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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 appeal from the 459th Judicial District Court,
Travis County, Texas, Cause No. D-1-GN-17-006632

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130 ENVIRONMENTAL PARK, LLC's RESPONSE TO PETITION FOR REVIEW

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RECORD REFERENCES

130EP employs the same conventions for citing the record as used by Petitioners, as modified below:

> The Clerk's Record is cited as "CR[page #]" (i.e., CR47).
>
> The Administrative Record is cited as "[vol.#AR[item #]" and "at [page #]" where applicable (i.e., 30CR248 at 57).
>
> Exhibits in the Administrative record are cited as "[vol.#AR-[party]-[exhibit #]" and "at [page #]" where applicable (i.e., 51AR-130EP-8, at 1-3).
>
> Transcripts in the Administrative Record are cited as "[vol.#]AR-TR[transcript vol.#] at [page#]" (i.e., 73AR-TR at 43)

Certain key items in the Administrative Record contain multiple parts under the same item number that are not contiguously paginated. For example, 30AR248 is the "Proposal for Decision and Order" rendered by the ALJs. The first 211 pages of that item are consecutively paginated as the "Proposal for Decision;" however, the same item also contains the ALJs' separately paginated proposed Order granting the permit application, including the ALJs' findings of fact and conclusions of law. Citations to 30AR248 will identify the page number of the portion of the item containing the ALJs' Proposal for Decision (i.e., 30AR248 (PFD) at 45), or the portion referring to specific findings of fact or conclusions of law (i.e., "30AR248 (FOF) at 2 (FOF 7)).

REPLY TO STATEMENT OF JURISDICTION

Were the facts the way TJFA[1] frames them, then perhaps this case would present the important issue it asserts. But this case does not involve the abrogation of any legislative powers conferred to the TCEQ. Instead, it involves a textbook application of the law to a timeline of events on which all agree. This case poses no threat to local governmental authority, and simply confirms limits already imposed by the Legislature.

Nor does this case present any dispute or controversy about the applicability of *Robinson*[2] standards to administrative proceedings. The question is not whether the same standard for expert testimony applies in administrative proceedings. Instead TJFA's real complaint is that it does not like the result flowing from the ALJ's application of that standard because it resulted in an order authorizing the waste facility permit.

These complaints do not present novel or recurring issues important to the jurisprudence of the State and do not warrant review.

[1] All Petitioners are collectively referred to as "TJFA".
[2] *E.I. DuPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

COUNTER-STATEMENT OF ISSUES

1. Did the Commission correctly conclude that the filing by 130 Environmental Park, LLC ("130EP") of Parts I and II of a permit application before Caldwell County passed its Disposal Ordinance[3] invoked the exceptions to the County's statutory authority to prohibit disposal of solid waste at the location covered by the application?

2. The Administrative Law Judges (ALJs) devoted thirty-six pages of their Proposal for Decision (PFD) to discussing evidence concerning geology and soil issues, including TJFA's complaints about the failure to retain field logs and soil samples. They ultimately concluded that evidence presented both by 130EP and TJFA provided sufficient geologic information to justify the issuance of the landfill permit sought by 130EP (the Permit). The court of appeals rejected TJFA's arguments that the only way to determine if the opinions 130EP's expert geologist were reliable was for TJFA to observe the original field logs and soil samples.

   a. When the ALJs' PFD includes significant discussion as to why 130EP's expert testimony was reliable and thus ultimately admissible, does TJFA's assertion that *Robinson* was held not to apply to an administrative proceeding present a recurring issue of importance to the jurisprudence of the State?

   b. Does the case-specific determination by the court of appeals concerning what evidence may have constituted "foundational data" rendering an

[3] The County's December 9, 2013 Ordinance Prohibiting Solid Waste Disposal in Caldwell County (58AR-Caldwell-3) is referred to herein as the "Disposal Ordinance."

expert opinion reliable present a recurring issue of importance to the jurisprudence of the State?

c. Did the court of appeals have a basis on which to conclude that "foundational" data for purposes of supporting an expert's opinion included more categories of information than urged by TJFA?

