FILED
21-0717
6/16/2022 11:39 AM
tex-65505158
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 21-0717

IN THE SUPREME COURT OF TEXAS

TJFA, L.P., ENVIRONMENTAL PROTECTION IN THE INTEREST OF CALDWELL COUNTY, JAMES ABSHIER, AND BYRON FRIEDRICH,
***Petitioners*,**

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY AND 130 ENVIRONMENTAL PARK, LLC,
***Respondents*.**

On Petition for Review from the Third Court of Appeals at Austin
No. 03-19-00815-CV

REPLY IN SUPPORT OF PETITION FOR REVIEW

Marisa Perales
State Bar No. 24002750
marisa@txenvirolaw.com
Eric Allmon
State Bar No. 24031819
eallmon@txenvirolaw.com
PERALES, ALLMON & ICE, P.C.
1206 San Antonio Street
Austin, Texas 78701
Telephone: (512) 469-6000
Facsimile: (512) 482-9346

Wallace B. Jefferson
State Bar No. 00000019
wjefferson@adjtlaw.com
Melanie D. Plowman
State Bar No. 24002777
mplowman@adjtlaw.com
Amy Warr
State Bar No. 00795708
awarr@adjtlaw.com
ALEXANDER DUBOSE & JEFFERSON LLP
515 Congress Avenue, Suite 2350
Austin, Texas 78701-3562
Telephone: (512) 482-9300
Facsimile: (512) 482-9303

ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Rules

RECORD REFERENCES

The Clerk's Record is cited as "CR[page no.]."

The Administrative Record is cited as "[vol. no.]AR[item no.]" and "at [page no.]" where applicable.

Exhibits in the Administrative Record are cited as "[vol. no.]AR-[party]-[exhibit no.]" and "at [page no.]" where applicable.

Transcripts in the Administrative Record are cited as "[vol. no.]AR-Tr.[transcript no.] at [page no.]."

ACRONYMS AND SHORTHAND REFERENCES

130EP	130 Environmental Park, LLC
ALJ	Administrative Law Judge
The County	Caldwell County
TJFA	TJFA, LP is a nearby property owner. For convenience, the briefing collectively refers to the Petitioners as TJFA, as the court of appeals did in its opinion. Petitioners are: TJFA, LP; Environmental Protection in the Interest of Caldwell County, a group of nearby property owners and residents ("EPICC"); and individual residents James Abshier and Byron Friedrich.
NOD	Notice of Deficiency
PFD	Proposal for Decision
SOAH	State Office of Administrative Hearings
SWDA	Solid Waste Disposal Act, TEX. HEALTH & SAFETY CODE § 361.001, *et seq.*
TCEQ or Commission	Texas Commission on Environmental Quality

ARGUMENT

Respondents' arguments only reinforce the importance of the following issues:

- statutory limits on agency authority
- local governments' legislatively fashioned sphere of authority in managing the State's solid waste
- deference owed to a state agency's own assessment of its authority
- the notion that an expert must be reliable in administrative proceedings no less than other cases, and
- separation-of-powers problems that emerge when a court defies plain statutory terms defining agency authority or rules governing contested administrative proceedings.

These issues proliferate in courts across the State and SOAH proceedings and warrant the Court's resolution.

I. Respondents eliminate a critical phrase from Section 363.112(c) in direct defiance of this Court's precedent.

Respondents fail to rehabilitate the court of appeals' opinion, and instead confirm that the court violated this Court's black-letter statutory-construction precedent when it expanded TCEQ's permitting authority.

A. Respondents invoke the optional, two-step process for permit applications, but that process does not alter Section 363.112's clear and binding text.

Respondents rely on the opportunity for an early land-use-determination and the process's chronology here to alter Section 363.112(c)'s plain language. *E.g.*,

130EP-Resp. v, 2, 10; TCEQ-Resp. 11.

But the early, optional process and chronology are a red herring. Section 363.112(c)(1), which controls TCEQ's authority to issue landfill permits, prohibits TCEQ from granting a permit *unless* the local government adopted its restrictive ordinance or order after "an application for a permit…has been filed with and is pending before the commission." TEX. HEALTH & SAFETY CODE § 363.112(c)(1). Section 363.112 does not reference the optional, early land-use-compatibility determination or its process, rendering the chronology and optional process mere distractions. And here, no application for a permit was pending before Caldwell County adopted its restrictive ordinance.

