[23]

After completion of the evidentiary hearing and briefing by the parties, the ALJs issued their Proposal for Decision ("PFD") in which they recommended that the permit be issued as proposed in the Draft Permit prepared by the TCEQ Executive Director, with three suggested modifications:

1. The Permit Boundary should be expanded to include the entire length of the access road from the entrance at US 183 to the entrance of the Facility at the current Permit Boundary. [24]

2. The Permit Boundary should be expanded to include the entire screening berm. [25]

3. The operating hours for the Facility should be set at the standard hours provided in 30 TAC § 330.135.[26]

The Proposal for Decision included a Proposed Order granting 130EP's Application and issuing a permit as set out in the Draft Permit with the three modifications listed above. It also included proposed findings of fact and

[23] 75AR,Tr.10,pp.i-xxxvi; 30AR248,pp.209; 58AR,Ex.ED-SO-1; 59AR,Ex.ED-AA-1.

[24] The "access road" (referred to in the Application as the "entrance road") is proposed to extend from a public roadway (US Highway 183), across a portion of the Hunter Tract (or "the Property") into the Site and past the scale house (or gatehouse) for the landfill facility. *See, e.g.* 44AR,Ex.130EP-1,pp.124,143.

[25] The screening berm is a vegetated earthen berm that will be constructed at the north end of the 130EP facility to provide visual screening of the landfill. 44AR,Ex.130EP-1,p.124; 53AR,Ex.Worrall-1,pp.14-15; 44AR,Ex.Worrall-10.

[26] 30AR248,pp.211,207-208.

conclusions of law.[27] The ALJs also issued a May 10, 2017 letter to the Commission recommending several corrections and revisions to the Proposed Order.[28]

The TCEQ Commissioners considered the PFD at a public meeting on September 6, 2017, at which they heard oral arguments by the parties and conducted deliberations. The Commissioners then voted unanimously to adopt the ALJs' Proposed Order, with several corrections and changes, including the deletion of provisions requiring that the permit boundary be expanded to include the entirety of the access road and screening berm.[29] On September 18, 2017, the Commission issued its written final order ("Order") granting 130EP's Application and issuing the permit.[30]

Plaintiffs filed a motion for rehearing at TCEQ,[31] which was overruled by operation of law.[32] This appeal followed.

STANDARDS OF REVIEW

Because this is an appeal from an administrative ruling, challenges made to it are subject to the standards for review contained in section 2001.174 of the Texas Government Code. *See Lauderdale v. Tex. Dep't. of Agric.*, 923 S.W.2d

[27] 30AR248,pp.212-250.
[28] 32AR259.
[29] 76AR,CD-3; *see also* 33AR264,pp.39-40 ("Explanation of Changes").
[30] 33AR264.
[31] 33AR266.
[32] 33AR268.

834, 835 (Tex. App.—Austin 1996, no writ) (scope of review of final order following administrative hearing is limited "to that specified in the Administrative Procedure Act for judicial review under the 'substantial evidence rule'"). *Tex. Health Enterprises, Inc. v. Tex. Dep't. of Health*, 954 S.W.2d 168, 171 (Tex. App.—Austin 1997, no pet.) ("The substantial evidence rule governs appeals of administrative orders."); *Gulf States Utilities Co. v. Public Utilities Comm'n of Tex.*, 947 S.W.2d 887, 890 (Tex. 1997) (describing application of substantial evidence rule to administrative decisions subject to review under § 2001.174); Tex. Gov't Code § 2001.174.

Review of this appeal under this statutory scheme involves four matters: (1) the showing required by an appellant to demonstrate injury flowing from any alleged error; (2) the showing required to demonstrate an alleged error involving the sufficiency of evidence; (3) the showing required to demonstrate a legal error in interpretation or application of law; and (4) the scope of the Commission's authority to reject proposed findings of fact or conclusions of law. These are addressed in turn.

Existence of an injury—prejudice to substantial rights of appellant: As a threshold matter, Section 2001.174(2) provides for the reversal or remand of an agency decision upon a showing that an alleged error prejudiced substantial rights of an appellant. Tex. Gov't Code § 2001.174(2). A reviewing court "may not

reverse the administrative order unless the agency record demonstrates that [appellant's] substantial rights have been prejudiced by the [agency's] committing one of the errors listed in section 2001.174(2) (A-F) of the Administrative Procedures Act." *Tex. Health Enterprises, Inc.*, 954 S.W.2d at 171-72; *see also Southwest-Tex. Leasing Co., Inc. v. Bomer*, 943 S.W.2d 954, 957 (Tex. App.—Austin 1997, no writ) (noting court may only reverse if appellant's substantial rights have been prejudiced by a violation of a subsection of Government Code section 2001.174(2)).

In appeals from administrative proceedings, courts consistently recognize that even upon a showing of an error listed in section 2001.174(2)(A-F), a reversal is not appropriate absent a demonstration that the error prejudiced appellant's substantial rights. *See, e.g., McMullen v. Employee Retirement Sys. of Tex.*, 935 S.W.2d 189, 191 (Tex. App.—Austin, 1996, no writ) (under 2001.174, "we may not reverse the Board's order unless the agency record demonstrates that [appellant's] substantial rights have been prejudiced by the Board's committing one of the errors listed in section 2001.174(2)(A)-(F) of the APA"); *Fay Ray v. Tex. Alcoholic Beverage Comm'n*, 959 S.W.2d 362, 365 (Tex. App.—Austin 1998, no pet.) ("[t]he agency order may not be reversed unless the agency record demonstrates that appellant's substantial rights have been prejudiced by the

Board's committing one of the errors listed in section 2001.174(2)(A)-(F) of the APA.").

In *Lone Star R.V. Sales v. Motor Vehicle Board, Tex. Dep't of Transp.*, 49 S.W.3d 492, 500 (Tex. App.—Austin, 2001, no pet.), the Third Court of Appeals framed the necessity of showing prejudice to support a request for reversal of an agency decision:

> Even if we were to find, however, that the Board engaged in an unlawful procedure, the task at hand is the determination whether [appellant's] substantial rights were prejudiced by [the alleged error]. *See* Tex. Gov't Code Ann. § 2001.174(a). [Appellant] does not point to a single argument that it was not permitted to fully make either in its own exceptions or in argument to the Board. Finding that the purpose of the rules—to ensure a fair, just, and effective adjudication of the parties' rights—was served, and that no prejudice to Lone Star's substantial rights occurred, we overrule its first three issues.

See also Tex. Dep't Public Safety v. Varne, 262 S.W.3d 34, 38 (Tex. App.—Houston [1st Dist.] 2008, no pet.) ("To warrant either reversal or remand, therefore, the reviewing court must conclude that (1) substantial rights of the appealing party have been affected because of (2) one or more of the reasons listed in section 2001.174(2)(A)-(F)."). Thus, the necessary first question in addressing any alleged error is whether the complaining party has demonstrated any prejudice to its substantial rights allegedly flowing from the complained-of agency action. Without such a demonstration, the alleged error cannot support reversal or remand.

Substantial Evidence: Agency decisions are subject to the "substantial evidence" scope of review provided by section 2001.174 of the APA. "The findings, inferences, conclusions, and decisions of an administrative agency are presumed to be supported by substantial evidence, and the burden is on the contestant to prove otherwise." *City of El Paso v. Public Util. Comm'n*, 883 S.W.2d 179, 185 (Tex. 1994) (citations omitted); *see also Fay Ray*, 959 S.W.2d at 368. The burden of seeking the reversal of an administrative order on the basis of the lack of substantial evidence is a heavy one. *Tex. Health Enterprises*, 954 S.W.2d at 172. A reviewing court may not substitute its judgment for that of the agency on the weight of the evidence on matters committed to the agency's discretion. Tex. Gov't Code § 2001.174; *see Southwestern Pub. Serv. Co. v. Public Util. Comm'n*, 962 S.W.2d 207, 215 (Tex. App.—Austin 1998, pet. denied). So long as an agency decision is supported by "substantial evidence," a reviewing court may not reverse the agency's decision—even if it would have reached a different conclusion from the evidence. *See City of El Paso*, 883 S.W.2d at 185. The question during a substantial evidence review is not whether an agency reached the correct conclusion, but whether some reasonable basis exists in the record for the action taken by the agency. *Railroad Comm'n v. Pend Oreille Oil & Gas Co., Inc*., 817 S.W.2d 36, 41 (Tex. 1991). Substantial evidence requires only more than a mere scintilla, and the evidence on the record may preponderate

against the agency's decision and still constitute substantial evidence. *Railroad Comm'n v. Torch Op. Co.*, 912 S.W.2d 790, 792-93 (Tex. 1995) (citations omitted). Conflicting evidence is resolved in favor of the agency's decision. *Tex. Dep't of Public Safety v. Williams*, 303 S.W.3d 356, 358 (Tex. App.—El Paso 2009, no pet.).

Agency interpretation/application of the law: "If a statute is clear and unambiguous it should be given its commonly understood meaning without resort to extrinsic aids of statutory construction. . .. If a statute is ambiguous, however, extrinsic aids, such as the interpretation of the agency charged with the statute's enforcement, may be used to determine legislative intent. *Hunter Indus. Fac., Inc. v. Tex. Nat. Res. Conserv. Comm'n*, 910 S.W.2d 96, 102 (Tex. App.—Austin 1995, writ denied).

As to the interpretation/application of agency ruled and regulations, an agency has discretion to depart from procedural requirements set forth by rule or statute, and its discretion in "relaxing" such requirements "is not reviewable except upon a showing of substantial prejudice to the complaining party." *Smith v. Houston Chemical Services, Inc.*, 872 S.W.2d 252, 260-61 (Tex. App—Austin 1994, writ denied) (citations and internal quotations omitted). The Third Court of Appeals has recognized that the discretion of an agency in interpreting and applying its rules allows it to add special provisions to municipal solid waste

permits – even after an evidentiary hearing – so long as inclusion of the special provision does not prejudice substantial rights of the appellant. *City of Jacksboro v. Two Bush Community Action Group*, No. 03-10-00860-CV, 2012WL2509804, at *21 (Tex. App.—June 28, 2012, pet. denied).