INTRODUCTION

This case presents no issues warranting review by this Court. Rather, the two issues presented both rely on well-established precedents that were correctly applied by the TCEQ Executive Director, the ALJs, the TCEQ Commissioners, the district court, and the court of appeals.

TJFA's issue challenging the application of statutory provisions governing disposal ordinances does not present any "recurring issue" important to the State's jurisprudence. The issue is not "recurring;" in fact, in the twenty-three-year history of these provisions, no reported opinions have addressed them, precisely because the application of the statutes does not present a state-wide issue of concern. And while the interpretation of these provisions may be of interest to those whose activities are subject to regulation, it certainly presents no question with a significant impact on state-wide jurisprudence.

Similarly, TJFA's complaint discussing the admissibility standards for expert testimony in an administrative proceeding is hardly novel. While TJFA casts the case as rejecting the applicability of *Robinson* standards in administrative proceedings, neither any party, the ALJs, the Commission, the district court, nor the court of appeals ever took that position. The question is not whether *Robinson* applies, but whether it was satisfied. The decision by the court of appeals that it was

satisfied thus does not present the novel issues framed by TJFA, and does not present a dispute warranting review.

In short, the petition for review should be denied.

COUNTER-STATEMENT OF FACTS

130EP does not agree with TJFA's recitation of facts to the extent it inappropriately characterizes the record on the two issues it raises. 130EP offers this counter-statement as to those issues.

A. The chronology relating to the filing of 130EP's permit application and the adoption of the Disposal Ordinance.

TJFA states that Caldwell County adopted its Disposal Ordinance "before any landfill operator applied for a permit." Pet. at 4. That is not correct.

In September 2013, 130EP filed with TCEQ Parts I and II of an application for a permit to construct and operate a new municipal solid waste landfill[4].

Three months after 130EP filed its application, Caldwell County adopted its Disposal Ordinance, purporting to prohibit the disposal of solid waste in all areas of the County other than on an 18-acre County-owned property.[5] That chronology is critical to TJFA's first issue because it confirms that 130EP had filed a permit application before the County adopted its Disposal Ordinance.

[4] 30AR264 at 1 (FOF 1,2,8).
[5] 33AR264 at 26 (FOF 316, 317); 58AR-Caldwell-3

B. The record regarding the basis for 130EP's Geology Report and expert opinions.

130EP's experts and consultants investigated the proposed landfill site (the Site) in 2013 when, among many other things, they drilled soil borings, and collected soil samples. The experts used the results of these investigations to prepare the Geology Report contained in Part III of the Application.

While the borings were being drilled, a state-licensed driller collected samples, made a "field log" of each boring, and packaged and labeled the samples, then transported the field logs and samples to 130EP's geology and geotechnical experts, both "qualified groundwater scientists"[6] who conducted visual and manual analyses of the samples and had laboratory analyses performed on them, then created "boring logs" in the manner specified by TCEQ rule to be included in the application.[7] Consistent with their standard practice, those experts did not retain the field logs and, after the boring logs had been prepared and storage space was needed for other projects, the soil samples were discarded.[8]

In November 2015, 47 days after the deadline for non-deposition discovery,[9] TJFA filed a motion complaining that the field logs and soil samples were not retained or produced in discovery, requesting an order compelling 130EP to allow

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[6] 30 Tex. Admin. Code § 330.3(125).
[7] 30 Tex. Admin. Code § 330.63(e)(4).
[8] 69AR-Tr-4 at 374-75; 62AR-Prot.-5-H at 93-94.
[9] 18AR59 at 2.

TJFA to enter the Site so it could conduct its own geology investigation and, alternatively, seeking a sanction in the form of a spoliation instruction by which the ALJs would "presume that the destroyed evidence would have been harmful to [130EP's] case."[10]

TJFA filed an amended motion, again requesting to investigate the Site.[11] TJFA again also sought a spoliation instruction as alternative relief.[12] TJFA then filed a second amended motion, requesting to investigate the Site and asking for a spoliation instruction in the alternative.[13]

On February 12, 2016, the ALJs issued an order granting the primary relief sought in TJFA's motion (investigation of the Site), and directed the parties to confer regarding the form of a proposed order including the scope of TJFA's investigation.[14] After the parties conferred and 130EP arranged for TJFA to have access to the Site to conduct all of the investigations it wanted, TJFA informed the ALJs it was withdrawing its request for entry of any further order on its motion. The ALJs then issued an order concluding "the motion is moot."[15]

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[10] 19AR88 at 2-3.
[11] 21AR93 at 18-19
[12] *Id*. at 19.
[13] 23AR119.
[14] 23AR138.
[15] 25AR155 at 2.

