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REPORTER'S RECORD

VOLUME 1 OF 1

TRIAL COURT CAUSE NO. D-1-GN-17-006632

ENVIRONMENTAL PROTECTION,)	IN THE DISTRICT COURT
IN THE INTEREST OF)	
CALDWELL COUNTY, JAMES)	
ABSHIER, BRYON FRIEDRICH,)	
AND TJFA, L.P.,)	
Plaintiffs,)	
)	TRAVIS COUNTY, TEXAS
V.)	
)	
TEXAS COMMISSION ON)	
ENVIRONMENTAL QUALITY,)	
Defendant,)	
)	
AND)	
)	
130 ENVIRONMENTAL PARK,)	
LLC,)	
Intervenor-Defendant.)	495th JUDICIAL DISTRICT

ADMINISTRATIVE APPEAL

On the 28th of August 2019, the following proceedings came on to be held in the above-entitled and numbered cause before the Honorable Dustin Howell, Judge Presiding, held in Austin, Travis County, Texas.

The proceedings were reported by McKayla McHugh, Certified Shorthand Reporter in Travis County and the State of Texas, by computer-aided stenotype machine.

APPEARANCES

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ADMINISTRATIVE APPEAL

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25

1 (Proceedings)

2 (Open court)

3 THE COURT: On the record in -- looks like
4 two cause numbers here, Cause No. D-1-GN-15-000910, and
5 that matter is styled *Environmental Protection in the*
6 *Interest of Caldwell County v. Texas Commission on*
7 *Environmental Quality.*

8 We're also here on Cause
9 No. D-1-GN-17-006632. It is also styled
10 *Environmental Protection in the Interest of Caldwell*
11 *County, et al, v. Texas Commission on Environmental*
12 *Quality.*

13 Counsel, I'll have you announce yourselves,
14 please.

15 MS. WOELK: Your Honor, I'm Cynthia Woelk
16 for the Attorney General's Office on behalf of TCEQ. And
17 I would like to clarify something. We don't -- I think
18 none of the attorneys believe that we're here on the
19 first case that you called.

20 THE COURT: Okay.

21 MS. WOELK: It involves a different
22 facility, and I think none of us were prepared to talk
23 about it today. But we're here on the second one that
24 you called.

25 THE COURT: That's fine. It was just on

1 the docket that way. I'm not sure why. But everything
2 that I was given to review was under that 2017 cause
3 number.

4 MS. WOELK: We weren't surprised by your
5 announcement, and we'd actually talked about it
6 beforehand because one of the attorneys had seen the
7 docket yesterday and seen that both cases were listed,
8 so...

9 THE COURT: Okay. Thank you for that
10 clarification.

11 Ms. Woelk, who else do we have?

12 MR. RYAN: Your Honor, my name is
13 Brent Ryan, here on behalf of the defendant-intervenor
14 130 Environmental Park, LLC.

15 MR. TRUESDALE: Mike Truesdale, Your Honor,
16 on behalf of Defendants as well, intervenor.

17 THE COURT: Good afternoon.

18 MS. PERALES: Good afternoon.
19 Marisa Perales on behalf of the plaintiffs. And with me
20 is Eric Allmon and Melanie Plowman.

21 THE COURT: Good afternoon to y'all as
22 well.

23 So first things first, let's admit the
24 record. I've got nine bankers boxes back there that I'm
25 told comprises the administrator's record. Those are in

1 Ms. Rincon's office.

2 Do you guys offer it, or who offers the
3 record?

4 MS. WOELK: Often we do it jointly,
5 Your Honor.

6 MS. PERALES: Right. Yeah, that's fine.

7 MS. WOELK: Joint exhibit of all the
8 parties.

9 THE COURT: Very good. The Court admits
10 the joint exhibit of the parties, and that will now be
11 made a part of this record.

12 *(Joint Exhibit No. 1 admitted)*

13 THE COURT: How do you suggest we proceed?

14 MS. PERALES: Your Honor, first, we have a
15 couple of housekeeping matters that I would propose that
16 we address before we get into the arguments, if that's
17 okay?

18 THE COURT: Sure.

19 MS. PERALES: So we filed a motion to
20 exceed the word count limit for our reply brief, and we
21 have -- the motion was not -- unopposed by the defendant
22 intervenor, and TCEQ took no position on the motion. We
23 have a written order that we could circulate or -- I
24 don't know if you would prefer to do it on the record.

25 THE COURT: I grant the motion.

1 MS. PERALES: Okay.

2 THE COURT: If that's enough, that's good
3 enough for me. If y'all think I need to sign an order,
4 I'm happy to do that as well.

5 MS. PERALES: Okay. That's good enough for
6 me.

7 MS. WOELK: It's fine with TCEQ,
8 Your Honor.

9 MR. RYAN: It's fine with us, Your Honor.

10 THE COURT: Okay.

11 MS. PERALES: Thank you. In that case, we
12 are prepared to proceed with our opening arguments, and
13 we requested that we have one hour for our opening
14 arguments and reserve 30 minutes for our rebuttal. I
15 don't expect that we're really going to take that much
16 time, and Mr. Allmon is prepared to begin with those.

17 THE COURT: Very good.

18 MS. PERALES: Oh, and I -- we have a
19 PowerPoint presentation prepared, and we've also prepared
20 a printout of that PowerPoint. I've shared it with the
21 other parties. And with the Court's permission, I'll
22 bring one up.

23 THE COURT: Yes, I'll take it. Thank you.
24 And I guess I'll give you a five-minute warning before
25 you get to your hour, if that works.

1 MS. PERALES: If needed, yes.

2 THE COURT: Okay.

3 MR. ALLMON: May it please the Court, I am
4 Eric Allmon, here on behalf of Environmental Protection
5 in the interest of Caldwell County, James Abshier,
6 Bryon Frederick, and TJFA, LP.

7 TCEQ's regulations applicable to the
8 permitting of municipal solid waste landfills seek to
9 address the long-term hazards those landfills pose to
10 human health and the environment, including potential
11 impacts on flooding and groundwater quality.

12 In this case, the implementation of these
13 rules is particularly important, given that the waste
14 footprint is closely surrounded by the 100-year
15 floodplain and is only a few hundred feet upstream of a
16 high hazard dam. The failure would --

17 THE REPORTER: Excuse me. Could you move
18 the microphone.

19 MR. ALLMON: -- is closely surrounded by a
20 100-year floodplain and is immediately only a few hundred
21 feet upstream of a high hazard dam. It's important to
22 realize the high hazard dam is a regulatory
23 classification that reflects the failure of the dam that
24 would result in significant loss of lives or excessive
25 economic loss or both.

1 The magnitude of this risk warrants strict
2 enforcement of TCEQ's rules and intent to protect against
3 flooding.

4 In this case, TCEQ's failure to follow its
5 rules justifies reversal for several reasons addressed in
6 the briefs. Here today, Marisa Perales and I will
7 address four of those errors, any one of which would
8 require reversal of the TCEQ's decision.

9 First, TCEQ has violated the plain and
10 unambiguous language of its rules requiring that an
11 applicant submit a local floodplain development permit.

12 Second, in violation of permit, TCEQ -- in
13 violation of statute, TCEQ has permitted a landfill in an
14 area where a valid County ordinance prohibits such a
15 facility.

16 Third, TCEQ premised this decision on
17 unreliable expert opinions which did not meet *Daubert*
18 standards.

19 Fourth, TCEQ improperly excluded elements
20 of the facility from the facility permit boundary.

21 Each of these issues presents legal error,
22 by which the Commission independently erred, requiring
23 reversal of TCEQ's issuance of 130 EP's landfill permit.

24 I will now address the first issue, TCEQ's
25 failure to require submission of a floodplain development

1 permit. The extent of the floodplain at the 130 EP site
2 necessitates construction within the 100-year floodplain.
3 As a result, Caldwell County requires a floodplain
4 development permit. TCEQ's role at 330.63(C) directly
5 addresses such circumstance by requiring that an
6 applicant provide a copy of the local floodplain
7 development permit in the application.

8 This regulation contains both the
9 substantive and a procedural requirement. Substantively,
10 this regulation requires an applicant submit a floodplain
11 development permit to the TCEQ. Procedurally, 330.63(C)
12 requires that this be submitted in part 3 of the
13 application.

14 130 EP failed to comply with the
15 substantive requirement of this rule, since 130 EP did
16 not submit the required floodplain development permit at
17 any point in the permitting process. The executive
18 director staff had repeatedly requested that 130 EP
19 provide the required floodplain development permit, as
20 reflected in this August 1st, 2014, notice of deficiency,
21 referencing a prior May 6th, 2014, notice of deficiency,
22 which was followed up in September of 2014 with an
23 additional request for the development permit.

24 Despite these repeated requests by TCEQ
25 staff, and EP's claim that it would pursue the

1 authorization, 130 EP never even sought the required
2 floodplain development permit from Caldwell County.

3 Ultimately, TCEQ issued 130 EP's requested
4 permit despite 130 EP's failure to meet this explicit
5 regulatory requirement. The Texas Supreme Court has held
6 that no deference is due to an agency's interpretation of
7 its regulation where the agency fails to follow the
8 clear, unambiguous language of its rules. Regulations
9 have the force and effect of law. And an agency's
10 failure to follow its own rules warrants reversal of the
11 decision as arbitrary and capricious.

12 Excusing an agency from compliance with its
13 own rules undermines the legislative intent of the
14 Administrative Procedures Act. As the Texas Supreme
15 Court has noted, a presumption favors the use of
16 rulemaking in the adoption of requirements of general
17 applicability.

18 Further, Texas Health and Safety
19 Code 361.024(e) specifically provides that the Commission
20 must adopt rules when adopting, repealing, or amending
21 any agency statement of general applicability that
22 interprets or prescribes law or policy or obstructs the
23 procedure or practice requirements of the agency.

24 Rather than assert that TCEQ complied with
25 its rule, the TCEQ and 130 EP first claimed that

1 Plaintiffs' substantial rights were not prejudiced by the
2 Commission's failure --

3 THE COURT: What was submitted instead? Or
4 are you saying that there was nothing submitted in terms
5 of a permit or documentation addressing the effect on the
6 floodplain?

7 MR. ALLMON: No -- there were -- there are
8 other elements of the application that deal with the
9 floodplain. But this particular element of the rules
10 requiring the submission of a floodplain development
11 permit was simply not submitted to the TCEQ.

12 They represented that they were in the
13 process of obtaining plat approval, but that is different
14 than a floodplain development permit. Floodplain
15 development permit was never submitted to the TCEQ.

16 As for substantial prejudice to the
17 plaintiffs, Plaintiffs' own property in areas that were
18 potentially flooded by the facility, and TCEQ's failure
19 to require submission of floodplain development permit
20 undermine the protectiveness of TCEQ's permit.

21 THE COURT: This argument was considered by
22 the ALJs and the TCEQ and they didn't find a reversible
23 error. Why not?

24 MR. ALLMON: Well, this was dealt with
25 through a special condition placed in the permit, and

1 that is what the TCEQ has pointed to.

2 The problem is that TCEQ, in the past, and
3 Courts upholding special conditions have only addressed
4 those where the rules had been met at the time of the
5 agency decision, without the special condition.

6 THE COURT: I mean, from what I gathered in
7 my review of how this was handled below, and, I guess,
8 TCEQ's and 130 EP's position here is that it's -- it's
9 not a technical, you have to dot every single I and cross
10 every single T in the exact order, but that there is a
11 practical consideration, and that as long as the spirit
12 of the rules and the policy embodied by those rules is
13 being carried out, and protected, for example, through
14 special provisions that allow a deviation from the normal
15 procedure, then that's enough.

16 MR. ALLMON: We would contend that the
17 spirit of the rule was not met in this case. Local
18 floodplain authorities are the lead agencies in Texas for
19 floodplain issues, both in their role under statutory
20 plat approval and in their role as floodplain
21 administrators for FEMA's national flood insurance
22 program.

23 The TCEQ -- the rules require the
24 submission of this prior to the TCEQ decision so that the
25 TCEQ can consider that and make sure its decision is

1 consistent with that. And it also informs the analysis
2 that the public and members such as Epic participate in
3 through the public participation and the contested case
4 hearing process, and that seeing that analysis, and
5 knowing that analysis, aids and is necessary in the
6 presentation of evidence and argument within the case.

7 Furthermore, the standard provisions of the
8 permit state that representations contained in the
9 application are binding upon the permittee. Since this
10 was not required to be submitted prior to permit
11 approval, it was not incorporated into the draft permit,
12 and thus the requirements of the permit were incomplete
13 with regard to floodplain protection.

14 So we do not think -- we think this is not
15 simply a matter of administrative convenience. This is a
16 matter that has substantive consequences, and
17 consequences for protection of the floodplain in this
18 downstream dam. So we do not think that such a
19 substantive requirement would simply be delayed in the
20 interest of administrative convenience.

21 Now, as for prejudice, the plaintiffs are
22 owners of downstream property that would be impacted by
23 this inadequate protection of the floodplain.
24 Furthermore, as I just noted, the plaintiff's
25 participation in the agency process was impaired due to

1 the unavailability of the County's determination on the
2 floodplain permit, and the expertise that the County
3 would have brought to bear.

4 Furthermore, as I noted, the local
5 floodplain administrators are the lead agencies for this.
6 The agency has tried to put the cart before the horse by
7 having the TCEQ make its determination on floodplains
8 without being informed by the determination of the local
9 authority.

10 These all resulted in prejudice to the
11 rights of protestants.

12 THE COURT: Yeah, because, I mean, that's
13 the other prong of this analysis, right, is -- it's not
14 enough that there's a failure to comply. You also have
15 to demonstrate, not just prejudice, but substantial
16 prejudice, right? And I think that's the other -- what I
17 understand the other side to say, is, hey, you got what
18 you needed to raise your challenge, you had your day in
19 court, and you lost; but you haven't shown any prejudice,
20 much less substantial prejudice, resulting from this.

21 MR. ALLMON: Well, Epic includes members
22 that own property that's potentially flooded by this
23 facility. And as noted for the floodplain, as you can
24 see here, the facility is shoehorned within the
25 floodplain. It comes very close to that floodplain.

1 And the high hazard dam and the extent of
2 the floodplain poses serious danger if the flood
3 protections in the permit are not adequate. We think
4 that that potentially harms the property rights and the
5 rights to the enjoyment -- to human health possessed by
6 the plaintiffs --

7 THE COURT: Well, I don't want to --

8 MR. ALLMON: -- and substantial
9 prejudice --

10 THE COURT: I don't want to put words in
11 their mouth, but I suspect that TCEQ and 130 EP is going
12 to stand up and say these flood concerns are addressed in
13 what has been submitted and was considered by everybody
14 that's been involved in this so far.

15 Why are they wrong about that?

16 MR. ALLMON: I think that it's a matter of
17 whether they were not addressed to an extent that
18 resulted in substantial prejudice to the plaintiff.
19 There were some elements of the floodplain that were
20 addressed in the analysis of the TCEQ, but by not
21 addressing this aspect of the analysis, and by not
22 following the rules -- nobody contends that the rules
23 were followed in this case. By not following those
24 rules, the flooding potential was -- the strength of the
25 permit with regard to flooding requirements was weakened,

1 which does raise the risk and pose a hazard to the
2 property owned by the plaintiffs.

3 THE COURT: Are you asking me, then, to
4 re-conduct the analysis that occurred at the
5 administrative level below? Because that's kind of the
6 feel I have from this, is we're relitigating argument
7 that's already been made before, and that's the whole
8 point of substantial evidence review is to -- to not do
9 that.

10 MR. ALLMON: We are not asking you to
11 relitigate and look at the substantial evidence in this
12 case. The failure of the agency to follow the plain and
13 unambiguous language of its rules is a legal error, which
14 is a question of law for the courts to review de novo,
15 without any deference to the agency as to whether there's
16 substantial evidence in the record.

