No. 03-19-00815-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS AT AUSTIN

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

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY AND 130 ENVIRONMENTAL PARK, LLC,
Appellees.

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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S APPELLEE'S BRIEF

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JUNE 30, 2020

ORAL ARGUMENT CONDITIONALLY REQUESTED

IDENTITY OF PARTIES AND COUNSEL

The Commission makes the following correction to the Identity of Parties and Counsel filed by Appellants:

Parties	Counsel
Texas Commission on Environmental Quality	**Counsel in District Court:** Cynthia Woelk Daniel C. Wiseman **Counsel in the Court of Appeals:** Priscilla M. Hubenak Kellie E. Billings-Ray Assistant Attorneys General Office of the Attorney General Environmental Protection Division P.O. Box 12548, MC-066 (512) 463-2012 Priscilla.Hubenak@oag.texas.gov Kellie.Billings-Ray@oag.texas.gov

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STATEMENT OF THE CASE

Nature of the Case:	This is a suit under the Texas Administrative Procedure Act, Tex. Gov't Code §§ 2001.001–.903, seeking judicial review of a Texas Commission on Environmental Quality (Commission or TCEQ) final order granting an application for a permit to operate a landfill in Caldwell County, Texas.[1]
Course of Proceedings:	130 Environmental Park, LLC (130EP) applied to the Commission for a permit for a landfill. TJFA, L.P., Environmental Protection in the Interest of Caldwell County, James Abshier, and Byron Friedrich protested the application. After a contested case proceeding at the State Office of Administrative Hearings (SOAH), the Commission entered an order granting the permit. The protestants, Appellants here, appealed the order to the Travis County district courts.
Trial Court:	The Honorable Dustin M. Howell, 200th District Court, Travis County, Texas.
Trial Court Disposition:	The district court affirmed the Commission's order.[2]

[1] Tex. Comm'n on Envtl. Quality, *An Order Granting the Application by 130 Environmental Park, LLC, for a New Type I Municipal Solid Waste Landfill in Caldwell County, Texas*, TCEQ Docket No. 2015-0069-MSW, SOAH Docket No. 582-15-2082 (Sept. 18, 2017). (33 AR 264 [Order]). A copy of the final order is at Tab B in the Appendix. Further references to the agency's Order will omit the administrative record cite.

[2] A copy of the Final Judgment is at Tab A in the Appendix.

STATEMENT REGARDING ORAL ARGUMENT

This case is controlled by well-established principles of administrative law. The Court should not grant oral argument as requested by Appellants because the decisional process would not be significantly aided by oral argument. The facts and legal arguments at issue in this appeal have been adequately presented in the briefs and record. If, however, this Court determines it would be aided by argument, the Commission requests to be heard.

ISSUES PRESENTED

Issue No. 1

The permit application was filed prior to Caldwell County's adoption of an ordinance prohibiting a landfill at the site of the Facility.

(Responsive to Appellants' Issue No.1)

Issue No. 2

Substantial evidence supports the Commission's determination that the applicant conducted a fully sufficient subsurface investigation to support the issuance of the permit.

(Responsive to Appellants' Issue No. 2)

Issue No. 3

The Commission acted within its authority in excluding from the permit boundary a portion of the access road to the Facility and the screening berm.

(Responsive to Appellants' Issue No. 3)

Issue No. 4

The applicant satisfied applicable requirements of Commission Rules concerning drainage patterns, floodplains, and, relatedly, land-use compatibility.

(Responsive to Appellants' Issue No. 4)

GLOSSARY

ALJ	Administrative Law Judge
AR	Administrative Record
COL	Conclusion of Law
Commission	Texas Commission on Environmental Quality
County	Caldwell County
130EP	130 Environmental Park, LLC
EP	Environmental Protection in the Interest of Caldwell County
EPICC	Environmental Protection in the Interest of Caldwell County
FOF	Findings of Fact
Hunter Tract	the proposed location of 130EP's landfill, two miles north of Lockhart's city limits in Caldwell County
TCEQ	Texas Commission on Environmental Quality
PFD	Proposal for Decision
Plum Creek District	Plum Creek Conservation District
SOAH	State Office of Administrative Hearings

STATEMENT OF FACTS

A. 130EP filed an application for a permit to operate a landfill in Caldwell County, Texas.

The subject of this appeal is a permit granted by the Commission based on an application submitted by 130EP, requesting authorization to construct and operate a new "Type I" municipal solid waste landfill in Caldwell County (the County), Texas. A Type-I landfill is "the standard landfill for the disposal of [municipal solid waste]." 30 Tex. Admin. Code § 330.5(a)(1).