Agency amendments to ALJ proposals: Texas Health and Safety Code § 361.0832 authorizes the Commission to overturn underlying findings of fact and conclusions of law proposed by the ALJ. Section 361.0832(c) allows the Commission to "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 evidence." Tex. Health & Safety Code § 361.0832(c). The Third Court of Appeals discussed this standard governing the Commission's authority to overturn proposed findings of fact, explaining it in terms similar to the "substantial evidence" test:

> We have previously interpreted [section 361.0832(c)] to allow TCEQ to "exercise its discretion to reverse those findings that do not find support in the 'great weight' of the evidence in the record." **Thus, if there is evidence in the record supporting a contrary finding to that of the ALJ, TCEQ could properly weigh the evidence and reject that finding by the ALJ.** Conversely, if the great weight of the evidence—e.g., undisputed and uncontroverted evidence—supports the ALJ's finding, the agency may not reject an ALJ's finding of fact.

Jacksboro, 2012 WL 2509804 at *19 (citations omitted) (emphasis added).

The Commission may also overturn conclusions of law "on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules." Tex. Health & Safety Code § 361.0832(d).

The Commission must explain the reasoning and grounds for overturning findings or conclusions or for rejecting any proposal for decision on an ultimate finding." *Id*. § 361.0832(f). When a conclusion of law is improperly labelled as a finding of fact, it will be reviewed as a conclusion of law. *Midland Central Appraisal Dist. v. BP America Prod. Co.*, 282 S.W.3d 215, 220 (Tex. App.—Eastland 2009, pet. denied); *see also Smith*, 872 S.W.2d at 271 (discussing circumstances when "findings of fact" should be treated as "conclusions of law").

Thus, the Commission complies with the discretion afforded under § 361.0832 when it overturns an ALJ's proposed finding of fact and there is evidence in the record supporting a contrary finding or when it overturns a proposed conclusion of law (including a conclusion of law improperly labeled as a finding of fact) that was clearly erroneous in light of precedent and applicable rules, so long as the Commission's order provides an explanation. Moreover, even the failure to comply with § 361.0832 is not grounds for reversal absent a showing that the failure prejudiced a substantial right of the appellant. *Smith*, 872 S.W.2d at 272 (rejecting complaint that the Commission failed to provide an adequate

explanation for its failure to adopt certain ALJ findings and conclusion when appellants failed to suggest how they were prejudiced by such a failure).

Against the heavy burden set forth by these standards, Plaintiffs do not demonstrate any error warranting the reversal of the Commission's Order.

ARGUMENTS AND AUTHORITIES

A. The Commission's decision granting a municipal solid waste landfill permit application must be affirmed because Plaintiffs have not shown, or even alleged, that the Commission's actions prejudiced any of Plaintiffs' substantial rights.

As a threshold matter, and as demonstrated in more detail below, the issues raised by Plaintiffs either do not assert or establish that any of the errors they allege prejudiced any substantial rights in the course of the administrative hearing or otherwise.

In the absence of any demonstration that the errors they allege prejudiced their substantial rights as required by Government Code § 2001.174(2) and cases construing the same, the errors alleged do not provide any basis for reversing the order authorizing the permit or for remanding the matter for any additional proceedings. Appellants cannot be entitled to a reversal or a remand.

B. The Commission committed no error by addressing the local floodplain development permit in a permit special provision (responding to Plaintiffs' Issue B.1).

TCEQ is not required to strictly adhere to its rule specifying that a local government floodplain development permit be included in a landfill permit

application, and was authorized to approve the 130EP permit subject to a special provision requiring that the floodplain development permit be provided to TCEQ before facility construction commences.[33] In Section B.1 of their Brief, Plaintiffs complain that by approving a permit when 130EP's TCEQ permit application did not include a floodplain development permit, the Commission violated its rule at 30 TAC § 330.63(c)(2)(D)(ii) and committed an error warranting reversal. Plaintiffs' Brief at 24-25. But the Commission's actions do not constitute reversible error.

TCEQ's rules specifying information to be included with a landfill permit application address dozens of issues.[34] One rule provision requires that:

> [A]pplications for landfill…units shall include the following...The owner or operator shall for construction in a floodplain, submit, where applicable…a floodplain development permit from the city, county, or other agency with jurisdiction over the proposed improvements.

30 TAC § 330.63(c)(2)(D)(ii).

At the 130EP facility, the landfill itself will not be located in a floodplain, but portions of the access road will cross the floodplain (although the access road

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[33] Permit Special Provision IX.A. states:

> Before physical construction may commence, the permittee must provide the executive director with a floodplain development permit from the city, county, or other agency with jurisdiction over improvements authorized by this permit.

33AR264,Permit,p.10.

[34] 30 TAC §§ 330.59-65, 330.121-179, 330.261-563.

will not be overtopped in a 100-year storm event).[35] Constructing the access road across the floodplain requires a floodplain development permit from the County.[36] Because the floodplain development permit was not included in 130EP's TCEQ permit application, the TCEQ Executive Director included in the Draft Permit a special provision (Special Provision IX.A, ultimately included in the Commission's Order issuing the permit) requiring that the floodplain development permit be provided to TCEQ before the beginning of construction on the 130EP facility.[37]

This special provision was also addressed during the agency hearing. Evidence in the record shows that it is not uncommon for a TCEQ permit to include this type of special provision, typically to ensure that uncompleted requirements involving coordination with and approvals from other agencies will be met before commencement of construction or before waste is accepted at a facility.[38] The record also confirms that special provisions like this one have been and may be used to address a variety of other governmental approvals that 30 TAC §330.63(c)(2)(D) provides must be included with a permit application, including a local government approval for levees, a Corps of Engineers 404 permit, and a

[35] 33AR264,pp.24,27; 30AR248.
[36] 30AR248,p.176.
[37] 64AR,Ex.Protestants-24; 70AR,TR-5,pp.1178-1180; 74AR,TR-9,pp.1975-1978,1983-1985; 59AR,Ex.ED-SO-8,Draft Permit.
[38] 70AR,TR-5,p.1181-1183; 74AR,TR-9,p.1983-1986; 59AR,Ex.ED-SO-9,pp.69-70.

conditional letter of map revision from FEMA.[39]

In the PFD, the ALJs stated:

> The evidence is uncontroverted that 130EP does not have the required floodplain development permit from the County. Accordingly, the ALJs conclude that the Application did not comply with 30 TAC § 330.63(c)(2)(D)(ii). However, the evidence shows that addressing these types of deficiencies through the use of special provisions in the permit is a common practice at the TCEQ…Although not strictly in compliance with the TCEQ's rules, this seems to the ALJs a reasonable accommodation that will not cause any harm or threat to the environment, given that construction cannot begin until 130EP obtains the required permit…The ALJs agree with the ED that the use of special provisions [sic] adequately resolves the issue.[40]

The TCEQ Commissioners agreed with the Executive Director and the ALJs on this issue. They voted unanimously to include Special Provision IX.A. in the permit, and made findings in support:

> 329. 130EP has not obtained the required floodplain development permit from the County and did not submit the floodplain development permit with its Application.
>
> 330. The Draft Permit contains special provisions to address this deficiency. The use of special provisions in the permit matter is a common practice at the TCEQ to address similar types of deficiencies involving approvals from other governmental entities.

76AR,CD-3; 33AR264. [41]

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[39] 74AR,TR-9,pp.1985-1986.

[40] 30AR248,pp.179-180.

[41] Plaintiffs assert that "during their deliberations regarding 130EP's application, the Commissioners did not even mention…130EP's failure to obtain local floodplain

The Third Court of Appeals has upheld TCEQ's use of special provisions in municipal solid waste permits, even when added after the conclusion of the evidentiary hearing (which was clearly not the case here; the Executive Director included the special provision in the Draft Permit in October 2014, four months before commencement of the contested case proceeding[42]):

> TCEQ has the authority—under the APA, its own rules, and opinions from this Court to add special provisions to municipal solid waste permits after the evidentiary hearing has concluded so long as the decision to add the special provisions does not prejudice substantial rights.

Jacksboro, 2012 WL 2509804 at *13 (citations omitted).

In asserting that it is reversible error for TCEQ not to require compliance with the relevant permitting rule requirement (here, that a permit application must include a floodplain development permit), Plaintiffs ignore established Texas law. In at least two cases, the Third Court of Appeals has held that an environmental permitting agency is "free to depart from a strict adherence" to requirements in the agency's permitting rules and "free to relax the 'law' embodied in" a rule provision that is not primarily intended to confer procedural benefits on a party to a contested

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development approvals…" Plaintiffs' Brief,p.19. That is simply not true. In fact, at the September 6, 2017 public meeting where they considered the PFD, each of the three Commissioners addressed the issue of the floodplain development permit and specifically indicated their approval of the permit special provision requiring that it be submitted to TCEQ prior to construction of the 130EP facility. 76AR,CD-3,46:35-48:00.

[42] 59AR,Ex.ED-SO-8,Draft Permit.

case, and that the agency's doing so "is not reviewable except upon a showing of substantial prejudice to the complaining party". *Smith*, 872 S.W.2d at 252; *Lake Medina Conservation Soc., Inc./Bexar-Medina Atascosa Counties WCID No. 1 v. Texas Natural Resource Conservation Com'n*, 980 S.W.2d 511 (Tex. App.—Austin 1998, pet. denied).

In *Smith*, the Texas Water Commission (a predecessor agency to TCEQ), issued a permit for waste facility to Houston Chemical Services ("HCS"). On appeal, appellants (opponents to the project) argued that the Commission erred in granting the permit because HCS's permit application did not comply with Commission rules requiring a technical demonstration "shall be submitted as part of the permit application." 872 S.W.2d at 258-59. The Third Court rejected the alleged error, holding that:

> *[W]e believe the Commission was, in all events, free to depart from a strict adherence to what Rule 335.367(a)(2) required.* The rule consists of two parts. The first sentence imposes a requirement of substance: "The owner or operator must demonstrate that the facility or unit will not cause or contribute to a condition of air pollution." The second sentence imposes a procedural requirement for meeting this substantive requirement: "[s]uch demonstration must be based on waste characteristics, emissions estimates, and dispersion modeling... submitted as part of the permit application." *It is readily apparent from the face and context of the rule that the second sentence was not intended primarily to confer procedural benefits upon a party to the case; rather, it was manifestly intended as a procedural aid to facilitate the Commission's decision-making as to the first or substantive element of the rule.* The *Commission and the Air Control*

> *Board were therefore free to relax the "law" embodied in the second sentence and their doing so is "not reviewable except upon a showing of substantial prejudice to the complaining party."* ... It does not appear that any prejudice resulted from the Commission's chosen course of proceeding in the case.

