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SUPREME COURT OF TEXAS
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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

PETITIONERS' REPLY BRIEF ON THE MERITS

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

Because the Administrative Law Judges' Proposal for Decision in the Administrative Record includes two sets of consecutively paginated pages within the same document, references to that document include a notation of either "(PFD)" or "(FOF [no.])" or "(COL [no.])," as appropriate. The PFD is 30AR248 in the Administrative Record.

ACRONYMS AND SHORTHAND REFERENCES

130EP	130 Environmental Park, LLC
ALJ	Administrative Law Judge
The County	Caldwell County
EPICC	Environmental Protection in the Interest of Caldwell County, an organization formed by nearby property owners and Caldwell County residents opposed to the landfill.
TJFA	TJFA, LP owns property near the landfill site. For convenience, the briefing collectively refers to the Petitioners as TJFA, as the court of appeals did in its opinion. But Petitioners include TJFA, LP; 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

INTRODUCTION

Section 363.112 of the Texas Health & Safety Code gives local governments "unquestionabl[e]" authority to restrict where solid-waste landfills can be located. *Hallco Tex., Inc. v. McMullen Cnty.*, 221 S.W.3d 50, 53, 61 (Tex. 2006). But the TCEQ has a "long-standing history" of terminating that authority prematurely,[1] arrogating to itself the power to issue a landfill permit even when a local ordinance says no. The court of appeals' decision has now validated the TCEQ's usurpation, creating separation-of-powers concerns by signing off on the agency's policy decision to ignore local law. *See* Br. of Amicus Curiae The Texas Public Policy Foundation (June 17, 2022).

Respondents make no pretense that the only way TCEQ could issue the landfill permit here was to revise and eliminate words from Section 363.112(c)(1). Their defense of the court of appeals' holding thus fails on the text of the statute itself.

Local governments have singular knowledge about their solid-waste needs, community concerns, and site appropriateness. That is why the Legislature ensured that the local perspective is critical in the State's solid-waste-management scheme.

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[1] Br. of Amicus Curiae City of Waco, *et al.* at 13, 17 (July 12, 2022).

The Court should correct the court of appeals' misreading of Section 363.112(c)(1) and restore the authority the Legislature has afforded local governments.

The Court should grant review for another reason. To justify their reliance on unreliable expert testimony, Respondents cite the remedy TJFA received for 130EP's spoliation of investigative site materials. But this case presents no spoliation question. It is clear that the key foundational materials for the 130EP Geologist Expert's opinions are missing. Without the underlying basis for the expert's conclusions, the ALJs could not evaluate the opinions, and they were thus wrongly admitted. Neither TCEQ nor 130EP can redeem the court of appeals' ruling on this point, which independently undermines the permit.

ARGUMENT

I. The court of appeals' opinion impermissibly abrogates the County's landfill ordinance.

TCEQ and 130EP cannot rehabilitate the court of appeals' misreading of the operative statute allowing the Commission to ignore the County's ordinance. A county's authority to adopt a restrictive ordinance does not end until "an application for a permit…has been filed with and is pending before the commission." TEX. HEALTH & SAFETY CODE § 363.112(c)(1). Respondents' arguments—just like the court of appeals' opinion—revise and ignore this plain text.

A. TCEQ's arguments cannot erase the statutory condition—"an application *for a permit*"—and eliminate a county's authority.

The County had the power to prohibit local landfills until an "application for a permit" was filed and pending at the Commission. Like the court of appeals, TCEQ's response reads as if the statutory phrase "for a permit" were a ghost.

1. An early land-use-compatibility request is not a landfill-permit application.

TCEQ asserts that a request for an early land-use-compatibility determination is an "application for a permit." TCEQ reasons that because Section 361.069 permits TCEQ to process a component of a permit application (the land-use piece) early, before an entire application is filed and pending, that first component becomes, in spirit if not reality, the same as a landfill-permit application. 130EP.BOM.17-20.

But a preliminary compatibility request is not an application for a permit. The statute's text thus defeats TCEQ's argument. The ordinary meaning of "application for a permit" is a full, complete, or comprehensive application that can result in a landfill permit. *See, e.g.*, *In re Est. of Nash*, 220 S.W.3d 914, 917 (Tex. 2007) (courts must give unambiguous statutory language its common meaning). The Legislature's inclusion of the modifiers "filed with" and "pending before the commission" further confirm that an "application for a permit" in Section 363.112(c)(1) cannot exist until it is complete. TCEQ never suggests that the submission of Parts I and II (but not III and IV) can secure a landfill permit. Even the court of appeals agreed that a land-use-compatibility request could not result in a landfill permit. *TJFA, L.P. v. TCEQ*, 632 S.W.3d 600, 668 (Tex. App.—Austin 2021, pet. filed).

The mere fact that the agency is authorized to take an early step does not alter the character of an incomplete submission to the agency. A tax return is not complete until it is signed; a ballot is not effective until it is cast; and partial payment on an installment loan will not discharge the debt. A process containing multiple steps does not mean later, critical requirements need not be met to secure a permit.

By statute and TCEQ's rules, a land-use submission could never substitute for a completed landfill-permit application. *See, e.g.*, *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002) ("In ascertaining a term's meaning, courts look

primarily to how that term is used throughout the statute as a whole. Statutory terms should be interpreted consistently in every part of an act.").