17 When an agency commits an error of law such
18 as this, its decision is arbitrary and capricious,
19 regardless of whether there's substantial evidence in the
20 record to support the agency's decision.

21 THE COURT: Are we not, though, within
22 abuse-of-discretion land whenever we're considering the
23 agency's decision to depart from its normal rules and
24 issue these special conditions, et cetera?

25 MR. ALLMON: Due to the presumption that

1 agencies will use their rulemaking authority when the
2 Legislature gives them that authority, the general policy
3 underlying much of the arguments being made by the TCEQ
4 and the intervenor is that they may deal with these
5 agency -- what they term as agency coordination measures
6 through special provisions requiring information after
7 issuance of the permit. That approach is directly
8 contrary to certain rules that they have.

9 Now, if the agency is going to adopt that
10 approach, we are not here to litigate whether that -- the
11 wisdom of that approach. The point is that if they're
12 going to adopt that as a general policy and a common
13 practice, the proper way to do that is through an
14 engagement in rulemaking to identify those areas that may
15 be addressed after issuance of the permit, allow the
16 public, industry, and the coordinating agencies to all
17 have input as to how that should be done, and provide
18 certainty in the process that is going to be employed so
19 that people know what requirements are going to be
20 required to be met prior to permit issuance and what is
21 going to be able to be delayed until after permit
22 issuance.

23 It's the fact that they have worked outside
24 of their rules that presents the real issue here. That
25 lack of predictability in the process substantially

1 harmed the rights of the plaintiffs as well. The Austin
2 Court of Appeals has said that a fundamental issue in the
3 arbitrary capricious review is looking to whether the
4 parties know what is expected of them in the process.

5 In this case, the rules -- since they were
6 not followed, plaintiffs were not on notice of what would
7 be required and what would be at issue in the permitting
8 process.

9 And to that point, any prior practice of
10 addressing these deficiencies through special conditions
11 only heightens the concern with TCEQ's efforts to ignore
12 its rules. Again, this moves outside the bounds of what
13 is expected of the Commission under 361.024 as
14 previous -- which is now before you.

15 Where it has a general practice, or
16 procedure, TCEQ is expected to do that through
17 rulemaking, which was not done here. Instead, we have a
18 practice of selectively choosing certain applications in
19 which to take this approach, while not doing that in
20 others.

21 And on this point, the Commission's
22 treatment of the Post Oak Clean and Green application
23 highlights the problem with this. In that case, the
24 applicant had not submitted well-plugging certification
25 as required by the TCEQ rules. And rather than deal with

1 that through a special condition, as is done here, the
2 agency did not allow the applicant to go forward under
3 special conditions, but it remanded the matter to the
4 State Office of Administrative Hearing until that agency
5 coordination measure had been met.

6 TCEQ has provided no explanation for this
7 disparate treatment of different applicants. And
8 rulemaking would be intended to address that so there is
9 predictability for all parties. Since TCEQ did not act
10 in compliance with its rules, it should be -- the
11 decision should be reversed in this matter.

12 Now Ms. Perales is going to address the
13 argument regarding the floodplain -- the County
14 ordinance.

15 THE COURT: Thank you. Good afternoon.

16 MS. PERALES: Good afternoon. So I'll be
17 addressing the County siting ordinance and how it applies
18 or should have been applied in this case. First, a
19 little bit of background. So the County's landfill
20 siting ordinance and the issue related to that ordinance
21 presents an issue involving statutory construction, and
22 issues involving statutory construction are reviewed by
23 courts de novo. It's also worth noting that this is a
24 case of first impression with regard to this issue.

25 Counties, such as Caldwell County, they

1 possess the authority to enact landfill siting
2 ordinances, identifying areas in their county where
3 landfills or related solid waste management facilities
4 are prohibited. And this authority is derived from two
5 statutes, which are here up on the screen, 363.112 and
6 364.012 of the Health and Safety Code. And this is just
7 an excerpt of the relevant portions of those statutes.

8 Now, if a County adopts such a siting
9 ordinance under this authority, the TCEQ may not grant a
10 permit for a solid waste disposal facility proposed to be
11 located in an area that's prohibited by the County
12 ordinance.

13 There is one limitation on the County's
14 authority, and it's that the ordinance cannot prohibit
15 disposal of solid waste in an area of the county for
16 which an application for a permit or other authorization
17 has been filed and is pending before the Commission, or
18 for which a permit or other authorization has been issued
19 by the Commission.

20 In this case, 130 Environmental Park had no
21 solid waste permit or application or other authorization
22 pending before TCEQ at the time that the ordinance was
23 passed.

24 THE COURT: Well, they disagree with you on
25 that, right?

1 MS. PERALES: So the -- the two parties
2 have -- appear to have different arguments. So my
3 understanding is that the TCEQ's argument is that some
4 deference should be given to their interpretation of
5 filed or pending, whereas 130 EP seems to argue that
6 parts 1 and 2 of a request for a land use compatibility
7 determination is a permit application.

8 THE COURT: Right. I mean, as I understand
9 it, there's four stages to this, and they had -- they had
10 submitted at least the first two stages of applications,
11 correct, and then the County passed its ordinance?

12 MS. PERALES: Yes, here's the timeline. So
13 in September, before the County passed its ordinance,
14 what had been submitted to the TCEQ was a request for a
15 land use compatibility determination. So at that time,
16 it wasn't so much that 130 EP was piecemealing its
17 application. What it had requested of TCEQ was a
18 determination regarding the land use compatibility of its
19 proposed site, and what it had submitted was a request
20 for that determination.

21 The County then passed its ordinance in
22 December of 2013, and then the applicant abandoned its --
23 its initial request for a land use compatibility
24 determination, and, instead, it chose to pursue a
25 landfill permit by submitting a complete permit

1 application. It submitted part 1, part 2, part 3, and
2 part 4 in February, and it no longer sought to process
3 its request for a land use compatibility determination.

4 As I mentioned, this really involves
5 statutory construction, and statutory construction
6 principles are well-established. So in resolving this
7 issue, we look to the plain language of the statute,
8 reading every word, phrase, and expression as if
9 deliberately chosen, and presume that the words excluded
10 from the statute were done so purposefully.

11 And here, the plain language of the statute
12 makes clear that TCEQ may not grant a landfill permit for
13 a facility located in an area where a County ordinance
14 has prohibited that facility. And, again, the only
15 limitation on the County's authority is if an application
16 for a permit or other authorization is filed and pending.
17 And there's no dispute here that when the ordinance was
18 enacted, there was no application for a permit or other
19 authorization pending. That didn't occur until February.

20 So TCEQ erred in granting the permit
21 application, if we follow the plain language of the
22 statute.

23 As Your Honor has recognized in -- TCEQ has
24 argued that there should be some deference given to their
25 interpretation of the terms filed and pending in order to

1 resolve this issue.

2 But they missed the mark, because
3 resolution of the issue does not turn on deference,
4 because we have a statute with unambiguous language. And
5 it certainly doesn't turn on the terms "filed and
6 pending."

7 The only issue here is whether the phrase
8 "application for a permit or other authorization,"
9 whether that phrase existed here.

10 THE COURT: And when it comes to questions
11 of agency deference, am I correct in remembering that
12 that really only applies whenever interpreting the terms
13 at issue require, right, like the expertise of that
14 agency, right?

15 MS. PERALES: That's correct, Your Honor.
16 When we are dealing with a statute that is unambiguous
17 and does not include technical terms, then there is no
18 deference owed to the agency. It's a de novo review by
19 the Courts, who possess, obviously, the expertise to
20 construe statutes.

21 So, again, there's no dispute that the
22 pieces of paper that have been submitted back in
23 September -- those were not an application for a permit.
24 That was a request for land use compatibility
25 determination.

1 And to be clear, to kind of make this even
2 a better picture of how it works, there is a statute,
3 361.069 in the Health and Safety Code, that allows for an
4 owner or operator of a proposed landfill to request such
5 a land use compatibility determination. We refer to this
6 commonly as a bifurcated process, and that's what
7 happened in 2013.

8 But even if that process had not been
9 abandoned here, even if they followed through with that
10 initial request from September 2013, at the end of that
11 process, all 130 EP would have gotten would be a
12 determination about whether its proposed site is
13 compatible with surrounding land uses, whether it's
14 appropriate. But it would have -- under no circumstance,
15 under no interpretation, would it have received any sort
16 of permit or authorization.

17 If the determination would have authorized
18 nothing, it would have permitted nothing. It would have
19 simply allowed 130 EP to move forward with a landfill
20 permit application, if it got a favorable determination.

21 THE COURT: So are you saying it's not a
22 prerequisite to the permit or authorization that they
23 eventually sought in February?

24 MS. PERALES: I am saying that it's not a
25 prerequisite, not in the way that they submitted it.

1 That's right.

2 THE COURT: Could it have been -- what if
3 we've got -- well, I don't know.

4 What if 130 EP thought that it needed this
5 land use compatibility determination before it could go
6 forward with -- or, I mean, what difference -- I guess,
7 does it make a difference what they saw as the permitting
8 process? Maybe as they saw it, this -- it's part and
9 parcel of the whole authorization process. This is just
10 step 1 and maybe later they realized, okay, maybe not; we
11 just need this permit and authorization.

12 Does that affect how the Court should
13 consider the effect of this land use compatibility
14 request, in terms of the timing with the ordinance?

15 MS. PERALES: No, Your Honor. Again,
16 because this is a plain language statutory construction
17 type of issue. And -- and that is -- I mean, the
18 bifurcated process was intended to -- to essentially
19 allow for conservation of resources by the staff, by
20 permit applicants, by the surrounding community, in that
21 if -- if an applicant, such as 130 EP, had elected to
22 pursue the bifurcated process, had elected to first seek
23 a land use compatibility determination, then that -- that
24 determination only -- it doesn't require an expenditure
25 of substantial resources. It only requires information

1 about the surrounding land uses, about the competency of
2 the operator, about the transportation routes.

3 But it doesn't require the -- you know, the
4 surface water modeling. It doesn't require subsurface
5 characterization. It doesn't require more of the
6 technical expensive parts of a permit application. And
7 so that's the purpose of the bifurcated process, although
8 the applicant did not take advantage of it in that way in
9 this case.

10 What their intent was -- and this was made
11 clear, I think, by the amici in their amicus brief, was
12 to do precisely what they're arguing to this Court today,
13 and that is, throw together some pieces of paper, throw
14 it at TCEQ before the County has a chance to learn about
15 what's going on and before the County has a chance to
16 adopt a landfill siting ordinance so that they can then
17 say, we had something pending.

18 And we know that even what they threw
19 together back in September had to be -- they dropped the
20 bifurcated process, and then when they submitted the
21 permit application, they revised parts 1 and 2.

22 So I think it's clear what their intentions
23 were, but it doesn't really matter in this case because,
24 again, this is a statutory construction issue.

25 THE COURT: And this particular question is

1 one of first impression, you said? You're not aware of
2 any courts addressing a scenario like this?

3 MS. PERALES: That's correct, Your Honor,
4 I'm not aware of any Court that has considered the -- a
5 County's ordinance, and whether it applies when a -- a
6 request for a land use compatibility determination has
7 come in.

8 Again, related to the intentions, the last
9 thing I'll say here about this issue is that the -- the
10 approach that both TCEQ, 130 EP, and, frankly, the amicus
11 has proposed here, if -- what they're asking the Court to
12 do is to distort the bifurcated process, is to distort
13 the intention of the Legislature. And if their approach
14 or their request were adopted, that's precisely what
15 would happen. Because it would be a green light for
16 other applicants to do precisely what 130 EP has done
17 here, and that is to submit a stack of papers to propose
18 to the TCEQ that they are, indeed, requesting a land use
19 compatibility determination, and that they intend to
20 pursue this bifurcated process and then to abandon it
21 when it no longer suits them, and to use this process
22 simply as a tool to circumvent the exercise by a local
23 government of its lawful authority to -- to enact a
24 landfill siting ordinance.

25 That's not what the Legislature intended,

1 and that would be an absurd interpretation of the
2 statute.

3 Again, I'll note that the plain language of
4 the statute says nothing about a request for a land use
5 compatibility determination. If that was left out of
6 363.112 and 364.012, we must presume that that phrase was
7 left out intentionally, and we have to apply the plain
8 language of the statute. And when we do so, the --
9 there's no other -- there's no other decision that can be
10 made, except that they did not have an application for a
11 permit or authorization pending at the time the ordinance
12 was enacted.

13 THE COURT: Okay.

14 MS. PERALES: So unless there are other
15 questions, I'll move on to the next issue.

16 THE COURT: Not on that. Okay.

17 MS. PERALES: The next issue I will address
18 is -- I refer to it as the *Daubert* issue. But it -- from
19 the briefs, I'm sure it was apparent that it's -- that
20 the facts are interrelated with the spoliation issue as
21 well.

22 I'll start by providing just a little bit
23 of background and some context about the TCEQ's rules
24 when it comes to subsurface characterizations and the
25 geology report.

1 So the geology report and the subsurface
2 investigation, this comprises a rather large part of the
3 permit application. And, in fact, it's typically -- the
4 subsurface investigation is typically the first thing
5 that's done before a full permit application is prepared.

6 So, first, a prospective permit applicant
7 will prepare what's called a soil boring plan, and that
8 soil boring plan must include a number of details about
9 how that subsurface investigation is to be conducted,
10 including the number of borings proposed, the depths of
11 the borings, whether any permeability testing will be
12 done, et cetera.

13 And this soil boring plan must be approved
14 by the TCEQ staff before the borings are drilled. And
15 the soil boring plan and the subsurface investigation
16 must be done with attention to all of the detail in that
17 plan. There's no deviation allowed without the TCEQ's
18 approval.

19 So once that plan is approved, then
20 typically the applicant's consultant will drill their
21 borings in accordance with the plan, will install some
22 piezometers, or water wells, to investigate the
23 subsurface and the presence of groundwater. And then
24 here, again, the rules are very specific. The TCEQ rules
25 are -- they include a lot of detail about how that

1 investigation is to be conducted, the type of data that's
2 to be collected, how it's to be prepared, how it's to be
3 presented to the TCEQ. It includes details related to
4 the appropriate drilling methods that should be used,
5 details regarding how the samples should be collected.

6 The boring logs in the report that are
7 prepared after the subsurface investigation must include
8 details, according to the TCEQ rules, regarding the types
9 of soils that are present, any secondary features that
10 have been observed, such as fractures, fissures, cracks,
11 any discoloration, the color of the soil that's observed.
12 All of this is set out in the TCEQ rules, and I've got
13 just some kind of sample language from the TCEQ rules,
14 just to kind of emphasize what is required here.

15 And the reason for this level of detail is
16 because it's important to know more than just, you know,
17 what kind of soils do we have here; are they adequate for
18 constructing a landfill. We need to know where all of
19 the preferential pathways are for potential migration of
20 any contaminants, should we have a liner breach. And
21 this helps to inform how to install a groundwater
22 monitoring system, where to place the groundwater
23 monitoring wells, at what depth, and so forth.

24 THE COURT: This is a matter of curiosity.
25 What is a slickensides?

1 MS. PERALES: I'm not a geologist, so I
2 hesitate to try to --

3 THE COURT: Neither am I.

4 MS. PERALES: -- describe it. But it's a
5 secondary feature, so it's --

6 THE COURT: Subsurface geology.

7 MS. PERALES: Yeah. And it's a potential
8 migration pathway. I hesitate to describe it in any more
9 detail than that.

10 THE COURT: That's fine.

11 MS. PERALES: So there are a number of
12 different ways -- there are a couple of different ways,
13 actually, that contaminants might migrate through the
14 subsurface, and those are generally classified as primary
15 and secondary.

16 So the primary is if you have any permeable
17 soil. So you want to know about any lenses or seams or
18 pockets of sand or gravel, anything that's more permeable
19 than clay. It's important to know about that.

20 And then the secondary refers to fractures,
21 fissures, slickensides, not necessarily the
22 classification of the soil, but the features in the soil.

