Cause No. D-1-GN-17-006632

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

RESPONSE BRIEF OF DEFENDANT TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Tex. Water Code

Other Authorities

Rules

Tex. Admin. Code

LIST OF ACRONYMS AND SHORTHAND TERMS

130EP	130 Environmental Park, LLC
ALJ	Administrative Law Judge
BME	Biggs & Mathews Environmental, Inc.
The County	Caldwell County
The District	Plum Creek Conservation District
ED	Executive Director of TCEQ
EPICC	Environmental Protection in the Interest of Caldwell County
The Hunter Tract	1,229-acre tract of land about two miles north of Lockhart; proposed site
MSW	Municipal Solid Waste
Order	(Final Order) 33 AR 264, Order Granting the Application by 130 Environmental Park, LLC for New Type I Municipal Solid Waste Landfill in Caldwell County, Texas
PFD	Proposal for Decision
SOAH	State Office of Administrative Hearings
TCEQ or Commission	Texas Commission on Environmental Quality

To the Honorable Judge Dustin Howell:

STATEMENT OF THE CASE

This is an administrative appeal of a decision by the Texas Commission on Environmental Quality granting an application for a permit.

Statement of Facts[1]

On September 4, 2013, 130 Environmental Park, LLC (130EP) applied to the Texas Commission on Environmental Quality (TCEQ or Commission) for a permit to construct and operate a new Type I municipal solid waste landfill[2] to be located on a 1,229-acre tract of land (referred to as "the Hunter Tract") about two miles north of Lockhart's city limits in Caldwell County.[3] The facility would have a permit boundary of 520 acres (the Facility or Site), approximately 202 acres of which would encompass the landfill footprint itself. The proposed landfill would serve residences and businesses in Caldwell and surrounding counties.[4]

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[1] TCEQ objects to the argumentative nature of Plaintiffs' statement of facts. *See* Tex. R. App. P. 38.1(g) ("without argument").

[2] A Type-1 landfill is "the standard landfill for the disposal of [municipal solid waste]." 30 Tex. Admin. Code § 330.5(a)(1).

[3] 54 AR Welch 1 at 4:33-42.

References to items in the administrative record will be by *xx* AR *yy*, with *xx* being the volume in which the item is found and *yy* being the item number in that volume. References to testimony in the ten-volume transcript of the SOAH hearing are by "Tr." followed by the relevant pages numbers. The transcript is in volumes 66 through 75.

[4] 44 AR Ex. 130EP-1 at 42.

The 1,229-acre Hunter Tract is subject to an easement belonging to Plum Creek Conservation District (the District) for use of the Site 21 Reservoir and Dam, originally designed to protect downstream agricultural areas from flooding (i.e., a "low-hazard" dam), now, due to population growth, designated as a "high-hazard" dam, meaning that it is used to protect human life.[5]

As originally filed, the application consisted of Parts I and II.[6] The Executive Director declared them administratively complete on September 27, 2014.[7] Parts III and IV of the Application were filed on February 18, 2014, and declared administratively complete on February 28, 2014.[8]

After public notices were published, 130EP requested that its application be directly referred to the State Office of Administrative Hearings (SOAH) on all issues. The Plaintiffs and certain others were admitted as parties to protest the application. The District participated as a party but did not take a position on whether the permit should be granted.[9]

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[5] 30 AR 248 (Proposal for Decision [PFD]) at 152. Further references to the PFD in this brief will omit the administrative record cite.

[6] 54 AR Welch 1 at 4:33-42.

[7] 54 AR ED SO 1 at 9:1-18.

[8] 54 AR ED SO 1 at 11:20-22.

[9] 60 AR PCCD Ex. 1.0 at 24. The District did not file exceptions or replies to exceptions to the PFD.

As a result of a discovery dispute regarding the failure to preserve certain materials related to 130EP's 2013 subsurface investigation of the site, TJFA and Environmental Protection in the Interest of Caldwell County (EPICC) moved to compel access to the site to drill their own borings and conduct additional tests. The SOAH administrative law judges (ALJs) granted Plaintiffs their requested relief, and they performed their investigation during February and March 2016.[10] 130EP also conducted further investigations at the Site during the same period.[11]

Dissatisfied with the remedy they had requested and received, TJFA and EPICC sought to strike much of EP130's prefiled evidence, including the geology report (Geology Report) required by agency rules.[12] The ALJs denied this additional relief, and an evidentiary hearing was held from August 15 to 26, 2016. The ALJs issued their Proposal for Decision (PFD) on February 17, 2016, finding that 130EP's application met the requirements for approval but for three supposed deficiencies:

1. The application did not list the District's easement as required by 30 Tex. Admin. Code sections 281.5(6) and 330.59;
2. EP130 drilled its soil borings in August and September of 2013, before the Executive Director approved its soil boring plan in October, in violation of 30 Tex. Admin. Code section 330.63(e)(4)'s requirement that the plan be approved first; and

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[10] *See* PFD at 4; 130EP-7.

[11] Although the ALJs admitted the results of 130EP's 2016 subsurface investigation into evidence, they did not allow 130EP to "supplement" its application, as Plaintiffs suggest. PFD at 61 at n.222.

[12] *See* 33 AR 264 at 26 (Order). Further references to the agency's Order will omit the administrative record cite.

3. 130EP had not first obtained a floodplain development permit from the County, as required by 30 Tex. Admin. Code section 330.63(e)(2)(D)(ii).[13]

The ALJs "[left] it to the Commission's discretion whether to deny the Application based on these deficiencies," but noted that they had already been thoroughly litigated.[14] The ALJs did not identify the failure to preserve discoverable materials as a violation of TCEQ rules. Instead, as described in the PFD, they found it was a breach of the rules of civil procedure for which they had already provided a remedy.[15]

The ALJs recommended that if the Commission decided to issue the permit, it should extend the draft permit's boundary to include the whole length of the Facility's access road and the entire screening berm in order to ensure that the agency would have jurisdiction to enforce the permit's provisions in those areas. They also recommended that the Commission limit the operating hours to the standard hours set out in agency rules, rather than the extended hours allowed in the draft permit.[16]

With those exceptions, the ALJs found that 130EP had met its burden to obtain the requested permit, expressly rejecting the arguments Plaintiffs reassert here, and explaining their reasoning in detail.

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[13] PFD at 2.

[14] *Id.*

[15] PFD at 60–61.

[16] *Id.*

Ultimately, the Commission determined that neither the failure to have yet obtained a floodplain permit nor the failure to obtain preapproval for the soil boring plan was a basis for denying the application. Instead, it imposed a special provision in the permit requiring 130EP to obtain the necessary floodplain permit before commencing physical construction. In the order, the Commission explained the basis for these decisions.[17] The Commission found that the only other supposed violation—not listing the District's easement in the application—was based on a misinterpretation of the agency's rules, as also explained in the Order.[18]

The Commission declined to follow the ALJs' recommendation to extend the permit boundary, stating that doing so was unnecessary, as the agency has ample enforcement authority that does not end at a permit's boundary.[19]

After Plaintiffs' motion for rehearing was denied this appeal followed.