As proposed, the 130EP landfill would be located on a 1,229-acre tract of land, referred to as the "Hunter Tract," located about two miles north of Lockhart's city limits.[3] 130EP acquired the necessary property rights in the Hunter Tract, entering into an agreement to purchase the Hunter Tract prior to the development and operation of the facility (the

[3] 1 AR 1.

The Administrative Record consists of 78 continuous volumes of documents, exhibits, and SOAH hearing transcripts. Cites to the Administrative Record will be *xx* AR *yy*, with *xx* being the volume number and *yy* being 1) for documents, an item number in the volume, 2) for exhibits, an identification of the exhibit and who offered it, and 3) for testimony in the transcripts, by Tr. page:line(s). Cites may also be made to a specific finding of fact (FOF) or conclusion of law (COL) either in the Proposal for Decision (PFD) or the Commission's final order (Order).

Facility).[4] The Facility would have a permit boundary of 520 acres, approximately 202 acres of which would encompass the landfill footprint itself. The proposed landfill would serve residences and businesses in Caldwell and surrounding counties.[5]

The proposed site's 1,229-acre tract is subject to an easement belonging to Plum Creek Conservation District (Plum Creek District) for use of the Site 21 Reservoir and Dam. This dam was originally designed to protect downstream agricultural areas from flooding and is referred to as a "low-hazard dam." Due to population growth, the dam is now designated as a "high-hazard" dam, meaning that it is used to protect human life.[6]

As originally filed on September 4, 2013, 130EP's application consisted of Parts I and II of a four-part application.[7] The Texas Health and Safety Code and Commission Rules provide a bifurcated option for

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[4] 30 AR 248 (Proposal for Decision [PFD] at 13 (first paragraph). Further references to the PFD will omit the administrative record cite. Order at 4, FOF 29, 30; COL 14. A copy of the PFD is at Tab D in the Appendix.

[5] 44 AR 139EP-1 at 42.

[6] PFD at 152.

[7] 1 AR 1.

municipal solid waste permit applications. Tex. Health & Safety Code § 361.069; 30 Tex. Admin. Code § 330.57(a). This allows an applicant to file Parts I and II and later submit Parts III and IV. The Commission's Executive Director declared Parts I and II of 130EP's application to be administratively complete on September 27, 2014.[8]

On December 9, 2013, the County enacted an ordinance prohibiting disposal of municipal solid waste at the site chosen by 130EP for its landfill.[9] The County's ordinance prohibited processing or disposal of waste or operation of a solid waste facility in all areas of the County except for one property owned by the County itself.[10]

130EP filed Parts III and IV of the application on February 18, 2014, and the Executive Director declared them administratively complete on February 28, 2014.[11]

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[8] 58 AR ED SO 1 at 9:1-18.

[9] 58 AR Caldwell-3 (county order adopting ordinance).

[10] 58 AR Caldwell-3 at 3-4.

[11] 13 AR 19.

B. The Commission referred the application to the State Office of Administrative Hearings.

After public notices were published, 130EP requested that its application be directly referred to SOAH on all issues. Certain parties protesting the application were admitted, including the appellants TJFA, L.P., Environmental Protection in the Interest of Caldwell County (EPICC), James Abshier, and Byron Friedrich.[12] Plum Creek District also participated as a party but did not take a position on whether the permit should be granted.[13]

At the agency hearing, the protestants raised a discovery dispute regarding 130EP's geologist's lack of preservation of certain underlying materials related to his 2013 subsurface investigation of the site. TJFA and EPICC moved to compel access to the site in preparation of the geologist's expert report. As a remedy to the missing records, TJFA and EPICC moved to drill their own soil borings and conduct additional tests at the site. The SOAH Administrative Law Judges (ALJs) granted the

[12] 19 AR 62 (Order No. 2-adding a party and updating alignment of parties).