23 And so all of this detail is done through
24 observing what comes out of the subsurface. Some -- the
25 soil classification is also done by sending some samples

1 to a lab and waiting for the lab analysis.

2 And all of this information, the
3 observation, the details, all of those are opinions,
4 expert opinions, that are prepared by a geoscientist.
5 And, in fact, a geoscientist's seal is necessary on the
6 boring logs and the geology report, to reflect that a
7 professional has prepared these opinions.

8 So in this case the geology report
9 represented a subsurface that consisted of a thick layer
10 of fat clay, pure fat clay, almost no secondary features,
11 except for a single slickenside. And this seemed really
12 remarkable. It seemed not entirely consistent with the
13 literature that had been published about this area, not
14 entirely consistent with other information that was
15 available by the Plum Creek Conservation District, for
16 example. It was not consistent with observations made
17 of, like, gravel pockets, and so, understandably, we
18 sought, through discovery, the underlying data that
19 formed the basis of the expert opinions reflected in the
20 geology report.

21 And as you've read in the -- in the briefs
22 by all of the parties, that data was not available
23 because it was destroyed, all of it. The sample -- all
24 of the soils that had been collected, the field notes
25 from -- so the geoscientist who sealed the geology report

1 was not out there. He was out there a couple of times
2 during the entire drilling program. So the person who
3 was out there observing the drilling and observing the
4 soils as they came out of the subsurface typically takes
5 field notes and maybe even drafts boring logs. Those
6 were all destroyed. There were no photos of the soils.
7 There was nothing. All we had was the final product that
8 had been sealed and submitted to the TCEQ.

9 We also know that -- that the piezometer
10 logs -- so there are borings and then there are the water
11 wells, or piezometers that are used to detect the
12 presence of groundwater. Those are a lot like borings.
13 You drill the hole. You prepare field notes in a log to
14 show what you've observed. Those piezometer logs were
15 also destroyed. And so the -- what the geologist -- they
16 were destroyed before they were even prepared for TCEQ.

17 So the geologist took the boring logs,
18 duplicated them, gave it a piezometer identification
19 number and submitted them to TCEQ.

20 So Mr. Snyder, as the ALJ has determined,
21 had a duty -- that was the geologist. He had a duty to
22 preserve all of that data. He knew he had a duty. He's
23 done this before. He's participated in these hearings
24 before. He's destroyed this type of data before. And he
25 knew he had a duty. He violated that duty. The ALJs

1 determined that.

2 They also determined that we weren't
3 entitled to a remedy for the spoliation. And while we
4 disagree with that, we believe that we were entitled to a
5 remedy, and accessing the site is not a remedy.

6 Our contention here, and what I'd like to
7 argue today, is that there was no way for Mr. Snyder or
8 130 EP to satisfy its evidentiary burden, to satisfy the
9 *Daubert* standard, when there is no evidence in the record
10 to support the -- the opinions that were presented by
11 Mr. Snyder. There's no underlying data.

12 And the case there is -- there is so much
13 case law on *Daubert* and on what's required. On the
14 screen, by the way, I have just one page from the set of
15 boring logs, just to kind of represent the type of
16 information that we have here. So the classification of
17 the soils, the observations of the soils.

18 And there are so many things on here that
19 were later determined to be inaccurate. Things like even
20 the drilling method that was used. That's not an
21 accurate notation there.

22 And then here -- I just kind of picked out
23 a few of the cases that seemed most relevant, that
24 expressed the most relevant principles that apply here.

25 Ipse dixit is one of the principles that I

1 presented here. And under the case law that describes
2 this principle, the Courts have said that an expert
3 must -- an expert's opinion alone, that his -- that his
4 testimony is reliable, is insufficient. It's not enough
5 for the expert to just say, hey, take my word, trust me,
6 believe me, which is what happened here. There must be
7 underlying facts and underlying bases to support the
8 opinion.

9 And then here I have a few principles
10 regarding foundational data and what's required for an
11 expert opinion in terms of the foundation that must be
12 laid.

13 THE COURT: Why did the Commission
14 determine that *Daubert* was satisfied here?

15 MS. PERALES: So there is not a
16 determination in the order regarding whether *Daubert* was
17 satisfied. It's not in the PFC, it's not in the final
18 order. Instead, as I recall, the findings state that the
19 information required by the rules is in the application.
20 The applicant submitted the information required by the
21 rules.

22 THE COURT: Did you make an argument below
23 that, gosh, without this underlying data, it doesn't
24 satisfy *Daubert* standards, and they just didn't address
25 it?

1 MS. PERALES: Yes. So we made that
2 argument before the hearing. We objected to the
3 pre-filed testimony of Mr. Snyder, based on *Daubert* and
4 spoliation. We made that argument in our written closing
5 briefs and responses and replies. We made that argument
6 in the exceptions to the PFC. We made that argument
7 every step of the way.

8 And there is no -- I mean, there was no
9 real -- there was nothing that addressed the *Daubert*
10 analysis. There were only findings that said the
11 information required by the rules was submitted.

12 There were references in the findings of
13 fact to subsequent -- subsequent subsurface
14 investigations, but those subsurface investigations
15 collected data that were for something else. I mean, it
16 did not support what was in the application.

17 THE COURT: I found myself, as I was
18 considering -- I guess more in the context of the
19 spoliation argument -- that if anything, you ended up
20 better off than you would have otherwise, right?
21 Otherwise, you're just kind of -- you've got Mr. Snyder's
22 report, you know, and his findings, but if he hadn't
23 destroyed this backup data, you'd have that pile of
24 information that he considered to arrive at those
25 conclusions.

1 You don't have that. You complained to, I
2 guess, the ALJ, or whoever resolved this dispute, and
3 ultimately said, okay, now y'all can go out and do your
4 own drilling -- you know, borings. So now you've got a
5 big set of data that you've acquired yourself, done by
6 your own experts. And if anything, you've got a more
7 thorough picture than you did otherwise, don't you?

8 MS. PERALES: So I disagree slightly. And
9 the reason is because we were entitled to go on to the
10 site and collect that data with or without the
11 spoliation. And, in fact, we've done it before. We've
12 done it in other cases, where there was no spoliation of
13 the underlying data. We requested access to the site,
14 and we were granted access, and we were able to collect
15 our own data -- our own subsurface data. And in that
16 way, we were able to compare what we had collected versus
17 what had been presented by the applicant in the
18 application.

19 We didn't have that here. When we went
20 onto the site, it was not to conduct our own subsurface
21 investigation. In fact, we only drilled a very limited
22 number of borings in a few distinct areas in order to
23 show -- to clearly show what was missing and how we were
24 harmed by what was missing.

25 So when we collected our information, we

1 were able to present to the ALJs -- we brought to the
2 hearing actual soil. This was what was missing. This
3 soil shows these features and this is what we didn't get.

4 And so that was the purpose of our
5 subsurface investigation. But -- and, subsequently,
6 130 EP also drilled a few more borings and collected more
7 data that they did not discard.

8 But, again, that -- that later subsurface
9 boring program, it did nothing to show us that what had
10 been submitted to TCEQ, the application and the geology
11 report that formed the basis of the draft permit that the
12 entire hearing and the final permit -- whatever they
13 collected later, it did not show us anything about the
14 reliability of what had been submitted to the TCEQ.

15 THE COURT: If I'm reading --

16 MS. PERALES: It doesn't exist.

17 THE COURT: If I'm reading between the
18 lines here, are you saying that there's conspiracy
19 between 130 EP and the Commission to sign off on
20 something that otherwise isn't supported?

21 MS. PERALES: No. No, Your Honor. And,
22 again, you know, in other -- in other cases, we -- we are
23 supplied with the samples. And we have testimony from
24 the geologist, for example, from Plum Creek Conservation
25 District, who states, nobody throws away their data,

1 especially if you know you're going to have to testify
2 about the opinions that you've reached in a hearing.
3 Nobody throws away that data. Because you have to go
4 back and review it and make sure that -- that your
5 testimony is correct.

6 And that's typically the way it occurs at
7 SOAH. That's typically the way it occurs in other
8 applications.

9 No, Mr. Snyder, we have had experience with
10 him in two other cases, and he does have a practice of
11 discarding soils and data. And so we sent him a
12 preservation of evidence letter as soon as that
13 application had been filed with TCEQ, and it was all
14 discarded anyway.

15 And so it's not that there was necessarily
16 a conspiracy here between the TCEQ and 130 EP; it's that
17 there were -- there was no evidence in the record to
18 support Mr. Snyder's opinions, and TCEQ and SOAH failed
19 to conduct an analysis that would have led them to the
20 only conclusion, and that is that there is no
21 foundation -- reliable foundational data to support the
22 opinions that are reflected in the application for the
23 permit that was ultimately issued. And that is legally
24 insufficient evidence. Again, that's a legal issue, it's
25 not a weighing of the evidence. It's a legal issue

1 because without that foundational data, his opinions are
2 not probative; they're not competent. They're
3 essentially no evidence.

4 So all of the findings related to the
5 geology report, all of the conclusions related to the
6 geology report, those are all reversible error because --
7 here are just a few more cases. Those are all reversible
8 error because they were based on incompetent testimony.

9 I'm happy to answer more questions about
10 the *Daubert* issue.

11 THE COURT: No. You can move on to your
12 next one.

13 MS. PERALES: Mr. Allmon -- this is our
14 last issue.

15 THE COURT: Okay. Thank you.

16 MR. ALLMON: Yes, Your Honor. I wanted to
17 address the TCEQ's reversal of the administrative law
18 judge's recommendation that the entrance road for the
19 facility be included within the permit boundary.

20 On issues such as these, the TCEQ's
21 abilities to overturn an ALJ is limited. It may reverse
22 a finding of fact only when against the great weight of
23 the evidence, and may only reverse the conclusion of law
24 when it was clearly erroneous. Neither standard was met
25 here.

1 The Commission premised its decision in
2 part on the asserted authority to enforce its
3 requirements outside the permit boundary. What dismissed
4 was that it was only the permittee who has an obligation
5 to obey the conditions of the permit. The permit is
6 essentially a contract between the State and the
7 permittee that the permittee will be -- obey those
8 conditions in exchange for being authorized to
9 participate in the activity.

10 The problem here is that if that entrance
11 road in the future was to be owned by someone else who
12 was not the permittee, TCEQ would be able to enforce this
13 general law against that person, but the TCEQ could not
14 step in and force that person to follow the conditions of
15 the permit, such as the maintenance of an all-weather
16 road. TCEQ would be left hoping that it had a
17 cooperative landowner in that case.

18 Now, TCEQ rules define "facility" as all
19 contiguous land and structures and appurtenances on the
20 land use for processing or disposal of waste.

21 THE COURT: Why would TCEQ interpret this
22 in a way to limit its authority to regulate something?
23 Seems counterintuitive to an agency's marching orders.

24 MR. ALLMON: That's a question, I guess,
25 primarily for the TCEQ. I don't -- I think the short

1 answer is, the applicant did not ask for the expansion of
2 the permit boundary. The TCEQ took the application on
3 face value for all that was presented to it. And without
4 a request for that permit boundary, the TCEQ did not
5 require that type of permit boundary.

6 Now, importantly, the permit, both the
7 draft permit and the final permit, provided a statement
8 of what activities would be authorized. And as the ALJ's
9 noted, that said that those type 1 landfills shall
10 include various things, including the paved entrance road
11 and all-weather access road.

12 It was appropriate for the administrative
13 law judges to impose a consistent requirement that those
14 access roads be included within the permit boundary. The
15 potential alteration of the permit in the futures also
16 undermine the public participation process here. The
17 analysis of the roadways was done, premised upon certain
18 assumptions as to where that road would lead to. And,
19 furthermore -- for instance, FM 11 and Highway 183 is an
20 intersection where there have been fatal accidents
21 before. The configuration of the road as represented in
22 the application as an entry in one place in relation to
23 that intersection.

24 Without it included within the permit
25 boundary, there is a risk in the future of that being

1 reconfigured, while it being on someone else's property,
2 without the agency able to step in and prevent that.

3 Now, TCEQ relied upon, in discussions
4 amongst the commissioners, a rule regarding all-weather
5 roads, to claim that its rules contemplate that an access
6 road may be outside the permit boundary. But the rule
7 doesn't compel the conclusion that TCEQ claims. Just as
8 a normal driveway fully encompassed within a piece of
9 property may abut and provide access from that property
10 onto a public road, so, too, consistent with that
11 language, an access road encompassed fully within the
12 permit boundary can lead up to the public road and go
13 from the permit site to the public road without
14 necessarily having intervening property between.

15 Now, importantly, ALJ's conclusion in this
16 case that the entrance road should be included within the
17 permit boundary was not clearly erroneous, and it was not
18 against the great weight of the evidence, and so the TCEQ
19 erred in reversing the administrative law judge on those
20 findings.

21 And with that, we're available for any
22 further questions you may have.

23 THE COURT: None on that topic at this
24 point.

25 MR. ALLMON: Thank you for your time,

1 Your Honor.

2 MS. WOELK: May I approach?

3 THE COURT: You may.

4 MS. WOELK: If you need a spare one of
5 these for your staff attorney, I brought a spare.

6 THE COURT: This one -- we just kind of
7 share them back and forth, so this will do.

8 MS. WOELK: Your Honor, again,
9 Cynthia Woelk on behalf of Texas Commission on
10 Environmental Quality. I'll be addressing just two
11 issues this morning, and then 130's attorneys will
12 address any remaining issues, and answer any questions
13 from the Court on those issues.

14 I've handed my binder to all counsel, and
15 I'll be referring to items in the binder as I go through
16 my argument.

17 First, Your Honor, I'd like to address the
18 Caldwell County ordinance prohibiting landfills in most
19 areas of the county.

20 The Solid Waste Disposal Act in Chapter 361
21 gives the TCEQ almost complete authority over landfill
22 permitting, including this -- the siting of landfills.
23 However, the Legislature, in Chapters 363 and 364 of that
24 act, has given local governments limited authority over
25 siting of landfills in their jurisdictions. And so the

1 Legislature has adopted two statutes, which are strangely
2 pretty overlapping, one of which applies to counties and
3 municipalities, and the other one applies only to
4 counties. And because they say almost exactly the same
5 thing, I'm going to refer to the statute that only
6 applies to counties. That makes it just a little simpler
7 to review. And that's under tab 2 of my binder. It's
8 364.012.

9 Both statutes have what we all, I think, in
10 our briefing, referred to as grandfathering provisions,
11 saying that a County may not prohibit disposal in an area
12 for which a landfill permit has -- landfill permit
13 application has already been filed. And I've highlighted
14 what I think is all the key language here. And it's
15 especially the language in subpart E, "The County may not
16 prohibit the disposal of municipal solid waste" -- I'm
17 skipping a lot of words because I'm only trying to read
18 the relevant ones.

19 "The County may not prohibit the disposal
20 of municipal solid waste in the area of that county for
21 which an application or a permit has been filed with and
22 is pending."

23 And the dispute, I thought, until today,
24 was a little different than counsel argued it today. I
25 would have said that we all agreed that parts 1 and 2 of

1 an application have been filed -- had been filed before
2 the ordinance was adopted, and that parts 3 and 4 were
3 adopted after the ordinance was adopted.

4 But in their briefing, Plaintiffs were
5 arguing that what was required was a "complete
6 application" or a technically complete application.
7 Today they seem to be arguing that parts 1 and 2 aren't
8 part of the application at all, which is belied by
9 statutory language. So I'm going to refer to language
10 under tab 3.

11 THE COURT: I want to jump in here just so
12 I can kind of put out my understanding of their argument,
13 and you'll have a chance to correct me if I'm wrong.

14 But -- and I'm betraying my ignorance in
15 saying, I don't know what is exactly required in this
16 stage 1, stage 2, stage 3, and stage 4. But as I
17 understood their argument, it was, hey, all that they
18 were seeking prior to this ordinance being adopted was
19 something called a land use compatibility determination,
20 and that that's not part of the application for a permit
21 or authorization.