Five months after TJFA abandoned its request for an alternative spoliation remedy and completed its Site investigation, TJFA filed yet another "spoliation" motion, incorporating virtually all the background facts and legal arguments from its earlier motion, and asking for the same spoliation instruction.[16] TJFA also moved to strike, as unreliable, the Geology Report in the application and any testimony regarding it.[17]

Because the ALJs has already allowed TJFA to conduct a Site investigation (outside the discovery period) in response to their prior spoliation assertions, the ALJs concluded that no additional remedy was necessary; they also did not strike 130EP's geology evidence and expert testimony.[18]

After the hearing, the ALJs issued their PFD recommending that the TCEQ Commissioners grant 130EP's application, and including proposed findings of fact and conclusions of law.[19] The ALJs noted they had strived "to provide a thorough description" of the investigations conducted by both 130EP and TJFA," and then "explain[ed] in great detail" the procedures used and matters reviewed in reaching conclusions about the character of the subsurface materials at the Site.[20] Then, after "carefully reviewing the substantial and voluminous evidence" on these issues, the

[16] 27AR204 at 2-3.
[17] *Id.* at 20-23; 26AR202.
[18] 28AR212 at 1-5.
[19] 30AR248 (FOF/COL).
[20] 30AR248 (PFD)at 32-33.

ALJs concluded that "the Geology Report meets all other applicable requirements of 30 TAC § 330.63(e)(4) and [TJFA's] criticisms of [130EP]'s subsurface investigation and resulting conclusions were ultimately unpersuasive."[21] The ALJs then noted that "the disposal of the field logs and the 2013 samples do not render the findings and conclusions in the Geology Report inaccurate, scientifically unreliable, or legally insufficient."[22] In fact, they concluded that evidence from both 130EP and TJFA "lends credence to and generally support the basic findings and conclusion set forth in the Geology Report regarding the subsurface materials at the Site."[23]

Thus, the factual record demonstrates that the ALJs did in fact employ the standards in *Robinson* to determine whether the expert's testimony satisfied reliability requirements, and concluded that it did. This case never involved any decision not to apply *Robinson* to administrative proceedings, just a conclusion that expert testimony meeting the reliability standards warranted issuance of the Permit, and was buttressed by evidence presented from TJFA.

[21] *Id.* at 33.
[22] *Id.* at 61 (emphasis added).
[23] *Id*.

ARGUMENT AND AUTHORITIES

I. Whether TCEQ properly issued the Permit to 130EP despite Caldwell County's Disposal Ordinance does not present an issue warranting review.

The court of appeals agreed with the TCEQ Executive Director's staff, the ALJs, the TCEQ Commissioners, and the district court that the filing of Parts I and II of the landfill permit application by 130EP constituted "an application for a permit or other authorization under Chapter 361" and, as a result, the Disposal Ordinance did not prevent TCEQ from issuing the Permit to 130EP. As explained below, this Court need not review these rulings.

A. The relevant statutory and regulatory background.

1. TCEQ is the dominant regulatory authority.

The legislature has given TCEQ dominant authority over the regulation of municipal solid waste (MSW). The Solid Waste Disposal Act, (SWDA), Chapter 361 of the Health and Safety Code, grants to TCEQ very broad powers, including "controlling all aspects of the management of MSW … by all practical and economically feasible methods," "the powers and duties specifically prescribed by the SWDA … and all other powers necessary or convenient to carry out those responsibilities," authority to adopt rules consistent with the SWDA, and the authority to require and issue permits authorizing the operation of MSW facilities. If TCEQ exercises its permitting authority, it must prescribe "the form of and

reasonable requirements for" permit applications and "the procedures for processing" applications. *See* TEX. HEALTH & SAFETY CODE §§361.011(a-c); 361.024(a); 361.061; 361.064(a).