As TJFA has explained, TJFA.BOM.32-33, Section 361.069's opportunity for an early land-use-compatibility determination lacks any indication that completion of Parts I and II fulfill the requisites of an "application for a permit." *See* TEX. HEALTH & SAFETY CODE § 361.069. Adjacent provisions specify that a "permit application" is "administratively complete" only when the full application is submitted and ready for review; incomplete applications are "withdrawn." *Id.* §§ 361.066(b), .069.

The agency's rules confirm that a land-use-compatibility request is not a landfill-permit application. They establish that a landfill-permit application comprises *four parts*—not just the two that make up the land-use-compatibility request. Rule 330.57(a)—the rule implementing Section 361.069, which TCEQ relies on—explains:

> The application for a municipal solid waste facility is divided into Parts I-IV. Parts I-IV of the application ***shall be required*** before the application is declared administratively complete[.]

30 TEX. ADMIN. CODE § 330.57(a) (emphasis added). The rule distinguishes submission of Parts I and II as "a partial application" and "a partial permit application," and defines "[a] complete application" as "consisting of Parts I-IV of the application." *Id*. Only after the four-part application has been received do the

statute and rules call a permit application administratively complete and ready for Commission review. TEX. HEALTH & SAFETY CODE § 361.066(b); 30 TEX. ADMIN. CODE § 330.57(a).

In addition, TCEQ's rules include a variety of applications and submissions. The universe of submissions to TCEQ is larger than solid-waste-landfill permit applications and land-use-compatibility-determination requests. TCEQ supervises the gamut of waste activities. *See, e.g., id.* §§ 330.5(a) (facilities for used and scrap tires, sludges), 330.7(e) (animal crematories), 330.9 (certain waste transfer stations, recycling facilities, certain grease and grit trap waste processing facilities, and certain liquid waste processing and transfer facilities). In the context of the many possible submissions to TCEQ, the descriptor "for a permit" in Section 363.112(c) takes on greater significance and makes clear that it is only that type of application that can terminate local authority.

TCEQ's answer is to emphasize that that Section 363.112(c)(1) does not also say that all four parts are required. TCEQ.BOM.18. It is true that the agency has divided the permit application into four parts. *See id.* §§ 330.57(a), .59, .61, .63, .65. Regardless, Section 363.112(c)(1) specifies the type of "application" on which county authority hinges: an "application for a permit." TEX. HEALTH & SAFETY CODE § 363.112(c)(1). The agency's division of a permit application into four parts

does not mean it could also redefine what a permit application is. An incomplete application does not suffice.

TCEQ contends that TJFA has cited no authority requiring that all four parts of an application must be filed and pending before a county's siting-ordinance authority expires. TCEQ.BOM.17-18. TJFA has, to the contrary, recited black-letter authority mandating that courts enforce all the terms of a statute and prohibiting courts from rewriting statutory language. TJFA.BOM.26-28. That authority compels enforcement of the plain meaning of the phrase "application for a permit."

TCEQ points to Section 361.069's provision for an optional, preliminary land-use analysis to justify its interpretation of Section 363.112(c)(1), but never acknowledges that ***no early land-use-compatibility determination ever happened***. *See* TJFA.BOM.8-9, 34-36; TJFA.PFR-Reply.6-7.[2] And no applicant has ever completed the two-step permit-application approach. TJFA.BOM.34-37. Section 361.069 is simply not relevant in this statutory equation.

2. Section 361.069 and Section 363.112(c)(1) are compatible.

TCEQ contends that if Section 363.112(c)(1) requires a complete "application for a permit" before the County's right to preclude a landfill expires, then it conflicts

[2] Land-use compatibility was not determined until September 2017, when the Commission considered the full application and granted the permit. CR308-10 (FOF290-320), CR320 (COL18).

with Section 361.069's opportunity for an early land-use-compatibility determination. TCEQ.BOM.18. There is no conflict. *See generally Great Dane Trailers, Inc. v. Est. of Wells*, 52 S.W.3d 737, 743 (Tex. 2001) ("an actual conflict" exists when it is "impossible" to comply with two different statutory provisions or one provision "obstructs accomplishing and executing [the] full purposes and objectives" of another provision).

TCEQ cannot explain how a plain-text reading of Section 363.112(c)(1), one that gives meaning to the whole phrase "application for a permit," makes it impossible for the Commission to exercise its authority under Section 361.069 to make a separate land-use determination.

Indeed, this Court has required harmonization of statutes, over a claim of conflict, when that can be reasonably accomplished. *See, e.g., In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686, 716 (Tex. 2015) (orig. proceeding). Section 361.069's sole function is to permit the Commission to make a separate, initial land-use-compatibility determination. Section 363.112(c)(1) concerns a discrete matter: local-government authority to restrict landfill locations. Section 363.112(c) does not impair the Commission's authority under Section 361.069. Section 361.069 need not be read, as TCEQ urges, to alter Section 363.112(c)(1)'s text to either eliminate the phrase "for a permit" or to allow a land-use request to qualify as an "application

for a permit." With no clash in language or purpose, the two provisions harmoniously co-exist.

Moreover, statutory-construction conventions do not selectively delete statutory language. When there is a truly irreconcilable conflict, the more recent enactment prevails. *See* TEX. GOV'T CODE § 311.025(a); *Mem'l Hermann*, 464 S.W.3d at 716. Here, the later statute is Section 363.112(c)(1). The Legislature added local government-authority to the solid-waste management scheme eighteen years after instituting the early land-use determination option. *See* Acts 1999, 76th Leg., R.S., ch. 570, §§ 4, 5 (p.3111) (eff. Sept. 1, 1999); Acts 1981, 67th Leg., R.S., ch. 831, § 4 (pp.3174-75) (eff. Sept 1, 1981). Even indulging TCEQ's erroneous contention that Section 363.112 and 361.069 conflict, Section 363.112 controls.