SUMMARY OF THE ARGUMENT

In their summary of argument, Plaintiffs attempt to discredit 130EP's landfill application by associating it with a different application—the Pintail application for a permit to build a landfill in Waller County—that was so deficient that the TCEQ returned it to the applicant. This comparison, which is entirely irrelevant to the

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[17] Order at 39; 33 AR 269 at 10 (Permit). Further references to the Permit will omit the administrative record cite.

[18] Order at 39.

[19] *Id.*

Court's review of the Commission's order in this case, exemplifies the flaws in Plaintiffs' arguments throughout their brief. Instead of addressing the substantial evidence supporting the Commission's determinations, Plaintiffs rely on vague allegations of error or impropriety. Moreover, Plaintiffs' comparison of this decision to the Pintail application demonstrates that—contrary to Plaintiffs' briefing—the Commission is capable of interpreting and enforcing its own rules to reject flawed applications.

Their diffuse arguments reflect Plaintiffs' attempts to circumvent the substantial evidence of review. The spoliation claim (for which Plaintiffs received the remedy they requested below), the complaints about procedural violations of agency rules which they were not harmed by, and the suggestion that essentially all the evidence they disagree with is inherently flawed do not present any basis for reversing the order here. The Commission reasonably applied its rules and the statutes it administers, consistent with their plain language and underlying purpose, explained its reasoning, and relied on substantial evidence in the record. Its order should be affirmed.

ARGUMENT AND AUTHORITIES

Standard of Review

The Commission's final order in a contested case is reviewed under the substantial evidence standard codified in section 2001.174 of the Government

Code.[20] A court applying this standard shall reverse or remand an administrative order "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are," among other grounds, "affected by other error of law," "not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole," or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."[21]

In reviewing fact-based determinations under this standard, courts "may not substitute [their] judgment for that of the agency but rather must determine whether, considering the reliable and probative evidence in the record as a whole, some reasonable basis exists in the record for the agency's action."[22] "Thus, the agency's action will be sustained if the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action."[23]

There is a presumption that the agency's findings, inferences, conclusions, and decisions are supported by substantial evidence, and the burden is on the

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[20] *See* Tex. Gov't Code § 2001.174.

[21] *Id.* § 2001.174(2)(D)-(F).

[22] *Maverick Cty. v. R.R. Comm'n of Tex.*, No. 03-14-00257-CV, 2015 WL 9583873, at *2 (Tex. App.—Austin Dec. 29, 2015, pet. denied) (mem. op.).

[23] *Tex. Health Facilities Comm'n v. Charter Med.-Dall., Inc.*, 665 S.W.2d 446, 453 (Tex. 1984).

contestant to demonstrate otherwise.[24] An agency's fact findings must be affirmed if they are supported by more than a scintilla of evidence.[25]

Evidentiary rulings made during a contested case proceeding, including those related to spoliation, are reviewed under the abuse of discretion standard.[26] Even where there is an abuse of discretion, the plaintiff must demonstrate harm to obtain a reversal.[27]

In challenges involving the construction of agency rules, courts apply the rule's plain language.[28] However, "[i]f there is vagueness, ambiguity, or room for policy determinations in a statute or regulation, ... we normally defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute, regulation, or rule."[29] Courts will "generally uphold an agency's interpretation of a statute it is charged by the Legislature with enforcing, 'so long as

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[24] *See Froemming v. Tex. State Bd. of Dental Exam'rs*, 380 S.W.3d 787, 790-91 (Tex. App.—Austin 2012, no pet.).

[25] *Mireles v. Tex. Dep't of Pub. Safety*, 9 S.W.3d 128, 131 (Tex.1999) (per curiam).

[26] *See Maverick Cty.*, 2015 WL 9583873, at *3; *see also Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 27 (Tex. 2014).

[27] *Maverick Cty.*, 2015 WL 9583873, at *5.

[28] *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999).

[29] *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011).

the construction is reasonable and does not contradict the plain language of the statute.'"[30]

Accordingly, when reviewing the issuance of permits like the one at issue here, courts have acknowledged that the Commission's rules require the applicant to prove compliance with the applicable requirements by a preponderance of the evidence—a determination that is in turn reviewed under the substantial evidence standard described above.[31]

I. The Commission properly required EP130 to obtain a county floodplain development permit by imposing a special provision in the landfill permit. (Responsive to Plaintiffs' Issue 1)

Plaintiffs contend that TCEQ was required to deny 130EP's application because it had not yet obtained a floodplain development permit from the County, and TCEQ's rules contemplate that such local approvals be obtained in advance. As set out below, the agency's decision to issue the permit subject to a special provision prohibiting any construction of the landfill until the local approval is granted was

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[30] *Dyer v. Tex. Comm'n on Envtl. Quality*, No. 03-17-00499-CV, 2019 WL 2206177, at *5 (Tex. App.—Austin May 22, 2019, no pet. h.) (citing *R.R. Comm'n v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011)).

[31] *See TJFA, L.P. v. Tex. Comm'n on Envtl. Quality*, No. 03-10-00016-CV, 2014 WL 3562735, at *2 (Tex. App.—Austin July 16, 2014, pet. denied) (mem. op.) (citing 30 Tex. Admin. Code § 80.17(a) (2011); *BFI Waste Sys. of N. Am., Inc. v. Martinez Envtl. Grp.*, 93 S.W.3d 570, 577 (Tex. App.—Austin 2002, pet. denied).

neither erroneous nor harmful to the Plaintiffs: regardless of when the floodplain development permit is obtained, the landfill cannot proceed without it.

In order to obtain a municipal solid waste (MSW) landfill permit from TCEQ, an applicant must also secure any necessary related permits or approvals from local governmental entities.[32] Because 130EP proposed to construct an entrance road to its Facility that would cross a floodplain, it was required to obtain a floodplain development permit from Caldwell County,[33]

Although TCEQ rules contemplate that an applicant will have already obtained such a permit and specify that it be attached to Part III of the permit application, EP130 had not obtained the floodplain permit at the time it filed its application with TCEQ.[34] Rather than deny the permit, however, the Commission imposed a special provision requiring 130EP to secure the floodplain permit and provide it to the agency's Executive Director prior to beginning any construction on the landfill.[35]

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[32] 30 Tex. Admin. Code § 330.67(d).

[33] 30 Tex. Admin. Code § 330.63(c)(2)(D)(ii). 130EP also obtained a permit from the U.S. Army Corps of Engineers (Nationwide Permit No. 14) for constructing the entrance/access road at locations where the road will cross floodplains associated with streams on the tract. 18 AR 58 at 69, ¶ 5 (Amended Response to Comments).

[34] *Id*.

[35] Permit at 10, Special Provision IX.A.

Plaintiffs argue that the Commission erred by "[a]llowing submission of this local authorization *after* issuance of the TCEQ permit . . . ."[36] But correcting the deficiency in this manner was not error. The Commission has discretion in addressing rule violations, and nothing in the rule specifies a different consequence for failing to timely obtain local approval. Imposing a special provision is a reasonable consequence under the circumstance, given the complexity of the permitting process for landfills and the multiplicity of authorizations from various jurisdictions that are often necessary.[37] Moreover, record evidence showed that it is not unusual for permits or approvals needed from other agencies to be submitted at a later time, instead.[38] Finally, Plaintiffs cannot show the requisite harm to their substantial rights that follows from this alleged error, and it should be overruled, as explained below.