[13] 60 AR PCCD Ex. 1.0 at 24. Also, the Plum Creek District did not file exceptions or replies to the PFD.

protestants' requested relief, and TJFA and EPICC performed their own investigation during February and March 2016.[14] 130EP also conducted further investigations at the site during the same period.[15]

Dissatisfied with the remedy they had requested and received from the ALJs, TJFA and EPICC sought to strike much of 130EP's prefiled evidence, including the geology report required by agency rules (the Geology Report).[16] The ALJs denied protestants this additional relief, and they proceeded with an evidentiary hearing held from August 15 through 26, 2016.

[14] *See* PFD at 4; 51 AR 130EP-7.

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

[16] *See* Order at 26.

C. The SOAH ALJs found that 130EP met its burden to obtain a permit for the Caldwell County landfill.

When the ALJs issued their Proposal for Decision (PFD) on February 17, 2016, they found that 130EP's application met the requirements for approval, except for three alleged deficiencies:

(1) The application failed to list Plum Creek District's easement as required by 30 Texas Administrative Code sections 281.5(6) and 330.59;

(2) 130EP drilled its soil borings in August and September 2013, before the ED approved its soil boring plan in October, which was in violation of the requirement in 30 Texas Administrative Code section 330.63(e)(4) that the plan be approved first; and

(3) 130EP had not obtained a floodplain development permit from Caldwell County, as required by 30 Texas Administrative Code section 330.63(c)(2)(D)(ii).[17]

The ALJ's "[left] it to the Commission's discretion whether to deny the Application based on these deficiencies," but noted that the deficiencies had already been thoroughly litigated.[18] Further, the ALJs did not identify the failure to preserve discoverable materials as a violation of Commission Rules. Instead, as described in the PFD, the

[17] PFD at 2.

[18] PFD at 2.

ALJs found it was a breach of the rules of civil procedure for which they had already provided a remedy.[19]

Additionally, the ALJs recommended that if the Commission decided to issue the permit, it should extend the draft permit's boundary to include the whole length of the Facility's access road and the entire screening berm to ensure that the agency would have jurisdiction to enforce the permit's provisions in those areas. They also recommended that the Commission limit the operating hours to the standard hours set out in agency rules, rather than the extended hours allowed in the draft permit.[20]

With those exceptions, the ALJs found that 130EP had met its burden to obtain the requested permit, expressly rejecting the arguments by the protestants—the same arguments re-asserted here. The ALJs explained their reasoning in detail.[21]

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[19] PFD at 60-61.

[20] PFD at 60-61.

[21] *See generally* PFD, which is a 211-page document thoroughly discussing the facts and law, along with 39 pages of proposed findings of fact and conclusions of law.

D. The Commission issued an Order granting 130EP the permit for the landfill.

Ultimately, the Commission approved the Order granting 130EP a permit for the landfill in Caldwell County.[22] The Commission determined that neither the failure to have yet obtained a floodplain permit nor the failure to obtain preapproval for the soil boring plan was a basis for denying the application. Instead, the Commission imposed a special provision in the permit requiring 130EP to obtain the necessary floodplain permit before commencing physical construction.[23] In the Order, the Commission explained the bases for these decisions.[24] Additionally, the Commission found that the only other alleged violation—not listing the District's easement in the application—was based on a misinterpretation of the agency's rules, as also explained in the Order.[25]

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[22] Order.

[23] 33 AR 269 at 10 (Permit). A copy of the Permit is at Tab C in the Appendix. Further references to the Permit will omit the administrative record cite.

[24] Order at 39; Permit.

[25] Order at 39, Explanation of Changes No. 2.

The Commission declined to follow the ALJs' recommendation to extend the permit boundary to include the whole access road and the screening berm. The agency stated that doing so was unnecessary, as the Commission has ample enforcement authority that does not end at a permit's boundary.[26]

E. The district court affirmed the Commission's action in granting 130EP the landfill permit.

After the Commission denied motion for rehearing, protestants TJFA, EPICC, and Mr. Abshier and Mr. Friedrich filed a petition in Travis County district court, seeking judicial review of the Commission's Order.[27] Following full briefing and a hearing on the merits, the district court, with the Honorable Dustin M. Howell presiding, issued a Final Judgment affirming the Commission's Order.[28]

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[26] Order at 39, Explanation of Changes No. 3.

[27] Clerk's Record at 4-54.

[28] Clerk's Record at 602-604.