3. TCEQ deletes language from Section 363.112(c)(1).

TCEQ urges the Court to adopt the court of appeals' deletion of critical language from Section 363.112. TCEQ thus asks the Court to dismiss the phrase "for a permit" from Section 363.112(c)(1).

Like the court of appeals, TCEQ identifies the dispositive terms in Section 363.112(c)(1) as only "application," "filed with," and "pending," TCEQ.BOM.14-15, omitting the phrase "for a permit." TEX. HEALTH & SAFETY CODE § 363.112(c)(1). That is the only way TCEQ can plausibly contend that the land-use-determination request precluded the County from adopting a siting ordinance. *See,*

e.g., TCEQ.BOM.1 ("filing of *a portion of* 130 Environmental Park's (130EP) application for a landfill permit constitutes an application filed and pending with the Commission") (emphasis added). TCEQ relies heavily on the land-use-compatibility submission's status as "administratively complete" before the County enacted its siting ordinance, TCEQ.BOM.14-15, but that status cannot transform the submission into an "application for a permit" under Section 363.112(c)(1).

The eliminated words are consequential. The Legislature established when local government authority ends: only when ***an application for a landfill permit*** is ready for disposition by the Commission.

4. The court of appeals adopted TCEQ's erroneous statutory interpretation.

TCEQ's denial that the court of appeals deferred to the agency's misreading of Section 363.112(c)(1) rings hollow. TCEQ.BOM.16. The court's elimination of the statutory phrase "for a permit" is as plain as the text of that section.

TCEQ repeatedly emphasizes the authority and discretion the Legislature has given the agency, *see, e.g.*, TCEQ.BOM.17-18, but that authority does not include expanding its authority beyond statutory limits. If a statute's text is not strictly observed, then the reviewing court has, in effect, improperly substituted its own policy preference for the legislative command. *See generally Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 315 (Tex. 2001) (agencies possess "only those powers that the Legislature expressly confers upon it"). Here,

the court of appeals improperly indulged the agency's flawed understanding of its own authority and thus diverted the law from its textual roots. *See, e.g., Pretzer v. Motor Vehicle Bd.*, 138 S.W.3d 908, 915 (Tex. 2004) (per curiam) (rejecting deference to agency's interpretation of statutory sanctions that did not follow plain language); *Bexar Metro. Water Dist. v. City of Bulverde*, 156 S.W.3d 79, 90 (Tex. App.—Austin 2004, pet. denied) (rejecting deference to TCEQ's interpretation of water district's enabling statute because agency had "no expertise that is greater than the courts").

The Texas Public Policy Foundation has correctly concluded that the court of appeals' holding, which gives the agency discretion in interpreting Section 363.112(c)(1), amounts to an unconstitutional delegation of powers. *See* Br. of Amicus TPPF at 11-15; TCEQ.BOM.17. TCEQ dismisses TPPF's point as misunderstanding "administrative law precedent" and "invalidating" Section 361.069's opportunity for an early land-use-compatibility determination. *Id*.

TCEQ offers no specifics on its superior grasp of "administrative law precedent." And, as discussed, TCEQ never demonstrates how giving effect to all the words in Section 363.112(c)(1) would render Section 361.069 inoperable. *See supra* Section I.A.2. In addition, the bar for an "absurd result" is high. Rejecting a statutory reading on that ground occurs only in "truly exceptional cases" when "it was quite impossible that a rational Legislature could have intended [that result]."

Combs v. Health Care Servs. Corp., 401 S.W.3d 623, 630-31 (Tex. 2013). TCEQ does not establish the necessary "unthinkable or unfathomable" result here. *Id.* Implementation of Section 363.112(c)(1)'s statutory text reasonably preserves local authority unless and until a complete permit application is submitted and ready for consideration.

5. TCEQ invokes a results argument, but policy choices belong to the Legislature.

Lacking a textual basis, TCEQ warns about the supposed consequences of adherence to Section 363.112(c)(1). TCEQ.BOM.20. But these are policy preferences, not statutory interpretation.

TCEQ's assertions are also misplaced. TCEQ claims that TJFA's argument "would give counties power over ***every application filed***." *Id*. (emphasis added). But the statutory language says a local government may restrict landfills only up until "an application for a permit" is "filed" and "pending" with TCEQ. TEX. HEALTH & SAFETY CODE § 363.112(c)(1). Rather than "total veto power," TCEQ.BOM.20, a plain-text reading of Section 363.112(c)(1) recognizes local authority ***until*** permit applications are filed, but not after.

TCEQ also predicts that accepting Section 363.112(c)(1)'s plain language would make the "first step of the bifurcated process ***useless***," causing a "***needless waste of time and resources***," because a county could pass a landfill ordinance after a land-use-compatibility determination is requested. *Id*. (emphasis added). The

purpose of the early land-use-compatibility determination is to allow landfill developers to know sooner rather than later if the intended site is appropriate. That purpose would be served, undermining TCEQ's characterization.

In any event, the early land-use-compatibility process is already a waste of time. Developers have perverted its purpose. Legislative evidence shows that permit applicants are using the two-step opportunity to end-run local authority and that ***no one has ever completed the two-step process*** in obtaining a permit. TJFA.BOM.34-37; TJFA.PFR-Reply.6-7. Developers use the statute as a mechanism to freeze local authority, but not to complete the process. TCEQ protests the use of this evidence, TCEQ.BOM.21-22, but it provides important real-world context.