Smith, 872 S.W.2d at 259-260 (emphasis added, citations omitted).

In *Lake Medina*, the Texas Natural Resource Commission (another TCEQ predecessor agency) issued an order amending a water use authorization held by a water district. Appellants in that case asserted, *inter alia*, that the Commission erred by violating two provisions in its rules. The Third Court overruled the alleged error, holding that

> [T]he Commission did not abuse its discretion by departing from a strict adherence to what Rule 295.2 and Rule 295.201 [both prohibiting substantive changes to an application after filing] require. The two rules were not intended primarily to confer procedural benefits upon a party to the case; they were intended rather to aid the Commission in the efficient processing of such applications….The Commission was therefore free to relax the requirements of the rules, and the agency's doing so in a particular case is "not reviewable except upon a showing of substantial prejudice to the complaining party." ... It does not appear that any prejudice resulted from the Commission's action.

Lake Medina, 980 S.W.2d 511 at 517 (citations omitted).

In holding that an agency's relaxation of procedural rules is not reviewable absent a showing of substantial prejudice to the complaining party, *Smith* and *Lake Medina* both cited Peter Raven–Hansen, *Regulatory Estoppel: When Agencies*

Break their Own "Laws," 64 Tex. L. Rev. 1, 23 (1985). Raven-Hansen explained that, in order to show the "substantial prejudice" required to invalidate an agency action for lack of strict adherence to a rule like 30 TAC § 330.63(c)(2)(D)(ii), a complaining party must show "that the violation prevented the party from presenting its case or deprived the agency of information with which it would probably have reached a decision favorable to the [complaining] party." Raven–Hansen, 64 Tex. L. Rev. at 27. Here, no such substantial prejudice was shown. [43]

Whether the local floodplain development permit was included with 130EP's TCEQ permit application (per 30 TAC 330.63(c)(2)(D)(ii)) or obtained prior to construction of the 130EP facility (per Permit Special Provision IX.A.) is simply a matter of timing. The Commission's action in addressing the issue with the permit special provision did not result in "substantial prejudice" to Plaintiffs: It did not prevent Plaintiffs from presenting their case,[44] and it certainly did not

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[43] *See id.*,pp.26:

> The mere possibility of prejudice is therefore not enough…A complainant has the burden of showing actual or probable prejudice in the sense of the effects of an adverse agency action on the outcome. For example, when an agency disregards an internal procedure requiring a set format or quantity of information before a decision can be made, the agency has usually concluded that information sufficient to reach a correct decision is already before the agency. Such violations are presumptively harmless to outside parties, as *American Farm Lines* [*v. Black Ball Freight Serv.*, 397 U.S. 532 (1970)] illustrates. There, the Court expressly found that, notwithstanding the agency violation of its own filing requirements, the agency had sufficient information with which to make a decision.

[44] During the contested case hearing, in addition to Plaintiffs' specific cross-examination about Permit Special Provision IX.A., they presented the testimony of

"deprive the agency of information with which it would probably have reached a decision favorable to" Plaintiffs.

Plaintiffs' allegations of error regarding Special Provision IX.A. and 30 TAC § 330.63(c)(2)(ii), and their allegations of error in the entry of corresponding findings of fact and conclusion of law should thus be overruled.

C. The Commission committed no error by granting the application and issuing the permit notwithstanding the county Disposal Ordinance(responding to Plaintiffs' Issue B.2)

In Section B.2 of their brief, Plaintiffs contend that the Commission was prevented from granting 130EP's Application by provisions in two separate statutory sections that give local governments limited authority to prohibit solid waste disposal in certain areas within their boundaries.[45] However, Plaintiffs' arguments fail to acknowledge an exception, set out in each of those statutory sections, that clearly applies, allowing the Commission to grant the Application.

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five witnesses and at least seven exhibits that addressed floodplain and/or flooding matters. 60AR,Exs.Protestants-1,2; 61AR,Ex.Protestants-4; 62AR,Exs.Protestants-5, 5AF, 5AG, 5F, 5G, 5Y; 63AR,Exs.Protestants-9, 9E, 10, 11.

[45] Also in Section B.2 of their Brief, Plaintiffs allege that five findings of fact (317, 319, 325, 326, and 327) and one conclusion of law (41) in the Commission's Order each violate four subsections of Government Code section 2001.174(2), but because they do not explain how any particular finding or conclusion violates any of those subsections, Plaintiffs failed to meet their burden of showing error regarding any of these findings or conclusions. Nonetheless, in this section, 130EP shows that each challenged finding and conclusion is supported by substantial evidence and was within TCEQ's authority and discretion to incorporate into its Order.

The Solid Waste Disposal Act, chapter 361 of the Health & Safety Code, establishes TCEQ as the dominant regulatory authority over municipal solid waste in Texas:

> The commission is responsible…for the management of municipal solid waste…by controlling all aspects of the management of municipal solid waste… by all practical and economically feasible methods consistent with its powers and duties under this chapter and other law.[46]

Additionally, it grants TCEQ "the powers and duties specifically prescribed by this chapter relating to municipal solid waste management…and all other powers necessary or convenient to carry out those responsibilities under this chapter."[47] And it specifically grants TCEQ the authority to "require and issue permits authorizing and governing the construction, operation, and maintenance of the solid waste facilities used to store, process, or dispose of solid waste."[48]

Two sections in other chapters of the Health & Safety Code give local governments limited authority to prohibit solid waste disposal in certain areas within their boundaries: sections 363.112 and 364.012. These sections are very similar in their wording and are identical in their operation, except that section 363.112 applies to both municipalities and counties, whereas section 364.012

[46] Tex. Health & Safety Code §§ 361.011(a,b).
[47] *Id.* § 361.011(c).
[48] *Id.* § 361.061.

applies only to counties. But, as is relevant here, the authority granted by these sections is limited in two significant ways:

1. In order to prohibit solid waste disposal in certain areas, a governing body (city council or commissioners court) must adopt an ordinance or order designating the area in which such disposal is not prohibited.[49] This ensures that a local government does not attempt to prevent waste disposal everywhere within its boundaries.

2. A governing body may not prohibit disposal in an area…for which: "(1) an application for a permit or other authorization under Chapter 361 has been filed with and is pending before the commission; or (2) a permit or other authorization under Chapter 361 has been issued by the commission."[50] This prevents a local government from adopting an ordinance or order prohibiting disposal in an area for which a permit or other authorization under Chapter 361 has already been issued by TCEQ, or where someone has begun the process of obtaining a permit or other Chapter 361 authorization by filing an application with TCEQ.

Mindful of the protection (or "grandfathering") from a potential county disposal ordinance provided by the filing of an application with TCEQ, on September 4, 2013, 130EP filed two separate applications at TCEQ: Parts I and II

[49] *Id.* §§ 363.112(a), 364.012(b).
[50] *Id.* §§ 363.112(c), 364.012(e).

of the landfill permit application,[51] and a separate application for a transfer station registration, each constituting "an application for a permit or other authorization under Chapter 361" and each covering the same area of Caldwell County, the 519+ acre Site for which TCEQ subsequently issued both the landfill permit and the transfer station registration.[52] On December 9, 2013, three months after 130EP filed its applications with TCEQ, the Caldwell County Commissioners Court adopted the County's Disposal Ordinance, purporting to authorize the disposal of solid waste in one location (property owned by the County) and to prohibit the disposal of solid waste in all other portions of Caldwell County.[53]

Section 363.112 and 364.012 both include subsections limiting TCEQ's authority to grant a permit for solid waste disposal in certain areas:

> The commission may not grant an application for a permit to process or dispose of…solid waste in an area in which the…disposal of…solid waste is prohibited by an ordinance [or order], UNLESS the [governing body] violated Subsection (c) [or (e)] in passing the ordinance.[54]

This prohibits TCEQ from granting an application in an area where disposal is prevented by a local ordinance, with a very significant exception: "UNLESS the [governing body] violated Subsection (c) [or (e)] in passing the ordinance."

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[51] 130EP filed Parts I and II of its landfill permit application separately from Parts II and IV in accordance with TCEQ's rules at 30 TAC § 330.57(a) and (c)(2), as authorized by Tex. Health & Safety Code § 361.069.

[52] 63AR,Ex.Protestants-10,pp.176-177; 33AR264,findings7-8;Permit,pp.1,3; 51AR, Ex.130EP-8,pp.1,3; 54AR,Ex.Welch-1,pp.4-5.

[53] 58AR,Ex.Caldwell-3; 30AR264,pp.26(findings 316, 317).

[54] *Id.* §§ 363.112(d), 364.012(f) (emphasis added).

(emphasis added). If the governing body violated section 363.112(c) and/or 364.012(e), by attempting to prohibit disposal in an area for which TCEQ has issued a permit or other authorization, or for which an application has been filed with TCEQ, TCEQ is not prohibited from issuing a disposal permit. That is exactly the case here: Caldwell County violated the statutory limitations by not excluding the 130EP site from its disposal ordinance, so TCEQ was not prohibited by that ordinance from approving 130EP's permit.[55]

At pages 26-27 of their brief, Plaintiffs claim that TCEQ was required, by sections 363.112 and 364.012, to deny 130EP's landfill permit application because, Plaintiffs assert, "130EP had no application pending before the Commission when the Ordinance became effective" and it was only after 130EP had submitted all four parts (I-IV) of its landfill permit application to TCEQ (which occurred in February 2014) that an application had been filed. Plaintiffs have made this argument before and, as discussed below, it has been appropriately rejected by the TCEQ Executive Director, the ALJs, and the TCEQ Commissioners. But there is also a threshold reason for the Court to reject this assertion by Plaintiffs: they are estopped from raising it by their own admission. In their Reply to Responses to Closing Arguments, a pleading filed with the ALJs in the contested case

[55] In Section B.2 of their brief, when Plaintiffs describe the subsections of sections 363.112 and 364.012 that limit TCEQ's authority to issue permits in areas covered by a local government ordinance, they completely fail to mention the "UNLESS" clause, the exception that applies in this case. Plaintiffs' Brief,pp.26.

proceeding, Plaintiffs stated:

> **Admittedly**, in this case, landfill permit application here was filed with TCEQ before the adoption of the County's landfill siting ordinance.

30AR238,p.10 (emphasis added).

In 2001, the Texas Supreme Court held that "assertions of fact, not pled in the alternative, in the live pleadings of a party are regarded as formal judicial admissions" and that a judicial admission bars the admitting party from later disputing the admitted fact.[56] Given their admission, Plaintiffs are thus precluded from now arguing that 130EP had no application pending when the County ordinance was adopted.