SUMMARY OF THE ARGUMENT

Property owners and residents near the proposed solid waste disposal facility in Caldwell County were among the protestants when 130EP applied to the Commission for its permit. They feared the nearness of the landfill and had concerns about safe habitation, groundwater resources, road and traffic impacts, screening of the waste, possible flooding, and a multitude of imagined outcomes. These issues were all considered by the SOAH ALJs in the administrative proceeding.

In the contested case proceeding, the ALJs determined that 130EP met its burden to show the Facility satisfied applicable Commission Rules. The ALJs issued a Proposal for Decision with a detailed discussion of the issues. Ultimately, the Commission granted the permit.

Those property owners and residents are now Appellants exercising their right to judicial review of the Commission's decision. Procedurally, Appellants first ask the Court to find that a Caldwell County ordinance prohibits disposal at the site of the Facility, but 130EP is exempt since it simply filed its application prior to the enactment of the ordinance.

As to the merits of the application, this is a case in which

substantial evidence supports the Commission's decision to grant the permit, and this Court should not now re-weigh the evidence. 130EP's Geology Report was detailed and provided the analysis required—particularly that the Facility has the soil appropriate for waste disposal and development of the Facility will not adversely alter existing drainage patterns. Further, the Facility will not negatively affect the downstream reservoir and dam. In addition, record evidence demonstrates that waste disposal is only in the landfill footprint, which is outside the 100-year floodplain. When the Commission issued the permit, it rightfully and legally declined to change the boundaries of the draft permit to include the entire access road and screening berm because the Commission has enforcement authority beyond the permit boundary.

Appellants' diffuse arguments reflect their attempt to circumvent the substantial evidence standard of review. The spoliation claim for which they received the remedy they requested, the complaints about procedural violations of Commission Rules, which they were not harmed by, and the suggestion that essentially all the evidence they disagree with is inherently flawed do not present a basis for reversing the Order here. The Commission reasonably applied its rules and the statutes it

administers—consistent with the plain language and underlying purpose, explained its reasoning and relied on substantial evidence in the record. The Commission's Order should be affirmed.

ARGUMENT

I. Standard of Review

As in any suit for judicial review, the plaintiff bears the burden of proof. For an administrative appeal of the Commission's order in a contested case, plaintiffs must show reversible error in the agency's order. The substantial evidence rule described in section 2001.174 of the Administrative Procedure Act controls. Tex. Gov't Code § 2001.174; *Anderson v. R.R. Comm'n*, 963 S.W.2d 217, 219 (Tex. App.—Austin 1998, pet. denied). The substantial evidence rule recognizes that deference to the agency is appropriate in many situations, but the deference owed varies depending on the type of error alleged.

In reviewing an agency's fact-based determination under this standard, a court looks to see whether there is substantial evidence—more than a mere scintilla—in the record to support that finding. A court "may not substitute [their] judgment for that of the agency but rather

must determine whether, considering the reliable and probative evidence in the record as a whole, some reasonable basis exists in the record for the agency's action." *Maverick Cty. v. R.R. Comm'n of Tex.*, No. 03-14-00257-CV, 2015 WL 9583873, at *2 (Tex. App.—Austin Dec. 29, 2015, pet. denied) (mem. op.) (citing *Tex. Indus. Energy Consumers v. CenterPoint Energy Hous. Elec., LLC*, 324 S.W.3d 95, 105 n.60 (Tex. 2010)). "Thus, the agency's action will be sustained if the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action." *Tex. Health Facilities Comm'n v. Charter Med.-Dall., Inc.*, 665 S.W.2d 446, 453 (Tex. 1984).

There is a presumption that the agency's findings, inferences, conclusions, and decisions are supported by substantial evidence, and the burden is on the contestant to demonstrate otherwise. *See Froemming v. Tex. State Bd. of Dental Exam'rs*, 380 S.W.3d 787, 790-91 (Tex. App.—Austin 2012, no pet.) (explaining the court will sustain the agency's action if the evidence as a whole is reasonable such that reasonable minds could have reached the agency's conclusion). An agency's fact findings must be affirmed if they are supported by more than a scintilla

of evidence. *Mireles v. Tex. Dep't of Pub. Safety*, 9 S.W.3d 128, 131 (Tex. 1999).