The Legislature chose not to protect ***potential*** landfill-permit applicants, but applicants with a landfill-permit application on file and awaiting a decision. That line was the Legislature's to draw.

B. Each of 130EP's three arguments denying the County's authority fails.

130EP claims that three distinct implementations of Section 363.112(c)(1) allow the County's ordinance to be ignored. 130EP.BOM.20-21, 28-33. None has merit.

1. Like TCEQ, 130EP wrongly claims that the land-use-compatibility submission was a landfill-permit application.

130EP's first argument echoes TCEQ's position that 130EP's land-use submission was a permit application, but 130EP's version of this contention is narrow and explicitly based on agency rules. 130EP.BOM.20, 28-29. Its argument is that under TCEQ rules, landfill operators can submit either "complete applications" (Parts I, II, III, and IV) or "partial applications" (Parts I and II), and both are "applications" that activate the statutory condition ("filed" and "pending" "application for a permit") in Section 363.112(c)(1). 130EP.BOM.28-29.

130EP does not explain how it is permissible to delete the defining phrase "for a permit" from Section 363.112(c)(1). Its theory instead rests on TCEQ's rulemaking authority. Because the agency's rules call a permit application a "complete application" and a land-use-compatibility-determination request a "partial application," 130EP concludes that agency-selected nomenclature supplies the answer. 130EP.BOM.28-29. In 130EP's view, because the Legislature gave the agency authority to establish permit rules, and the agency chose to call each kind of submission a type of "application," they must both satisfy the statutory prerequisite for ending local government authority, which is Section 363.112(c)(1)'s "application for a permit."

But the ***Legislature***'s language choices in the statute control the agency and County's authority here and should also have controlled the ***court of appeals***'

holding. A semantic choice the agency made in referencing a land-use submission in a rule cannot displace the Legislature's decision regarding the scope of local governmental authority.

130EP denies that TCEQ has overreached. *See, e.g.*, 130EP.BOM.1-2, 18.[3] But it invokes the agency's "broad" discretion and "dominant" authority to bolster the Commission's decision, 130EP.BOM.21-25, and explicitly relies on TCEQ's discretionary rule-making choices to claim that the land-use submission qualifies as an "application for a permit." But authorization to implement the opportunity for an early land-use determination did not give the agency authority to redefine a permit application.

Separation-of-powers constraints require courts to recognize the limitations that statutory provisions impose on agency discretion so agencies do not make policy decisions. *See* Br. of Amicus TPPF at 11-15. What 130EP advocates—and the court of appeals' opinion sanctions—is an intrusion on the separation of powers. *See* TEX. CONST. art. II, § 1, art. III, § 1.

When the Commission departed from the statutory text for ending local government authority by deciding that a land-use determination request—which is

[3] Amici City of Waco, *et al.* urge the Court to "defer" to TCEQ's understanding of its statutory authority, but like TCEQ, fail to show how the prerequisites for potentially permissible deference are satisfied. Br. of Amicus City of Waco at 13; *see also* Br. of Amicus TPPF at 8-10; TJFA.PFR-Reply.5-6; TJFA.BOM.40-42.

decidedly ***not*** an "application for a permit"—terminated the County's authority, the Commission made a policy determination. The court of appeals interpreted the Health & Safety Code provisions in a way that impermissibly gives TCEQ discretion to make that legislative policy decision, in violation of separation-of-powers limitations, by allowing the agency to decide whether to preempt local governmental authority to restrict landfills after a "partial application" or after a "complete application."

Moreover, any deference here is unfounded. The Legislature created a role for TCEQ in solid-waste management, but 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 for courts that check executive-branch authority and enforce legislative policy. *See Baldwin v. United States*, 140 S.Ct. 690, 691-92 (2020) (Thomas, J., dissenting) (recognizing that agency deference "undermines the ability of the Judiciary to perform its checking function" and can subvert "structural constraints on all three branches"); *see also generally Loper Bright Enters. v. Raimondo*, No. 22-451, —S.Ct.—, 2023 WL 3158352 (U.S. May 1, 2023) (granting petition for certiorari on question of whether statutory ambiguity requires deference to agency interpretation). Deference to TCEQ's expansive assertion of its power, and its simultaneous elimination of a governmental counterpart's authority, should be corrected.

2. A land-use-compatibility determination request is not an "other authorization" under Section 363.112.

Section 363.112(c)(1) includes an alternative statutory condition to a filed and pending landfill-permit application that can end a local government's siting ordinance authority: an "application for…other authorization under Chapter 361 [the SWDA]." TEX. HEALTH & SAFETY CODE § 363.112(c)(1). As a second basis to repudiate the ordinance, 130EP now claims that its land-use-analysis request was such an "application" for "other authorization." 130EP.BOM.29.

This is a new, but equally unavailing, argument for 130EP. It did not raise this argument at any stage of this litigation. *See* TEX. R. APP. P. 33.1; *Fed. Deposit Ins. Corp. v. Lenk*, 361 S.W.3d 602, 604, 612 (Tex. 2012) ("When a party fails to preserve error in the trial court or waives an argument on appeal, an appellate court may not consider the unpreserved or waived issue."); *Tex. Dep't of Pub. Safety v. Cuellar*, No. 01-22-00085-CV, 2023 WL 2376132, at *4 (Tex. App.—Houston [1st Dist.] Mar. 7, 2023, no pet.) (mem. op.) (failure to raise arguments before the ALJ waived arguments).