It is undisputed that the Commission has authority to add special provisions to municipal solid waste permits.[39] And it may relax procedural requirements embodied in its rules intended to facilitate decision-making as to the substantive

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[36] Plaintiffs' Initial Br. at 25.

[37] 130EP also obtained a permit from the U.S. Army Corps of Engineers (Nationwide Permit No. 14) for constructing the entrance/access road at locations where the road will cross floodplains associated with streams on the tract. 18 AR 58 at 69, ¶5 (Amended Response to Comments).

[38] Tr. 1983:18-1986:9 (testimony of TCEQ's Steve Odil).

[39] *See City of Jacksboro v. Two Bush Cmty. Action Grp.*, No. 03-10-00860-CV, 2012 WL 2509804, at *13 (Tex. App.—Austin June 28, 2012, pet. denied) (mem. op.).

element.[40] Imposing a special provision in this instance addresses that substantive element of the rule—ensuring that there are no unnecessary delays in processing MSW permit applications in light of the requirement in Texas Health & Safety Code section 361.064, which requires TCEQ to provide a timely review of any permit application for a solid waste management facility. The special provision was especially apt and reasonable here where Caldwell County was, at the time of the contested case hearing, in the difficult position of being both an active protestant in the hearing and the entity responsible for issuing the floodplain development permit.

The reasonableness of this decision is supported by testimony that imposing special provisions is hardly rare in landfill permitting proceedings. Evidence showed that Commission followed a "fairly standard practice" of issuing MSW-landfill permits with a special provision allowing another regulatory permit to be submitted after the filing of the application but prior to commencement of construction.[41] Relying on such testimony, the ALJs concluded that, while not in strict compliance with the applicable rule, the special provision is a "reasonable accommodation that will not cause any harm or threat to the environment . . . ."[42] And in finding of fact

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[40] *Smith v. Hous. Chem. Servs., Inc*., 872 S.W.2d 252, 259 (Tex. App.—Austin 1994, writ denied).

[41] Tr. 1985:1-2 and Tr. 1987:7-10 (Odil).

[42] 30 AR 248 at 179-180 (PFD).

330, the Commission found that 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.

For these reasons, the Court should overrule Plaintiffs' first point of error. However, even if Plaintiffs were correct that the timing provision of the rule were mandatory rather than directory, Plaintiffs have no standing to assert this claim. Not every failure to follow the literal words of a rule or every error is a sufficient basis for overturning an agency decision. An agency's application of its procedural rules is not even reviewable "except upon a showing of substantial prejudice to the complaining party."[43] Here, Plaintiffs neither pled nor showed harm to their substantial rights from the Commission's decision to allow the floodplain development permit to be submitted later than the rule required.[44] Because an agency's decision may be reversed only if the challenging party shows prejudice to its substantial rights, the Court should decline to reverse the agency's decision on this point.[45]

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[43] *Smith,* 872 S.W.2d at 259.

[44] Plaintiffs also contend that imposing this special provision was "arbitrary and capricious." Even if they had preserved such an argument, it is meritless, given that the Commission acted in accord with agency practice, consistent with its own rules, and plainly reasonable.

[45] *See* Tex. Gov't Code § 2001.174(2); *Citizens Against Landfill Location v. Tex. Comm'n on Envtl. Quality*, 169 S.W.3d 258, 264 (Tex. App.—Austin 2005, pet. denied).

II. Caldwell County adopted its ordinance prohibiting landfills in most of its jurisdiction *after* 130EP filed its permit application. (Responsive to Plaintiffs' Issue 2)

As allowed by statute and agency rules, 130EP filed parts I and II (the land-use compatibility portions) of the agency's four-part landfill permit application on September 4, 2013. Three months later—after the filing of the initial application but before 130EP submitted parts III and IV—the County adopted a landfill siting ordinance prohibiting disposal of municipal solid waste at, *inter alia*, the location where 130EP had proposed to construct its landfill.[46] The County relied on Texas Health & Safety Code sections 363.112 and 364.012, which allow the governing body of a county or municipality to prohibit waste disposal in certain areas. Importantly, any such ordinance may not prohibit landfills in a location for which a permit application is "has been filed with and is pending" with TCEQ or has been granted.[47] If a county does not comply with that limitation, the ordinance does not bar TCEQ from granting the pending permit application.[48]

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[46] 58 AR Caldwell-3 (county order adopting ordinance). The County's ordinance prohibits processing or disposal of waste or operation of a solid waste facility in *all* areas except for one property owned by the County itself. *Id*. at 3 of 5 – 4 of 5.

[47] Tex. Health & Safety Code §§ 363.112(c), 364.012(e).

[48] Tex. Health & Safety Code §§ 363.112(d), 364.012(f).

There is no dispute that 130EP complied with the law in submitting its application. Texas Health & Safety Code section 361.069 and Rule 330.57(a)[49] provide a bifurcated option for municipal solid waste permit-applications.[50] Under that option, an applicant may initially submit just Parts I and II of the four-part application and later submit Parts III and IV, as 130EP elected to do. The County ordinance, therefore, only bars TCEQ from granting 130EP's application if it was not filed and pending after Parts I and II were initially filed. The Commission applied the plain language of the phrase "has been filed with and is pending" to find that the county ordinance did not prevent it from granting the application, which had been filed and was pending when the County passed the ordinance.[51]

The Commission set out its reasoning in the order:

> 326. When the County adopted the Disposal Ordinance, the County sought to prohibit the processing or disposal of municipal or industrial solid waste in an area of the County for which an application for a permit or other authorization under Texas Health & Safety Code ch. 361 had been filed with and was pending before the TCEQ.

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[49] All TCEQ rules cited in this brief are in Chapter 30 of Texas Administrative Code. In the text of this brief, TCEQ will omit reference to Chapter 30 and simply refer to the specific rule number.

[50] "The commission in its discretion may, in processing a permit application, make a separate determination on the question of land use compatibility, and, if the site location is acceptable, may at another time consider other technical matters concerning the application. A public hearing may be held for each determination in accordance with Section 361.088. . . ." Tex. Health & Safety Code § 361.069.

[51] FOF 325.

327. The County's Disposal Ordinance does not prevent the TCEQ from granting the Application and issuing the permit.[52]

EP130's bifurcated filing—with Parts I & II having been filed before Caldwell County adopted its ordinance and Parts III & IV having been filed after—did not change the fact that the application was already pending when the County passed its ordinance. The Commission's findings were consistent with the plain language of Health & Safety Code sections 363.112 and 364.012.[53] Assuming *arguendo* that the terms "filed" and "pending" in Health & Safety Code sections 363.112 and 364.012 were ambiguous (and they are not), the Commission's formal interpretation of the status of EP130's application as filed and pending when the County adopted its ordinance is reasonable and entitled to deference.[54]

The Court should overrule the County's point of error.

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[52] 33 AR 264 (Commission's Final Order Granting Permit).

[53] The objective in construing statutory language is to give effect to the Legislature's intent, which is ascertained from the plain language of the words employed by the Legislature. *Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 404 (Tex. 2016).

[54] *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011) (if statutory language is subject to more than one interpretation, court should uphold implementing agency's construction if it is reasonable and in harmony with statute).