2. Authority granted to counties is subservient to the TCEQ's.

In contrast, the legislature has given counties very limited ability to regulate MSW,[24] subservient to TCEQ's authority and/or subject to the TCEQ's approval or even its override.[25]

3. The permit application process.

An important aspect of TCEQ's MSW rules is consideration of land use compatibility. 30 Tex. Admin. Code §§ 330.61(h), 330.57(c)(2). The SWDA provides the option for a separate agency determination on the issue of land use compatibility:

> 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.

TEX. HEALTH & SAFETY CODE § 361.069.

Pursuant to TCEQ's statutory directive to prescribe permit application requirements and processing procedures, the agency's rules authorize a party

[24] *See generally* Tex. Health & Safety Code §§ 361.162, 361.154, 363.063, 364.011 (a).
[25] *See generally* Tex. Health & Safety Code §§ 361.151, 363.063, 364.011(a).

applying for a permit to request a land use only determination by filing Parts I and II of the application. 30 Tex. Admin. Code § 330.57(a).

Health and Safety Code Section 361.069 and its predecessor provisions have been amended at least eight times in the past 39 years, but none affected either the agency's discretion to make a separate determination on the question of land use compatibility or the rule provision allowing for the submission of a partial permit application.

4. Statutory provisions regarding county prohibition of solid waste disposal

In 1971, the legislature authorized counties to prohibit solid waste disposal in certain areas.[26] In 1999, the legislature imposed significant limitations on this authority.[27] Counties are now precluded from adopting prohibitions on the:

> disposal of…solid waste in an area for which
> (1) an application for a permit or other authorization under Chapter 361 has been filed with and is pending before [TCEQ]; or
> (2) a permit or other authorization under Chapter 361 has been issued by [TCEQ].

TEX. HEALTH & SAFETY CODE §§ 364.012(e).

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[26] Acts 1971, ch. 516, sec. 18(b) (eff. Aug. 30, 1971), now codified at TEX. HEALTH & SAFETY CODE § 364.012. In 1983, the legislature enacted a similar provision that applied to both counties and municipalities. *see* Acts 1983, ch. 934, sec. 34(b), eff. Sep. 1, 1983, now codified at TEX. HEALTH & SAFETY CODE § 363.112. Because these two provisions are identical in their application to counties, for simplicity, further references herein are to Section 364.012 only.

[27] Acts 1999, 76th Leg., ch. 570, Secs. 4-5, eff. Sept. 1, 1999.

TCEQ is statutorily prohibited from granting a permit application for an area covered by a county disposal prohibition unless the "county violated Subsection (e) in passing the ordinance or order…" *Id.* § 364.012(f).

TCEQ may not issue a permit for a location where the disposal of solid waste is prohibited by a county ordinance *unless*, at the time the ordinance was adopted, either (1) an application for a SWDA permit or other authorization for that location was pending before TCEQ, or (2) a SWDA permit or other authorization for that location had been issued by TCEQ.

B. The chronology of events confirms that the adoption of the Disposal Ordinance did not preclude TCEQ from issuing the Permit to 130 EP.

The facts relevant to the permit application and the Disposal Ordinance are not disputed. Collectively, they demonstrate an unremarkable application of law to the relevant facts reaching an outcome that TJFA does not like, rather than one reflecting a misinterpretation of law so significant that it gives rise to a recurring problem of state-wide importance to the jurisprudence.

As to the filing of the permit application, it is not disputed that on September 4, 2013, 130EP submitted to TCEQ Parts I and II of its permit application. 1-3AR1 at 2; 33AR264, FOF1,2,8. Nor is it disputed that on September 27, 2013, TCEQ issued a letter declaring 130EP's application "administratively complete." 3AR9; 33AR264, FOF8. It is also undisputed that as of those dates, Caldwell County did

not have an ordinance in place that would prohibit waste disposal at the 130EP Site or prevent TCEQ from issuing a permit for that location.

As to the Disposal Ordinance, there is also no dispute that more than three months after 130EP filed its permit application, Caldwell County adopted its Disposal Ordinance purporting to prohibit solid waste disposal at the site of the proposed 130EP facility. 58AR Caldwell-3; 33AR264, FOF316.