22 Are you saying that it is, and that this
23 stage 1 or stage 2 is this -- what they're calling a land
24 use compatibility determination?

25 MS. WOELK: Well, I'm going to refer to the

1 statutory language to answer your question, Your Honor.
2 If you look at -- the statute under tab 3, 361.069, and
3 it says, "The Commission, in its discretion, may, in
4 processing a permit application, make a separate
5 determination on the question of land use compatibility."

6 And then the -- the TCEQ has implemented
7 that statute with a rule, which is under tab 4,
8 30 TAC-330.57, and it starts out in A -- I've highlighted
9 the key language -- I hope I have highlighted in yours.

10 THE COURT: Yes.

11 MS. WOELK: It starts out, Permit
12 Application. The application for an MSW facility is
13 divided into four parts, parts 1 through 4. So any
14 argument they have that parts 1 and 2, which have to do
15 with land use compatibility, are not part of the
16 application is just contrary to the wording of the
17 statute and the rule.

18 But, indeed, parts 1 and 2 have to do with
19 land use and compatibility. And the -- the statute,
20 supplemented by the rule, authorized an applicant to
21 start off by just filing parts 1 and 2. And if -- and
22 then if they get approval of the site that they plan to
23 use for the landfill, then they can file parts 3 and 4,
24 which is the more technical aspect of the permit
25 application.

1 And I would be the wrong person to try to
2 explain to the Court, like, what's really in each part of
3 the application, other than the generalities that I just
4 spoke. But I'm sure Mr. Ryan could answer questions
5 about, you know, what's really in parts 3 and 4 versus
6 parts 1 and 2.

7 THE COURT: Ms. Perales said that if you're
8 correct, your reading of this was correct, then this
9 bifurcated process contemplated by the Legislature would
10 be frustrated by what would be allowed under your
11 reading.

12 MS. WOELK: Well, I want to start by saying
13 these statutes -- I just looked it up while I was sitting
14 at counsel table. These statutes authorizing Counties to
15 specify what parts of the county there can be landfills
16 in and there can't be landfills in, have been around for
17 quite a few years. And it's not necessary for a County
18 to wait until an application is filed, or about to be
19 filed, or they caught wind of it being filed, to rush in
20 and pass an ordinance prohibiting it.

21 I mean, I think that the -- I'm not totally
22 aware of the legislative history, but I understand the
23 purpose of this statute is for there to be something
24 orderly, where the County passes an ordinance saying,
25 here's where you can have -- dispose of waste and here is

1 where you can't dispose of waste. And then applicants
2 know this.

3 But what this County did was wait until
4 part of the application was filed, and then rush in and
5 adopt an ordinance to prohibit this facility. And I
6 believe that's what the Legislature was trying to stop.

7 I think the amicus brief that was filed
8 elaborates on that, because the parties who wrote that
9 seem to know more about the legislative history than I
10 actually do.

11 THE COURT: I was going to ask if there is
12 insight into the legislative history, but I take it
13 that's addressed in your amicus brief.

14 MS. WOELK: That's addressed in the amicus
15 brief. And as far as I know, that's the only place the
16 history is addressed.

17 When Ms. Perales spoke, I believe she
18 stated, probably accidentally, that TCEQ wasn't arguing
19 that the plain language of the statute supported what the
20 Commission did. And that is our first argument. I mean,
21 the plain language of both of the provisions, 363.112 and
22 364.012, speak about an application. They don't,
23 contrary to the briefing that Plaintiffs filed, require
24 that the application be administratively complete or that
25 the complete application be on file.

1 Both statutes only use the phrase "pending
2 application." And when there is a pending application,
3 then the landfill permit that is being sought is
4 grandfathered in under the statute.

5 But even assuming for the sake of argument,
6 that that's not a plain language interpretation, it's --
7 and assuming that that language is susceptible to more
8 than one interpretation, certainly the Commission's
9 formal interpretation of these statutes in the -- in the
10 context of this final order is a reasonable one, and the
11 Courts should give deference to it.

12 THE COURT: Right. Well, I mean, you heard
13 me ask the question about deference, though. I mean, I
14 don't -- the Courts don't defer to every determination
15 made by an agency, right? Only in certain instances is
16 deference appropriate, correct?

17 MS. WOELK: I agree that this -- the
18 standard of reference has been changing somewhat, but
19 this is a statute administered by the TCEQ, an agency
20 that has expertise, and it's interpreting the language in
21 this statute.

22 And I guess I'll say this: Even if the
23 case law doesn't say, with respect to a statute, that
24 deference is given to a technical agency like this, it's
25 certainly a reasonable interpretation. And we would urge

1 the Court to find that it's a correct interpretation.

2 In conclusion on that point, Your Honor --
3 one more thing before I conclude.

4 In their briefing and a bit in argument,
5 they've tried to say, oh, the TCEQ has acted
6 inconsistently in this case than in other cases. And I
7 want to say to the Court, that's extra record, some of
8 the points they're making. And they made a point today
9 about a case that they called Post Oak Clean and Green
10 [verbatim]. Whatever happened in that case isn't in this
11 record, and the Court should not assume that it is
12 correct, that when they say this is an inconsistent
13 application of a statute or rule.

14 In conclusion on this, because EP 130's
15 bifurcated filing didn't change the fact that an
16 application was already pending when the County passed
17 its ordinance, we would urge the Court to overrule that
18 point of error.

19 The other point I'd like to address is
20 the -- the local floodplain development permit issue.
21 Because 130 proposed to construct in Caldwell County, an
22 entrance road to its facility that would cross a
23 floodplain in a couple of places, it needed to obtain a
24 floodplain development permit from Caldwell County.

25 And as the briefing and Plaintiffs have

1 told you, there's a rule, which is under tab 7 of my
2 binder, that says, "Any local floodplain development
3 permit that is required should be filed with the
4 application," although the rule doesn't specify a
5 consequence for failing to file it at that time.

6 130 had not secured a floodplain
7 development permit from Caldwell County when it filed its
8 application; and, thus, of course, it didn't attach one.

9 Prior to the contested case hearing, TCEQ's
10 executive director issued a draft permit, which is done
11 on virtually every case that's contested, and a draft
12 permit is a recommendation from the executive director of
13 what the permit ought to be specifically.

14 In this case, the draft permit recommends
15 that a special provision be included in that permit to
16 resolve this matter, and the recommended special
17 provision would require 130 to submit a local floodplain
18 development permit to the TCEQ before it commenced
19 construction of the landfill.

20 The -- that recommendation and the delayed
21 floodplain development permit were addressed in the
22 contested case hearing, and the ALJs wrote in their
23 proposal for decision that the evidence shows that
24 addressing these types of deficiencies through the use of
25 special provisions in the permit is a common practice of

1 the TCEQ. Although not strictly in compliance with the
2 TCEQ's rules, this seems, to the ALJs, a reasonable
3 accommodation that will not cause any harm or threat to
4 the environment, given that construction cannot begin
5 until 130 obtains the required permit.

6 The ALJs agreed with the EPD that use of
7 special provisions adequately solves the issue.

8 THE COURT: So I want to jump in here,
9 because as I understand at least part of their argument,
10 it's, hey, setting aside the ALJ's reasoning for why it
11 was okay, part of the policy behind requiring this
12 permitting to take place simultaneously, or prior to its
13 submission of a permit and authorization, is to inform
14 the public or anybody else who might oppose this
15 authorization, right? And this is an important component
16 of the case that they may build to -- either to better
17 understand what's at stake in this permit, or if they
18 know they don't like it, give them an understanding to
19 oppose it, right?

20 And if they don't get this -- if this
21 floodplain development authorization isn't obtained until
22 long after the permit has been signed off on, and you're
23 just waiting for the bulldozers to pull onto the site,
24 well, at that point, any chance of public -- the public
25 weighing in has long since passed.

1 MS. WOELK: Well, I don't think that's how
2 the TCEQ sees the requirement that it be attached to the
3 application. The TCEQ was not going to weigh in to the
4 decision on the floodplain development permit. It can't
5 do that. That -- that belongs to Caldwell County. And
6 whatever processes there are in that -- in that
7 permitting proceeding are something that interested
8 parties, like these Plaintiffs, could participate in.

9 For example, I'm told -- and I haven't
10 looked this up -- but I'm told people can sometimes
11 appeal those issuances of floodplain development permits.
12 But that's just a different requirement.

13 And part of the reason -- or the reason for
14 TCEQ often relaxing the timing of the filing of these
15 permits issued by different agencies is that the TCEQ
16 doesn't control the timing of those issuances. That's in
17 the hands of other agencies. TCEQ wants to know that one
18 of those permits has been issued, and it's -- it insists
19 that all those permits be obtained by saying you can't
20 turn dirt until you have all those permits and file
21 copies of them with the executive director.

22 THE COURT: Okay.

23 MS. WOELK: TCEQ, in its order, made
24 findings about the deficiency, and I put an excerpt from
25 the order -- the cover page to it, and then three other

1 pages, and I've highlighted the language. Portions of
2 the access road will cross the floodplain, and 130 hasn't
3 obtained their floodplain development permit yet --

4 THE COURT: Is this tab 8?

5 MS. WOELK: This is tab 8, Your Honor.

6 The draft permit contains special
7 provisions to address the deficiency. Use -- they found,
8 based on evidence in the record, the use of special
9 provisions in the permit matter is a common practice at
10 the TCEQ to address similar types of deficiencies
11 involving approvals from other governmental entities.
12 And they recognize it on the next page, in conclusion of
13 law 7. They recognize it as a deficiency, but this is
14 how they cured the deficiency. All they did was relax
15 the procedural aspect of this by allowing it to be filed
16 at a later time.

17 The Commission and 130 EP cited in our
18 briefing to the Third Court of Appeals cases, supporting
19 our position that TCEQ may properly ease timing -- ease
20 the timing aspect of the rule via special provision. We
21 cited one case, which I won't discuss today, which we --
22 TCEQ only cited to say, special provisions are
23 appropriate in municipal solid waste permits. That's all
24 I was citing that case for.

25 But between us and 130, we've cited these

1 two other cases, *Smith* and *Lake Medina*. And in both, the
2 Court upheld the departure by a predecessor agency to the
3 TCEQ -- upheld the departure from strict adherence to
4 requirements in the agency's permitting rules. And the
5 Court said -- in both, says -- these were Third Court
6 cases -- they said in both cases that the agency may
7 relax the law embodied in a rule provision that's not
8 primarily intended to confer procedural benefits on a
9 party to a contested case. And the agency's doing so is
10 not reviewable except upon a showing of substantial
11 prejudice to the complaining parties.

12 Plaintiffs complain about those cases and
13 try to trump them by citing a couple of cases of their
14 own coming out of the Third Court of Appeals.

15 So they cited the 1992 *Flores* case, where
16 the agency -- a predecessor, again, to the TCEQ in
17 landfill matters -- the agency had confessed error to the
18 Court in failing to follow certain rules concerning
19 determination of the groundwater table, and based on that
20 confession of error in the administrative record, the
21 Court found error, and in its opinion merely, you know,
22 found error and recited that the agency's discretion is
23 bounded by its rules. So it's not a very helpful case.
24 It's a confession of error case.

25 Plaintiffs also cited the *BFI* case, and in

1 that case, the concern was a substantive requirement,
2 submission of site-specific operating procedures for a
3 landfill.

4 Instead of setting out specific operating
5 procedures in its landfill rules, at least at that time,
6 the rules consisted of general requirements that empower
7 operators to develop operating procedures tailored to
8 their individual sites. And the rule required the
9 applicant to include very specific procedures in a
10 detailed site operating plan, a deviation from which
11 would be deemed a violation of the rules.

12 So you set out these procedures in your
13 site operating plan. They have to be very detailed. And
14 if you deviate from them, then it would be a violation of
15 the rules.

16 But this -- the application -- the
17 applicant there, BFI, instead of including the required
18 site-specific details in its site operating plan, merely
19 mimics the rule's general requirements. Thus, there were
20 no specifics to guide the daily operation of a landfill,
21 and holding that BFI's plan didn't comply with the rule
22 requiring specifics, the Court said -- the Commission has
23 rejected a one-size-fits-all approach to permitting --
24 I'm paraphrasing here.

25 Each site operating plan must therefore

1 provide specific enforceable procedures to govern the
2 daily operation. The exact level of detail required of
3 each individual section of a plan is a matter of agency
4 discretion, but at a minimum, the plan must set
5 enforceable procedures and be more detailed than the
6 general rules that it implements.

7 THE COURT: Well, couldn't -- aren't they
8 going to jump up and say, well, at least in *BFI* they
9 submitted something that mimicked the rules? Here, we
10 have nothing.

11 MS. WOELK: Well, of course, we're really
12 talking about something different. Here we're talking
13 about a very substantive part of a landfill application
14 that is how the -- how the landfill is going to be
15 operated from day to day. That's what we're talking
16 about in the case that I'm referring to.

17 Whereas in our case, we're just talking
18 about attaching a copy of some other regulatory entity's
19 permit that the -- that that permittee will need to
20 operate its landfill.

21 So I think it's very different. I think
22 the requirement that we're dealing with here is a
23 procedural requirement, when must this permit be
24 submitted to the TCEQ -- this other entity's permit be
25 submitted to the TCEQ. And the *BFI* case is about very

1 substantive requirements about how the landfill itself
2 will operate something that the TCEQ has control over.

3 THE COURT: I remember -- I mean, in
4 reviewing the reply, that that was a point they made
5 about *Smith* and *Lake Medina* was, hey, the substantive
6 requirements are satisfied in that case, and that's why
7 it was okay to excuse any procedural missteps.

8 I guess it's your contention that this
9 land -- this requirement is procedural in nature?

10 MS. WOELK: The timing of it is -- is
11 procedural in nature. That's our position, Your Honor.

12 THE COURT: Because -- and the reason why
13 you say it's substantive, is satisfied or will be
14 satisfied, is because ultimately a permit cannot issue
15 without having this attached?

16 MS. WOELK: Well, the permit has issued,
17 but they can't use the permit until that -- until a copy
18 of the local permit is supplied to the TCEQ so it knows
19 that the permittee has the permit.

20 THE COURT: Got it.

21 MS. WOELK: As I think back, until filing
22 its reply brief, the plaintiffs had really never
23 contended that there was harm to their substantial
24 rights. And I think we all pointed that out in our
25 response brief. So this is -- it was a new argument in

1 their reply brief, that they were harmed by the -- the
2 easing of the -- of the timing requirement on supplying
3 that permit.

4 They haven't pointed to a place in the
5 record showing that they raised this argument that they
6 are now raising, that, you know, they're saying now, oh,
7 we couldn't really present our case to the TCEQ without
8 having a copy of that permit attached to the application.
9 But if that were the case, maybe they should have sought
10 a continuance from the ALJ. I don't know if they did
11 that. They don't -- they haven't shown that they did
12 that.

13 Maybe they should have raised this in their
14 motion for a rehearing to the Commission, that they were
15 harmed because, of course, the motion for a hearing is
16 the point where the agency has a chance to correct any
17 errors. I'm not saying there was an error, but one is
18 supposed to raise these -- the errors that they claim,
19 and the legal bases upon which they rest. And they
20 didn't -- they didn't claim, I believe, in their motion
21 for rehearing that there was some inability to present
22 their case to the TCEQ because that local permit wasn't
23 attached to the application.

24 THE COURT: I don't take that to be their
25 primary assertion of the substantial prejudice or harm

1 that they say they face. I think that, as I see it, the
2 bigger argument is, hey, you didn't satisfy this
3 requirement. This requirement is intended to protect us
4 from having our land flooded by either a dam that's not
5 properly accounted for or something to do with the
6 floodplain. And because you didn't satisfy this
7 requirement, we're put at risk -- our property is at
8 risk.

9 That's what I perceive to be their -- I'm
10 not saying they're right or they're wrong, but, I mean,
11 that's what I perceive to be the main thrust of their
12 argument in terms of, here's the harm we face. And I
13 think that's in -- on the first page of their motion.