TCEQ claims a conflict between the opportunity for an early land-use determination and TJFA's reading of Section 363.112(c). TCEQ-Resp. 14. But no conflict exists. One provision limits TCEQ's permitting power based on the timing of local-government ordinances in relation to a filed "application for a permit," TEX. HEALTH & SAFETY CODE § 363.112(c)(1), and one provision extends discretion to make early land-use-compatibility determinations, *id.* § 361.069. *See Standard v. Sadler*, 383 S.W.2d 391, 395 (Tex. 1964) (orig. proceeding) (where no clear repugnance, each statute will be given effect). Section 361.069's opportunity for an early land-use determination functions independently of Section 363.112(c)'s limit

on TCEQ's authority to grant permits, and the Legislature made no mention of it in authorizing local governments to restrict landfill locations. Pet. at 13.

TCEQ contends that its optional, two-step process effectively modifies Section 363.112's "application for a permit" and allows the early filing of Parts I and II to satisfy the condition precedent for the end of local authority. TCEQ-Resp. 11, 14. But no one, including the court of appeals, contends that Parts I and II are sufficient for a landfill permit.

TCEQ observes that nothing in Section 363.112 requires "all parts" of an application. TCEQ-Resp. 13. But Section 363.112 *conditions* the termination of local governments' authority on an "application for a permit" and nothing less. The division of an application into "parts" is something that appears only in TCEQ's rules and not in the statute.

130EP embraces the court of appeals' deletion of the phrase "for a permit" that follows the word "application" in Section 363.112(c). In its view, it is "*immaterial*" that a land-use-compatibility request cannot "result in the issuance of a permit." 130EP-Resp. 12 (emphasis added). But the elimination of the critical descriptor "for a permit" cuts off local authority prematurely and defies this Court's consistent refrain that courts must take statutes as they find them. *See, e.g., BankDirect Cap. Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 86-87 (Tex. 2017) ("We must rely on the words of the statute, rather than rewrite those words[.]")

(quotation and citation omitted). None of Respondents' cited rules of statutory construction, *e.g.*, 130EP-Resp. 13; TCEQ-Resp. 11-12, permit the substantive revision of Section 363.112.

130EP asserts that TJFA's reading of Section 363.112(c) "relies" on a TCEQ rule (30 Texas Administrative Code § 330.57(a)), that defines Parts I and II as a "partial application," and asserts the rule undercuts TJFA's reading by never stating that Section 363.112(c) requires a "complete application." 130EP-Resp. 14-15. Rule 330.57(a) simply does not address Section 363.112(c) or local-government authority. TJFA's reading depends on Section 363.112(c)'s plain meaning, which curtails local-government authority *only* after an "application for a permit" is filed and pending.

In a contra-textual argument, TCEQ asserts that the Legislature intended for local governments to take action before TCEQ exercises jurisdiction over any submission. TCEQ-Resp. 16. But "the words" chosen by the Legislature are "the surest guide to legislative intent." *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999). Those words preserve local governments' plenary authority to adopt prohibitive orders and ordinances until the point in time at which an "application for a permit" is filed and pending. Nothing in the statute references TCEQ jurisdiction or action.

B. Respondents urge deference to the agency, but *courts* decide statutory limits on agency power.

Respondents next invoke agency deference, emphasizing TCEQ's permitting and solid-waste management authority. 130EP-Resp. 13-14; TCEQ-Resp. 2-3, 14.

But deference to an agency's statutory interpretation is appropriate only for (1) ambiguous statutes (2) that implicate agency policy or expertise. *See, e.g., TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011). Neither condition exists here.[1]

Interpreting the statutory limits of TCEQ's permitting authority is a task for courts. 130EP's mischaracterization of local-government authority as "subservient" "and/or subject to the TCEQ's approval or even its override," 130EP-Resp. 8, demonstrates the importance of *not* blindly deferring to the agency's expansive assertion of its power, particularly vis-à-vis a governmental counterpart.