III. The Commission did not err in excluding the screening berm and a portion of the site access road from the permit boundary and in rejecting the ALJs' recommendation that they be included. (Responsive to Plaintiffs' Issue 9)

Neither the vegetative screening berm nor the portion of the site access road that crosses private property is included within the permit boundary approved by the Commission. Plaintiffs argue that agency rules require their inclusion because the Commission "has no ability to enforce" its own rules or the terms of the permit concerning these components if they are outside the permit boundary.[55] They base their argument largely on an inapposite attorney general opinion from 1999 concerning *city* authority—derived from specific language in the Transportation Code—to adopt and enforce traffic laws on private roads. TCEQ's authority, however, does not end at the permit boundary—a proposition amply supported by statute and caselaw. Because this misunderstanding of the agency's authority was the sole basis for recommending that the permit boundary be expanded, it was not error for the Commission to reject it.

The ALJs had recommended that the entire length of the access road be included in the permit boundary to "clarify" TCEQ's enforcement authority over it.[56]

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[55] Plaintiffs' Initial Br. at 69.

[56] 30 AR 248 at 29, lns. 2-3 (PFD).

For seemingly the same reason, the ALJs also recommended that the entire vegetated screening berm be included.[57]

With respect to the screening berm, Plaintiffs make a three-sentence argument: that the Commission "erred in reversing the ALJ's recommendation that the Permit Boundary include the screening berm at the facility"[58] because "[w]ithout inclusion of the berm within the Permit Boundary, there is no regulatory assurance that this regulation will be met in the construction and operation of the facility."[59] The complaint should fail because, as explained below (and by the Commission on pages 39-40 of its Final Order), the Commission has statutory authority to enforce its rules and statutes as well as the terms of its permits and orders to components of the landfill that lie outside the permit boundary.

The Commission deleted proposed findings of fact 69 and 70 and conclusion of law 21 concerning inclusion of the access road, explaining in its order that no rule required that the entire access road be within the permit boundary and that Water Code section 7.002 and Health & Safety Code section 361.032 authorize the Commission to compel compliance with rules, order, and permits even outside the permit boundary.

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[57] *Id*. at 201.

[58] Plaintiffs' Initial Br. at 72.

[59] *Id*. at 72-73.

Plaintiffs also challenge the Commission's rejection of conclusion of law 21 on procedural grounds, invoking Health & Safety Code section 361.0832(d), which provides,

> 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.

This standard for overturning an ALJ's conclusion was addressed by the Third Court of Appeals in *Hunter Industrial Facilities, Inc. v. Texas Natural Resources Commission.*[60] The *Hunter* court, upholding the agency's rejection of findings and conclusions, wrote that the agency (a predecessor of TCEQ) may reverse findings and conclusions when they are clearly erroneous, i.e. when the agency "is left with the definite and firm conviction that a mistake has been committed."[61] The court described the standard as one that "is generally considered to give the [agency] broader authority than is allowed under 'substantial evidence' review because a decision may be overturned despite its theoretical reasonableness."[62]

Under this deferential standard, the Commission did not err in rejecting proposed conclusion of law 21 or so-called finding of fact 70, which was simply an abbreviated restatement of conclusion of law 21 (and not a finding of fact at all),

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[60] 910 S.W.2d 96 (Tex. App.—Austin 1995, writ denied).

[61] *Id*. at 104.

[62] *Id*.

because both were based on the ALJs misunderstanding of the law. Likewise, the Commission did not err in overturning proposed finding of fact 69 ("130EP has not justified why the entire length of the access road is not included within the Permit Boundary. . . .") because it was superfluous once the Commission held that no rule required 130EP to include the entire access road in the permit boundary.

Accordingly, the Commission did not err.

IV. EP130 met the applicable requirements of TCEQ rules concerning drainage patterns, floodplains and, relatedly, land-use compatibility. (Responsive to Plaintiffs' Issues 3, 4 and 8)

Plaintiffs complain about the landfill's location because it is upstream of the Site 21 Reservoir and Dam managed by Plum Creek Conservation District. Because municipal solid waste rules do not prohibit locating landfill units upstream of a reservoir and dam, the ALJs and Commission considered Plaintiffs' complaints as part of the land-use compatibility analysis, which is guided by Rule 330.61(h). Under this analysis, the Commission's determinations with respect to the reservoir and dam are reasonable and supported by substantial record evidence showing that the application met all substantive requirements.

The major issue in evaluating this landfill's land-use compatibility was its effect on surface water drainage and the potential to increase the amount of water that the dam will need to control. Thus, the land-use compatibility evaluation focused primarily on compliance with surface water drainage requirements in

TCEQ's rules, as described below, and the Commission determined that 130EP had complied. Concerning drainage, floodplains, and land-use compatibility, the Commission made numerous findings of fact including 239 through 320. Plaintiffs challenge several of them but all were supported by substantial evidence.

Rule 330.63(c) requires an applicant to provide a surface water drainage report showing that the operator will design and operate the landfill to meet the requirements of Subchapter G of Chapter 330. Agency rules, including Rule 330.305, require 130EP to manage run-on and runoff during the peak discharge of the volume of water resulting from a 25-year rainfall event, to ensure that the landfill will not *adversely* alter existing drainage patterns.

The record includes a drainage analysis prepared by EP130's expert engineer, Mr. Tyson Traw, after he conducted an analysis using 12 perimeter points to compare the existing drainage patterns with the patterns created by the facility once its drainage system is in place.[63] The analysis, which the ALJs found was properly prepared,[64] encompasses all the required information including an analysis based on the required 25-year rainfall event, design of all drainage facilities, sample

[63] 46 AR 130EP-2 (Appl. Part III, Vol. 2 of 5 at 47-468 [Attach. C]). The index to the administrative record mistakenly refers to Volume 46 of the administrative record as Volume 47.

[64] PFD at 143.

calculations to verify that existing drainage patterns will not be adversely altered,[65] and a description of the hydrologic method and calculations to estimate peak flow rates and runoff volumes.[66] (As noted by the ALJs,[67] generally increases in peak flows and velocities are the main concerns regarding alteration of drainage patterns.)

Mr. Traw's analysis, which specifically addresses the Site 21 Reservoir and Dam in the demonstration that there will be no adverse change to drainage, shows that stormwater and runoff will be managed via a perimeter drainage system and detention ponds.[68] As required, the analysis includes discussions and detailed designs, calculations, and operational considerations for collection, control, and discharge of storm water from the landfill. The drainage system described in the application consists of drainage swales, downchutes, perimeter channels, detention ponds and outlet structures.[69]

Consistent with TCEQ rules, the perimeter drainage system, which will be constructed as each sector of the landfill is developed, is designed to collect, convey, and discharge the 25-year peak flow rate from the developed landfill. The perimeter channels are designed to convey the runoff from a 100-year rainfall event. Detention

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[65] 46 AR 130EP-2 at 68-158.

[66] 47 AR 130EP-2 at 81-158.

[67] PFD at 144.

[68] 46 AR 130EP-2 (Appl. Part III, Vol. 2 of 5 at Attach. C1, Section 7).