Evidentiary rulings made during a contested case procedure, including those related to spoliation, are reviewed under the abuse of discretion standard. *Maverick Cty.*, 2015 WL 9583873, at *3; *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 27 (Tex. 2014). A court abuses its discretion if it acts "without reference to guiding rules and principles." *Bennett v. Grant*, 525 S.W.3d 642, 653 (Tex. 2017). An appellate court will reverse only if the ruling is arbitrary and unreasonable. *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 242 (Tex. 1985). And even where there is an abuse of discretion, the plaintiff must demonstrate harm to obtain a reversal. *Maverick Cty.*, 2015 WL 9583873, at *5.

In challenges involving the construction of agency rules, courts apply the rule's plain language. *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999). However, "[i]f there is vagueness, ambiguity, or room for policy determinations in a statute or regulation, . . . [the court will] normally defer[s] to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute, regulation, or rule." *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d

432, 438 (Tex. 2011). Courts will "generally uphold an agency's interpretation of a statute it is charged by the Legislature with enforcing, 'so long as the construction is reasonable and does not contradict the plain language of the statute.'" *Dyer v. Tex. Comm'n on Envtl. Quality*, No. 03-17-00499-CV, 2019 WL 5090568, at *5 (Tex. App.—Austin Oct. 11, 2019, pet. filed) (mem. op.) (citing *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011)).

Accordingly, when reviewing the issuance of permits, like the one at issue here, courts have acknowledged that the Commission's Rules require the applicant to prove compliance with the applicable requirements by a preponderance of the evidence—a determination that is in turn reviewed under the substantial evidence standard described above. *TJFA, L.P. v. Tex. Comm'n on Envtl. Quality*, No. 03-10-00016-CV, 2014 EL 3562735, at *2 (Tex. App.—Austin July 16, 2014, pet. denied) (mem. op.) (citing 30 Tex. Admin. Code § 80.17(a)(2011)); *BFI Waste Sys. of N. Am., Inc. v. Martinez Envtl. Grp.*, 93 S.W.3d 570, 577 (Tex. App.—Austin 2002, pet. denied).

II. The permit application was filed prior to the County's adoption of an ordinance prohibiting a landfill at the site of the Facility. (Responds to Appellants' Issue No.1.)

Despite 130EP filing Parts I and II of its application three months *before* the County's adoption of an ordinance prohibiting solid waste disposal at 130EP's Facility, Appellants continue to argue that the application was not really an application. This argument is simply incorrect.

To the contrary, 130EP's initial filing met the provisions of the Texas Health and Safety Code statute requiring an application to be filed and pending before an ordinance is adopted to be excluded from any prohibition. Tex. Health & Safety Code § 361.069; 30 Tex. Admin. Code § 330.57(a). Further, additional statutory language and Commission rules support that the 130EP application was filed prior to enactment of Caldwell County's ordinance.

A. As allowed by statute and Commission Rules, 130EP first filed Parts I and II—the land-use compatibility portions—of the Commission's four-part landfill permit application.

130EP complied with the law when it submitted its application by first submitting Parts I and II on September 4, 2013.[29] Texas Health and Safety Code section 361.069 provides a bifurcated option for solid waste permit applications:

> The commission in its discretion may, in processing a permit application, make a separate determination on the question of land use compatibility, and, if the site location is acceptable, may at another time consider other technical matters concerning the application. A public hearing may be held for each determination in accordance with Section 361.088. . . .

Tex. Health & Safety Code § 361.069. Likewise, the Commission Rule 330.57(a) mirrors the bifurcated proceeding:

> An owner or operator applying for a [municipal solid waste] permit may request a land-use only determination. If the executive director determines that a land-use only determination is appropriate, the owner or operator shall submit a partial application consisting of Parts I and II of the application. The executive director may process a partial permit application to the extent necessary to determine land-use compatibility alone.

30 Tex. Admin. Code § 330.57(a).

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[29] 1 AR 1.

Under this option, an applicant may initially submit just Parts I and II of the four-part application and later submit Parts III and IV, as 130EP elected to do. The language of both this statute and the Commission Rule recognize that the filing of Parts I and II is an "application,"—albeit a partial one, but nevertheless still an *application*.

B. A county has limited authority to prohibit processing or disposal of solid waste in its jurisdiction.

Three months after 130EP filed the initial application—but before 130EP submitted Parts III and IV—the County adopted a landfill siting ordinance prohibiting disposal of solid waste at the location where 130EP proposed to construct its landfill. In fact, the ordinance prohibited processing or disposal of waste or operation of a solid waste facility in all areas of the County except for one property owned by the County itself.