Beyond their clear admission, Plaintiffs are also legally incorrect in their assertion that 130EP's filing of Parts I and II did not amount to the filing of "an application for a permit or other authorization under Chapter 361", as specified in sections 363.112(c) and 364.012(e).[57] This issue was raised in public comments

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[56] *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001).

[57] The130EP transfer station registration application was filed with TCEQ on September 4, 2013 (the same day the landfill permit application was filed), covered the same 519+ acre Site as the landfill permit application, and was "an application for a permit or other authorization under Chapter 361". 54AR,Ex.Welch-1,pp.4-5; 51AREx.130EP-8. Because it had been filed with TCEQ before adoption of the Caldwell County Disposal Ordinance (58AR,Ex.Caldwell-3), it satisfied the criteria under the "grandfathering" provisions in Health & Safety Code sections 363.112(c) and 364.012(e) and provides an independent basis for a conclusion that the Ordinance did not prevent the Commission from granting the Application and issuing 130EP's landfill permit.

regarding 130EP's landfill permit application that were submitted to TCEQ well before the contested case hearing, with at least one person commenting that that the landfill should be prohibited under § 361.012 [sic] because Parts III and IV of the application were submitted after the ordinance was adopted. The TCEQ Executive Director considered, and rejected this comment, as set out in Response 59 of his Response to Comments:

> The County ordinance does not apply to this Application. The Texas Health and Safety Code empowers counties to prohibit waste processing and disposal in certain areas of the county; however, a county may not prohibit the processing or disposal of waste in an area of the county for which an application for a permit or other authorization has been filed and is pending before the Commission. In this case, the Applicant submitted its application on September 4, 2013.[58]
>
> In their May 10, 2017 letter to the Commission, the ALJs said:
>
> Protestants also took issue with the ALJs' conclusion that the Disposal Ordinance did not prohibit the issuance of the permit to 130EP because it did not have "a landfill permit application" on file with the TCEQ at the time the Disposal Ordinance was adopted. [Another party] also claimed that 130EP did not have an application on file until it submitted Parts III and IV, and therefore the Disposal Ordinance prohibits 130EP from constructing and operating the Facility. The ALJs disagree with [these] exceptions…Although Parts I and II may only address land-use compatibility issues**, the plain language of Section 330.57(a) indicates that these two parts constitute "a partial application" for a permit for an MSW facility**… §§ 363.112(c)(l) and 364.012(e)(l) provide that a county may not prohibit the disposal of solid waste in an area for which an "application" is pending before the TCEQ. However, **the statutes do**

[58] 18AR54. The Commission adopted the Executive Director's Response to Comments in its Order. 33AR264,pp.40.

> **not require that a complete application be on file and pending**. Without legal authority that these Texas Health and Safety Code provisions require a complete application to be on file, the ALJs cannot agree…that 130EP did not have an "application" on file with the TCEQ at the time the County adopted the Disposal Ordinance.[59]

The Commission agreed with the Executive Director and the ALJs, appropriately including in its Order the findings of fact and conclusion of law objected to by Plaintiffs. As set out above, those findings and conclusion are supported by substantial evidence in the record and were adopted by the Commission in accordance with legal requirements. Plaintiffs' allegations of error in Section B.2 of their brief should be overruled.

D. The Commission's findings and conclusions that the landfill will not have an adverse impact on drainage or on the downstream Site 21 dam and reservoir constitute no error (responding to Plaintiffs' Issue C).

In Section D of their Brief, Plaintiffs allege that three findings of fact and two conclusions of law in TCEQ's Order each violate four subsections of 2001.174(2) because

> 130EP failed to demonstrate that the landfill will not have an adverse impact on drainage patterns [because] 130EP made no analysis of how the landfill would impact the probable maximum flood, and made no analysis of whether the landfill would alter the likelihood of a breach of the downstream reservoir[60] under probable maximum flood conditions.

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[59] 32AR259,pp.10-11 (emphasis added).

[60] Plaintiffs correctly refer to the dam for that reservoir as a "high hazard dam". But, contrary to Plaintiffs' implications, the classification of a dam as a high hazard dam is based on the amount of development downstream from the dam; it is not related to the condition or structural integrity of the dam. 71AR,Tr.6,p.1279.

Plaintiffs' Brief,pp.27-29.

The only legal authority cited by Plaintiffs for the error alleged in Section D of their brief is 30 TAC § 299.15(a)(1)(A) (and the definition of "probable maximum flood" in § 299.2(47)). However, as the ALJs stated in the PFD:

> 30 TAC § 299.15(a)(1)(A) cited by Protestants refers to the criteria for the design of a proposed dam. It has no applicability to this case. Accordingly, the ALJs find that Protestants' argument regarding the probable maximum flood and the TCEQ's dam safety criteria in 30 TAC chapter 299 is without merit.[61]

As a result, Section D identifies no error in the Commission's Order.

E. The Commission committed no error by not requiring 130EP to address the design hurricane, probable maximum flood, or possible future changes to the floodplain. (responding to Plaintiffs' Issue D).

In Section D of their Brief, Plaintiffs' assert that nine findings of fact and nine conclusions of law in the Commission's Order each violate four subsections of Section 2001.174(2) because TCEQ did not require 130EP to provide information related to three issues identified by Plaintiffs as required to be submitted with a landfill permit application: the design hurricane, the probable maximum flood, and possible changes to the floodplain due to "foreseeable" future development. However, 130EP was not required, by TCEQ rule or otherwise, to include any of this information in its Application.

[61] 30AR248,p.146.

Design hurricane. Plaintiffs claim that TCEQ's rule at 30 TAC § 330.63(c)(2)(C) requires that certain information to be included in a landfill permit application, "specifically including the design hurricane projected by the Corps of Engineers".[62] However, § 330.63(c)(2)(C) actually says "if the site is located within the 100-year floodplain, provide information detailing the specific flooding levels and other events (**e.g.**, **design hurricane projected by Corps of Engineers**) that impact the flood protection of the facility." (emphasis added) So the rule simply identifies the "design hurricane" as an example of events that may impact the flood protection of a particular facility" about which information is to be provided, not as information to be provided for every facility. Plaintiffs do not cite to any evidence in the record showing that or how any design hurricane "impact[s] the flood protection of the [130EP] facility", or that the Corps of Engineers has even projected a design hurricane for this area of northern Caldwell County, which is located well over 100 miles from the Gulf of Mexico.[63] That is because the record contains no such evidence. Evidence that is in the record describes that the flood control and analysis report in the Application (consisting of more than 200 pages of data, computer modeling results, and engineering analyses[64]) includes information regarding events that actually do impact flooding and flood protection

[62] Plaintiff's Brief, p.30.
[63] 46AR,Ex.130EP-1,p.677.
[64] 47AR,Ex.130EP-2,pp.244-445.

of the 130EP facility, including peak flow conditions used in the computer modeling[65]; a 100-year, 10-day duration storm (used in the modeling because it yielded the highest flooding levels)[66]; and conditions that reflect peak discharges and maximum flooding levels.[67] (This issue was not addressed in the PFD because Plaintiffs only raised it for the first time in their motion for rehearing to TCEQ. The word "hurricane" does not appear anywhere in the 2,195 page hearing transcript.[68])

Probable maximum flood. Plaintiffs assert that, in connection with its application for a landfill permit, 130EP was required to provide information based on the "probable maximum flood", citing TCEQ's rule at 30 TAC §299.15(a)(1)(A). However, as the ALJs stated in the PFD:

> 30 TAC § 299.15(a)(1)(A) cited by Protestants refers to the criteria for the design of a proposed dam. It has no applicability to this case. Accordingly, the ALJs find that Protestants' argument regarding the probable maximum flood and the TCEQ's dam safety criteria in 30 TAC chapter 299 is without merit.[69]

Possible future changes to the floodplain. Plaintiffs assert that the floodplain analysis in the Application should have considered possible changes to the floodplain from potential future development upstream of the proposed facility, but

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[65] *Id.*,p.248.
[66] *Id.*,p.249; 74AR,Tr.9,pp.2009-2010.
[67] 47AR,Ex.130EP-2,pp.251,252.
[68] 66-75AR,Tr.1-Tr.10.
[69] 30AR248,p.146.

cite to no rule or other legal authority for their assertion. In fact, applicable TCEQ rule provisions require current floodplain information by specifying that an application "identify whether the site **is** located within a 100-year floodplain" and "provide the source of all data for such determination and include a copy of the relevant Federal Emergency Management Agency (FEMA) flood map or the calculations and maps used…"[70] As set out in the PFD:

> The ALJs…disagree with [the] contention that 130EP's floodplain analysis should have considered future development upstream of the Site. As pointed out by the ED, the TCEQ does not require applicants to model possible future conditions in their floodplain analyses…Mr. Odil [the Executive Director's engineering expert witness] also stated that…TCEQ does not require an applicant to consider future upstream development in its drainage plans…[t]he ALJs conclude that 130EP was not required to incorporate into its floodplain modeling the potential for future development upstream of the Site.[71]

F. The Commission's finding and conclusions concerning subsurface characterizations were supported by the record (responding to Plaintiffs' Issues E, F, and G).

In sections E-G of their Brief, Plaintiffs collapse a mish-mash of complaints that boil down to evidentiary challenges to the ALJs' and Commission's extensive factual findings concerning geology and hydrogeology issues. As an initial matter, these arguments fail to establish any prejudice to any substantial rights of Plaintiffs, and must be overruled. On the merits, Plaintiffs fail to demonstrate any

[70] 30 TAC § 330.63(c)(2) (emphasis added).
[71] 30AR248,p.157.

error, as the findings are supported by competent and substantial evidence and fail to show any abuse of discretion or resulting harm. Many of Plaintiffs' arguments in these sections are repeated or overlap, so they are addressed thematically below.

1. The ALJs provided an appropriate remedy for the failure of 130EP's experts to preserve soil samples and field logs (responding to Plaintiffs' Issue F).