14 MS. WOELK: Well, Your Honor, there are two
15 entities out there, I guess, protecting them. I think
16 that's maybe how they would describe it. And the TCEQ
17 has its role, but the County had its role, and it was the
18 one doing the protecting that a floodplain development
19 permit offers. And the TCEQ was evaluating -- evaluating
20 matters that are under its purview.

21 So, again, all that the applicant failed to
22 do was attach a copy of a permit issued by another entity
23 to the application. And instead they're going to -- or
24 already have, I don't know -- you know, this isn't in the
25 record, so I don't know the status of whether it's been

1 on behalf of 130. And before I start, Judge, can we get
2 a time check?

3 THE COURT: Yes. So y'all have used --
4 hold on just a second -- 31 minutes. The other side,
5 y'all have used 51 minutes.

6 MR. TRUESDALE: Well, I'm going to try to
7 keep this as brief as possible, but I just want to do
8 that anyway.

9 Your Honor, I'm going to discuss one of the
10 matters that was briefed heavily, but not discussed by
11 Plaintiffs, and that's the spoliation issue. I want to
12 talk very briefly about that and then segue from that
13 into a discussion of the geology report, because it's a
14 related issue. And then I'm going to discuss the permit
15 boundary issue.

16 And as I begin, I would like to start by
17 just a real quick refresher on the standards of review,
18 because it dovetails both with the spoliation and then
19 also with the permit boundaries, and they're both
20 governed by separate standards of review.

21 But at the outset, Rule 174 governs -- and
22 as this Court is well aware, the -- under 174, reversal
23 is only appropriate absent -- or is not appropriate in
24 the absence of a showing in the agency record that the
25 appellant's substantial rights were prejudiced by the

1 alleged violation of Rules A 1 through -- or A through F
2 of 174.

3 And the reason I start with this is it
4 dovetails into what it takes to show substantial
5 prejudice. And the case law establishes that a
6 substantial prejudice requires a showing that a party is
7 deprived by an error from fully being able to make its
8 own arguments during the course of a hearing, or make
9 exceptions. So the substantial prejudice really goes to
10 the party's ability to litigate the matter in the
11 contested case hearing or otherwise.

12 And when we analyze those types of errors
13 under a -- the substantial evidence prong of 174, there's
14 always a heavy presumption that the agency findings and
15 inferences and conclusions are supported by substantial
16 evidence; and the burden of showing that they are not is
17 a substantial one.

18 In a court -- even if this Court disagrees
19 with factual findings that were made by the agency or by
20 the Commission, this Court can't substitute its judgment
21 so long as there's more than a scintilla. And that's not
22 a remarkable standard, but it bears repeating because it
23 frames the arguments that were made.

24 And very briefly, I'd just like to say,
25 with respect to the agency's rejection of ALJ proposals,

1 which dovetails with the permit boundary, you know, that
2 implicates a separate standard of review, and that
3 standard is under the Health and Safety Code,
4 Section 361.82. And there are two different provisions
5 in that. One governs findings of fact and one governs
6 conclusions of law. And the standards, at their essence,
7 though, both require the agency to articulate a basis for
8 rejecting an agency's -- or ALJ's factual finding or
9 conclusion of law.

10 And so the question is not whether it's
11 right or wrong; it's, did they articulate the basis? And
12 you'll understand my point on that when we talk about the
13 permit boundary issue.

14 With respect to spoliation, I do want to
15 spend a lot of time on this. It wasn't argued. I'm not
16 going to say that they conceded it by not arguing it.
17 That's obviously not the case.

18 But the point I want to make is that a
19 recurring theme through the plaintiff's briefing is that
20 they were afforded no remedy for an allegation of
21 spoliation. The key is no remedy. And that's just
22 simply not correct.

23 They petitioned the ALJs, after the
24 discovery period ended, for an opportunity to take
25 discovery, and they were granted that. And in their

1 request for discovery, they said, or in the alternative,
2 we seek some other remedy. They were granted the
3 opportunity to take discovery in response to their
4 request for some sort of spoliation consequence. So they
5 were, in fact, granted a remedy.

6 Now the point that they draw upon is, they
7 quote from an ALJ ruling later in the case, where they
8 asked for additional relief, and the ALJ says, basically,
9 look, we've litigated this. We gave you the opportunity
10 to go out and look at the property. You conducted your
11 own inspection. No additional remedy is necessary --
12 they didn't say "no additional." They say no remedy is
13 necessary. But in context, that's because directly above
14 that they just discussed the remedy that had been
15 provided.

16 So -- so it's just a red herring for them
17 to say that there was no remedy provided. There was a
18 remedy provided.

19 But, more importantly, the remedy that they
20 seek exclusively through the briefing is an instruction,
21 a spoliation instruction, to be given by an ALJ during an
22 administrative proceeding. I was kind of puzzled over
23 that, because as I was reviewing that I was thinking to
24 myself, now, who is supposed to give this instruction,
25 and who's going to receive it? This is not a jury trial.

1 This is not a case where a jury is told, hey, you may
2 make some presumption about the fact that evidence was
3 not produced, and you may presume that had the evidence
4 been produced, it would be prejudicial to the party who
5 didn't produce it. This is not a case where an
6 instruction -- this isn't a jury trial. The remedy they
7 seek is simply one that doesn't dovetail or fit within
8 the administrative contested case proceeding. And so to
9 the extent that that's the remedy they seek, it's not
10 appropriate to anything.

11 THE COURT: But I think what's at the heart
12 of it, whether it's an instruction -- I mean, is that
13 presumption, right? I mean, I think that's what they're
14 saying, is that the ALJ should presume, you know -- adopt
15 that presumption that would be instructed to a jury. And
16 that I think that's what they were -- the point --

17 MR. TRUESDALE: And the presumption -- as
18 you well know, the presumption isn't a requirement that
19 they conclude; it's an ability to decide that the
20 evidence would have been prejudicial.

21 And that takes us right into the argument
22 that -- they call it *Daubert*. I call it the geology
23 report component of their argument. Because if you look
24 at page 61 of the proposal for a decision, the ALJs
25 address what they would have done had they even

1 considered a presumption.

2 At the end of the day, the ALJs concluded
3 that the disposal of the field logs and the 2013 samples
4 do not render the findings and conclusions in the geology
5 report inaccurate, scientifically unreliable, or legally
6 insufficient.

7 And what that means is that basically
8 they're saying that we've analyzed everything, and that
9 our conclusion is that the destruction of those logs did
10 not render the report inaccurate.

11 Then they go further, and they say,
12 protestants have the ability to "double-check" the
13 representations made in the geology report, regarding the
14 subsurface characteristics at the site by performing
15 their own investigation, collecting their own samples,
16 and obtaining their own lab results.

17 So bottom line is that the Court said that
18 the geology report was not rendered unreliable based upon
19 that. And that's just the consequence for the
20 spoliation. And then I'll get back to the beginning of
21 the *Daubert* geology report thing. But I think I just
22 interrupted you.

23 THE COURT: Well, no, I guess that's the
24 *Daubert* argument, right? It does -- kind of go hand in
25 hand, is, without the backup data, we can't know if what

1 he concluded is reliable or not. And the ALJ's
2 determination to the contrary -- I think the nub of this
3 is, well, what -- is that a legal determination that I
4 review de novo, or is it one that's subject to one of
5 these heightened standards of review you addressed at the
6 beginning of the argument?

7 MR. TRUESDALE: Fair enough. Let me
8 start -- that takes me back to where I was going to
9 start, and it's going to be an indirect answer to your
10 question, but I will get there. I promise.

11 I said -- I called this a geology report
12 rather than a *Daubert* issue because the question really
13 is, was -- did the geology report satisfy the
14 requirements of Subsection 363? They put it up on their
15 PowerPoint slide that one of the requirements of an
16 application is that it must satisfy the requirements of
17 Subsection 363.

18 And the ALJ spent over 30 pages going over
19 this issue. They start on page 31 and 32 of the PFD,
20 noting the fact that there's been a lot of contentious
21 disputes about the geology reports and the preparations
22 of the logs, and they say that, you know, we're going to
23 explain in great detail the process and procedures that
24 the evidence indicates were followed in sampling the
25 subsurface materials, testing the samples both in the

1 field and in the labs, and analyzing the samples and test
2 results to reach conclusions regarding the
3 characteristics of the subsurface materials at the site.

4 And then the ALJs say, after carefully
5 reviewing the substantial and voluminous evidence
6 presented on these issues, the ALJs find that the --
7 130 EP failed to obtain pre-approval from the ED as to
8 the boring plan, which Mr. Ryan is going to discuss.
9 Otherwise, the ALJ concludes that the geology report
10 meets all of the other applicable requirements of 30 TAC
11 330.63(e)(4), and that the arguments and criticisms of
12 the subsurface investigation and the resulting
13 conclusions were ultimately unpersuasive.

14 At its essence, the analysis of the geology
15 report is a substantial evidence challenge under
16 Rule 174. Because the question is, is the material --
17 does the material satisfy the requirements of that?

18 And without taking words from your mouth,
19 the questions that you asked counsel with respect to the
20 benefits of having their own investigation, goes neatly
21 into what actually occurred.

22 The question was, you know, didn't you
23 benefit from this because you had an opportunity to test
24 this?

25 The question that -- about the reliability

1 of the geology report turns upon -- you know, their
2 complaint is that we didn't have field logs, we didn't
3 have the actual soil samples. We did have the boring
4 logs because those were filed with the report. The
5 question was whether they were field logs, et cetera.

6 Now, when both 130 and Plaintiffs went out
7 and conducted their own tests in 2016, those tests
8 corroborated the reports and the geology -- or the
9 conclusions of the geology report. And after substantial
10 discussion of why and how the ALJs reached that
11 conclusion, they said that nothing from the 2016 boring
12 changed the ultimate finding that the geology report
13 contains complete and accurate information about the
14 geology of the site.

15 When they -- what the report and the
16 proposal for decision repeatedly says is that once you
17 analyze all of the information that was obtained by
18 Plaintiffs in their 2016 investigation, and by 130 in its
19 2016 investigation, all of the information that they
20 presented based upon that was consistent with, if not
21 identical to, the -- the information that was contained
22 within the geology report. And that's why the Court
23 was -- or the ALJ was able to conclude that we find it
24 unpersuasive to argue that the geology report is
25 unreliable. Its reliability is confirmed by subsequent

1 investigations, not only by 130 but also by Plaintiffs.

2 Now, there are, you know -- there are some
3 certain disparities that they talk about, you know, like
4 the fractures, but the ALJs basically say that those are
5 insubstantial in terms of the ultimate conclusions about
6 the reliability of the geology report.

7 And, therefore, the question really is, is,
8 was there a basis in the record for the Court -- for the
9 ALJ to conclude that the geology report was reliable?
10 And we have fact-finding after fact-finding, and we have
11 34 pages of analysis by the ALJ, confirming what steps it
12 took to reach the conclusion that it was, in fact,
13 reliable, and why arguments to the contrary were
14 unpersuasive.

15 I was going to go through on kind of a
16 point-by-point basis with respect to some of the
17 evidentiary challenges that they had made, but at the end
18 of the day -- you know, and I'd be happy to do that,
19 because the -- the report itself tracks through and
20 the -- report -- the PFD tracks through and addresses
21 every one of the issues that they raise.

22 These are matters that are being
23 relitigated again and again at the agency level, and now
24 in this court, even though they were -- they were the
25 subject of substantial evidence review at an earlier

1 phase.

2 Give me one second, Your Honor.

3 THE COURT: That's fine.

4 MR. TRUESDALE: Your Honor, one point that
5 I will refer you to is the appendix that was attached to
6 our initial brief because what the appendix does is it
7 provides a -- basically a line-by-line comparison of the
8 allegations of deficiencies in the evidence and matters
9 that rendered the report unreliable, and the discussion
10 by the ALJs as to why those were found by the ALJs to be
11 unpersuasive and why the ALJs were able to conclude that
12 the representations made by the geology report were, in
13 fact, reliable and were substantial, and were supported
14 by the evidence.

15 THE COURT: I mean, I think the
16 plaintiffs -- part of the plaintiff's narrative here is,
17 we get this report from Snyder -- I believe this guy's
18 name -- and it is devoid of backup data. We don't have
19 the soil samples or the borings. And its conclusions
20 were surprising, from a geologic perspective, that it
21 made the subsurface geology seem less vulnerable than
22 what we, the plaintiffs, and allegedly other people,
23 might have expected.

24 You're saying that the subsequent drillings
25 conducted by the plaintiffs confirmed all of his

1 findings, or overall, the record compiled from their
2 additional discovery, and whatever additional information
3 that was in the record, confirmed that, yeah, it's not
4 any more vulnerable than what Mr. Snyder said it was?

5 MR. TRUESDALE: Yes. Bottom line is what
6 it -- the subsequent drilling confirmed that the geology
7 was as reported in the geology report, okay? And that
8 the property was as fit for a landfill as any other
9 property that had been inspected.

10 The dispar- -- you know, the differences
11 between what the plaintiffs and what 130 found in the
12 subsequent investigation were not substantial from the
13 contents of the original geology report, and that's what
14 the ALJs found. They compared it. They compared every
15 step of the way, evidence about the nature of the clay,
16 evidence about the fissures or fractures, everything
17 else. They compared them all and looked at them and said
18 that based upon this, you know, the -- the analysis of
19 the underlying geology report remains consistent.

20 And not only did they do that, the -- the
21 ALJs, the ALJs note that the expert from the ED also
22 reached those conclusions, and said that there was the --
23 you know, anything that happened in the subsequent
24 report -- subsequent investigation didn't change his
25 initial conclusions and analysis about the geology report

1 and about its reliability.

2 So with that in mind, the arguments about
3 the sufficiency of the reliability should be rejected.
4 This is just an attempt to relitigate matters that were
5 demonstrated again and again by the record.

6 And going back to the standard of review,
7 with respect to prejudice, the question here has to do
8 with what kind of prejudice could they have experienced
9 when they were allowed to take their own investigation?

10 Oh, I'm sorry, I was just -- you know, to
11 the extent that they were out there drilling their own
12 samples, conducting their own analysis, there was not
13 prejudice from the fact that the geology report was filed
14 and that the source data for that was not retained.

15 THE COURT: So I -- I posed that question,
16 and as I remember it, the response was, well, we went
17 out, but we didn't do as extensive an investigation as
18 presumably Mr. Snyder did when he -- you know, we did a
19 few drillings, but it's not of the extent of data we
20 would have if we had his data, which we don't have.

21 MR. TRUESDALE: Well, with all respect to
22 opposing counsel, I don't think that the ALJs PFD bears
23 that out. They did conduct an extensive investigation.
24 Moreover, the PFD expressly says that when Plaintiffs
25 were analyzing their soil samples, Plaintiffs selectively

1 decided which ones to analyze. They wanted to analyze
2 ones that they thought might look like they had a
3 different clay result, or something else.

4 And so if anything, the ALJs pointed out
5 that it was the plaintiffs, that if there's any abuse of
6 discovery process, in terms of analyzing the data, would
7 have been on them and not on 130.

8 THE COURT: In terms of the discovery
9 process in a case like this, let's say Mr. Snyder had
10 retained -- the spoliation issue didn't exist, right, and
11 all of the borings were kept in a temperature controlled
12 warehouse and every soil sample was free to be inspected
13 by the plaintiffs and anybody else who wanted to look at
14 them. Would -- is there an opportunity for someone in
15 the Plaintiffs' position to go ahead and say, you know
16 what, thanks, Mr. Snyder, but I've got my own experts who
17 I trust, and I want them to go out and conduct their own
18 investigation, or is that not possible? Is the -- and I
19 guess to make this multi-faceted question, is the remedy
20 that was given to them to address the spoliation
21 argument, was that the only opportunity -- was it an
22 unusual opportunity to allow them to go out and conduct
23 these drillings?