[69] 18 AR 54 at 30 (ED's Response to Comments).

ponds are designed in accordance with rules to provide the necessary storage and outlet control to mitigate impact to the receiving channels downstream of the landfill.[70]

In testimony, Mr. Traw described the drainage requirements for landfills and the models that should be used to calculate drainage analysis. He identified 130EP-2 as an exhibit that summarized differences between existing and post-development drainage patterns.[71] He explained the three factors he considered: peak discharge; run-off volume, and velocity.[72] He said that he modeled both the 100-year and 25-year storm events—in an effort to go above and beyond the requirements of the rules.[73]

At most comparison points along the permit boundary there will be minimal changes in peak discharge, volume, and velocity during the 25-year, 24-hour storm.[74] The most significant changes along the permit boundary occur at points CP7 and CP8, with decreases in peak discharge rates of 41 percent and 12 percent respectively

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[70] *See* 46 AR 130EP-2 (Appl. Part III, Vol. 2 of 5 at Attch. C1, Section 7). Design storms and floods, such as the 24-hour, 25-year storm or the 100-year flood are statistically derived from extensive weather data and published.

[71] Tr. 519:2-5 (Traw).

[72] *See*, e.g., Tr. 2040-2045 (Traw).

[73] Tr. 519:2-521 (Traw).

[74] PFD at 144.

and slight changes in velocity.[75] The evidence shows that reductions in peak discharge rates and velocities do not typically result in adverse alterations of existing drainage patterns.[76] Although discharge volume will increase at point CP7,[77] the reductions in peak flow and velocity mean it will not result in an adverse alteration in existing drainage patterns along the permit boundary.[78] At point CP8, development of the facility will result in a decrease in volume of 16.5 percent, which will be offset by the increase in volume at CP7.[79] The net increase between the two points in a 25-year storm event will amount to an increase in volume of about one percent of Site 21 Reservoir's capacity; and that increase would be insignificant.[80]

TCEQ's Executive Director was a party to the contested case hearing. His witness, TCEQ permit engineer Steve Odil, testified that the 25-year peak discharge "reduces significantly" as a result of the landfill.[81] Mr. Odil described how an increase in volume at one point along the permit boundary can be offset by other factors such as a lower volume at another point, a decrease in peak discharge, a

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[75] Tr. 1901-1911 (Traw).

[76] Tr. 524 (Traw); Tr. 1906 (Odil).

[77] 47 AR 130EP-2 at 69, 79; Tr. 1902-1903 (Odil).

[78] Tr. 1904:22-1906:15 (Odil); 46 AR 130EP-2 at 78-79; 58 AR ED-SO-1 at 26.

[79] PFD at 144-145; Tr. 1899:25-1906.

[80] Tr. 1904:22-25; Tr. 1911:13-17 (Odil); PFD at 145-146.

[81] Tr. 1902-1903 (Odil).

slower rate of release, and the existence of a downstream reservoir.[82] He also said that that staff in TCEQ's municipal solid waste program had consulted with staff in TCEQ's dam safety program, and determined that the one percent expected increase in volume would be insignificant since it represents less than one percent of the reservoir's capacity during a 25-year storm event.[83]

The District, which is responsible for the Site 21 Dam and Reservoir, did not argue that the landfill would interfere with its operation of the dam or ability of the dam to protect downstream life and property. The ALJs noted that they attached significance to that.[84]

Similarly, Plaintiffs' complaint that 130EP was required under Rule 330.63(c)(2)(C) to include additional information in its surface water drainage analysis ignores the undisputed evidence that waste is being disposed of only in the landfill footprint,[85] which is outside the 100-year floodplain.[86] Nor do Plaintiffs address, let alone overcome, the substantial record evidence—the testimony of Mr.

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[82] Tr. 1902-1911 (Odil); PFD at 135-136 (summarizing ED's position).

[83] 54 AR ED-SO-1, p. 26.

[84] PFD at173.

[85] "[T]he landfill footprint is, give or take, approximately 18 feet beyond the actual limit of where waste would be placed." Tr. 538:17-39:16; 701:24-702:1 (Traw).

[86] Mr. Traw, who analyzed and determined the location of the floodplain in the area, testified that the landfill footprint and solid waste storage and processing units will be outside the floodplain. Tr. 550-551; 700-702 (Traw). *See also* 130EP-24, 130EP-25 (maps).

"Portions of the access road will cross the 100-year floodplain." FOF 328.

Traw and Mr. Odil along with Mr. Traw's written analysis included in the application—supporting the Commission's determination that there will be no adverse alteration to existing drainage patterns, and that the landfill is a compatible land use.[87]

Finally, Plaintiffs again point to the dam as a basis for reversing the Commission's order by contending that the landfill is incompatible with the dam in the event of a "probable maximum flood." However, the rule they cite for this alleged deficiency is in a chapter of TCEQ rules governing criteria for the design of proposed dams and reservoirs, Rule 299.15(a)(1)(A). Had 130EP applied for a permit to construct a dam, this rule would have applied. But the "probable maximum flood" standard cited by Plaintiffs is not applicable to an MSW permit applicant's drainage analysis.[88]

Neither the Health & Safety Code nor applicable rules define land-use compatibility or set a specific standard to guide the agency's determination of it, but Rule 330.61(h) provides the general framework for consideration. The Austin Court of Appeals examined the precursor to Rule 330.61(h)[89] and suggested that

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[87] See, e.g. findings of fact 259, 263-264, 286-289 and conclusions of law 9-12, 17-18, 36-37, 39, 53, and 55.

[88] *See* PFD at 146.

[89] *See* 31 Tex. Reg. 2335, 2508 (2006) (The commission repeals § 330.53, Technical Requirements of Part II of the Application . . . [and] moves the requirements of . . . § 330.53(b)(6)-(11) to new § 330.61(f)-(k) . . . .").

compatibility should be determined by balancing an array of factors.[90] "Once made," the Court said, "a land-use-compatibility decision is subject to the substantial-evidence review" with the court presuming that the agency's decision is supported by the substantial evidence.[91]

130EP thoroughly addressed potential adverse impacts of the landfill on the Site 21 Reservoir and Dam, the Commission made findings of fact, and substantial evidence showed that the landfill will not adversely impact the District's operation of the Site 21 Dam and Reservoir. Consequently, Plaintiffs' argument that the landfill is incompatible with the reservoir and dam, is not a valid basis for overturning the Commission's decision.

V. Substantial evidence supports the Commission's determination that 130EP conducted a sufficient subsurface investigation to support the issuance of the permit. (Responsive to Plaintiffs' Issues 5–7)

Across three related points of error, Plaintiffs contend that the Commission's findings concerning the geology and hydrogeology of the Facility and its vicinity are erroneous. To avoid the standard of review applicable to these findings and negate the ample record evidence that supports them, Plaintiffs level a multitude of

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[90] *Ne. Neighbors Coal. v. Tex. Comm'n on Envtl. Quality*, No. 03-11-00277-CV, 2013 WL 1315078 (Tex. App.—Austin March 28, 2013, pet. denied) (mem. op.).

[91] *Id.* at *9.

complaints, including challenges to the qualifications of 130EP's witnesses and the adequacy of the remedy for a discovery violation Plaintiffs themselves requested and received. However, Plaintiffs are effectively asking the Court to reweigh the evidence and evaluate the credibility of witnesses. The Commission's extensive findings related to geology and hydrogeology[92] are supported by substantial evidence and Plaintiffs offer no basis for reversing them.