Unable to demonstrate errors on the merits given the significant amount of substantial evidence supporting the underlying subsurface and geology/hydrogeology findings, Plaintiffs pursue a spurious argument before this Court based on allegations of spoliation and a claim that the ALJs provided them an inadequate remedy. Plaintiffs' challenges to the record concerning geology and hydrogeology depend heavily on their "spoliation" argument: that 130EP's experts failed to preserve and produce in discovery certain data collected during their 2013 site investigation.[72] And based on those challenges, they argue in this appeal that the ALJs abused their discretion in not granting them a "spoliation" instruction in

[72] The core of Plaintiffs' arguments regarding the sufficiency of evidence on geology and hydrogeology is that 130EP's professional geologist's firm, discarded soil samples and accompanying driller's field logs of those samples after he and the geotechnical engineer had used those samples to create "boring logs" in the form required for the Application by Commission rules. *See, e.g.*, 30 TAC § 330.63(e)(4) (describing contents of boring logs). Over Plaintiffs' objections and various motions to strike, the ALJ's admitted into the record all of 130EP's expert testimony and other evidence regarding geology and hydrogeology as well as the boring logs.

the contested-case proceeding.[73] But Plaintiffs mischaracterize the ALJs' rulings made in response to their spoliation arguments. While they claim the ALJs ruled that "no remedy was necessary", in context, the ALJs did far more than that, and did not abuse their discretion in determining that no additional remedy was warranted (particularly the remedy complained of on appeal—the failure to give a "spoliation instruction").

After Plaintiffs learned about the potential unavailability of materials from the initial (2013) geologic investigation, they filed several versions of a motion (between November 2015 and February 2016) for an order granting them access to the Site so they could conduct their own investigation, with an alternative request for an award of sanctions.[74] The ALJs granted the motion and issued an order directing the parties to confer on an order providing Plaintiffs access to the Site. After the property owner granted Plaintiffs access to the Site in February 2016 and they conducted their own extensive investigations, they informed the ALJs they no longer sought an order on their motion, leading the ALJs to enter an order declaring the issue moot.[75]

Plaintiffs were granted unprecedented access to the site to conduct their own soil borings, excavate observation trenches, collect soil samples, install a

[73] Plaintiffs' Brief,pp.59-60.
[74] 19AR88, 21AR93, 23AR119.
[75] 25AR155.

groundwater piezometer, perform in-situ permeability testing, observe and perform geophysical logging of 17 existing piezometers, and observed the entirety of 130EP's 2016 geologic investigation of the Site, including its field operations and soil sampling. Plaintiffs were allowed to conduct every investigation, run every test, and collect every sample they wanted.

Months after those efforts, in July 2016 Plaintiffs again sought sanction against 130EP for spoliation related to the 2013 site investigation.[76] This time, the ALJs issued an order noting that any remedy for spoliation must be proportionate to any prejudice resulting from the destruction of evidence, implicitly recognizing that the access granted to Plaintiffs based on their initial motion cured any prejudice because it gave them evidence to contest information and analysis in 130EP's reports from its 2013 and 2016 investigations. The ALJs also explicitly recognized that, in light of the access that had already been granted, no additional remedy was necessary.[77]

Against that full procedural backdrop, the ALJs' "no additional remedy" conclusion made sense. The ALJs agreed to grant Plaintiffs access to the site to conduct their own investigation as the initial relief requested to their spoliation complaint (even though the request for an order was ultimately withdrawn). To the extent the spoliation argument ultimately focuses on Plaintiffs' ability to test the

[76] 27AR204.
[77] 28AR212,pp.1-4; 30AR248,pp.3-5.

conclusions in 130EP's geology reports, the ALJs provided Plaintiffs a basis to do so and cured any alleged prejudice they contend resulted from the destruction of initial field logs and samples.

Notably absent from Plaintiffs' argument is any explanation of why and how any prejudice was not cured by their ability to conduct their own investigation and to monitor 130EP's 2016 investigation. At the time of the contested case hearing, Plaintiffs were well-positioned to, and did, present their own data to contest and contradict the evidence offered by 130EP based on its 2013 and 2016 investigations. Plaintiffs now contend that prejudice is shown because of discrepancies they claim existed between what was shown in 130EP's 2013 geology report and what Plaintiffs observed at the site.[78] But that is precisely why the investigation allowed by the ALJs provided an adequate cure. Plaintiffs conducted their own investigation, allowing them to contest the evidence offered by 130EP.

Moreover, it is entirely unclear what relief Plaintiffs claim they should have been granted but were denied and how that resulted in prejudice. The only relief they identify in their brief is their claim they "were thus entitled to a spoliation instruction."[79] But this was a contested case hearing before ALJs, and not a trial before a jury. It is unclear to whom Plaintiffs are suggesting the ALJs should have

[78] Plaintiffs' Brief,p.59.
[79] *Id.* at 59-60.

given an instruction (since the ALJs themselves were the finders of fact) and what any instruction should have been.

In any event, the ALJs had the discretion to determine what relief was required to cure any prejudice and that restore Plaintiffs' position. They also had the discretion to conclude that the additional relief sought by the Plaintiffs during the contested case proceeding, and now on appeal (a "spoliation" instruction) was not appropriate or necessary.

Plaintiffs misplace reliance on *Petroleum Solutions., Inc. v. Head*, 454 S.W.3d 482 (Tex. 2014) to argue the ALJs abused their discretion in refusing to require a "spoliation instruction" as a remedy to the spoliation.[80] First, *Petroleum Solutions* arose from a jury trial and accordingly, it involved an instruction from the trial court to the jury concerning the consequences of spoliation that had allegedly occurred. It provides no basis to contend that ALJs conducting a contested case hearing should have given themselves an instruction regarding the consequences of spoliation. A spoliation instruction is a function of a jury charge, which does not occur in contested case hearings before administrative law judges.

Petroleum Solutions does, however, confirm that a trial court has the discretion to craft an appropriate remedy to address spoliation.[81] If a trial court

[80] Plaintiff's Brief, p.59.
[81] 454 S.W.3d at 488; *see also Brookshire Brothers, Ltd. v. Aldridge*, 438 S.W.3d 9, 20 (Tex. 2014).

finds that spoliation occurred, it must exercise discretion (*i.e.*, be discrete) in imposing a remedy. First, a direct relationship must exist between the offensive conduct and the sanction imposed.[82] Second, any sanction must not be excessive, which means it should be no more severe than necessary to satisfy its legitimate purpose.[83]

Here, there is no question that the ALJs made these determinations. Finding 25, initially proposed by the ALJs and ultimately included in the Commission's Order, states:

> The ALJs overruled Protestants' motion to strike and admitted 130EP's prefiled evidence. The ALJs determined that striking 130EP's prefiled testimony was not appropriate because any remedy must be proportionate to the prejudice suffered by Protestants due to the destruction of the discoverable material. Because Protestants conducted an investigation at the Site outside of the discovery period as a result of their prior spoliation assertions, no other action was necessary to remedy the prejudice caused by 130EP's destruction of discoverable material.[84]

Plaintiffs simply do not demonstrate that the ALJs abused their discretion in determining that no additional sanctions would be required to ameliorate any prejudice resulting from the spoliation. Plaintiffs performed their own investigation. Their rights were honored. The ALJs and Commission considered the evidence in light of the spoliation assertions and found the evidence in support

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[82] *Petroleum Solutions,* 454 S.W.3d at 489.
[83] *Id.* (citing *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991)).
[84] 33AR264,p.4.

of granting the Application and issuing a permit to 130EP to be persuasive. Plaintiffs' evidence and arguments were not.

2. 130EP's boring plan satisfied the TCEQ's rules and was properly approved by the Executive Director .

Plaintiffs assert as a deficiency that 130EP's 2013 soil borings at the site were performed before a soil boring plan was approved by the ED and that the subsurface investigation was not performed in accordance with the plan in that 130EP did not perform *in situ* permeability or slug tests. Plaintiffs assert these procedural deficiencies as bases on which they argue that the subsurface investigation should be thrown out *in toto* and considered no evidence as a matter of law. But the ALJs' proposed findings in these regards were supported by substantial evidence and the Commission committed no error in including them in its Order.

Plaintiffs assert that the TCEQ staff was not aware that 130EP drilled its borings before the soil boring plan was approved and that "the ED admitted that this was a violation of the rules."[85] The ED never made such an admission. Neither the ED's Response to Comments,[86] nor the testimony of the ED's witnesses cited by Plaintiffs,[87] contain any such statement.

[85] Plaintiffs' Brief,p.39.
[86] 18AR54.
[87] 18AR74,pp.1996-97

The fact that soil borings at the site proposed for the 130EP landfill were drilled prior to the ED's approval of the soil boring plan is not a substantive deficiency that would justify denying the application.[88] As the ALJs acknowledged in the PFD, "the evidence shows that there have been situations in the past in which an applicant has drilled borings prior to receiving approval from the ED for the boring plan, and…the ED ultimately did approve [130EP's] boring plan and did not require [130EP] to redrill any borings."[89]

Plaintiffs do not allege or identify any prejudice to their substantial rights resulting from the ED's acceptance of the boring plan after borings were drilled, and they demonstrate no injury resulting from any conduct allegedly amounting to one or more errors listed in subsections A-F of Government Code section 2001.174(2). While Plaintiffs were not entitled to the procedural benefit of pre-approval of the soil boring plan, Plaintiffs had ample opportunity to investigate the subsurface in an effort to contradict the findings arising from those borings. (See discussion related to spoliation above.) The ALJs did not abuse their discretion in

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[88] 31AR251,p.3.

[89] 30AR248,p.65. Evidence supporting this conclusion includes: 65AR,Ex.Protestants-34 (Approval of boil boring plan - "additional soil borings and piezometers could be required if the data generated by this SBP is inconclusive."); 52AR,Ex.130EP-23 (Letter of TCEQ Manager of municipal solid waste division - "Upon review of a permit application that uses information from a subsurface investigation that did not receive prior approval, it could be determined that additional borings will be needed."; Testimony of 130EP's geologist - 66AR,Tr.2,pp.436,439,457. Additional evidence supporting this conclusion is detailed in 130EP's Exceptions, 32AR255,pp.4-6.

determining there was no harm arising from commencing borings before receipt of approval of the boring plan as they made clear that they were relying on guiding principles - prior practice of the TCEQ - in considering the ramifications thereof.

Moreover, an agency has discretion to depart from procedural requirements set forth by rule or statute not primarily intended to confer procedural benefits on a party to a contested case, and its discretion in deciding to "relax" such requirements "is not reviewable except upon a showing of substantial prejudice to the complaining party."[90] Here, the chronology for obtaining approval before conducting subsurface investigations is just such a procedural requirement—it inures to the benefit of the TCEQ to ensure the agency has adequate information. And, as Plaintiffs have not made a showing of substantial prejudice, the TCEQ's decision to relax the requirement for pre-approval of the boring plan is not reviewable by this Court. Regardless, the TCEQ was within its discretion to allow the results of the soil investigation to support the geology report and hydrogeology report notwithstanding the ED's approval of the soil boring plan after the drilling of the borings.