The County relied upon Texas Health and Safety Code sections 363.112 and 364.012 to adopt the ordinance. These provisions allow the governing body of a county or municipality to prohibit waste processing or disposal in certain areas. But this authority to prohibit a landfill is limited. Importantly, any such ordinance may not prohibit landfills in an area for which "an application for a permit or other authorization

under Chapter 361 has been filed with and is pending before the commission," or for which a permit has been issued. Tex. Health & Safety Code §§ 363.112(c), 364.012(e) (identical language used in the two provisions). If a county does not comply with that limitation, the ordinance does not bar the Commission from granting the pending permit application. Tex. Health & Safety Code §§ 363.112(d), 364.012(f). The County ordinance, therefore, only bars the Commission from granting 130EP's application if it was *not* filed and pending.

C. The Commission relied on the plain language of the statute to find that 130EP's application preceded the County ordinance.

After 130EP initially filed Parts I and II, the application "had been filed" and was "pending" when the County passed the ordinance. The Commission applied the plain language of the phrase "has been filed with and is pending" in sections 363.112(c) and 364.012(e) to find that the county ordinance did not prevent the Commission from granting the application.[30]

[30] The ALJs also found that the 130EP application was on file before the County adopted its ordinance. PFD at 26, FOF 325-27.

The Commission set out its reasoning in the Order as follows:

> 325. When the County adopted the Disposal Ordinance, the Application for the 130EP Landfill permit was pending at the TCEQ.
>
> 326. When the County adopted the Disposal Ordinance, the County sought to prohibit the processing or disposal of municipal or industrial solid waste in an area of the County for which an application for a permit or other authorization under Texas Health & Safety Code ch. 361 had been filed with and was pending before the TCEQ.
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> 327. The County's Disposal Ordinance does not prevent the TCEQ from granting the Application and issuing the permit.[31]

The Commission's findings were consistent with the plain language of Health and Safety Code sections 363.112 and 364.012. The objective in construing statutory language is to give effect to the Legislature's intent, which is ascertained from the plain language of the words employed by the Legislature. *Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 404 (Tex. 2016).

It is clear the Legislature intended to give a county authority to control processing or disposal of solid waste in its jurisdiction, but not at the expense of an application already filed with or granted by the

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[31] Order at 27, FOF 325-27.

Commission. EP130's bifurcated filing—with Parts I and II being filed before the County adopted its ordinance and Parts III and IV filed after—did not change the fact that the application was already pending when the County passed its ordinance. Moreover, the language allowing a bifurcated process supports that the first step is part of the application process.

Further, even assuming *arguendo* that the terms "filed" and "pending" in Health and Safety Code sections 363.112 and 364.012 were ambiguous, the Commission's formal interpretation of the status of EP130's application as filed and pending when the County adopted its ordinance is reasonable and entitled to deference. *Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d at 624 (holding that if statutory language is subject to more than one interpretation, court should uphold implementing agency's construction if it is reasonable and in harmony with statute).

Appellants argue that Health and Safety Code section 363.112(c)(1) requires that the permit application cannot be pending until *all* permit application prerequisites are fulfilled. In essence, Appellants want to require that Parts III and IV be on file for there to be an application.

Nothing in section 363.112(c)(1) requires all parts to be present for there to be an "application." Moreover, this concept would conflict with the language in the bifurcated process set out in section 361.069 that recognizes the land-use determination, initiated by the filing of Parts I and II, is the first step in processing a permit application—indicating it is all one process.

None of the definitions of "application," "file," and "pending" cited by Appellants detract from this particular statutory language.[32] To the extent that "application" is a request for a permit,[33] filing Parts I and II are the first steps in the request for a solid waste permit under the bifurcated process. Also, Appellants try to portray the filing of Parts I and II as merely "seeking a land-use compatibility determination."[34] Again, this is opposite the language in section 361.069 that the determination is done "in processing a permit application," thus indicating it is part of *an application*.

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[32] App. Br. 24-25.

[33] App. Br. 24.

[34] App. Br. 28.