130EP contracted with Biggs & Mathews Environmental, Inc. (BME) to prepare the geology report required by Rule 330.63(e) (the Geology Report). The Geology Report was prepared and signed by Gregory Adams, P.E., and John Snyder, P.G.[93] Mr. Snyder is a professional geoscientist with over 40 years' experience in Texas, and has worked on over 100 landfill projects in his career.[94] Mr. Adams is a professional engineer with extensive experience in solid waste design and permitting.[95]

As explained in the Geology Report, BME initially drilled two soil borings in early 2013 in order, as Mr. Snyder explained in his testimony, to obtain preliminary information about the site. These borings, according to Mr. Snyder, indicated

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[92] *See* Order, FOF 73-141, COL 23, 24.

[93] 49 AR 130EP-4 at 6

[94] 54 AR 130EP Snyder-1 at 4–9

[95] 56 AR 130EP Adams-1 at 4–5

clayish soils and revealed no groundwater.[96] He then prepared a Soil Boring Plan and began drilling additional borings. The Soil Boring Plan was reviewed and approved by TCEQ Staff in October 2013, though by this time the borings had already been drilled. As stated in the Order and explained further below, this violated Rule 330.63(e)(4)'s requirement that the plan be approved prior to beginning work.[97]

BME contracted with Hydrogeologic/Environmental Testing (H/ET) to drill borings and take soil samples at the site. In the fall of 2013, H/ET—a firm owned by Stefan Stamoulis, a licensed water well driller and professional Texas geoscientist—drilled 32 borings, referred to in the PFD as the "2013 borings."[98] In addition, several trenches were dug to obtain information on the shallow soil in the site area. These trenches, according the Geology Report, showed pebbles and cobbles within silty fat clay.[99] Mr. Snyder testified in detail how he performed field work at the site along with Mr. Stamoulis, explaining how the locations of the borings were identified, which drilling methods were employed, the criteria used to determine the depth of the borings, and other details. The Geology Report details

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[96] 49 AR 130EP-4 at 19–31, 44–222

[97] Order at 35, COL 7b.

[98] 54 AR 130EP Snyder-1 at 17–18.

[99] 49 AR 130EP-4 at 19.

how the borings were sampled and the reasons for using particular sampling methods.[100]

To obtain the requisite hydrogeological information, seventeen piezometers were installed next to 15 of the borings. Although the Soil Boring Plan stated that BME intended to perform slug tests in some of the piezometers, Mr. Snyder determined that there was insufficient water in any piezometer for such a test—in which a slug—typically a metal object or volume of water—is injected into the water column within a piezometer and the water's response measured to calculate the permeability of the formation.[101]

As explained more fully below, Plaintiffs attempt to negate the substantial record evidence supporting the Order's geological/hydrogeological findings by claiming that the failure to retain field logs[102] and soil samples from the 2013 borings

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[100] 130 EP Resp. to Mot., Attach. A (Snyder Affidavit).

[101] Tr. 441–42

[102] Mr. Snyder described "field logs" as follows:

In each boring, continuous sampling was done down to a depth of approximately 50 feet below ground surface, then intermittently to total depth; generally consisting of a two-foot sample from each 4-8 feet drilled. A draft log (or "field log") was then prepared for each boring. Each field log included n description of the soil encountered at various depths in the boring, based on the depth from which each numbered sample was collected. [Driller] Mr. Stamoulis's visual observation of the collected samples and his descriptions of the soil materials (but not based on the Unified Soil Classification System, which is a geotechnical engineering description system required by TCEQ rule to be used in soil boring logs that are included in a municipal solid waste facility permit application. [sic]

(130 EP Resp. to July 26, 2016 Mot., Attach. A at 2).

renders the entirety of the Geology Report so unreliable as to constitute no evidence. But TCEQ rules do not require applicants to retain these materials—the ALJs determined that 130EP violated only the rules of civil procedure. TCEQ rules ensure that geology reports are reliable by requiring that they include boring logs—created by reviewing the initial field logs (which are created by the driller—not necessarily a professional scientist), soil samples, and the results of laboratory testing conducted on the samples—and that they be signed and sealed by a qualified scientist. To argue that the absence of field logs and soil samples renders geology reports inherently unreliable, Plaintiffs must challenge these rules that provide otherwise. But as these rules remain valid, Plaintiffs are precluded from collaterally attacking them here.

A. Plaintiffs requested and received a remedy for 130EP's failure to preserve soil samples and field logs from the 2013 borings—the right to conduct their own subsurface investigation.

The bulk of Plaintiffs' complaints springs from a discovery dispute concerning field logs and soil samples that were discarded in violation of the rules of civil procedure. Without these materials, Plaintiffs allege that it is impossible to rely on much of the evidence in the record—including the results of Plaintiffs' own investigations—that demonstrates that the site location is suitable for a landfill. Instead of considering the record evidence, Plaintiffs contend that TCEQ and the ALJs should have issued spoliation instructions and relied on presumptions. As set out below, Plaintiffs' arguments are meritless.

In the course of discovery, it was revealed that BME, the firm hired by 130EP to prepare the Geology Report, had not retained the soil samples and field logs taken as part of the 2013 subsurface investigation. Although the Geology Report included the qualified groundwater scientists' boring logs, which contain descriptions of the soils based on the experts' analysis,[103] and other records and data from the 2013 borings were preserved, the soil samples themselves, along with the driller's field logs were not.

As Mr. Snyder testified, "Pursuant to BME's standard instructions to Stefan Stamoulis, he did not retain copies of the field logs and, pursuant to BME's standard document retention policies, neither did BME. The soil samples from the [130 EP] site that [Gregory W. Adams, P.E.,] and I inspected in our office were then placed in a secure storage unit, then disposed of as storage space was needed for other projects on which BME was working."[104]

A prolonged discovery dispute ensued. After TJFA/EPICC moved to compel access to the site to conduct their own testing or, in the alternative, sanctions for spoliation, the parties reached an agreement allowing TJFA/EPICC their requested access and testing.[105] However, after the parties were unable to agree on the terms

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[103] 49 AR 130EP-4 at 044, Appl., Part III, Attach. E2.

[104] 28 AR 209, Attach. A at 3.

[105] 19 AR 88; 21 AR 93; 20 AR 91.

of that access, TJFA/EPICC filed a "Second Amended Motion to Compel Access to Property or in the Alternative, Motion for Sanctions Due to Spoliation of Evidence."[106] In their prayer, TJFA/EPICC requested a "spoliation instruction" only conditionally: "If Protestants are not allowed to collect their own evidence regarding the subsurface of the proposed landfill site, then, Protestants request a spoliation instruction."[107] Thus, from the outset TJFA/EPICC appear to have acknowledged that the right to conduct their own subsurface investigation was a sufficient remedy for the loss of their ability to examine the soil samples and field logs from the 2013 borings.

The ALJs granted TJFA/EPICC's Second Amended Motion and ordered 130EP to allow them access to the site to conduct their own testing.[108] Accordingly, the protestants conducted a subsurface investigation at the site in 2016, drilling ten borings, taking 292 soil samples from those borings, and lab testing 11 of those soil samples.[109] Although they contend that their results differed significantly from those set out in the Geology Report, the ALJs and Commission found that "[t]he soil samples obtained by Protestants in 2016 and the results from testing on 11 of those

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[106] 23 AR 119.