Nevertheless, TJFA invites the Court to address this argument on the merits. A TCEQ land-use determination does not authorize anything, by any understanding of the statutory term "authorization." It merely results in an analysis of the proposed site in light of surrounding land uses and the opportunity to submit a full landfill-

permit application. *See* TEX. HEALTH & SAFETY CODE § 361.069; 30 TEX. ADMIN. CODE § 330.57(a).

3. 130EP's registration of a transfer station cannot satisfy the statutory condition to end local-government authority to adopt landfill ordinances.

Similarly, 130EP asserts that its request for a waste-transfer-station registration satisfied the statute's alternative condition for ending the County's ordinance authority—another so-called "other authorization." 130EP.BOM.30-33; TEX. HEALTH & SAFETY CODE § 363.112(c)(1) (disallowing a county from passing a siting ordinance if "an application for...other authorization under Chapter 361 has been filed with and is pending before the commission"). The court of appeals chose not to affirm on this alternative theory. This Court should flatly reject it.

First, 130EP's reading of Section 363.112(c)(1) does not support its claimed effect for its transfer-station registration. 130EP cites only part of the provision and ignores Section 363.112(c)(1)'s key phrase tying the cited part of the provision—"application for a permit or other authorization under Chapter 361"—to ***what*** a local government may not prohibit. The entire provision must be considered:

> (c) The governing body of a municipality or county may not prohibit the processing or disposal of municipal or industrial solid waste in an area of that municipality or county ***for which***:
>
> (1) an application for a permit or other authorization under Chapter 361 has been filed with and is pending before the commission;

Id. (emphasis added). A local government loses authority to restrict ***only*** "the processing or disposal…***for which***…an application for…other authorization under Chapter 361" has been filed. *Id*. (emphasis added). What a local government loses the ability to prohibit by virtue of an "application for…other authorization" is the waste activity covered by that application.

Here, to the extent that the registration request affected what the County could enact, it cut off only the County's authority to prohibit a transfer station. The dispute here is not about a transfer station that was never built.[4] Thus, the transfer station's potential effect on the County's ordinance authority is not relevant.

Second, TCEQ has explicitly rejected 130EP's theory on transfer stations. In a separate permit proceeding, TCEQ made clear its policy that a transfer-station application cannot invalidate an ordinance's landfill prohibition when, like here, the transfer-station registration was filed before the ordinance. *See* CR195, 575-86; 30AR241 & Attachs. A & B (Pintail proceeding).[5] A court should, in fact, defer to

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[4] 130EP claims a Third Court of Appeals' decision "unquestionably" establishes that a transfer-station registration is an "other authorization under Chapter 361." 130EP.BOM.31 & n.86 (citing *McDaniel v. Tex. Nat. Res. Conservation Comm'n*, 982 S.W.2d 650, 651-53 (Tex. App.—Austin 1998, pet. denied)). The words "transfer station" do not appear in that opinion. And the opinion did not consider Section 363.112(c)(1). Instead, *McDaniel* generally observed that the then-Texas Natural Resource Conservation Commission could "us[e] different levels of regulation, including both permitting and registration." 982 S.W.2d at 652. No court has considered 130EP's argument. Regardless of what *McDaniel* means about transfer stations, a registration request's impact on local prohibitory authority is limited to the waste activity covered by the registration request.

[5] The Commission explicitly rejected 130EP's transfer-station-registration theory. *See* TCEQ—Commissioners' Meeting, *Petition for Contested Case Hearing on Regulatory Taking*, Docket No. 2017-0791-MSW, Agenda Item 3, at 15:50 (Oct. 4, 2017),

TCEQ's position—not because it owes that agency deference, but because TCEQ, in this instance, has stated the law correctly.

The Commission appropriately followed its precedent here, and did not rely on the waste-transfer-station registration. *See, e.g., Flores v. Emps. Ret. Sys. of Tex.*, 74 S.W.3d 532, 544-45 (Tex. App.—Austin 2002, pet. denied) (agency departures from prior policies should include rational reasoning and adoption of new policies without notice may deprive parties of procedural due process); *see also* CR310-11, 318-19, 321 (FOF317, 319, 325-27; COL1, 5, 41). The Court should decline

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https://www.adminmonitor.com/tx/tceq/agenda_meeting/20171004/; *see also id.* at 21:10 (explanatory comments by now-TCEQ Chair Jon Niermann); *id.* at 23:00 (comments by then-Commissioner Toby Baker remarking that "I can't imagine the outcry" if the Commission determined that a waste-transfer station could cut off local government authority to restrict landfills and stating that "I don't think when the Legislature wrote that, that that was the intent.").

In the same proceeding, the TCEQ Executive Director explained the agency's position that a transfer-station registration did not exempt the proposed landfill from a county siting ordinance:

> [T]he filing of a transfer station application, or even the issuance of a transfer registration, should not be the basis for declaring a local ordinance not applicable. Transfer stations operate to process municipal solid waste, whereas landfills are designed to dispose of the waste. Transfer stations are authorized by registration and as such, they are not subject to the same level of public participation that a landfill is subject to. Most notably, they are not subject to a contested case hearing. There are many levels of authorization under THSC Chapter 361, from notices to registrations to permits. Accepting Pintail's argument could lead to a scenario in which a compost registration is issued and later, after a local ordinance is adopted, a landfill application is filed for the same general area and is a grandfathered from the ordinance by the compost registration. Such a result is unreasonable and could not have been intended by the legislature. A reasonable reading of the statute would be that the existence of a transfer station registration at a specified location in a county or city serves to grandfather that area for future transfer stations, but not for landfills.