Based on this sequence of events, TCEQ's final order includes several related findings of fact and conclusions of law relevant to the Disposal Ordinance, confirming that:

- The landfill permit application was pending when the County adopted its Disposal Ordinance (FOF 325);
- Because 130EP's permit application was pending when the County adopted its Disposal Ordinance, the County sought to prohibit solid waste disposal in an area for which a TCEQ application was pending (FOF 326);
- The adoption of the Disposal Ordinance did not prevent TCEQ from granting 130EP's application (FOF 327, COL 41)

33AR264.

C. Because Parts I and II of the permit application constitutes an application for a permit or other authorization, the Disposal Ordinance did not preclude TCEQ from issuing a permit to 130EP.

As noted, the chronology is not in dispute, and the language of the applicable statutory provisions speak for themselves. Thus, the issue comes down to the simple question whether Parts I and II of the landfill permit application filed by 130EP

constitutes "an application for a permit or other authorization under Chapter 361". If it does, then an application for permit or other authorization was on file with TCEQ before the adoption of the Disposal Ordinance, rendering the ordinance inapplicable to constrain the TCEQ's otherwise existent authority to grant 130EP's permit application.

This issue presents square questions of statutory construction: Does the phrase "application for a permit or other authorization under chapter 361" include Parts I and II submitted pursuant to SWDA Section 361.069 and 30 Tex. Admin. Code Section 330.57(a)? More specifically, does the filing of Parts I and II satisfy Health and Safety Code section 364.012(e) to "grandfather in" the location covered by the application from restrictions in a later-adopted, otherwise applicable ordinance restricting the locations of solid waste disposal?

Here, the court of appeals noted that the Solid Waste Disposal Act does not define "application," "filed with," or "pending. 632 S.W.3d at 667. But it noted that the dictionary definition of "application" includes "a request or petition." *Id.* (citation omitted). And it explained that the definition of "pending" means "remaining undecided; awaiting decision." *Id*. Putting the two together, the court explained that while an approval of the land-use determination would not result in the issuance of a permit, that fact is immaterial to deciding whether the filing of a Parts I and II application satisfies subsection (e). Accordingly, it correctly concluded

that 130EP's application was 'filed with' and 'pending before' the Commission when Caldwell County adopted its Disposal Ordinance. *Id*. at 668.

The court of appeals did nothing novel in reaching this result. It relied on tools recognized to guide courts in determining legislative intent, looking first to the plain and common meaning of a statute's words, as well as the context and framework of the statute as a whole. *Id*. at 667 (citations omitted). Noting that the statute did not define the operative terms, it turned to the dictionary definitions to determine their common, ordinary meaning. *Id.* at 668. As noted above, those definitions supported a conclusion that the filing of a partial application (Parts I and II) that remained pending at the time of the adoption of the Disposal Ordinance established that 130EP's filing was sufficient to protect the location covered by its application from an otherwise near county-wide disposal prohibition.

Finally, the appellate court's decision is consistent with and supported by TCEQ's interpretation, the agency responsible for implementation of the statutory provision. Consideration of TCEQ's interpretation is especially appropriate here, where the legislature specifically authorized and directed the agency to develop and implement nearly all aspects of the MSW facility permitting program, including deciding whether to require permits and, if so, to establish the permit application requirements and processing procedures. In exercising that authority, TCEQ decided that the application for a separate land use compatibility determination should be a

"partial application" consisting of Parts I and II. And, in this case, TCEQ determined that 130EP's Parts I and II was a "partial application" as authorized by 30 Tex. Admin. Code § 330.57(a) and Tex. Health & Safety Code § 361.069, and that "an application for a permit or other authorization under Texas Health and Safety Code ch. 361 had been filed with and was pending before TCEQ…when the County adopted the Disposal Ordinance" such that the Disposal Ordinance did not prevent TCEQ from granting 130EP's application and issuing the Permit. 33AR264, FOF 327, COL 41.