Further, applying the language of the bifurcated process is *not* an attempt to "end-run" the County's authority to prohibit solid waste processing and disposal.[35] To ignore that it's all one process would allow any county to immediately move to prohibit solid waste disposal once a land-determination was filed. This would make the first step of the bifurcated process useless. In that case, it would affect the applicant's business decision of making the significant investment required to file a landfill permit. In contrast, once the application is filed, the Commission's jurisdiction over the application attaches. A county cannot then adopt an ordinance to prohibit a landfill and essentially attack the Commission's jurisdiction to consider the application and decide whether to grant the permit.

The cases cited by Appellants interpreting other statutes do not apply here.[36] Those cases involve different statutes and different facts.

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[35] App. Br. 28.

[36] App. Br. 28-30.

Finally, the Commission recognizes the County's authority to prohibit a landfill.[37] But such action is intended by the Legislature to occur before the Commission takes jurisdiction over an application. Additionally, the Commission also must apply the statute as written and enforce the limitation on the County's authority when there is a pending application.

III. The Commission's determination, that the Applicant conducted a fully-sufficient subsurface investigation to support the permit's issuance, is reasonable and supported by substantial evidence. (Responds to Appellant's Issue No. 2).

In challenging the sufficiency of the subsurface investigation, Appellants improperly request this Court to re-weigh the evidence and evaluate the credibility of the witness that were before the Commission—a request that is entirely improper. *See Charter Med.-Dall., Inc.,* 665 S.W.2d at 452 (stating a court is prohibited from substituting its judgment for that of the agency's on the weight of the evidence). In fact, the agency is the sole judge of the weight of the evidence and credibility of the witnesses. *Central Power & Light Co. v. Pub. Util. Comm'n*, 36

[37] App. Br. 30-32.

S.W.3d 547, 561 (Tex. App.—Austin 2000, pet. denied). To avoid the substantial evidence standard applicable to these findings, Appellants level a multitude of complaints, including a challenge to the qualifications of 130EP's witnesses and the adequacy of the remedy for a discovery violation that TJFA/EPICC requested from the ALJs and received. Contrary to Appellant's contentions, the Commission's extensive findings related to geology and hydrology are supported by substantial evidence, and Appellants offer no valid basis for reversing them.[38]

A. The ALJs properly determined the reliability of the expert testimony.

130EP contracted with Biggs & Mathews Environmental, Inc. (BME) to prepare the geology report required by Commission Rule 330.63(e) (the Geology Report). As the evidence before the ALJs indicated, the Geology Report was prepared and signed by Gregory Adams, P.E. and John Snyder, P.G.[39] The evidence showed that Mr.

[38] Order, FOF 73-141, COL 23, 24.

[39] 49 AR 130EP-4 at 6.

Snyder is a professional geoscientist with over 40 years experience working in this capacity in Texas and has worked on over 100 landfill projects in his career.[40] Likewise, the evidence showed that Mr. Adams is a professional engineer with extensive experience in solid waste design and permitting.[41]

As explained in the Geology Report, BME initially drilled two soil borings in early 2013 in order, as Mr. Snyder explained in his testimony, to obtain preliminary information about the site.[42] These borings, according to Mr. Snyder, indicated clayish soils and revealed no groundwater.[43] He then prepared a Soil Boring Plan and began drilling additional borings.[44] The Soil Boring Plan was reviewed and approved by Commission Staff in October 2013, though by this time, the borings had already been drilled. As stated in the Order, the early drilling violated

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[40] 54 AR Snyder-1 at 4-9.

[41] 56 AR Adams-1 at 4-5.

[42] 49 AR 130EP-4 at 19-31, 44-222.

[43] 49 AR 130EP-4 at 19-31, 44-222.

[44] 49 AR 130EP-4 at 19-31, 44-222.

Commission Rule 330.63(e)(4)'s requirement that the plan be approved prior to beginning work.[45]

BME contracted with Hydrogeologic/Environmental Testing (H/ET) to drill borings and take soil samples at the site. In the fall of 2013, H/ET—a firm owned by Stefan Stamoulis, a licensed water well driller and professional Texas geoscientist—drilled 32 borings, referred to in the PFD as the "2013 borings."[46] In addition, several trenches were dug to obtain information on the shallow soil in the site area. These trenches, according to the Geology Report, showed pebbles and cobbles within silty fat clay.[47] Mr. Snyder testified in detail how he performed field work at the site along with Mr. Stamoulis, explaining how the locations of the borings were identified, what drilling methods were employed, the criteria used to determine the depth of the borings, and other details.[48]

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[45] Order at 35, COL 7b.