Plaintiffs assert that, when he approved the soil boring plan, the ED was unaware that 130EP had not conducted *in situ* or slug tests in selected borings as the plan provided. As a starting point, the plan only stated that BME would

[90] *Smith*, 872 S.W.2d at 260-61.

perform testing in "selected" borings. While 130EP's experts had anticipated performing slug tests in some of the borings or piezometers, the high clay content of the soils and the lack of water found at the site rendered such tests useless.[91] Because no borings were appropriate for slug tests, none were selected. Still, 130EP's experts followed the permeability testing requirements set forth in TCEQ rules.[92] Plaintiffs again fail to identify any substantial right that was affected by the lack of (useless) slug testing in the 2013 borings, and as such have not raised any issue reviewable by this Court.[93] The ALJs did not abuse their discretion in recommending, and the Commission did not abuse its discretion in making its decision on the boring plan in reliance on the guiding principles of prior Commission practice.

As summarized in their PFD, the ALJs went to great lengths to "provide a thorough description of the subsurface investigations performed at the Site both by [130EP's consultant] BME and Protestants."[94] They explained:

> After carefully reviewing the substantial and voluminous evidence presented on these issues, the ALJs … conclude that [130EP's] Geology Report meets all other applicable requirements of 30 TAC §330.63(e)(4) and that the arguments and criticisms of BME's

[91] 66AR,Tr.2,pp.442-443.
[92] 66AR,Tr.4,pp.893-896; *see* 30 TAC § 330.63(e)(5).
[93] *See Smith*, 872 S.W.2d at 272.
[94] 30AR248,p.32.

subsurface investigation and resulting conclusions were ultimately unpersuasive.[95]

3. 130EP's consultants and experts performed appropriate investigations and prepared application materials in accordance with Commission rules

a. The numerous factual errors asserted by Plaintiffs were all matters addressed by the ALJs and decided by the Commission based on substantial evidence in the record.

Plaintiffs identify deficiencies and errors allegedly committed by 130EP's experts that they contend, under various legal theories, should render the results of 130EP's geology and hydrogeology investigations as "no evidence," rendering several findings of fact deficient. Implicit in their arguments is the fact that the ALJs received and considered evidence on all the contested points. The ALJs heard and considered all of these challenges to the evidence, and against the voluminous evidence presented by all parties, found all of Plaintiffs' arguments to be without merit.

Each asserted deficiency is identified below, along with a reference to where and how each was considered and rejected by the ALJs in the PFD, 30AR248, with specific excerpts from the PFD reproduced as Appendix 1:

Plaintiff's Assertions (paraphrased):	References in PFD (30AR248)
"*The professional geologist was not personally on site to supervise soil*	*See* PFD at 64, beginning: "Mr. Snyder's supervision …"

[95] 30AR248,pp.32-33.

borings."	
"The methods used during soil borings were ambiguous."	*See* PFD at 64, beginning: "As to Protestants' claims …"
"The geology report is 'implausibly simplistic' in that it has no findings regarding secondary features, is not supported by reliable factual data, was contradicted by subsequent investigations, and Plaintiffs' consultant does not agree with the findings."	*See* PFD at 62-63, beginning: "Therefore, there is insufficient …"
"Elevation data in the well logs and piezometer logs were inaccurate and 130EP submitted false information regarding them."	*See* PFD at 63-64, beginning: "Similarly, the ALJs find …"
"There is no "foundational data" to support the professional geologist's opinions and the professional geologist's opinion cannot be tested."	*See* PFD at 61, beginning: "However, the ALJs also found …"
"Admission into evidence of 130EP's report of supplemental investigations was an abuse of discretion."	*See* PFD at 61, fn.222, beginning: "Although the May 2016 …"
"130EP's consultants did not comply with regulatory or professional standards in their investigations and the evidence proffered through 130EP's consultants is unreliable "as a matter of law."	*See* PFD at 64-65, beginning: "Regardless of whether …"
"130EP's piezometer data did not support the statement that ground water occurs at the interface between Strata II and III."	*See* PFD at 78, beginning: "The revisions to the groundwater …"

"The evidence presented clearly contradicts 130EP's theory of groundwater movement and potential leachate migration from the proposed landfill."	*See* PFD at 77, beginning: "The preponderance of the evidence …"

As Plaintiffs' evidentiary challenges had been evaluated and rejected based on the ALJs' consideration of all evidence and on the weight they gave evidence offered both by Plaintiffs and 130EP, the findings challenged by Plaintiffs were supported by substantial evidence, and may not be disturbed.

b. The ALJs met the requirements of law in the recitations of the findings.

Plaintiffs cite *Tex. Health Facilities Comm'n v. Charter Medical—Dallas, Inc.*, 665 S.W.2d 446, 451 (Tex. 1984) for the proposition that, under the APA, findings of fact should not be mere recitals of evidence, and that the information on which they are based should be vetted for accuracy and competency.

130EP's Application was directly referred to SOAH for a contested case hearing pursuant to 30 TAC §55.210 and the issue before SOAH was therefore whether the Application complies with all applicable statutory and regulatory requirements. Plaintiffs specifically challenge findings of fact nos. 86, 87, 106, 112, 113, and 114.[96] None of these findings are statutory findings or mere recitals

[96] In a footnote at the end of their Section E., Plaintiffs also assert that that findings of fact nos. 73 through 80, 82, 83, 84, 86 through 90, 92, 93, 106, 107,

of evidence. Rather, each addresses the Application's satisfaction of specific rules and/or responds to specific disputes raised during the hearing (and now) by Plaintiffs:

Challenged Finding:	Rule addressed or disputed issue resolved
FOF86:	30 TAC §330.63(e)(4).
FOF87:	30 TAC §330.63(e)(4).
FOF106:	30 TAC §330.63(e)(4)(H).
FOF112:	30 TAC §330.63(e).
FOF113:	30 TAC §330.63(e).
FOF114:	Directly responding to Plaintiffs' arguments.

In short, all of the findings of fact specifically challenged by Plaintiffs meet the standard of *Texas Health Facilities Comm'n*, and were more than mere recitations of conclusion or of statutes, but resolved factual disputes contested by the parties based on the evidence.

108, 109, 111, 112, 113, 114, 116, and 123 are in error "for the same reasons". Similarly, at the end of their Section G., Plaintiffs assert that "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 error. 130EP relies on its arguments herein as response to those not directly addressed in this Reply.

c. The ALJs did not commit any evidentiary errors in admitting expert evidence establishing the contested facts.

Plaintiffs cite *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 713 (Tex. 1997), *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009) and other cases for the propositions that there must be some basis for an expert's opinion offered to show its reliability and that the data underlying an expert's opinion should be "independently evaluated in determining if the opinion itself is reliable."

In a contested case, the rules of evidence as applied in nonjury civil cases in a district court are applied, with additional leniency for admission of evidence if the evidence is:

> (1) necessary to ascertain facts not reasonably susceptible of proof under those rules;
> (2) not precluded by statute; and
> (3) of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs.[97]

"Like a trial court, an ALJ has broad discretion in deciding whether to admit expert testimony in an administrative hearing, and her decision will not be disturbed absent an abuse of discretion."[98] The ALJs conducted the contested case hearing on 130EP's Application pursuant to a procedural schedule that required submission of prefiled written direct evidence and provided a deadline to submit

[97] Tex. Gov't Code § 2001.081.
[98] *Fay Ray*, 959 SW2d at 367 (citing Tex. Gov't Code § 2001.081).

any objections to the prefiled evidence.[99] Plaintiffs made all the arguments they now assert either in their pre-hearing "Motion to Strike and for Sanctions Due to Spoliation of Evidence,"[100] or in their "Objections to, and Motion to Strike, Prefiled Evidence."[101] As gatekeepers, the ALJs rejected requests for evidentiary remedies based on spoliation grounds (as discussed above) and ruled on all timely objections.[102] The ALJs considered Plaintiffs' arguments regarding reliability of evidence, including those under "the Daubert principles,"[103] and rejected them.

Plaintiffs now make numerous assertions that the methods, record keeping, and conclusions of 130EP's professional geologist and geotechnical engineer and their subcontractors were inappropriate, and that opinion testimony based on their work should be considered "no evidence" based on *Havner* and *Pollock*, both of which are Texas applications of "the Daubert principles". The ALJs were well within the rules of evidence for contested case hearings under Tex. Gov't. Code § 2001.081 and did not abuse their discretion in admitting the 130EP's Geology Report.

Plaintiffs take particular aim at the quality of the work product of 130EP's geologist and groundwater scientist, John Michael Snyder, P.G. The evidence in

[99] 24AR149.
[100] 27AR204.
[101] 26AR202.
[102] 28AR212.
[103] 26AR202,pp.7-8,59.

the record shows that Mr. Snyder is eminently qualified by knowledge, skill, experience, training and education to offer expert testimony and evidence regarding geology and hydrogeology, including the information and analysis included in an application for a landfill permit before the TCEQ. As set forth in his resume,[104] Mr. Snyder has B.S. and M.S. degrees in geology and has performed graduate work in hydrogeology. He is registered as a Professional Geoscientist and certified as a Professional Geologist. He has numerous published technical papers and has participated on several policy, standard, and rule-making committees and boards. He has a wide range of geologic, hydrogeologic and solid waste permitting experience in the State of Texas. His coordination with TCEQ and of project professional team members have been key elements in each of the more than 35 successful solid waste permitting projects completed by Mr. Snyder during the past 30 years. In addition, he has direct experience in performing geology and groundwater projects for solid waste facilities in Texas and Oklahoma. Mr. Snyder has testified as an expert geology and hydrogeology witness in many solid waste public hearings in Texas. Evidence in the record shows that the ALJs appropriately relied on and applied the guiding principles of Rule 702 in accepting expert witness testimony and evidence from Mr. Snyder.

[104] 54AR,EX.Snyder-2.

After considering Plaintiffs vigorous challenges to the evidence, the ALJs and Commissioners found 130EP's experts' opinions well-founded, well-articulated, and persuasive. (See discussion of Plaintiffs' asserted errors in subsection 3.a. above.)