24 MR. TRUESDALE: Okay. With respect to some
25 of the details about discovery, and the general, I'm

1 probably going to have to defer to Mr. Ryan.

2 But with respect to the remedy that was
3 offered in this case, I think I can speak authoritatively
4 to say that when the remedy was requested, it was unique
5 and it was unusual because the discovery period had
6 ended. And so it would have been outside the ordinary
7 course for them -- they make the point that, well, we can
8 go out and inspect property if we want to, in ordinary
9 course. Well, they didn't in the ordinary course here.
10 It was outside the discovery period. And so the remedy
11 was, since it was outside the discovery period, we'll let
12 you go out there.

13 THE COURT: Because I guess an analogy
14 would be, you know, in a car accident, so one side's
15 expert reviews the car, the other side gets a chance to
16 review the car as well. Okay. Well --

17 MR. TRUESDALE: Well, and, also, what makes
18 this a little bit more unique, apart from the car example
19 case, is the context in which this all arises.

20 Keep in mind that the geology report was
21 not prepared for litigation. It was prepared as a part
22 of a permit application being filed with an
23 administrative agency, okay? And it just so happens that
24 as the administrative agency's consideration of that
25 evolved into a contested case, then it becomes under

1 greater scrutiny, or under a different level of scrutiny
2 than would have been available had it just been a part of
3 an administrative filing.

4 THE COURT: Right. Well, that's kind of
5 what brings me back to the question I had before -- and I
6 think you said maybe your co-counsel is going to address
7 this.

8 But they're preparing this report because
9 they've got to attach it to their application. Then it
10 becomes a contested case at some point in this process.
11 At that point, I guess, does the other side have an
12 opportunity to conduct their own investigations to
13 challenge the --

14 MR. TRUESDALE: Well, okay. I presume so,
15 but, please, if anybody in this courtroom wants to
16 correct me, I'm a humble man. So --

17 THE COURT: Fair enough. I don't know that
18 it really matters.

19 MR. TRUESDALE: Well, again, that goes back
20 to where I started with this. The question is, did the
21 report satisfy the requirements of the administrative
22 rules? Can you check -- I mean, if it were an
23 administrative thing, can you check the box that says,
24 this did all the things that were required by Section 363
25 [verbatim]. And the ALJ spent 30-some-odd pages walking

1 through the analysis to conclude this report reliably did
2 that.

3 And so, you know, again, this isn't a
4 witness that's testifying on trial about the color of a
5 light. It is, did they do everything they were supposed
6 to do? Did the report do so in a reliable manner? And
7 the administrative law judge says yes. The
8 administrative law judges said yes.

9 So with that in mind, I'll move on to the
10 next argument unless there are other questions with
11 respect to the evidence and the *Daubert* issues.

12 THE COURT: Nope.

13 MR. TRUESDALE: Okay. Well, then, the next
14 issue has to do with the site boundary. And the point
15 about this, as the Court recalls, the ALJ's proposed
16 requested consideration of two modifications to the
17 permit. One was to include an expansion of the permit
18 area to capture all of the access road. The other was to
19 expand the boundaries to capture the entirety of the
20 screening berm.

21 The rationale for doing so was expressed
22 concern that absent the expansion that the TCEQ would
23 lack the authority to enforce its regulations to areas
24 that fell outside of the boundary area.

25 And when the Commission rejected those

1 findings, it did so based upon its conclusion that its --
2 its authority extended beyond the permit boundaries.
3 And, you know, we have two quotes in the -- in our
4 briefing that I think are very important, and they're
5 from the hearing on September 6th, 2017, the public
6 meeting, where the commissioners basically said, with
7 regard to expanding the permit boundaries to include the
8 access roads, those are not required to be included in
9 the permit boundary. And I think the concerns over our
10 being able to enforce outside of our permit boundaries, I
11 don't think those are our concerns. I don't see a
12 concern about our ability to ensure enforcement of the
13 permit.

14 And then another commissioner, I agree, no
15 question. We have the authority to enforce the terms of
16 the permit outside the permit boundaries, as well as our
17 rules.

18 And so that's the legal basis that they
19 considered as giving them the authority to enforce the
20 permit outside of the -- or outside of the boundary
21 areas.

22 In the explanation for rejecting the
23 findings of fact and conclusions of law, they articulate
24 that. They say, there is no need for expanding the
25 boundary because we have authority to enforce our permits

1 outside the boundary. And the commissioners cite to
2 Texas Water Code Chapter 7, and they cite to other
3 statutes.

4 And if there was any question about their
5 authority, they also have authority under what I kind of
6 colloquially call the "thou shall not" provision of
7 Chapter 330.7, which basically empowers them to enforce
8 or to prohibit anybody from doing things with respect to
9 waste, whether it's in a permit boundary or not.

10 So the question really isn't so much
11 whether the permit boundary exists; it's whether the
12 ALJs -- or whether the Commission articulated a
13 legitimate basis, a legitimate basis under -- to reject
14 the conclusion of the -- of the proposal of the ALJs.

15 Here, they articulated a legitimate basis,
16 and that legitimate basis was that their authority exists
17 with or without the expansion of a permit boundary. And,
18 therefore, the requirement imposed by the ALJ to expand
19 the permit boundary was clearly erroneous, wasn't
20 required by the law.

21 The question then becomes, did the
22 Commission satisfy Section 361.0832 when it articulated
23 that? And the short answer -- and the inescapable answer
24 is that they did because they were reciting the evidence
25 that gave the Commission authority beyond the permit

1 boundaries.

2 Any other questions on that, I would be
3 happy to address; otherwise, I'll cede the time to
4 co-counsel.

5 THE COURT: No, I think I'm good there.

6 MR. TRUESDALE: Thank you, Your Honor.

7 THE COURT: Thank you.

8 MR. RYAN: May I approach, Your Honor?

9 THE COURT: You may.

10 MR. RYAN: Your Honor, my name is Brent
11 Ryan. I'm one of the lawyers representing
12 130 Environmental Park, LLC. And I want to start by
13 talking a little bit about this geology issue and the
14 discussion that you and Mr. Truesdale were having.

15 Yes, during the discovery period and
16 pursuant to discovery rules that applied to this case, a
17 party to a contested case hearing does have the ability
18 to go on to property and conduct investigations and
19 evaluations. The opposing parties in this case did not
20 seek to do that as part of the discovery process, even
21 though they knew well before then that the soil samples
22 and field logs were not available.

23 Ms. Perales referred to a retention letter
24 that she had sent to Mr. Snyder. I think it's important
25 to note -- and the record shows this -- one important

1 omission there was that she sent that letter after the
2 field logs had been destroyed and the soil samples had
3 been disposed of in order to free up storage space at
4 Mr. Snyder's firm.

5 What happened in this case was, after the
6 close of the discovery period, the plaintiffs filed a
7 motion -- actually, I think they filed a motion -- a
8 motion and two or three amendments to it -- requesting
9 that because those materials were no longer available,
10 asking the judges to either give them access to the
11 property or exclude all of the evidence regarding the
12 2013 field investigation.

13 So what actually happened here during the
14 administrative process is, they got exactly what they
15 asked for. They got access to the property to go out and
16 do whatever they wanted to do. Every single thing they
17 identified as wanting to do, they did.

18 And then even though they got exactly what
19 they asked for in response to what they suggested was
20 spoliation that occurred, they subsequently continued to
21 make the arguments that, well, we got -- we got the first
22 thing that we asked for in our either/or, but now we want
23 the second thing we asked for in our either/or. You gave
24 us access to the property. Will you also exclude all the
25 evidence?

1 I want to talk a little bit about the
2 floodplain development permit, and then I'm going to talk
3 some about -- sort of, I think, connected with that, I'm
4 going to talk a little bit about the issues that
5 Plaintiffs have raised related to compatibility of the
6 landfill and the Site 21 reservoir and dam. And then I'm
7 going to talk very briefly, make a couple of points about
8 the County's disposal ordinance.

9 With regard to the floodplain development
10 permit, I'm going to start with that the plaintiff's
11 primary argument here relates to protecting them from
12 flooding, and they believe that a floodplain development
13 permit from the County is important to accomplishing
14 that.

15 Well, the special provision that the
16 Commission included in the TCEQ permit affords that to
17 them. That special provision provides that the landfill
18 cannot even be constructed until the floodplain
19 development permit has been issued by the County. So if
20 they think that's important, they're getting that.

21 And as a matter of fact, it is a matter of
22 public record that the Commission has issued that
23 floodplain development permit.

24 THE COURT: The county Commission?

25 MR. RYAN: Yes. The county floodplain

1 development permit has been issued. So to the extent
2 they think that's important to protecting them, not only
3 does this special provision -- did it give them that
4 protection at the time the TCEQ permit was issued,
5 they've got whatever protection they're going to get from
6 the county floodplain development permit.

7 THE COURT: Because, I mean -- I asked -- I
8 found myself wondering -- again, I try to confine my
9 stream of consciousness to the relevant matters at hand,
10 but I found myself wondering, well, I mean, if this -- if
11 we've kind of structured this this way, and the
12 floodplain development permit from the County is normally
13 required to be attached to the application, and TCEQ
14 says, well, okay, we're going to let you -- we're going
15 to excuse the timing of that, but not let you construct
16 until you get it, then I thought to myself, well, if the
17 County opposes this landfill, then what's to stop it from
18 just not granting this floodplain development permit when
19 it's sought? And it sounds like that has already -- it's
20 already issued.

21 MR. RYAN: Yes. Well, and as a matter of
22 fact, the County did oppose this landfill permit in the
23 contested case hearing process. The County was a party
24 in opposition to the permit.

25 THE COURT: Presumably that's why it issued

1 that ordinance, which I guess we're going to also talk
2 about.

3 MR. RYAN: Yes. But the County is not a
4 party to this appeal. And subsequent to the TCEQ issuing
5 the permit for the landfill project, the County issued
6 the floodplain development permit. So they -- their
7 opposition is -- if there is any opposition left, it's
8 clearly in a different stage at this point.

9 Plaintiffs also, in their reply brief and
10 here today, are asserting, for the first time, that they
11 needed to have the floodplain development permit in order
12 to properly participate in the TCEQ contested case
13 hearing.

14 Well, I think other than the fact that
15 generally that's not the case because that is a
16 requirement simply to provide that document -- and as
17 Ms. Woelk pointed out, TCEQ is not a reviewing authority
18 of what the County did. There's nothing in the TCEQ's
19 rules or in any statutes or elsewhere that makes TCEQ a
20 reviewing authority of the County's action. That's an
21 independent action that occurs.

22 But especially in this case, the record
23 shows that it's not true that the plaintiffs needed a
24 floodplain development permit in order to investigate and
25 look into issues that might be associated with it.

1 In ALJ's proposal for decision --

2 THE COURT: Because that's what they're
3 saying at least is part of the alleged substantial
4 rights.

5 MR. RYAN: That's exactly right.

6 So in the proposal for decision at pages 1
7 and 2, the ALJ has identified what they considered to be,
8 I think, three deficiencies in the permit application;
9 one of which, of course, was that it didn't include a
10 floodplain development permit from the County.

11 In that discussion, at the very beginning
12 of the proposal for decision, ALJs say, however, the
13 parties thoroughly litigated the issues raised by the
14 deficiencies in the contested case hearing.

15 And it is true that the plaintiffs knew
16 from TCEQ -- from 130 Environmental Parks TCEQ permit
17 application and other information that was provided to
18 them, what improvements associated with development of
19 the landfill required a Caldwell County floodplain
20 development permit.

21 The landfill itself is not located within
22 the floodplain, so it didn't need to be permitted as part
23 of that Caldwell County process.

24 THE COURT: I guess at the end of the day,
25 again, if you're just considering the practicalities of

1 the information that folks have to deal with, I can see
2 an argument to be made that whether some county official
3 has given their stamp of approval, that's just one source
4 of information on the overall flood risk, right? I mean,
5 there's -- Plaintiffs are free to conduct their own
6 investigation. You guys have your experts. TCEQ has its
7 experts. All these people are weighing in on the various
8 environmental impacts.

9 MR. RYAN: Absolutely. And impacts to
10 floodplains and overall impacts to surface water
11 drainage, including downstream impacts of changes that
12 might be made as the result of development of a municipal
13 solid waste facility are a major part of TCEQ's municipal
14 solid waste permitting rules, and they're a major part of
15 a permit application.

16 130 Environmental Park's permit application
17 consisted of five volumes in large binders like this one
18 (indicating).

19 This is volume 2 of the permit application.
20 It's 460-something pages. 420 pages of this address
21 floodplains and surface water drainage and protection of
22 downstream properties. That's a big part of a case like
23 this. It's a big part of the work that's put into one of
24 these applications. And it was a big part of this
25 hearing.

1 I think another thing that's important is
2 that the plaintiffs knew at the time of this contested
3 case hearing -- in fact, before this contested case
4 hearing, that Caldwell County had approved
5 130 Environmental Park's analysis and delineation of the
6 floodplain. They knew what the County thought about the
7 floodplain.

8 As Ms. Perales indicated, 130 Environmental
9 Park had submitted an application for approval of a
10 preliminary plat to the County, and part of that was a
11 floodplain state.

12 The record shows -- and this is discussed
13 in the PFD at pages 129 through 143. The record shows
14 that 130 Environmental Park submitted to the County, as
15 part of that preliminary plat application, the very same
16 floodplain study that was in the TCEQ application.

17 Mr. Tracy Bratton, the county engineer who
18 reviewed that preliminary plat application, determined
19 that the analysis contained some oversimplifications and
20 thought it might produce some questionable results.

21 So he required 130 Environmental Park to
22 amend its preliminary plat application and its drainage
23 analysis and its floodplain delineation, to redo the
24 modeling using the inputs that he thought were
25 appropriate. And this is all in the record of the TCEQ

1 case. This was all hashed out there.

2 So Mr. Traw, 130 Environmental Park's
3 engineer who did all the floodplain and drainage work, he
4 redid the floodplain analysis and submitted it to the
5 County.

6 In the PFD, at page 139 and 141, the ALJs
7 who looked at all the information from not only Mr. Traw,
8 who was working for 130 Environmental Park, but
9 Mr. Bratton, who was working for the County and who
10 reviewed all this information and said, wait, you've got
11 to change some of this; the ALJs said, we're not
12 convinced that Mr. Traw's modeling input methods --
13 modeling inputs and methods were improper. They also
14 said, we cannot conclude that the modeling inputs used by
15 Mr. Traw were erroneous.

16 After looking at the information that had
17 been submitted to the County with the preliminary plat
18 regarding the floodplain, the changes Mr. Traw wanted --
19 I'm sorry, the changes Mr. Bratton wanted, the revisions
20 Mr. Traw made in response to that, and looking at the
21 flood study in the TCEQ permit application, the ALJs
22 concluded, at page 143 of the PFD, no party has directed
23 the ALJs to evidence showing that there are significant
24 differences between the floodplain map submitted to the
25 TCEQ and the floodplain approved by the County.

1 So --

2 THE COURT: Why would they be, right? It's
3 the same plot of land. I mean, what are they going to
4 say --

5 MR. RYAN: Well, there were differences in
6 the modeling input. Mr. Bratton wanted some changes
7 made. So Mr. Traw made those changes. But when you get
8 down to what is the end result of the whole exercise of
9 doing the floodplain analysis and delineating the
10 floodplain -- which is a map that shows the location of
11 the floodplain. When you get down to that, it was
12 essentially the same shown in the two flood studies, even
13 though one was done with some different inputs as
14 requested by the County.

15 So, you know, it was a little unusual here
16 in that during the TCEQ hearing, there was a lot of
17 testimony -- and there was about 100 pages of testimony,
18 and multiple exhibits discussing, comparing, and
19 evaluating the floodplain analysis submitted to TCEQ with
20 the one submitted to the County. That's something you
21 don't get very often. But that all happened.