[107] *Id.* at 20.

[108] 23 AR 138 (ALJs' Order No. 14).

[109] Order at 11, FOF 115; PFD at 40-41.

samples generally support the basic findings and conclusions set forth in the Geology Report regarding the subsurface characteristics at the Site."[110]

In any event, after conducting their own examination pursuant to the order they had obtained from the ALJs, TJFA/EPICC decided that this remedy was inadequate (they now dispute that this "was a remedy at all").[111] They then filed another motion related to the failure to retain the 2013 field logs and soil samples, a "Motion to Strike and for Sanctions Due to Spoliation of Evidence."[112] In it, the protestants made many of the same arguments contained in their briefing to the Court—that the Geology Report is inherently unreliable because, under Plaintiffs' interpretation, those materials are necessary to determine the reliability of the conclusions contained therein, and because the additional testing that the ALJs allowed in response to their prior motions called those conclusions into question.[113] Thus, though they had already been granted the relief they requested in response to the alleged spoliation, TJFA/EPICC now asked the ALJs to issue themselves a spoliation instruction requiring them to presume that the all the discarded materials were harmful to 130EP's application.[114] In addition, TJFA/EPICC contended that

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[110] Order at 11, FOF 116.

[111] Plaintiffs' Initial Br. at 57 n.108.

[112] 27 AR 201.

[113] *Id*. at 3.

[114] *Id.* at 23.

130EP's subsurface methodology was so deficient that the expert testimony it offered equated to no evidence under the *Daubert* and *Havner* standards, and asked the ALJs to strike the Geology Report itself along with other portions of the application.[115]

Following a prehearing conference, the ALJs issued Order No. 26, denying the protestants' motion for additional relief. The ALJs, applying Texas caselaw, determined that, while 130EP breached its duty to preserve discoverable material, the previously granted ability to conduct an independent subsurface investigation was sufficient to address the violation.[116]

Although the ALJs stated that "no remedy is appropriate"—a phrase seized on by Plaintiffs—it is clear from the context that this should be read as "no additional remedy." Indeed, in the same paragraph, the ALJs state that "no additional action" [beyond conducting an independent investigation of the site] is necessary to remedy 130 EP's breach of its duty to preserve discoverable material."[117] The Commission found no error in the ALJs' handling of the dispute and adopted their findings that this discovery violation did not render the Geology Report unreliable or otherwise require denial of the permit.

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[115] *Id.*

[116] 28 AR 212 at 4 (ALJs' Order No. 26).

[117] *Id.*

In declining to grant Plaintiffs additional remedies, the ALJs and Commission acted well within their discretion. Judges have broad discretion in crafting appropriate remedies to address spoliation—the goal of which is to restore the parties "to a rough approximation of what their positions would have been were the evidence available."[118] Being allowed to conduct their own investigation was a reasonable remedy for the loss of the filed logs and soil samples, essentially allowing Plaintiffs to create their own versions of the missing materials. While it may be true that this was an expensive remedy, it was the very remedy the Plaintiffs initially requested, with a spoliation instruction only sought if this were denied. This achieved the rough approximation of what the positions would have been had the evidence been available—striking the Geology Report and ignoring the ample evidence supporting its conclusions would not.

B. The Commission's finding that 130EP's Geology Report was sufficient is supported by substantial evidence.

Plaintiffs allege that the geology report submitted by 130EP did not meet the requirements imposed by agency rules. Specifically, the geology report is required to contain:

> (1) a description of the regional geology of the area;
> (2) a description of the geologic processes active in the vicinity of the facility that includes an identification of any faults and subsidence;

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[118] *See Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 19 (Tex. 2014).

(3) a description of the regional aquifers in the vicinity of the facility;

(4) the results of investigations of subsurface conditions, including a description of all borings drilled on site to test soils and characterize groundwater; and

(5) geotechnical data that describes the geotechnical properties of the subsurface soil materials and a discussion with conclusions about the suitability of the soils and strata for the uses for which they are intended.[119]

It is effectively undisputed that 130EP's Geology Report contains all of this information. Plaintiffs argue, however, that the information is not sufficiently reliable or otherwise tainted procedurally. As with their other points of error, Plaintiffs' complaints regarding the geology and hydrogeology findings are essentially substantial evidence points, and there is record evidence supporting these findings. The ALJs and Commission properly dealt with the procedural objections, and Plaintiffs can show no abuse of discretion or any harm necessary to support such a point of error. And the arguments that the evidence is in fact not evidence simply asks the Court to reweigh the credibility of witnesses and weight of evidence differently from the ALJs, whose factual findings on this issue were incorporated in the Order.

[119] 30 Tex. Admin. Code § 330.63(e)(1)–(5).

Indeed, Plaintiffs' briefing now reasserts substantially the same arguments regarding the Geology Report and related geology and hydrogeology issues that were exhaustively addressed and rebutted in the PFD.[120]

> Given the extensive and numerous criticisms of the Geology Report proffered by Protestants, the ALJs endeavor in this PFD to provide a thorough description of the subsurface investigations performed at the Site both by BME and Protestants. The PFD therefore explains in great detail the process and procedures that the evidence indicates were followed in sampling the subsurface materials, testing the samples both in the field and in the laboratory, and analyzing the samples and test results to reach conclusions regarding the character of the subsurface materials at the Site. After carefully reviewing the substantial and voluminous evidence presented on these issues, the ALJs find that 130EP failed to obtain pre-approval from the ED as to BME's boring plan, in violation of 30 TAC § 330.63(e)(4). Otherwise, the ALJs conclude that the Geology Report meets all other applicable requirements of 30 TAC § 330.63(e)(4) and that the arguments and criticisms of BME's subsurface investigation and resulting conclusions were ultimately unpersuasive.[121]

Plaintiffs' allegations are contrary to the well-supported findings of the ALJs and Commission. For example, the Order expressly states that 130EP did not submit false information in the Geology Report[122] and that the methodology used by Biggs and Mathews Environmental, Inc. did not violate any TCEQ rule, was adequate for the work performed, and did not result in unreliable or inaccurate findings or

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[120] PFD at 29–84.

[121] PFD at 32–33.

[122] Order at 11, FOF 114.

conclusions.[123] Plaintiffs' arguments constitute a collateral attack on those findings, which may only be reversed for lack of substantial evidence.

And for those allegations that were confirmed by the ALJs and Commission—i.e., the commencement of drilling prior to the boring plan's approval and the failure to retain some materials from the 2013 borings—the Commission acted within its discretion to determine that these flaws did not require denial of the permit. As explained above, not every shortcoming in an application necessarily results in a denial. And to show reversible error here, Plaintiffs must demonstrate that the findings upon which the Commission based its approval are unsupported—simply disagreeing with them is not sufficient.

Plaintiffs' other complaints are rebutted by contrary evidence in the record. With respect to the allegation that the Geology Report's description of the subsurface soil materials and strata is "overly simplistic," the ALJs noted that there is no complexity standard in the rules and that in any event BME plainly documented the discovery of small amounts of material other than fat and lean clay in samples from the 2013 borings.[124]

As to the existence of fractures, the ALJs explained that it was not surprising that the 2013 investigation revealed no fractures, while the 2016 borings and

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[123] *Id.*, FOF 112.