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130EP's invitation to use its transfer-station registration to abrogate Caldwell County's ordinance. Such a decision would impermissibly impose a new policy.[6]

Indeed, the agency does not invoke this alternative ground for affirmance, TCEQ.BOM.13-22, and has never advocated in this litigation that county ordinance authority ended with 130EP's transfer-station registration.

II. 130EP and TCEQ's defenses of the expert admissibility holding fail.

The court of appeals' opinion ignored the requirements of this Court's decision in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). Respondents assert several arguments in defense of the court of appeals' admissibility holding, but none justify its reliance on a spoliation remedy to sidestep the reliability defect in 130EP Geologist Michael Snyder's opinions.

A. TCEQ asserts that spoliation displaces *Robinson* and suggests that *Robinson* might not apply to administrative proceedings.

1. TCEQ's spoliation arguments are irrelevant.

TCEQ asserts that the ALJs correctly applied the *Robinson* standard and suggests that the spoliation ruling resolved the *Robinson* challenge, arguing only

[6] Moreover, 130EP did not advance this argument or seek findings and conclusions at SOAH. *See, e.g.,* 33AR267 at 2-3, 25-26, 46; 32AR255 at 24; 32AR258. Because 130EP and Pintail share the same corporate parent (Green Group Holdings), 30AR241 at Attach. A; 30AR237 at 8, 130EP was familiar with the Commission's policy on this point from the Pintail proceeding and knew the Commission would reject this argument. 130EP's cited principle of affirming on an alternative ground supported by the record does not absolve parties of waiver. *See* 130EP.BOM.30. Indeed, waiver forecloses a basis in the record for an alternative holding. The Commission was not given the opportunity to consider this issue, and the Court should not entertain this argument. *See, e.g., Cuellar*, 2023 WL 2376132, at *4.

spoliation points. TCEQ.BOM.23-27. The Court will note that TJFA has not raised spoliation. TJFA.BOM.xvi-xvii.

TJFA contends that the court of appeals did not enforce the standards for expert testimony admissibility for the 130EP Geology Expert. *Id.* TCEQ asserts that TJFA's arguments were addressed when TJFA obtained a spoliation ruling from SOAH. But a spoliation finding does not establish that the expert's opinions are reliable. Reliability is an independent obligation. *See Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256, 262 (Tex. 2012). TCEQ also claims, without explanation, that "apply[ing] the [*Robinson*] standards…to all administrative hearings is unnecessary and unfair to 130EP." TCEQ.BOM.12; *see also id*. at 22 n.31 (asserting that a *Robinson* objection would not preclude evidence under Texas Government Code § 2001.081).

2. TCEQ's procedural distractions do not justify the court of appeals' decision.

TCEQ asserts three procedural standards, without application to specifics in this case.

First, TCEQ claims that TJFA seeks a re-weighing of the evidence. TCEQ.BOM.22, 28-29. This is not true. TJFA does not, for example, contend that particular evidence played too large or too small a role in the Commission's assessment. It urges, instead, that the expert's opinions were not reliable, barring SOAH and the lower courts from considering his opinions.

Second, TCEQ urges deference to the ALJs on this ruling. TCEQ.BOM.27-28. But highlighting the abuse-of-discretion standard only proves TJFA's point. The test for an abuse of discretion is whether the ruling lacked reference to guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). The guiding rule was announced in *Merrell Dow Pharmaceuticals, Inc. v. Havner*: the "[t]he underlying data should be independently evaluated in determining if the opinion itself is reliable." 953 S.W.2d 706, 713 (Tex. 1997); *accord Helena Chem. Co. v. Cox*, —S.W.3d—, No. 20-0881, 2023 WL 2335694, at *5 (Tex. Mar. 3, 2023); *Guadalupe-Blanco River Auth. v. Kraft*, 77 S.W.3d 805, 808 (Tex. 2002). To avoid an abuse of discretion, the underlying materials had to be reviewed. "[T]he court must be provided with some way of assessing the reliability of objected-to expert testimony, apart from the expert's credentials and say-so." *Helena Chem.*, 2023 WL 2335694, at *5. Here, the underlying data was ***missing***, depriving the ALJs or any court of a basis to assess the reliability of the Geology Expert's opinions.

Third, TCEQ asserts that TJFA cannot demonstrate harm from the admissibility error. TCEQ.BOM.28. But the Geology Expert's opinions comprise the critical component of a landfill-permit application. *See* Br. of Appellee 130 Environmental Park, LLC, at 29, No. 03-19-00815-CV (Tex. App.—Austin July 6, 2020) (conceding that Geology Report is "pivotal component" of application),

https://tinyurl.com/4u4my7cz; *id.* at 44 ("If the Geology Report were excluded, 130EP's Application would not satisfy TCEQ rules, making that action a death-penalty sanction."); 20AR90 at 17 (same); 30 TEX. ADMIN. CODE § 330.63(e)(4) (requiring a geology report from a qualified expert that includes "the results of investigations of subsurface conditions"). A permit could not be granted without this expert evidence. A ruling incorrectly admitting the expert opinions necessarily caused harm, reversible error, and the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1; *see also Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388, 410 n.23 (Tex. 2016) ("Unreliable expert testimony is legally no evidence."); *Coastal Transp. Co. v. Crown Cent. Petrol. Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) (bare conclusions and incompetent evidence cannot support a judgment); *Merrell Dow*, 953 S.W.2d at 713 ("If the expert's scientific testimony is not reliable, it is not evidence.").

B. The court of appeals wrongly relied on a spoliation remedy to avoid the admissibility problem, and 130EP's alternative arguments do not justify the ruling.