22 So prior to the TCEQ hearing, the
23 plaintiffs here knew the details of the road crossing
24 culverts that required the floodplain development from
25 the County. It's two places where the entrance road for

1 the landfill crosses the floodplain, stream channels on
2 the western side of the landfill area there. So they
3 knew the details of those road crossings. They knew that
4 130 Environmental Park was going to use seven barrel -- a
5 seven-barrel culvert, each barrel seven feet by 12 feet.
6 They knew the other one was going to be, I think, a
7 three-barrel culvert, each barrel five feet by eight
8 feet. They knew exactly what 130 was proposing. They
9 knew what the County had accepted as the delineation of
10 the floodplain. They knew all those things ahead of
11 time.

12 So the plaintiffs and the other parties to
13 the contested case hearing not only had the opportunity
14 to fully address issues related to the County's
15 consideration of the floodplain and issues related to the
16 road crossings, they actually did it in this case.

17 So now I want to talk a little bit about
18 the issue that the plaintiffs have identified as land use
19 compatibility and the Site 21 dam and reservoir.

20 They have asserted in their briefing that
21 TCEQ failed to consider the compatibility of the proposed
22 landfill facility with the Site 21 dam and reservoir
23 located downstream. That is simply not the case.

24 If you will look at, in the notebook I
25 handed out -- if you'll look right behind tab 1, this

1 first page is excerpts from TCEQ's final order in this
2 case. In the very first paragraph of that order, it says
3 that the Commission considered an application by
4 130 Environmental Park.

5 In the second paragraph, it says, after
6 considering the ALJ's proposal for decision -- so the
7 Commission considered the application. They considered
8 the proposal for decision. And then there's a list of
9 findings of fact and conclusions of law that they made.

10 I think it's also important to keep in mind
11 that on page 2 of the proposal for decision, the ALJs
12 said in there that they have concerns regarding the
13 compatibility of the landfill with the Site 21 reservoir.
14 They said, as will be discussed extensively in this PFD,
15 the Commission must determine whether situating a
16 landfill in very near proximity to the 100-year
17 floodplain immediately upstream of a flood control
18 structure needed to protect human life is a compatible
19 land use.

20 The ALJs devoted many pages in the proposal
21 for decision to discussing potential impacts downstream
22 of the landfill, including to the reservoir and the dam.
23 Pages -- and that includes pages 122 to 149 of the PFD.

24 And if you look back here in the notebook
25 at this first page, some of the findings of fact that the

1 Commission adopted, 320, considering all relevant
2 factors, the facility will not adversely impact human
3 health and the environment, and will be compatible with
4 surrounding land uses.

5 TCEQ's permitting rules require the
6 Commission to consider exactly that, compatibility of a
7 proposed facility with surrounding land uses.

8 130 Environmental Park prepared --
9 submitted as part of its application, a land use report,
10 prepared by John Worrell, who's a well-qualified,
11 experienced land planner. And that report included the
12 information referenced in the land use compatibility
13 Rule 330.61(H), including identifying the Site 21
14 reservoir as a nearby land use and a map showing the
15 location of various features, including the proposed
16 landfill and the Site 21 dam and reservoir.

17 Now, as you can imagine, the evaluation and
18 determination of land use compatibility and impacts on
19 surrounding land use can be a pretty subjective exercise.

20 If you look at the information that's
21 required to be submitted to the Commission, it addresses
22 things like population density, number and distances to
23 nearby residences and businesses.

24 So as part of this land use compatibility,
25 you end up with this analysis of what level of population

1 density can you have in a particular area around a site
2 and still have compatibility? How many residences and
3 businesses at what distances can be present in the area
4 that would result in a lack of compatibility?

5 But TCEQ's permitting rules also includes
6 lots of detailed objective technical requirements and
7 standards that cover all sorts of things with regard to
8 the design, construction, and operation of a landfill.

9 Now, one of those is surface water
10 drainage. TCEQ has got several rules in Chapter 330 --
11 330.63(c), 330.303, 330.305, set out detailed
12 requirements for managing stormwater at a facility and
13 for evaluating the impacts of stormwater that flows into
14 a receiving water body, like a river, a creek, or in this
15 case, a reservoir with a dam like Site 21.

16 So John Worrell, who prepared the
17 130 Environmental Park land use report is a land planner,
18 and he's really good at things like population density
19 and growth trends. He's probably not very good at things
20 that are required by TCEQ's rules related to drainage and
21 floodplains, like analysis using hydraulic equations and
22 the Corps of Engineers hydraulic Engineering Center
23 computer programs.

24 So 130 Environmental Park didn't ask its
25 land planner to evaluate the dam and reservoir. Instead,

1 it hired Tyson Traw to do that work. Tyson Traw is a
2 licensed professional engineer with more than 15 years
3 experience doing engineering work, all of it related to
4 surface water drainage and floodplains. He prepared the
5 surface water drainage report in this application as is
6 described in TCEQ's rules, and he designed the site's
7 drainage facilities.

8 Rather than go through everything that's in
9 the notebook here, I'll just touch on a couple of things,
10 sort of jump into some conclusions.

11 But if you'll look at the -- after tab 2,
12 the first page there, that shows the permit boundary with
13 a dashed line that has two little dashes. The dashed
14 line with three little dashes is the property boundary.
15 And it also shows the layout for the landfill. That's
16 what's inside that dark line that has all the closely
17 spaced contoured lines on it.

18 THE COURT: Yes.

19 MR. RYAN: This also shows various surface
20 drainage features, chutes, ditches, swales, ponds,
21 various features to control and manage runoff here.

22 Mr. Traw testified that a landfill, like
23 most any other type of land development, increases the
24 volume of stormwater that runs off the property after a
25 given rainfall event because development generally

1 decreases infiltration or the ability of the land to
2 absorb some of that water.

3 So rather than soaking down into the
4 ground, more of it's going to run off.

5 TCEQ, like a lot -- like most other cities
6 and entities that regulate land development, has
7 requirements to limit adverse effects from those kinds of
8 changes, especially on downstream areas where the changes
9 could result in increased flooding risks.

10 Surface water drainage analysis for
11 municipal solid waste landfill facilities include a
12 comparison of the existing and the post-developed
13 drainage patterns, to ensure that the development of a
14 landfill does not adversely alter existing drainage
15 patterns, potentially resulting in adverse impacts
16 downstream; in this case, for instance, to the reservoir
17 and the dam.

18 Mr. Traw did those analyses using the
19 computer program specified by TCEQ.

20 TCEQ's engineer, Steve Odil, testified that
21 when you do this sort of an analysis and comparison of
22 existing and post-developed conditions to evaluate the
23 potential for adverse alterations, you look at three
24 parameters: The volume of water, the total amount of
25 water passing a certain point after a particular rain

1 fall; the velocity at which that water is moving, the
2 speed the water is moving past that comparison point; and
3 the peak discharge rate, how much water is moving past
4 the comparison point in a given period of time.

5 That's exactly what Mr. Traw did. And if
6 you look at --

7 THE COURT: I'm going to give you a
8 heads-up that you've got about six minutes remaining of
9 your time.

10 MR. RYAN: Okay. If you look at the last
11 page, behind tab 3, this is a set of three tables that
12 Mr. Traw prepared based on all the analyses and modeling
13 that he did, and the ALJs actually included these tables
14 in their proposal for decision. These show, in the fifth
15 column of each of the three tables, the difference
16 between the existing condition and the post-developed
17 condition for each of those three parameters: Peak
18 discharge, volume, and velocity.

19 And if you look in that fifth column,
20 that's for a 25-year storm, which is what TCEQ rules
21 require, although Mr. Traw also did these analyses for
22 the 100-year storm. That's the last three columns.

23 If you look in that fifth column, you can
24 see that in the top table for peak discharge rate, most
25 points show a decrease or no change. For volume, there

1 are three decreases, three increases, and no change on
2 the others. And then the last table for velocity, we
3 have either a decrease in velocity or no change.

4 With regard to volume increases, Mr. Traw
5 testified that a landfill, just like any other type of
6 development, is going to increase the total runoff
7 volume.

8 TCEQ's engineer, Steve Odil, testified that
9 an increase in volume is not an adverse alteration if the
10 water is released at a slower discharge rate and
11 velocity.

12 Now, in the middle three pages, behind
13 tab 3, Mr. Traw discusses the existing and post-developed
14 comparisons, and then at the end of that, sets out his
15 conclusion that the landfill development will not
16 adversely alter existing drainage patterns, meaning that
17 development of the landfill will not adversely impact
18 areas downstream of the landfill facility, which, of
19 course, includes the Site 21 dam and reservoir.

20 Then behind tab 4 are a few documents
21 related to another analysis that Mr. Traw did, comparing
22 existing and post-developed water surface elevations.

23 If you look on that first page behind
24 tab 4, you can see where the landfill is, you can see the
25 dam down there at the bottom, and you can see all these

1 red lines. One in particular I've highlighted with a
2 green rectangle down near the dam. These are cross
3 sections at which Mr. Traw did computer analyses from
4 before the landfill and after the landfill to see what
5 the surface water elevations would be in areas upstream
6 from the dam. And you'll see that the one I highlighted,
7 1.93, is the one closest to the dam.

8 And then if you skip over a couple of pages
9 to page 371, this has the results of his modeling in the
10 post-developed condition.

11 The sixth column there has the water
12 surface elevation. And then at the bottom of the page,
13 you can see that there is information for that 193 --
14 1.93 cross section for the 100-year and 25-year storm.
15 The water surface elevations are at 518.9 and 517.4,
16 respectively, in those two storm events, and that's feet
17 above mean sea level.

18 Then if you look back at the last page in
19 the notebook, this provides the same information for the
20 existing conditions analysis. And you'll see that for
21 cross section 1.93, the water surface elevations in the
22 100- and 25-year storm events are exactly the same.

23 So what that shows is that the water level
24 in the reservoir behind the dam is not going to increase
25 in either a 25-year or 100-year storm event after the

1 landfill is built over what it is right now.

2 So the ALJs agreed with Mr. Traw's
3 conclusions. They recommended various findings of fact
4 to the Commission related to land use -- related to
5 surface water drainage and floodplains and the land use
6 compatibility. Several of those are shown on the first
7 page behind tab 1. And the Commission adopted the order
8 with those findings of fact and conclusions of law in
9 there.

10 So those -- that information shows that not
11 only did the Commission consider the issue of the
12 compatibility of the landfill and the dam and reservoir,
13 they concluded that there would be no adverse impacts
14 downstream resulting from the development of the
15 landfill.

16 And with that, I'll answer any questions.

17 THE COURT: I think that is good for me for
18 now. Thank you.

19 MR. RYAN: Thank you, Your Honor.

20 THE COURT: Any rebuttal?

21 MR. ALLMON: Yes, thank you, Your Honor.

22 First I'll address the floodplain development permit
23 issue. It is important to recognize the role that the
24 floodplain development permit plays in the TCEQ process.
25 It is not merely checking a box or assuring that there's

1 been a coordinated approval.

2 Local authorities are the lead agencies in
3 Texas for floodplain issues. They have expertise on
4 those issues. During the hearing, protestants, now
5 Plaintiffs, objected to the testimony by the executive
6 director's staff on issues of hydrology, drainage, and
7 runoff. The executive director responded, Mr. Odil is
8 not being offered as an expert in any of these deals, and
9 went on to say, his review is -- well, it's limited to
10 confirming the required information in each area was
11 submitted in the application.

12 When it came to all of this modeling that
13 Mr. Ryan has pointed at, submitted in the application,
14 the agency does not have hydrology experts to evaluate
15 whether that is right.

16 I mean, we're talking about geology issues.
17 The TCEQ has a staff geologist, someone with expertise
18 who can take a look at that geology material and
19 determine, using expert opinion, whether it's valid or
20 not valid. TCEQ has no such resources in-house when
21 dealing with floodplain issues.

22 But that is why the rules purposefully
23 require the submission of floodplain development permit
24 prior to the issuance of the application. That aids in
25 assisting the agency and assisting the public in

1 evaluating the permit.

2 It's also important to realize the
3 difference between the platting approval and the
4 floodplain development permit. Your platting approval
5 involves determining the extent of the floodplain. Your
6 floodplain development permit involves what Mr. Ryan
7 mentioned as the particular type of culverts, particular
8 type of structures that are going to be implemented in
9 order to address flooding at a location.

10 Without the floodplain development permit,
11 there was not knowledge of exactly what those types of
12 measures were that would be implemented. And I will back
13 him and say, we do not necessarily concede that all
14 necessary approvals have been obtained from the County
15 for this entire facility. There are certain facilities
16 outside the permit boundary we know have been permitted,
17 but we don't know that all permits required of the County
18 have been issued for this facility.

19 And even if that was the case, the issuance
20 of those after the issuance of the permit does not
21 resolve the fact that it would have been very helpful in
22 evaluating the permit to know what types of facilities
23 were going to be required to be dealt with in -- were
24 required to be installed to deal with this flooding. And
25 also, as we noted before, representations contained

1 within the permit are then requirements of the TCEQ
2 permit itself. In order to know what the requirements of
3 the TCEQ permit were, it was necessary to know what the
4 requirements were contained in that floodplain
5 development permit. That was simply not known at the
6 time.

7 I would also note, we pointed out the
8 Post Oak case. That -- the final order in the Post Oak
9 matter was attached to our briefing in our reply, and
10 that was a prior order of the Commission. We do ask that
11 the Court take judicial notice of that prior order in
12 this matter.

13 Now, the -- what the agency had available
14 to it on the floodplain issue was only the analysis
15 provided by the applicant's experts, with no
16 countervailing analysis of the type, and the agency's
17 review to determine that. This floodplain development
18 permit would have aided in that particular type of
19 analysis. And the County -- so for those reasons, we do
20 think that there was substantial prejudice to the
21 protestants because the inadequacy of the ability of the
22 agency to address the floodplain did place the properties
23 owned by the protestants at greater risk of being
24 flooded.

25 There was a comment that substantial

1 prejudice only is present if someone is prevented in
2 presenting their case. Certainly, substantial prejudice
3 can result from the endangerment of a person's livelihood
4 or endangerment of a person's property, which is the
5 consequence here of inadequate flood protections being
6 contained within the permit issued by the TCEQ.

7 THE COURT: Does -- in this county
8 permitting process, whether it's taking place or not, I
9 mean, does the public -- do people like your clients have
10 an opportunity to weigh in on the County's decision to
11 grant a floodplain permit or not?

12 MR. ALLMON: I do not know that there is a
13 formal process. I know that some of these do go before
14 the County commissioners, at which point, presumably,
15 there would be an opportunity to provide a comment as to
16 the other agenda items, where the Commission is deciding
17 to take certain actions. But there isn't a formal
18 comment process, and perhaps someone else will correct me
19 if I'm wrong. There's not the same type of process for
20 input as there is, for example, for a TCEQ permit where
21 there's a comment period and a response to that. That
22 level of interaction with the public is not provided.

23 I'll let Ms. Perales address the County
24 ordinance issue.

25 MS. PERALES: Thank you.

1 Your Honor, just briefly on the county
2 siting ordinance, I wanted to point out that throughout
3 our briefing, I really hoped that it was clear that the
4 argument here is that there are two different types of
5 requests of this that were submitted to the Commission by
6 130 EP. I think on page 25 of our initial brief, for
7 instance, we made that distinction, and then, again, in
8 our reply brief on page 26.

9 And we maintain that argument here. And
10 that is, this isn't about submitting a permit application
11 in a piecemeal process. This is about submitting either
12 a request for a land use compatibility determination,
13 which is what was submitted back in September of 2013, or
14 an application for a permit or authorization. And that
15 didn't occur until February of 2014, after the County had
16 enacted its ordinance.

17 If 130 EP had chosen to pursue its request
18 for a land use compatibility determination, at the end of
19 that process, all they would have gotten was a
20 determination as to whether their selected site was
21 compatible with surrounding land uses or whether it
22 wasn't. They would have not received any sort of permit
23 or authorization to dispose of solid waste or to
24 construct a landfill. They abandoned that process, and
25 they started over in February 2014, with an application

1 for a permit. And in that application, they included a
2 new parts 1 and 2.