TCEQ is wrong to suggest that review would require the Court to "re-weigh the evidence that was before the trier of fact." TCEQ-Resp. 10. As 130EP and the court of appeals rightly agreed, the issue is straightforward statutory construction.

[1] The court of appeals' deference also contravened this Court's precedent in other ways. The agency's interpretation is at odds with Section 363.112's plain text. *See Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006). And the agency has not formally adopted its statutory interpretation, *see Tex. Dep't of Ins. v. Am. Nat'l Ins. Co.*, 410 S.W.3d 843, 853 (Tex. 2012), despite the explicit opportunity to adopt rules for whether a permit application is for an area prohibited by ordinance or order, TEX. HEALTH & SAFETY CODE § 363.112(d).

No deference is due under the substantial-evidence standard. *See* TEX. GOV'T CODE § 2001.174.

While the Legislature created a role for TCEQ in solid-waste management, it did not empower the agency to answer legal questions regarding the scope of its authority or that of local governments. These are questions of law and implicate the courts' role in checking executive-branch authority by enforcing legislative policy. *See Baldwin v. United States*, 140 S.Ct. 690, 691-92 (2020) (Thomas, J., dissenting).

C. Respondents do not deny that permit applicants exploit the two-step process to defeat local governments' authority, nor that 130EP never obtained an early land-use-compatibility determination.

The court of appeals' ruling relies on the opportunity to obtain an early land-use-compatibility determination and 130EP's election to pursue that option. *TJFA, L.P. v. TCEQ*, 632 S.W.3d 660, 668-69 (Tex. App.—Austin 2021, pet. filed).

But Respondents do not deny that 130EP never obtained that determination. Respondents also do not deny that 130EP's early Parts I and II had significant omissions, appeared to be "quickly prepared" and designed to "beat the clock," Pet. at 18 (quotation and citation omitted), and were later replaced by new Parts I and II in 130EP's complete permit application *after* the ordinance's adoption, Pet. at 6-7.

Furthermore, Respondents do not disclaim the legislative testimony from the former head of TCEQ's Waste Permits Division that *no* applicant has *ever* completed

the two-step process, which is used to prevent local authorities from restricting landfills. Pet. at 16-17.

Thus, the court of appeals' predicates were, in fact, absent.

TCEQ predicts that if TJFA's reading of Section 363.112 is correct, a local government could prohibit a landfill when a land-use-compatibility request is submitted, rendering the early land-use determination "useless—except to signal to any county that had not yet adopted a landfill ordinance to do so immediately." TCEQ-Resp. 15. But this was the legislative design: to allow local authorities to restrict landfill locations *up until* an "application for a permit" was filed.

The early land-use determination would not be "useless," but would, as intended, allow a landfill operator to know early whether a site is conducive to a landfill before investing significant time and money into an application's technical parts. Pet. at 5-6. The early submission would be "useless" only if its sole function was to cut off the authority that the Legislature intentionally vested with local governments.

II. Respondents' arguments only serve to illuminate the importance of expert-evidence standards in administrative proceedings.

A. Respondents' disharmony whether *Robinson* governs expert evidence supports this Court's clarification that administrative proceedings fall under its ambit.

Although 130EP accepts that *Robinson* applies in administrative proceedings, 130EP-Resp. v, 15, TCEQ expresses doubt. The agency states that *Robinson*

"arguably" applies because the Administrative Procedure Act extends the rules of evidence to contested cases. TCEQ-Resp. 21 n.24. But in the same breath, the agency invokes APA exceptions that allow otherwise inadmissible evidence and suggests those exceptions trump *Robinson*'s requirements. By asserting that these exceptions override *Robinson*'s limits on expert testimony, the agency reinforces the importance of the Court's review.

B. The court of appeals contravened this Court's precedent to relieve an expert from his duty to give his opinion's foundation.

The court of appeals did not deny that the destroyed materials were a foundation of the Geologist's opinions. Instead, the court "disagree[d]" that review of the expert's underlying materials was the "only way" to verify his opinions' reliability, and pointed to TJFA's limited, later site investigation as an adequate substitute. *TJFA*, 632 S.W.3d at 671-72. Respondents embrace this approach. *E.g.*, 130EP-Resp. vi.