130EP works hard to excuse its destruction of the soil samples, field notes, and driller's field logs that underlie the Geology Report. First, like the court of appeals, it claims that a site visit by the TJFA expert cured any reliability problem. Second, it attempts to rewrite the basis for the expert opinions.

Neither assertion holds up.

1. The court of appeals improperly relied on the ALJs' spoliation remedy to salvage 130EP's expert's opinions.

130EP embraces the court of appeals' reliance on the TJFA site visit work to "cure[]" any reliability problem. 130EP.BOM.34.

The court of appeals upheld the 130EP Geologist's opinions as admissible based on two aspects of the TJFA site visit: (1) the ALJs' statement that the TJFA expert's site report "generally support[ed] the basic findings and conclusions set forth in the Geological Report"; and (2) TJFA's request for a site visit to "obtain the type of data necessary to test" Snyder's opinions. *TJFA*, 632 S.W.3d at 671-72. 130EP argues these aspects cured any defect.

First, reference to materials never considered by the 130EP Geologist (the TJFA expert's opinions) to call his opinions reliable has no support in the case law. Reliability is assessed by "independently evaluat[ing]" "the underlying data." *Merrell Dow*, 953 S.W.2d at 713; *accord Helena Chem.*, 2023 WL 2335694, at *5. By citing work by a different expert, conducted three years later, the court of appeals contravened this Court's instruction that an expert "show the connection between the data relied on and the opinion offered." *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 906 (Tex. 2004). The TJFA expert produced her site report long after Snyder reached his opinions, making it impossible for Snyder to have relied on it, and yet that is exactly what the court of appeals cited to render his opinions admissible.

In addition, the court of appeals misread the ALJs' opinion. It observed, incorrectly, that the ALJs took the position that the TJFA expert's site report aligned with Snyder's. *See* TJFA.BOM.49-51. But the ALJs' observation was limited to the type of soil generally present at the site. The two experts were at diametric odds on the critical, and more important, subject of the site's "secondary features" and subsurface permeability—details essential to approving an effective groundwater monitoring system. *See id*. The TJFA expert's opinion disputed Snyder's opinions, undermining the court of appeals' reasoning.

Second, like the court of appeals, 130EP relies on TJFA's remark that it "must be allowed to conduct [its] own investigation so [it] can test Mr. Snyder's opinions," 19AR88 at 2, when it requested a site visit as a spoliation remedy. 130EP.BOM.39-41. But no authority suggests that a spoliation remedy, like TJFA's site-visit request, relieves a spoliating litigant of the separate obligation independently to establish its expert's opinions' admissibility. 130EP and the court of appeals wrongly sweep TJFA's reliability complaint into its earlier spoliation challenge, but these are separate challenges with distinct consequences.

Conflating the two ignores the right to challenge an expert opinion that contains a glaring analytical gap, faulty foundation, or invalid conclusions. The fact that TJFA sought a limited site visit to "test" Snyder's opinions did not mean it believed that 130EP no longer had a burden to show its expert's opinions were

reliable. TJFA made the statement before obtaining and completing the site visit, in anticipation of what TJFA ***hoped a site visit would provide***. This single statement in seeking a site visit in the context of a different issue did not excuse 130EP from satisfying expert admissibility requirements.[7]

130EP disagrees that the court of appeals' reliance on TJFA's site visit imposed an obligation on litigants to investigate the reliability of an opponent's expert's opinions. 130EP.BOM.40. In 130EP's telling, the court of appeals merely "referred" to TJFA's request. *Id*. But the court of appeals explicitly relied on TJFA seeking site access to reject TJFA's *Robinson* challenge. *TJFA*, 632 S.W.3d at 672. In doing so, the court shifted responsibility for showing reliability to TJFA and excused the expert from establishing his underlying foundation. Moreover, the court effectively forced an after-the-fact choice on TJFA: TJFA could pursue spoliation remedies or an admissibility challenge, but not both. 130EP offers no authority for such a novel election of remedies.

130EP essentially urges the Court to excuse its obligation to present reliable expert testimony. But its expert has repeatedly destroyed materials underlying his

[7] Site visits and collection of subsurface materials are not uncommon in SOAH discovery, nor is extending a discovery deadline to allow such. *See, e.g.,* CR593-96 (unrelated example case without any spoliation allegations where SOAH granted protesting parties access to the site of a proposed hazardous waste facility, allowed them to drill borings, and extended the discovery period).

opinions, precluding protestants and ALJs from evaluating those opinions.[8] The court of appeals did not acknowledge that the 130EP expert was a "repeat offender," nor did it recognize the fundamental problem created by the absence of foundational data in contested-case proceedings, proceedings that rely heavily on expert opinions.[9]

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[8] *See* 62AR-Protestants-5 at 17-18 (IESI TX Landfill proceeding (Jack County)); 27AR204 at 16-18 & Exs. I, J (Pintail Landfill proceeding (Waller County)). Here, the 130EP Geologist testified that he destroyed the materials pursuant to his document retention policy. AR28-12 at 1 & n.1. 130EP has never suggested that policy has been rectified. Instead, in the face of the determination that 130EP violated its duty to preserve the destroyed evidence, 130EP regurgitates its rejected defense. 130EP.BOM.38*; see also* TJFA.BOM.12, 44.