3 And so our contention is that when the
4 County passed its ordinance --

5 THE COURT: So the parts 1 and 2, the thing
6 that was filed prior to the County's adoption of the
7 ordinance, that is also a parts 1 and 2, correct?

8 MS. PERALES: That's how they're referred
9 to, right. Because a land -- a land use compatibility
10 determination, it -- it basically encompasses the
11 information that is submitted in parts 1 and 2.

12 THE COURT: And you're saying that happens
13 in November, or whenever it did, and then the County
14 adopts its ordinance. And then in February they come
15 back with a new permit -- a new application that includes
16 a new part 1 and 2, plus 3 and 4?

17 MS. PERALES: Right. So parts 1 and 2 were
18 revised, so they -- you know, what they submitted back in
19 September was revised, and then parts 3 and 4 were added
20 to it. And so at that point, they were no longer asking
21 for a land use compatibility determination.

22 When they submitted the entire application,
23 they were then requesting a permit to construct and
24 operate a landfill. It was a different process. Had we
25 gone with the first process, we would have had an entire

1 hearing just on parts 1 and 2. And at the end of that
2 hearing, we would have had a PFD and an order from the
3 Commission that said, yes, this site is suitable, or, no,
4 this site is not suitable. But there wouldn't have been
5 a permit. There wouldn't have been an authorization.
6 But that would not occur unless and until they submit a
7 permit application.

8 THE COURT: So was the fatal mistake, then,
9 in your view, that -- in that February application, they
10 revised stages 1 and 2? What if they came back in
11 February and just included parts 3 and 4?

12 MS. PERALES: No, I don't think that that
13 changes the fact that what they submitted to the TCEQ was
14 only a request for a land use compatibility
15 determination.

16 And I think that -- that that was -- that
17 the intention was never to pursue that request. I mean,
18 the intention was to circumvent any attempt by the County
19 to enact a lawful siting ordinance.

20 THE COURT: Yeah.

21 MS. PERALES: That's what they were trying
22 to do.

23 THE COURT: Well, that was probably their
24 intent in the first place, right? That's why --

25 MS. PERALES: It was their intent in the

1 first place; that's correct.

2 THE COURT: That's why they initiated the
3 process in November, or whenever they did, was because
4 they wanted to do this through TCEQ, right?

5 MS. PERALES: They wanted to make sure
6 that -- that they could circumvent any ordinance that
7 might prohibit their site.

8 THE COURT: Sure.

9 MS. PERALES: Rather than -- so -- and I
10 think it's also important here to mention --

11 THE COURT: I don't see that -- you use the
12 word circumvent, and that, I think, implies some sort of
13 nefarious motive, and I -- I mean, I think they would
14 say, we aren't circumventing anything. We have different
15 choices in terms of how to put this landfill where we
16 think we want to put it --

17 MS. PERALES: Right.

18 THE COURT: -- and we invoked that process
19 before we were preempted by the County.

20 MS. PERALES: I think -- except for that
21 last part about being preempted by the County, I agree
22 with you. And ascribing no nefarious intent, the problem
23 is still that they only submitted a request for land use
24 compatibility determination.

25 And that's why I say, even if they had

1 followed through with it, even if they didn't have any
2 nefarious intent, even if they were legitimately trying
3 to get that determination, they still didn't beat the
4 ordinance.

5 And I think it's also important to point
6 out that when a County passes an ordinance, they have
7 this kind of expanded notice period. So they have to
8 first publish their draft ordinance for two weeks in a
9 newspaper of general circulation, and then they can adopt
10 it two weeks later. And the reason for that is so that
11 folks who -- stakeholders who might be impacted by that
12 ordinance can come in and try to convince the County that
13 they made a mistake. That's the process that should have
14 been followed here. That's the process they sought to
15 avoid by just submitting parts 1 and 2.

16 And whatever their intent, it's still -- it
17 still wasn't enough to comply with the plain language of
18 the statute that says that you only avoid landfill siting
19 ordinance if you submit an application for a permit or
20 authorization. They didn't do that.

21 THE COURT: But you concede that stages 1
22 and 2 are part of that permit process. You can't get to
23 stage 3 and 4 without 1 and 2, right?

24 MS. PERALES: I think I would phrase it
25 differently. So you have either/or, right? So you

1 can -- you don't submit -- if you're seeking a permit --
2 if you're seeking a landfill permit, you don't submit it
3 in terms of, here's parts 1 and 2, here's parts 3 and 4.
4 What you do is you submit parts 1 through 4. That's an
5 application for permit. And actually that's in the
6 rules.

7 THE COURT: Where in the plain language of
8 the statute -- I guess you're about to point me to a
9 rule.

10 MS. PERALES: Well, there is a rule. It's
11 330.7. And I think I have a copy, but I'd have to dig
12 around for it. I'm pretty sure I have a copy of it.

13 And in that rule, it describes what a
14 permit application is, and it says it's parts 1 through
15 4. And it says that that application can't even be
16 declared administratively complete until you have parts 1
17 through 4. That's a permit application.

18 You can't construct -- you can't construct
19 a landfill -- you can't commence construction until you
20 get a permit. You can't get a permit until you submit
21 parts 1 through 4. So if you only submit parts 1 and 2,
22 you don't get a permit.

23 And that's -- that's our argument, that
24 there's two separate things. The Legislature left out
25 one, and they included the other. They left out land use

1 compatibility determination. They said you -- if you
2 have an application for a permit or other authorization,
3 then the County ordinance doesn't apply to you.

4 THE COURT: Okay.

5 MS. PERALES: So turning to -- unless there
6 are questions on that particular issue, I'll move on.

7 THE COURT: Nope.

8 MS. PERALES: So turning to the geology and
9 the *Daubert* issue, I think there were quite a few details
10 regarding the process that occurred during the discovery
11 period, and the motions that were made, and the -- the
12 subsequent data that was collected. And I'd like to
13 address some of those just to kind of clarify the record,
14 but none of those have anything to do with the fact that
15 they could not satisfy the *Daubert* standard, that there
16 was no underlying data, there was no underlying
17 foundation for the opinions in the geology report that
18 was provided and introduced into evidence. And,
19 therefore, the opinions in that report are legally
20 insufficient.

21 Now, as far as the PFD and the ALJ's
22 explanation of whether our subsequent information was
23 persuasive, or whether they analyzed our information and
24 compared it to the geology report, all of that is
25 irrelevant, and it's wrong.

1 The Texas Rules of Evidence apply in these
2 SOAH hearings. The *Daubert* rules apply in these SOAH
3 hearings. And that analysis is what was missing from the
4 PFD, and that analysis was what was missing from the
5 TCEQ's final order.

6 THE COURT: Right. But, I mean -- I don't
7 have it in front of me, but when I was -- when
8 Mr. Truesdale was referring to the language from the
9 PFD -- I mean, it didn't cite *Daubert* or Robinson or
10 Rule 702, but it used the language of reliable or -- when
11 I was looking at that language, I was like, okay, that's
12 *Daubert* language if it's not citing *Daubert* itself.

13 MS. PERALES: So I wrote down some of the
14 words that he quoted. And so he said that our evidence
15 corroborated the geology report that was provided by
16 Mr. Snyder, that -- that it confirmed the geology report
17 that was provided by Mr. Snyder.

18 And, one, it didn't. But, two, there's a
19 reason it didn't, because we weren't out there conducting
20 Mr. Snyder's subsurface investigation.

21 What we were doing was using the rules of
22 discovery to access the site and collect our own
23 foundational information to show why it mattered, why it
24 makes a difference, why -- what it would look like if we
25 had access to this type of information.

1 I'd also point out that there were -- there
2 was a lot of discussion about the motion to compel access
3 to the site. So we did file a motion to compel access to
4 the site first. I don't know when Mr. Snyder discarded
5 all of the notes and the soil samples. All I know is --
6 and, in fact, I don't think he does.

7 What he said was that the notes were
8 discarded before he saw the preservation of evidence
9 letter. He couldn't recall when the soil was discarded,
10 but it was discarded before he responded to the first
11 notice of deficiency issued by TCEQ, which was May 2014.

12 So before TCEQ even got to ask him, you
13 know, do you have anything to support what's in here,
14 he'd already discarded that information. I don't know
15 when and he doesn't know specifically when.

16 THE COURT: I think the only thing that
17 matters for this whole back and forth is the harm that
18 you suffered, right?

19 MS. PERALES: Right. Exactly. And so we
20 sought to -- we sought to compel access to the site so
21 that we could show the type of harm that we would suffer,
22 the type of information that we should have received.
23 And what -- we styled it as motion to compel access, or
24 in the alternative, a motion for sanctions.

25 130 EP ultimately agreed to give us access.

1 So we didn't get an order. We had an agreement. Then
2 there was all of these impediments that were imposed upon
3 our access, so we went back to the ALJ and said, come on,
4 we need this order. And then we resolved those
5 impediments, and so ultimately we collected information,
6 they collected information. They split soil samples with
7 us. There's no question that we obtained some
8 observation of what was in the subsurface.

9 What we did not do, what they did not do,
10 was recreate the geology report. We did not collect
11 information or subsurface data from the borings that were
12 drilled to support the logs that were included in the --
13 in the geology report that was in the application. We
14 did not -- in fact, what we collected did not corroborate
15 what they had. In fact, they said there were no
16 fractures or fissures. We and they discovered there were
17 plenty of fractures and fissures. And there was one that
18 was so large that as we were drilling the boring, the
19 water, like, evacuated. It left the boring hole because
20 of -- there was a fracture or fissure or some sort of
21 secondary feature through which it escaped.

22 This was nowhere in their initial geology
23 report. This is the type of information that was
24 lacking. This is the type of information that had we had
25 even photos of the soils that had been collected, we

1 would have been able to confirm whether their geology
2 report was accurate or not.

3 And that is what *Daubert* speaks to, whether
4 the opinions that were offered by the expert -- and in
5 this case, because it's a TCEQ permit application, the
6 opinions that are reflected in the application that serve
7 as the basis for the draft permit and the final permit,
8 whether there's any foundational data for that, and there
9 wasn't.

10 Our -- our limited number of borings is not
11 a substitute. It does not support Mr. Snyder's opinions
12 that are reflected in this application.

13 THE COURT: The ALJs obviously disagreed
14 with that argument, right?

15 MS. PERALES: The ALJs -- I would say that
16 the ALJs did not apply the correct standard. And so
17 ultimately, they -- they -- they didn't look at -- there
18 was no evidence for them to look at to confirm whether
19 Snyder's geology report that was in the application was
20 based on any foundational data. There was nothing for
21 them to look at.

22 And so I'd also mentioned that, again, it
23 is not uncommon for us to -- or for a protesting party to
24 drill borings. It's not uncommon to extend the discovery
25 period, and we provided an example of that in our

1 appendix to our reply brief. It takes a while to get
2 drillers on board and to come up with some sort of plan.

3 Now, finally, just very briefly on the land
4 use compatibility issue. Mr. Worrell, the land use
5 expert for 130 EP, did not analyze, did not even know of
6 a high hazard dam located on the site. He was unfamiliar
7 with it. It wasn't part of his evaluation.

8 TCEQ's witnesses did not conduct a land use
9 compatibility analysis. Mr. Traw may have analyzed the
10 surface water drainage as it exits the site. He may have
11 analyzed the boundaries of a floodplain. But he did not
12 analyze the high hazard dam, the probable maximum flood
13 event that would impact that high hazard dam, and he is
14 no longer -- not a land use expert. He did not analyze
15 it in terms of land use compatibility.

16 That exercise simply was not conducted with
17 regard to issues that would impact the health and safety
18 of the surrounding residents.

19 If there are no questions, I believe I'm
20 done.

21 THE COURT: Okay. Good.

22 MR. ALLMON: Your Honor, I'll make just a
23 few points responding with regard to the permit boundary.
24 There was a comment made that 361.0832 only requires an
25 explanation for the changes made. It requires

1 significantly more than that. In the case of *Hunter*
2 *Industrial Facilities, Incorporated*, the Austin Court of
3 Appeals noted that that statutory provision was intended
4 to constrain the ability of the Commission to overturn
5 the rulings of an administrative law judge. The
6 Commission does not have free rein to simply overturn a
7 ruling because it would disagree with the conclusion.

8 THE COURT: It sounds like it was a
9 deliberative process. If I'm remembering correctly from
10 the briefs, there was this exchange quoted from the
11 hearing between a couple of the commissioners, right,
12 discussing this very topic?

13 MR. ALLMON: Yes, there was an exchange.
14 And I would like to address that exchange, because that
15 exchange regarded an assertion that the Commission had
16 the authority to have enforcement outside the permit
17 boundary. And while it is true that if someone were to
18 go out and pour out acid into a stream outside the permit
19 boundary there, the TCEQ would have general enforcement
20 authority. But the key question here is whether the TCEQ
21 can enforce the terms of the permit outside of the permit
22 boundary, such as that roadway is required to be an
23 all-weather road, and it's supposed to be able to
24 facilitate traffic, and it's supposed to have certain --
25 undergo certain operation and maintenance requirements.

1 Those are not general requirements under
2 the water code. Those are specific requirements under
3 this permit. And the TCEQ enforcement authority under
4 the permit is against the permittee.

5 Now, if the permittee does not have
6 ownership of that property, and it is transferred into
7 the hands of someone else, then TCEQ is at the whims of
8 whoever that landowner is. If TCEQ goes to the permittee
9 and says, your road needs repairing, it no longer is
10 sufficient for all-weather access -- if that permittee
11 does not own that property, then they cannot necessarily
12 force the person who does own the property to allow them
13 to fix that roadway.

14 If that area was included within the permit
15 boundary, that risk would not be nearly so great. Upon
16 inspection or upon reporting, the TCEQ would be able to
17 know who owned the property within the permit boundary,
18 and would be able to maintain authority and oversight
19 within that area.

20 So it certainly was reasonable for the --
21 and as the concern that the ALJs had, was that each other
22 element of the facility was included within the permit
23 boundary, with the sole exception of this roadway.

24 And as I noted, for the sake of
25 consistency, if you're going to impose requirements on a

1 facility and require that facility to be designed and
2 operated in a particular way, it makes sense to include
3 all elements of the facility within the permit boundary.

4 And this was the sole part of the -- the
5 permit defines certain points as being part of the
6 facility, and this was the sole area within that that was
7 not within the permit boundary of those specifically
8 listed.

9 Now, the ALJs also noted that the berm was
10 not in the permit boundary, but was subject to
11 requirements, and so they included that as well, at the
12 suggestion of the Office of Public Interest counsel.

13 But the conclusion of the administrative
14 law judges was certainly reasonable and supported by the
15 great weight of the evidence, and it was improper for the
16 TCEQ to reverse that finding.

17 And with that, I think that I conclude.
18 And we would think that there are a number of reasons,
19 those discussed here today and those identified in our
20 briefing, that warrant reversal of the TCEQ's issuance of
21 this permit. I appreciate your time.

22 THE COURT: Thank you.

23 So, obviously, I've got a lot to digest
24 here, but I appreciate the presentations from each of you
25 and argument from each of you. So I've got good

1 briefing, good argument, and so this is helpful for me.
2 But I need time to, like I said, digest it and go through
3 each of these issues.

4 So I'm going to take this under advisement.
5 And once I've come to a conclusion, I'll send y'all a
6 decision letter and request an order, okay?

7 Anything else? All right.

8 *(Proceedings adjourned)*

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REPORTER'S CERTIFICATE

THE STATE OF TEXAS) (

COUNTY OF TRAVIS) (

I, McKayla A. McHugh, Official Court Reporter in and for the 200th District Court of Travis County, State of Texas, do hereby certify that the above and foregoing contains a true and accurate transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is \$738 and was paid/will be paid by LF-LAW FIRM.

WITNESS MY OFFICIAL HAND this 23rd day of September 2019.

/s/McKayla McHugh
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