TJFA contends that only a "complete application", consisting of all of Parts I-IV, should be considered to be an "application for a permit or other authorization pursuant to Chapter 361". (In doing so, TJFA does not assert that the phrase "application for a permit or other authorization pursuant to Chapter 361" is ambiguous -- likely because., as this Court has said, "statutory ambiguity is the quickest path to administrative deference". *Hallmark Marketing Company, LLC v. Hegar*, 488 S.W.3d 795, 799 (Tex. 2016'). TCEQ certainly interprets the provisions differently and its interpretation is subject to deference given its relationship to the issue.

In any event, TJFA's "complete application" interpretation should be rejected because in asserting it, TJFA relies on 30 Tex. Admin. Code § 330.57(a), the very same rule that provides for the filing of a "partial application" (Parts I and II). There

is nothing in that rule, or in the rest of the relevant statutory scheme, that requires an "application" to be a "complete application" rather than a "partial application" to fit within the subsection (e) limitation on a county's authority to prohibit waste disposal.

Accordingly, TJFA's issue fails to raise any recurring issue of importance to the jurisdiction of the State. It presents nothing more than a complaint that cannot be reconciled with the facts or the text of the statutory provisions at issue. As it presents nothing warranting review, the petition should be denied.

II. TJFA incorrectly asserts that *Robinson* was not applied in the evidentiary proceeding.

TJFA asserts that "this case is an ideal vehicle" to establish precedent that the *Robinson* standards for the admission of expert testimony apply in administrative proceedings.[28] But the applicability of those standards is not, and never has been, a matter of contention in this case.

No one involved in this proceeding (neither any party, the ALJs, the TCEQ Commissioners, the district court, nor the court of appeals) has ever disputed that the standards for expert witnesses were applicable to the administrative proceeding below. The Texas Rules of Evidence and applicable standards for expert witnesses, were properly applied. Even so, and contrary to the record, TJFA warns:

[28] Petition at xi.

> Here, the 130EP expert destroyed soil samples, field notes, and field logs, making that underlying data unavailable to the parties, ALJs, and Commission. If expert reports and testimony are admitted in administrative proceedings despite the absence of foundational data, applicants are free to game the system.[29]

TJFA fails to connect the dots between its proclamation that the expert witness standards apply and its assertion that the unavailability of some soil samples, field notes, and field logs violated a standard within the *Robinson* doctrine. As explained elsewhere, the ALJs did not decline to apply *Robinson;* instead, they thoroughly tested the expert's testimony for reliability, leaving no issue requiring review.

A. The ALJs acted well within the scope of the Robinson doctrine and their sound discretion in admitting into evidence the Geology Report and testimony regarding it.

The issue below in the TCEQ administrative proceeding was whether 130EP's permit application complied with all applicable statutory and regulatory requirements.[30] The Geology Report is an important component of a landfill permit application.[31] It is not surprising that the ALJs devoted over a quarter of their 211-page Proposal for Decision to discussing geology and hydrogeology issues. TJFA has resolutely avoided addressing this issue, and instead attempted to derail the hearing process at every juncture to focus on 130EP's expert's failure to retain soil samples and field logs, as if that rendered their testimony unreliable and

[29] Petition at 20.
[30] *Id.*; 30 Tex. Admin. Code § 55.210(b).
[31] Petition at 7-8.

inadmissible. Though the ALJs recognized that data from both sides supported the approval of the application, TJFA continues its game plan of challenging the process rather than the actual data, which supports 130EP's position and the ultimate decision to grant the permit application.

130EP disagrees with TJFA's assertion that the failure to retain materials from the investigatory fieldwork deprived the tribunal of any basis to find experts' opinions reliable. TJFA's argument conflates the fieldwork with the many, and specifically required, forms of "data" that must, by TCEQ rules, be included in an application, items that were properly relied upon and that supported TCEQ's ultimate decision to grant 130EP a permit.

TCEQ's rules prescribe in great detail the form and content required of the Geology Report to be submitted with Part III of a landfill permit application, including "boring logs" containing specific information in specific form.[32] To accomplish its requirements, a state-licensed driller collected soil samples from borings drilled at specific surveyed locations and to depths directed by 130EP's geologist. The samples and field logs were then transported to 130EP's geology and geotechnical experts. Each soil sample was visually inspected by 130EP's experts who then obtained the required laboratory test data and prepared the boring logs and Geology Report. All foundational data regarding the geology at the Site that was

[32] 30 Tex. Admin. Code § 330.63(e).

used in preparing the Geology Report (and the expert testimony supporting it) was presented in the application in the form required by the rules: boring logs and laboratory reports.