[9] An illustrative example of the specific harm resulting from missing foundational materials is in the record. In another proceeding on an unrelated permit application (Pintail), the same categories of underlying materials were destroyed—also by Snyder—but later some of the original 57 driller's field logs were discovered and produced. 27AR204 at 17. TJFA's expert Dr. Lauren Ross explained that review of those logs enabled her to see discrepancies between the data recorded in the logs and the expert's opinions, which were not apparent through review of only the final Geology Report in the permit application. At least once, Snyder altered the reported lithology of a borehole to support his opinion that a clay formation was continuous across the proposed landfill footprint. *Id.* at 18 & Ex. J. The recovered driller's field logs were also at odds with the Geology Report's boring logs in that proceeding. The field notes reflected abundant, multicolored gravel in a particular area, which was inconsistent with Snyder's opinion of a continuous clay formation. *Id.* Even one discrepancy between the original driller's field logs and the Geology Report can be consequential, as illustrated in the Pintail matter: the difference between a layer of gravel material and a layer of fat clay is that the former will more readily transmit leaking contaminants, whereas fat clay (without significant secondary features) can slow contaminant migration. If TJFA had the destroyed materials here, it might have identified similar problems in the underlying foundation for Snyder's opinions in the Geology Report.

2. The field notes, soil samples, and field logs were foundational materials.

130EP recasts the foundational materials of Snyder's opinions, but the record and 130EP's own concessions undermine its effort. 130EP cannot hide from this Court's view the impact of the critical evidence it destroyed.

a. 130EP wrongly claims the boring logs and lab reports in the Geology Report were the foundational materials.

130EP distances its expert's opinions from the fieldwork-investigation materials and claims that those destroyed materials were somehow not foundational to his opinions. 130EP.BOM.34-36. 130EP now says that the Geology Report's final boring logs and lab reports were the "foundational data" behind its expert's opinions and emphasizes that those were not destroyed because they were contained in the Geology Report. 130EP.BOM.36, 38.

The boring logs and lab reports are analyses of the collected subsurface materials and are not the underlying data behind the expert's analysis. In other words, those parts of the Geology Report are geologist opinions. The 130EP Geologist used his expertise to review the soil samples, field notes, and driller's field logs (all destroyed). These materials were the basis of the boring logs in the Geology Report, which interpret, characterize, and describe the site's subsurface materials. The geologist's task is to use his expertise and the data to classify soils, identify the various layers of subsurface based on changes in the soils, and locate contaminant

migration pathways such as fractures. The only way to develop credible expert opinions of these aspects of the subsurface is to observe the subsurface materials. Likewise, lab evaluations of collected soil samples are expert opinions.

130EP concedes that the final boring logs and lab reports were analyses of the subsurface materials and the driller's field notes and logs. *See, e.g.,* 130EP.BOM.36 (acknowledging that 130EP Geologist "conducted visual and manual analyses of the [soil] samples" to prepare boring logs); *id.* (explaining that "laboratory testing of soil samples" is required); 54AR-Snyder-1 at 10, 19-20; 74Tr.9 at 251-52, 3159-60; 30 *see also* 30TEX. ADMIN. CODE § 330.63(e)(4), (5).

Because Snyder relied on his observations of the destroyed materials to reach his opinions, they are the foundational materials behind his opinions.

b. 130EP claims that other materials supported the expert's opinions.

130EP asserts that its expert used data from "many sources" to support his opinions, citing geologic literature and maps, aerial photographs, visual observations from site visits, standing on the site surface, lab reports on soil samples, labels on the soil samples, and data from two pre-investigation borings at the site. 130EP.BOM.37. 130EP contends that because these other materials were not destroyed, the expert's opinions are admissible.

The key to the Geology Report is its analysis of the site's subsurface, which cannot be accessed through 130EP's cited resources. *See* 62AR-Protestants-5 at 20

(explaining that expert geologist provides accurate picture of subsurface geological conditions); 30 TEX. ADMIN. CODE § 330.63(e)(4)-(5). The Geology Report's critical opinions concerned that subsurface investigation, and the investigational materials were the collected soil samples, field notes, and driller's field logs. *See id.* 130EP's other listed items were tangential and supplied larger context; they were not evidence of the site-specific subsurface characterization that were the basis for Snyder's opinions.

Not even the court of appeals adopted 130EP's expansive argument that the expert's opinions could be accepted as reliable based on the contextual materials, and neither should this Court. *TJFA*, 632 S.W.3d at 672.

c. Rule 702 encompasses the destroyed soil samples.

130EP claims the soil samples are not "data" as a dictionary defines it and thus could not be foundational for expert opinion admissibility. 130EP.BOM.38.

130EP cites no authority for limiting the materials underlying an expert opinion to "data" or its narrow understanding of that term. Broad categories of expert materials must be produced: "all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert." TEX. R. CIV. P. 192.3(e)(6). The expert witness rules do not limit underlying materials to "data," nor does the case law enforcing expert standards. Even if they did, the wide-ranging term "data" includes all "factual information,"

even under 130EP's own dictionary definition. 130EP.BOM.38. The soil samples were collected tangible materials that were observed and evaluated as the basis for the expert geology opinions. Indeed, 130EP repeatedly concedes that its expert relied on the soil samples to reach his opinions. *See, e.g.,* 130EP.BOM.35-37.

CONCLUSION & RELIEF REQUESTED

The Court should grant the petition, reverse the court of appeals, district court, and Commission, render or remand to the Commission, and grant any further relief to which Petitioners are entitled.

Respectfully submitted,

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Based on a word count run in Microsoft Word, this brief contains 7,270 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

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Filing Description: Petitioners' Reply Brief on the Merits
Status as of 5/16/2023 4:22 PM CST

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