But this approach contradicts this Court's precedent. Judges must exclude unreliable expert opinions to ensure that factfinders receive credible expert testimony. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557-58 (Tex. 1995). Because the underlying basis of an expert's opinion, and not the opinion itself, has probative value, *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009), this Court has directed that the data underlying an expert's opinion must be "independently evaluated in determining if the opinion itself is reliable,"

Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 713 (Tex. 1997); *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637 (Tex. 2009) ("courts are to rigorously examine the validity of facts and assumptions on which the testimony is based").

This Court has not looked *outside* experts' work to determine opinions' reliability. Although this Court requires *the expert* to "connect the data relied on and his or her opinion" and "show how that data is valid support for the opinion reached," *Camacho*, 298 S.W.3d at 642, the court of appeals relieved the Geology Expert from that obligation. It did not matter to the court that the expert could not justify his conclusions with reference to fieldwork data (which was missing). Instead, the court imposed a *new* burden on the opposing party to affirmatively establish the Report's *un*reliability. If this is the new paradigm, a return to pre-*Robinson* days, when experts need not worry about their opinions' analytical validity, is on the horizon.

C. The appellate record and TCEQ rules refute 130EP's claim that the missing fieldwork materials were not foundational to the expert's opinions.

130EP contends that the missing supporting materials were not foundational to the expert's opinions. 130EP-Resp. 17-18. It observes that TCEQ rules do not require the Geology Report to include fieldwork information and asserts that the Report has all the data required to support its conclusions. But a Geology Report's opinions are inevitably grounded in field-investigation material, whether or not it appears in the report. Indeed, 130EP admits this in describing the process of

evaluating the field data to produce the report. *Id.* TCEQ rules confirm the fieldwork data's foundational status by requiring the report to include "results *of investigations of subsurface conditions*" and "interpretations of the subsurface stratigraphy *based upon the field investigation*." 30 TEX. ADMIN. CODE § 330.63(e)(4) & (4)(H) (emphasis added).

D. 130EP's spoliation cannot alleviate its obligation to comply with standards for expert evidence.

Respondents expend significant time discussing spoliation. *E.g.,* TCEQ-Resp. 16-18, 20.[2] But that dispute was separate from the reliability challenge to the Geology Expert and is not at issue. A remedy for spoliation cannot replace the *evidence* required to evaluate the validity of an expert's conclusions. *See U.S. Renal Care, Inc. v. Jaafar*, 345 S.W.3d 600, 612-13, 615 (Tex. App.—San Antonio 2011, pet. denied) (rejecting argument that spoliation remedy could overcome expert testimony's unreliability).

E. TCEQ's understanding of a *Robinson* challenge in administrative proceedings raises a separation-of-powers problem.

TCEQ incorrectly asserts that a *Robinson* challenge poses separation-of-powers concerns by asking a court to "re-weigh the credibility of witnesses and the

[2] 130EP claims that the experts destroyed the materials "[c]onsistent with their standard practice," 130EP-Resp. 3, but 130EP spoliated evidence. 28AR212. Civil procedure and professional rules obligated preservation. *See* 30 TEX. ADMIN. CODE §§ 305.47, 305.66(a)(4); 22 TEX. ADMIN. CODE § 851.106(f)(2), (5); 66AR-Tr.1 at 222-27; 63AR-Protestants-8 at 30-32, 69-70.

weight of evidence." TCEQ-Resp. 20. But a *Robinson* challenge invites a court's *legal assessment* of admissibility, *e.g., Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 347 (Tex. 2015), not a new assessment of evidence.

TCEQ's misunderstanding demonstrates the need for the Court to make clear that *Robinson* applies in contested administrative proceedings. Indeed, TCEQ's urging of agency deference on admissibility itself raises separation-of-powers concerns. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 123-24 (2015) (Thomas, J., concurring) (improper "deference amounts to a transfer of the judge's exercise of interpretive judgment to the agency"). The paucity of case law in this area, which would inform the thousands of SOAH and other administrative proceedings that occur annually, would benefit greatly from this Court's confirmation that *Robinson* applies no less in the administrative context than in any other case.

PRAYER

For these reasons, and those in the petition, the Court should grant the petition, reverse the court of appeals, district court, and Commission, and grant all further relief to which Petitioners are entitled.