The ALJs acted within their discretion (relying on appropriate guiding principles) in finding that the Application satisfies Commission rules regarding geology and hydrogeology. The findings of fact and conclusions of law satisfy all standards of form and substance. It would have been an abuse of discretion to impose any additional remedy for spoliation of evidence. Plaintiffs asserted issues 5, 6 and 7 should therefore be overruled.

G. The Commission's findings and conclusions regarding land use compatibility demonstrate no error (responding to Plaintiffs' Issue H).

Plaintiffs' land use compatibility/surface water drainage arguments fail to demonstrate any prejudice to their substantial rights. Tex. Gov't. Code § 2001.174. Plaintiffs must show that their substantial rights were prejudiced whether they are arguing based on substantial evidence or because they assert the decision was arbitrary and capricious. As such, Plaintiffs arguments regarding the land use compatibility of the landfill should be overruled without further consideration.

Beyond that, Plaintiffs argue that specified findings and conclusions regarding the land use compatibility analysis were arbitrary and capricious and unsupported by substantial evidence. As regards the Site 21 Reservoir and land use

compatibility, Plaintiffs argue the Commission "failed to take a hard look" at what Plaintiffs call "salient" features and factors they advocated.

Plaintiffs do not explain their assertion that the land use compatibility findings and conclusions are arbitrary and capricious. Historically, substantial evidence has been equated with fair and reasonable conduct on the part of the agency. "Conversely, agency decisions that are unsupported by substantial evidence have been deemed arbitrary and capricious. Thus, the two terms have many times been considered two sides of the same coin." *Texas Health Facilities Comm'n*, 665 S.W.2d at 454. There, the court held that the Administrative Procedures Act, by inclusion of § 2001.174(2)(F), provides "a safeguard against agency conduct that is arbitrary or constitutes an abuse of discretion although that conduct does not amount to a violation of any other provision of the APTRA or the agency's enabling act." *Id*. But section 2001.174(2)(F) is not implicated here because the findings and conclusions on land use compatibility and the Site 21 Reservoir were consistent with the Commission's rules and supported by substantial evidence. An agency decision made in reference to applicable rules is not arbitrary and capricious. See *Fay Ray*, 959 SW2d at 368-69; *Tex. Dep't. Pub. Safety v. Cortinas*, 996 S.W.2d 885, 890 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

30 TAC § 330.61(h), states that "a primary concern is that the use of any land for an MSW site not adversely impact human health or the environment." For this reason, the rule requires an application to "provide information regarding the likely impacts of the facility on cities, communities, groups of property owners, or individuals by analyzing the compatibility of land use, zoning in the vicinity, community growth patterns, and other factors associated with the public interest." *Id*. The rule then enumerates the information to be included in the Application to assist the Commission in evaluating the impact of the site on the surrounding area.

It is uncontested that the Application and Updated Land Use Report[105] provide all applicable enumerated information required by 30 TAC § 330.61(h)(1)-(6). Plaintiffs' arguments are rather based on "concerns" about the nearby reservoir and their assumption that it is incompatible.

Separate from the Commission rules on land use, the rules contain extensive and specific requirements for surface water drainage analysis, (e.g., 30 TAC § 330.63(c)) including identification of the location of the 100-year floodplain before and after development of the landfill. (30 TAC § 330.63(c)(2).) The TCEQ rules contain a location restriction regarding the location of landfills relative to floodplains (30 TAC § 330.547). That requirement is satisfied in the

[105] 53AR,Worral-3.

Application.[106] A large portion of the Application is dedicated to surface water drainage including identification of floodplains and pre-existing drainage patterns and engineering to ensure compliance with these TCEQ rules.[107] Because the Application contains all required information and satisfies the requirements regarding surface water drainage and floodplains, the Application will be protective of human health and the environment as is a primary concern for municipal solid waste landfills as noted in 30 TAC § 330.61(h).

Because extensive data and analysis by qualified engineers of surface water drainage and floodplain matters is included in other portions of the Application, the TCEQ does not require a separate discussion thereof in the land use analysis, and it would be inappropriate to do so in the Land Use Report prepared by an expert whose expertise does not extend to surface water engineering or floodplain analyses. It is uncontested in this case that the Application satisfies all of the informational and operational requirements of the Commission's rules regarding surface water drainage.

Plaintiffs state that the land use "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." Plaintiffs' Brief at 65. This is a gross misstatement of the rule. It actually requires an applicant to provide the

[106] 44AR,Ex.130EP-1,p.839.
[107] *e.g.*, 47AR,Ex.130EP-2,pp.47-468.

information required by 30 TAC § 330.61(h) (1)-(5) and any additional information *requested by the ED* pursuant to 30 TAC § 330.61(h)(6). The ED concluded that the information contained in the Application was sufficient to demonstrate land use compatibility and that no additional information was required, and the Application thus satisfied 30 TAC § 330.61(h). The Commission found the same.

In short, Plaintiffs do not really contest the indisputable fact that the findings of fact and conclusions of law they raise are supported by substantial evidence. Instead, they complain that the findings could have been decided differently on the evidence presented. That argument cannot support reversal—even if this Court were to agree that different findings could have been reached. In the face of more than a scintilla of supporting evidence, the findings cannot be reversed on a substantial evidence challenge and the making of the findings cannot be held arbitrary and capricious.

Plaintiffs' challenged findings were direct responses and answers to the issues raised by Plaintiffs. Rather than failing to consider what Plaintiffs call "salient" factors in their conflated land use/surface water drainage issue, the Commission adopted findings of fact and conclusions of law that address the actual issues related to land use in section 330.61(h) and surface water drainage in section 330.63(c) (*inter alia*). It cannot be arbitrary and capricious for the Commission to

rely on the standards that actually apply over Plaintiffs' conflated rules and argument. Thus, the challenges to findings of fact 308 and 311[108], 313, 315, 317, 319, and 320, and conclusions of law 17 and 18 must be rejected.

H. The Commission committed no error by refusing to expand the permit boundary to include the entirety of the access road and screening berm (responding to Plaintiffs' Issues I and J).

The Commission was fully within its statutory authority to reject the ALJs' recommendations to expand the permit boundary.

In the PFD, the ALJs recommended that the permit boundary be expanded to include the entirety of the access road and screening berm.[109] But the Commission rejected that recommendation and the proposed findings of fact and conclusion of law associated with it.[110] In Section I of their Brief, Plaintiffs assert "TCEQ

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[108] Plaintiffs also identify Findings 308 (related to transportation) and 311 (related to visibility) as subject to challenge. These findings have no relation to the land use - surface water drainage issues and 130EP believes they are a relic of prior briefing by Plaintiffs.

[109] 30AR248,PFD,pp.12, 28, 185, 201, 207-208.

[110] 33AR264,Order,p.39; 30AR248,ProposedOrder,Findings 69, 70, 394, Conclusion 21:

> Finding 69. 130EP **has not justified** why the entire length of the access road is not included within the permit Boundary, even though it is a facility authorized by the permit.
> Finding 70. The entire length of the access road from US 183 **should be included** within the Permit Boundary.
> Finding 394. The entire screening berm l 30EP will construct on the northern boundary of the Facility **should be included** within the Permit Boundary.
> Conclusion 21. The entire length of the access road **should be included** within the Permit Boundary to ensure consistency with and enforceability of the permit's requirements.

improperly reversed the ALJs' recommendation", suggesting that unless the access road and screening berm are inside the permit boundary, TCEQ will have no authority to enforce various provisions in the permit and TCEQ rules.[111] That assertion is not correct.

The Commission's authority to overturn findings and conclusions proposed by ALJs is set out in Health & Safety Code section 361.0832(c),(d) and (f):

> (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.[[112]]
>
> (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.

(emphasis added).

[111] At the end of Section I in their brief, Plaintiffs also allege that ten findings and seven conclusions in TCEQ's Order each violate four provisions of Government Code section 2001.174(2), but Plaintiffs do not address these claimed errors. To the extent these alleged errors relate to the issue discussed in Section I of Plaintiffs' Brief (the Commission's rejection of the recommendation to expand the permit boundary), they are addressed in this section of 130EP's brief.

[112] In a 2012 opinion, the Third Court of Appeals discussed this standard governing the Commission's authority to overturn proposed findings of fact, explaining it in terms similar to the "substantial evidence" test:

> We have previously interpreted [section 361.0832(c)] to allow TCEQ to "exercise its discretion to reverse those findings that do not find support in the 'great weight' of the evidence in the record." **Thus, if there is evidence in the record supporting a contrary finding to that of the ALJ, TCEQ could properly weigh the evidence and reject that finding by the ALJ.** Conversely, if the great weight of the evidence—e.g., undisputed and uncontroverted evidence—supports the ALJ's finding, the agency may not reject an ALJ's finding of fact.

Jacksboro, 2012 WL 2509804 at 19 (citations omitted, emphasis added).

* * *

> (f) The commission shall issue written rulings, orders, or decisions in all contested cases and shall fully explain in a ruling, order, or decision the reasoning and grounds for overturning each finding of fact or conclusion of law...

Tex. Health & Safety Code § 361.0832 (c, d, f). In this case, the Commission properly exercised its authority to reject the ALJs' recommendations regarding expanding the permit boundary, as discussed during their September 6, 2017 public meeting:

> *Commission Chairman Bryan Shaw*: …[W]ith regard to expanding the permit boundary to include the access roads as well as the screening berm…those are not required to be included in the permit boundary. And I think that concerns over our being able to enforce outside of our permit boundaries, I don't think those are concerns…I don't see a concern with our ability to ensure enforcement of…the permit…
>
> *Commissioner Jon Niermann*: I agree. No question that we have the authority to enforce the terms of a permit outside the permit boundaries, as well as our rules.[113]

The "findings of fact" rejected by the Commission were, instead, patently conclusions of law because they each declare a legal effect or consequence. They did not establish any factual matters, but rather set out the ALJs' legal determination that 130EP failed to meet some undefined burden to "justify" why the entire length of the access road is not included within the permit boundary and the ALJs' legal determinations that those items should be included in the permit

[113] 76AR,CD-3,48:00-49:11.

boundary. When a conclusion of law is improperly labelled as a finding of fact, it will be reviewed as a conclusion of law. *Midland Central Appraisal Dist.* 282 S.W.3d at 220 ; *see also Smith,* 872 S.W.2d at 271 (discussing circumstances when "findings of fact" should be treated as "conclusions of law"). As such, the rejected findings should be treated as conclusions of law for purposes of section 361.0832. *Id*.