The missing 2013 soil samples were not "data" (*see Merriam-Webster,* definition of "data": "factual information [such as measurements or statistics] used as a basis for reasoning, discussion, or calculation")[33], so they were not "foundational data" (although various factual information regarding them, as described above, was "foundational data") and their absence does not give rise to *Robinson* issues. The ALJs considered TJFA's objections and found that:

> the disposal of the field logs and the 2013 samples do not render the findings and conclusions in the geology report inaccurate, scientifically unreliable, or legally insufficient.[34]

That is precisely what *Robinson* required.

While evidence admitted at trial must meet fairly stringent standards, matters relied upon by experts to form their opinions need not meet those same standards:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.[35]

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[33] "Data." *Merriam-Webster.com*. 2022. https://www.merriam-webster.com (4 April 2022).
[34] 30AR248 (PFD), at 61.
[35] Tex. R. Civ. Evid. 703.

As found by the ALJs, Mr. Snyder's opinions were proven reliable and were therefore admissible under Rule 703.

B. The expert opinions supported by appropriate data submitted with the application supported the ALJs' recommendation to grant the Permit.

As discussed above, ample data was developed and reviewed through the geology investigations to support the opinions of 130EP's geologist. The ALJs granted TJFA's request to independently evaluate and test that data itself by conducting its own geology investigation, and thoroughly scrutinized the data themselves after it was challenged by TJFA. Likewise, the data developed during investigation of the Site was connected through the expert analyses and opinions in the boring logs and Geology Report to produce the conclusions therein.

TJFA minimizes the Court of Appeals' analysis of its *Robinson* challenge, stating:

> The court of appeals rejected the *Robinson* challenge, concluding that TJFA could collect its own soil samples and make its own site observations. But no case law relieves a party of the burden to support its expert's opinions nor shifts the burden to the opposing party.[36]

This non-sequitur provides a disservice to the Court. The appellate court's rejection of TJFA's argument is telling:

- TJFA does not dispute that the underlying data supported Snyder's conclusions;

[36] Petition at 21-22.

- Review of the original soil samples and field logs was not the only way to determine if the expert's conclusions were reliable; and
- TJFA's separate geology investigation lent credence to and generally supported the basic findings and conclusions in the Geology Report.

632 S.W.3d at 671-72. Those conclusions led the court of appeals to conclude that the ALJs did not abuse their discretion in not striking 130EP's expert's opinions.

Remarkably, TJFA complains that its:

> site visit was two and a half years after the collection of the 130EP Geologist's data. 49AR-130EP-4 at 19; 63AR-Protestants-6 at 5. That visit did not allow TJFA to recreate the 130EP Geologist's underlying observations nor collect the same soils and materials he analyzed and characterized.[37]

This, in a nutshell, exposes the defects in TJFA's argument. The issue before the ALJs involved the characterization of the geology – geology of the early Cenozoic Era, more than fifty-million years old. All TJFA seems to care about are the samples taken by 130EP's expert's team from that ancient formation two and a half years prior to TJFA's site investigation, when TJFA drilled as many borings, collected as many samples, and conducted all of the other geologic investigations it wanted to challenge 130EP's geologic report. It is abundantly clear that TJFA could not have cared less about geology: in its spoliation-based motions to the ALJs, resurrected on appeal in the form of *Robinson* claims, TJFA has been solely interested in attempting to discredit 130EP's experts as a way to avoid their opinions,

[37] Petition at 22.

even though evidence presented by TJFA itself actually agreed with their ultimate conclusions.

PRAYER FOR RELIEF

For these reasons, Respondent 130 Environmental Park, LLC respectfully requests that this Court deny the petition for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this document contains 4,471 words, excluding those sections identified in Texas Rule of Appellate Procedure 9.4(i)(B).

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CERTIFICATE OF SERVICE

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