Respectfully submitted,

/s/ *Wallace B. Jefferson*
Wallace B. Jefferson
State Bar No. 00000019
wjefferson@adjtlaw.com
Melanie D. Plowman
State Bar No. 24002777
mplowman@adjtlaw.com
Amy Warr
State Bar No. 00795708
awarr@adjtlaw.com
ALEXANDER DUBOSE & JEFFERSON LLP
515 Congress Avenue, Suite 2350
Austin, Texas 78701-3562
Telephone: (512) 482-9300
Facsimile: (512) 482-9303

Marisa Perales
State Bar No. 24002750
marisa@txenvirolaw.com
Eric Allmon
State Bar No. 24031819
eallmon@txenvirolaw.com
PERALES, ALLMON & ICE, P.C.
1206 San Antonio Street
Austin, Texas 78701
Telephone: (512) 469-6000
Facsimile: (512) 482-9346

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF COMPLIANCE

Based on a word count run in Microsoft Word, this brief contains 2,400 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ *Melanie D. Plowman*
Melanie D. Plowman

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2022, this Reply was served via electronic service through eFile.TXCourts.gov on the opposing parties through counsel of record, listed below:

Brent W. Ryan
State Bar No. 17469475
bryan@msmtx.com
MCELROY, SULLIVAN, MILLER & WEBER, LLP
P.O. Box 12127
Austin, Texas 78711
Telephone: (512) 327-8111
Facsimile: (512) 327-6566

Michael S. Truesdale
State Bar No. 00791825
mtruesdale@enochkever.com
ENOCH KEVER, PLLC
5918 West Courtyard Dr., Suite 500
Austin, Texas 78730
Telephone: (512) 615-1200
Facsimile: (512) 615-1198

Attorneys for Respondent
130 Environmental Park, LLC

Priscilla Hubenak
State Bar No. 10144690
priscilla.hubenak@oag.texas.gov
Kellie E. Billings-Ray
State Bar No. 24042447
kellie.billings-ray@oag.texas.gov
ENVIRONMENTAL PROTECTION DIVISION
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
Telephone: (512) 463-2012
Facsimile: (512) 320-0911

Attorneys for Respondent Texas Commission on Environmental Quality

/s/ *Melanie D. Plowman*
Melanie D. Plowman

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below:

Ginger Grimm on behalf of Wallace Jefferson
Bar No. 19
ggrimm@adjtlaw.com
Envelope ID: 65505158
Status as of 6/16/2022 11:41 AM CST

Associated Case Party: TJFA, L.P., Environmental Protection

Name	BarNumber	Email	TimestampSubmitted	Status
Melanie Plowman		mplowman@adjtlaw.com	6/16/2022 11:39:26 AM	SENT
Eric Michael Allmon	24031819	eallmon@txenvirolaw.com	6/16/2022 11:39:26 AM	SENT
Marisa Perales	24002750	marisa@txenvirolaw.com	6/16/2022 11:39:26 AM	SENT
Wallace B.Jefferson		wjefferson@adjtlaw.com	6/16/2022 11:39:26 AM	SENT
Eric Allmon		eallmon@lf-lawfirm.com	6/16/2022 11:39:26 AM	SENT
Amy Warr		awarr@adjtlaw.com	6/16/2022 11:39:26 AM	SENT

Associated Case Party: Texas Comm'n on Environmental Quality

Name	BarNumber	Email	TimestampSubmitted	Status
Kellie Billings-Ray	24042447	Kellie.Billings-Ray@oag.texas.gov	6/16/2022 11:39:26 AM	SENT
Priscilla M. Hubenak	10144690	Priscilla.Hubenak@oag.texas.gov	6/16/2022 11:39:26 AM	SENT
Laura Courtney		laura.courtney@oag.texas.gov	6/16/2022 11:39:26 AM	SENT

Associated Case Party: 130 Environmental Park, LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Michael S. Truesdale	791825	mtruesdale@enochkever.com	6/16/2022 11:39:26 AM	SENT
Brent W. Ryan	17469475	bryan@msmtx.com	6/16/2022 11:39:26 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Cathi Trullender		ctrullender@adjtlaw.com	6/16/2022 11:39:26 AM	SENT