In rejecting the ALJs' recommendations, the Commission's Order stated:

> [T]he plain language of the TCEQ rules and the evidence in the record do not require or support the expansion of the Permit Boundary. In regards to access roads, the TCEQ rules specifically contemplate that portions of an access road may be outside of the permit boundary. For example,…§330.153 requires that "all-weather roads must be provided from the facility to access public roads .... " That language envisions that at least a portion of the road may be outside of the permit boundary….[Also] the Commission concluded that there are no rules which require a screening berm to be located within a permit boundary. Texas Water Code § 7.002 gives the Commission the authority to enforce…[and] compel compliance with the rules, orders, permits, and other decisions of the Commission. That statutory authority is not limited to the confines of a permit boundary. *See also, Texas Health and Safety Code§ 361.032…*[114]

The Commission identified the statutory bases for its authority to enforce permit terms outside of the permit boundary, including Water Code section 7.002 (providing that the Commission or the Executive Director may initiate proceedings, including administrative orders, to enforce provisions of the Health and Safety Code and provisions of its rules, orders, permits, or other decisions) and

[114] Explanation of Changes No. 3, Order, 33AR264,pp.39-40.

Health & Safety Code section 361.032(a) (providing that the Commission may inspect solid waste facilities and may investigate conditions concerning solid waste management and control). The Commission also referred to its rule at section 330.153(a) as establishing that at least part of an access road may be outside the permit boundary. These authorities show it was clearly erroneous for the ALJs to conclude that the permit boundary should be expanded to include the entirety of the access road and screening berm.[115]

Evidence in the record, including precedents, also supports the Commission's actions. The Commission has granted numerous other permits allowing access roads and other ancillary facilities outside permit boundaries.[116] These include the IESI Jacksboro Landfill that has an access road of one-and-one-half miles outside the permit boundary and the North Texas Municipal Water District 121 Landfill that has screening berms outside the permit boundary.[117] Moreover, TCEQ permit engineer Steven Odil, testified that the TCEQ has jurisdiction to enforce the requirements for construction of the access road, control of mud accumulations on the access road, and other permit requirements outside of

[115] Alternatively, given the explanation of the legal errors associated with the ALJs' conclusion that the screening berm and access road must be included in the permit boundary, the findings at issue cannot "serve as the basis for a decision," because the findings are immaterial. Accordingly, they were not subject to section 361.0832(c) in any event.
[116] 73AR,Tr.8,p.1920.
[117] 32AR255,Atts.2-5.

the permit boundary,[118] and that the TCEQ has the ability to enforce anything that the permit requires, even if it is outside the permit boundary.[119]

And, in compliance with section 361.0832, Explanation of Changes No. 3 in the Commission's order fully explains the reasoning and grounds for rejecting the ALJs' proposed conclusions and recommendations.[120]

Finally, Plaintiffs' arguments must be rejected because they do not allege or establish that the rejection of any findings or conclusions prejudiced any of their substantial rights during the proceedings. *See Smith*, 872 S.W.2d at 272 (overruling a complaint about the sufficiency of an explanation for rejecting proposed findings/conclusions when protestors failed to suggest how they were prejudiced by the alleged failure).

Because the Commission committed no error prejudicing any substantial rights of Plaintiffs by overruling the ALJs recommendation to expand the permit boundary, Plaintiffs' assertions should be overruled without further consideration. Further, as discussed above, Plaintiffs' assertions and arguments are without merit because the Commission's rejection of the ALJs' recommendations, findings, and conclusion was in compliance with its statutory authority, was supported by substantial evidence, and was consistent with TCEQ rules and precedent.

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[118] 73AR,Tr.8,p.1923.
[119] *Id.*,pp.1923-1924.
[120] 33AR264,Order,pp.39-40.

PRAYER FOR RELIEF

For these reasons, Intervenor 130 Environmental Park, L.L.C. respectfully requests that this Court affirm the final Order of the Texas Commission on Environmental Quality granting the permit Application.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this document contains 14,621 words, excluding those sections identified in Texas Rule of Appellate Procedure 9.4(i)(B).

/s/ Brent W. Ryan
Brent W. Ryan

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of this Response Brief on Behalf of 130 Environmental Park, LLC has been served by e-service on the following counsel of record for the following parties:

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APPENDIX 1

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Excerpts from Proposal for Decision responding to
Plaintiffs' Asserted Errors on Geology and Hydrogeology (30AR248)

- *ASSERTION: The professional geologist was not personally on site to supervise soil borings.*

"Mr. Snyder's supervision of the drilling operations, as represented in the Geology Report, did not require his physical presence or observation of every drilled boring or to make the final decision on every single detail involving all borings drilled and all samples taken. Direct, on-site supervision of the field work by the professional geoscientist preparing the Geology Report is not explicitly required by the rules, and Mr. Snyder's working relationship with Mr. Stamoulis and Mr. Adams was sufficient to ensure the field work was done in accordance with established field exploration methods." PFD p. 64.

- *ASSERTION: The methods used during soil borings were ambiguous.*

"As to Protestants' claims that the procedures employed by BME for collecting and maintaining the information and data used to prepare the Geology Report violated relevant rules and professional standards, the preponderance of the evidence shows that BME's methodology did not violate any applicable rule, was adequate for the work performed, and did not result in unreliable findings or conclusions." PFD p. 64.

- *ASSERTION: The geology report is "implausibly simplistic" in that it has no findings regarding secondary features, is not supported by reliable factual data, was contradicted by subsequent investigations, and Plaintiffs' consultant does not agree with the findings.*

"Therefore, there is insufficient evidence in the record to indicate that 130EP misrepresented the presence of fractures in its boring logs or elsewhere in the Geology Report. Importantly, the ED's geoscientist who performed the technical review of the Application and reviewed the May 2016 supplement testified that nothing from the 2016 borings changed his ultimate finding that the Geology

Report contains complete and accurate information about the geology at the Site and meets the requirements of 30 TAC § 330.63(e)(4). PFD pp. 62-63.

- *ASSERTION: Elevation data in the well logs and piezometer logs were inaccurate and 130EP submitted false information regarding them.*

"Similarly, the ALJs find that 130EP did not submit false information to the ED in the Geology Report and associated boring and piezometer logs that would constitute grounds for denial of the Application. Mr. Adams's explanation as to why he classified a particular depth interval in a boring as fat clay when the only sample from the boring at that depth was classified as lean clay was reasonable given the totality of the evidence. Specifically, the evidence showed that the soil from that interval, whether classified as fat or lean clay, still qualifies under TCEQ rules for use as landfill liner material. Additionally, Mr. Snyder's basis for including lithologic descriptions of the adjacent borings in the piezometer logs he created was also reasonable under the circumstances, given the lack of intact samples and lab test results from the piezometers. Protestants offered no evidence to show that the lithology from the adjacent borings would differ in any meaningful way from the lithology in the piezometers, or that Mr. Snyder's methodology in creating the piezometer logs was flawed." PFD pp. 63-64

- *ASSERTION: There is no "foundational data" to support the professional geologist's opinions and the professional geologist's opinion cannot be tested.*

"However, the ALJs also found no remedy was appropriate, given Protestants' own 2016 subsurface investigation and their observation of and taking samples from the 2016 borings. Together, these activities offered Protestants the opportunity both to test the opinions and conclusions reached by BME based on the 2013 borings and soil samples and to develop evidence to contradict the Geology Report's conclusions. That finding and resulting ruling also has not changed. The ALJs further find that the disposal of the field logs and the 2013 samples do not render the findings and conclusions in the Geology Report inaccurate, scientifically unreliable, or legally insufficient. Protestants had the ability to "double-check" the representations made in the Geology Report regarding the subsurface characteristics at the Site by performing their own

investigation, collecting their own samples, and obtaining their own lab results." (Citation omitted.) PFD p. 61.

- *ASSERTION: Admission into evidence of 130EP's report of supplemental investigations was an abuse of discretion.*

"Although the May 2016 supplement is identified by 130EP and BME as a "supplement" to the Geology Report, because it was not formally made a part of the Application and did not undergo technical review by the ED, the ALJs are not treating it as part of the Application but as evidence offered by 130EP in support of the Application." PFD p.61, fn. 222.

- *ASSERTION: 130EP's consultants did not comply with regulatory or professional standards in their investigations and the evidence proffered through 130EP's consultants is unreliable "as a matter of law."*

"Regardless of whether BME's protocols for collecting and retaining soil samples at the Site met any ASTM standards, such standards are not the applicable rules here. The applicable requirements regarding borings, sampling, and lab testing are set forth in TCEQ's rules in title 30 of the TAC. While certain provisions of the TAC incorporate ASTM standards as requirements, as with certain required lab testing, the ASTM standards referred to by Dr. Ross are not set forth as requirements in the applicable TCEQ rules pertaining to the subsurface investigation. There is further insufficient evidence to support Protestants' claim that the Application, and specifically the Geology Report, was not prepared in conformance with the Texas Engineering Practice Act and the Texas Geoscience Practice Act. The evidence shows that final boring logs included in the Geology Report were prepared by a qualified professional geoscientist and geotechnical engineer based on personal observations of the samples and lab test results from such samples. Protestants cite to no decision by the Texas Board of Professional Geoscientists finding that disposal of field notes and soil samples constitutes a violation of that Board's record-keeping rule, and the ALJs decline to so find here." PFD pp. 64-65.

- *ASSERTION: 130EP's piezometer data did not support the statement that ground water occurs at the interface between Strata II and III.*

"The revisions to the groundwater gradient evaluation reflected in the May 2016 supplement address Protestants' concerns regarding the relative accuracy of the structural contour map used by Mr. Snyder. Further, Protestants' argument that the direction of groundwater flow reflected by the Application is nonsensical is without merit. The groundwater gradient evaluation does not show groundwater flowing from P 7 in a northwesterly direction toward P-1; instead, it reflects groundwater movement in a westerly or southwesterly direction from P-7." PFD, p.78.

- *ASSERTION: the evidence presented clearly contradicts 130EP's theory of groundwater movement and potential leachate migration from the proposed landfill.*

"The preponderance of the evidence shows that the zone of the minimal groundwater occurrence beneath the Site is in Stratum II at or just above its interface with Stratum III, and that this zone is the uppermost aquifer below the Site as identified by the Application and Mr. Snyder. No evidence was offered to indicate that there was any other aquifer beneath the Site, and the evidence showed that no lower aquifers are hydraulically connected to this uppermost aquifer." PFD P.77.