[124] PFD at 62.

Protestants' subsequent borings found several. The evidence showed that the frequency of subsurface fractures was extremely limited in relation to the total number of samples taken. And of those fractures that were subsequently found in the 2016 borings, half were located outside the landfill's footprint. The ED's own geoscientist testified that nothing from the 2016 borings changed his conclusion that the Geology Report was complete and accurate and met the rule's requirements.[125]

Soil Boring Plan

Plaintiffs correctly note that 130EP was found to have violated agency rules by commencing drilling prior to approval of its soil boring plan. But the Commission appropriately determined that this timing violation—like the floodplain permit preapproval issue—did not compel the denial of the application.

TCEQ rules provide that an applicant's geology report must include information obtained by drilling borings at the site to test soils and characterize groundwater, and require the applicant to obtain the Executive Director's approval of its boring plan, "including locations and depths of all proposed borings . . . prior to the initiation of the work."[126]

While the ALJs and Commission found that the Geology Report met all the other requirements in the agency rules, it is not disputed that 130EP had drilled the

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[125] PFD at 63.

[126] 30 Tex. Admin. Code § 330.63(e)(4).

borings at the site *before* its Soil Boring Plan was submitted and eventually approved in October 2013.[127] Mr. Snyder testified that BME had two soil borings drilled on site in early 2013 that he used to obtain preliminary information about the subsurface conditions.[128] He then prepared a Soil Boring Plan and began drilling borings. The Soil Boring Plan was reviewed and approved by TCEQ Staff in October 2013, though by this time the borings had already been drilled. As stated in the Order, this violated Rule 330.63(e)(4)'s requirement that the plan be approved prior to beginning work.[129]

But both the ALJs and Commission determined that this violation of the pre-approval requirement in Rule 330.63(e)(4) did not render the subsurface information obtained by the borings unreliable. Relying on testimony showing that 130EP's actions were not unprecedented in similar agency proceedings, as well as the fact that the Executive Director ultimately approved the Soil Boring Plan, the ALJs did not recommend that 130EP be required to re-drill or that the permit be denied as a result, and the Commission agreed.

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[127] 49 AR 130EP-4 at 45–46.

[128] 54 AR 130EP Snyder-1 at 17.

[129] Order at 35, COL 7b.

Record evidence supports this decision. Mr. Snyder testified that it was common practice to begin drilling borings prior to approval.[130] He stated that if the borings were properly done the agency had allowed applicants to use them, arguing that the rule does not specify a remedy and that it would be absurd to require an applicant to redrill a boring that has already been correctly drilled.[131]

And in his briefing below, the Executive Director argued that the failure to obtain pre-approval of the boring plan was not a substantive deficiency, noting that while agency staff did request additional information concerning the borings, the Executive Director did ultimately approve the Soil Boring Plan and did not require any redrilling.[132]

Given that the Geology Report complied with the substantive provisions of the rules, the violations of the rule's timing requirement did not result in the type of substantive deficiencies the rule was designed to prevent. The ALJs found that the borings that were drilled were sufficient to obtain the subsurface information necessary for the Commission to determine whether the permit should be granted.[133] In following the ALJs' recommendation, the Commission acted within its discretion

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[130] Tr. 436, 439; PFD at 37.

[131] Tr. at 457; PFD at 38.

[132] 31 AR 251 at 1 (ED's Exceptions to PFD).

[133] PFD at 60.

to interpret its own rule's timing requirement as not dispositive of the merits of the application. Plaintiffs' attempts to second guess this decision should be rejected.

VI. The Commission's findings regarding hydrogeology and groundwater monitoring are supported by substantial evidence.

Plaintiffs contend that no evidence supports the Commission's groundwater monitoring plan because it was based on data it claims was inherently unreliable for the reasons described above. However, as explained above, the data is not unreliable and substantial record evidence supports the plan.

The ALJs and Commission found that the preponderance of the evidence showed that 130EP's Groundwater Sampling and Analysis Plan, along with the proposed groundwater monitoring system, met the requirements of the relevant rules, Rules 330.63(f) and 330.403. The plan included the required topographical map, an analysis of the most likely pathway(s) for pollutant migration in the event of a liner leak, and detailed plans and an engineering report describing the monitoring program.

They determined that the system has a sufficient number of wells at appropriate locations and depths to yield representative samples from the uppermost aquifer, included a background monitoring well and wells installed to allow determination of the quality of groundwater passing the point of compliance and ensured detection of groundwater contamination in the uppermost aquifer.

The evidence did show an area southeast of the Site that could serve as a pathway for leachate migration in the event contamination was to leak out of the liner and move through the groundwater southward along the gradient to that location. However, that location is 200 feet southeast of the landfill footprint, and the evidence showed that groundwater would flow in a southerly or easterly direction from the south end of the Landfill, away from that location.

Nevertheless, the groundwater modeling system calls for several wells to be installed between the landfill footprint and this location, rendering the plan sufficiently protective of groundwater in the vicinity.

Plaintiffs' remaining argument—that the piezometer data is inherently flawed—is rebutted by record evidence. As part of the Geology Report, 130EP was required to include data concerning the groundwater conditions at the site and its vicinity.[134] To meet this requirement, BME installed 17 piezometers at the site, each within at least 30 feet of a soil boring.[135] Plaintiffs argue that BME's use of lithogic descriptions of the adjacent soil borings in creating piezometer logs rendered the hydrology data unreliable if not false.[136] However, Mr. Snyder explained that he

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[134] 30 Tex. Admin. Code § 330.61(k)(1).

[135] The record is unclear whether the distance is 10 or 30 feet from each boring. *See* 49 AR 130 EP-4, Attach. E at 20; 51 AR 130 EP-7 at 5.

[136] Plaintiffs' Initial Br. at 54, 60.

used the soil borings to create the piezometer logs because the boring soil samples better represented the actual lithography at the location: (i) piezometers are drilled using a different method, which results in "cuttings" rather than the solid samples produced by drilling borings, and (ii) the boring soil samples had been lab tested, providing additional and more accurate information.[137]

The ALJs found that using the data from adjacent borings to produce piezometer logs was reasonable under the circumstances.[138] In rejecting the same arguments reurged by Plaintiffs here, the ALJs noted that they had "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."[139]

CONCLUSION AND PRAYER

The Texas Commission on Environmental Quality requests that this Court uphold the agency order.

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[137] Tr. 387–89.

[138] PFD at 63.

[139] *Id.* at 63–64.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 10.5 of the Travis County District Court's Local Rules of Civil Procedure and Rules of Decorum, I certify that this computer-generated document, excluding the contents listed in Texas Rule of Appellate Procedure 9.4(i)(l), contains 10,174 words and therefore complies with the word count limits described in Texas Rule of Appellate Procedure 9.4(i) and incorporated in Local Rule 10.5. I relied on the computer program used to prepare this document.

/s/ Cynthia Woelk
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document, Response Brief of Texas Commission on Environmental Quality, was served on the following counsel electronically through an electronic filing manager or via e-mail on June 28, 2019.

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