[46] 54 AR Snyder-1 at 17-18.

[47] 49 AR 130EP-4 at 19.

[48] 29 AR 209, Attach. A (Snyder Affidavit).

Additionally, the Geology Report details how the borings were sampled and the reasons for using particular sampling methods.[49]

During the 2013 soil borings, seventeen piezometers were installed next to fifteen of the borings in order to obtain the requisite hydrogeological information. Although the Soil Boring Plan stated that BME intended to perform slug tests in some of the piezometers, Mr. Snyder determined that there was insufficient water in any piezometer for such a test—in which a slug, typically a metal object or volume of water, is injected into the water column within a piezometer and the water's response measured to calculate the permeability of the formation.[50]

TJFA and EPICC attempt to negate the substantial record evidence supporting the Order's geological/hydrogeological findings. They claim that the failure to retain field logs[51] and soil samples from 2013 borings

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[49] 29 AR 209, Attach. A (Snyder Affidavit).

[50] Tr. 441-42.

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

> In each boring, continuous sampling was done down to a depth of approximately 50 feet below ground surface, then intermittently to total depth; generally consisting of a two-foot sample from each 4-8 feet

renders the entirety of the Geology Report so unreliable as to constitute no evidence by arguing the geologist's opinions could not survive *Daubert* and *Robinson* standards, and that under the spoliation doctrine, a certain presumption should have been granted. But this is simply not the standard, and substantial record evidence exists to support the agency's decision.

Even under the abuse of discretion standard, to be reversible error, the decision of the agency must be arbitrary and unreasonable, and the plaintiff must demonstrate harm—these requirements for reversal are not met here. *Bennett*, 525 S.W.3d at 653; *Downer*, 701 S.W.2d at 242. As the ALJs correctly noted when first raised, the foundation of Appellant's arguments spring from a discovery dispute concerning field logs and soil samples that were discarded in violation of the rules of civil

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> drilled. A draft log (or "field log") was then prepared for each boring. Each field log included a description of the soil encountered at various depths in the boring, based on the depth from which each numbered sample was collected. [Driller] Mr. Stamoulis's visual observation of the collected samples and his descriptions of the soil materials (but not based on the Unified Soil Classification System, which is a geotechnical engineering description system required by TCEQ rule to be used in soil boring logs that are included in a municipal solid waste facility permit application. [sic]

29 AR 209, Attach. A. at 2.

procedure. These arguments are without merit and provide no basis for reversal.

1. Commission Rules do not require these materials to be retained.

Commission Rules do not require applicants to retain field logs and soil samples such as these. Accordingly, the ALJs determined that 130EP violated only the rules of civil procedure. Commission Rules ensure that geology reports are reliable by requiring that they include boring logs—created by reviewing the initial field logs (which are created by the driller—not necessarily a professional scientist), soil samples, and the results of laboratory testing conducted on the samples—and that they be signed and sealed by a qualified scientist. To argue that the absence of field logs and soil samples renders geology reports inherently unreliable, Appellants must challenge the Commission Rules that provide otherwise. But these rules remain valid, and Appellants are precluded from collaterally attacking them here.

2. The agency properly determines the weight to be given to evidence.

Longstanding administrative law precedent has recognized that a court is prohibited from substituting its judgment for that of the agency's

on the weight of the evidence. Tex. Gov't Code § 2001.174; *Charter Med.-Dall., Inc.*, 665 S.W.2d at 452. "In other words, the court may not determine the correctness of the agency's findings." *Sw. Pub. Serv. Co. v. Pub. Util. Comm'n of Tex.*, 962 S.W.2d 207, 215 (Tex. App.—Austin 1998, pet. denied). "The evidence may actually preponderate against the agency's finding and the court must still uphold it if enough evidence suggests the agency's determination was within the bounds of reasonableness." *Id.* A court should affirm the agency's action if the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action. *Id.*

Further, courts have even recognized an agency's discretion in considering the weight it gives to uncontroverted testimony presented. "[A]n agency may, or may not, accept the testimony of witness, expert or non-expert. Likewise, the agency is the judge of the weight to be accorded the witness' testimony. Moreover, the agency may accept part of the testimony of one witness and disregard the remainder." *S. Union Gas Co. v. R.R. Comm'n of Tex.*, 692 S.W.2d 137, 141-42 (Tex. App.—Austin 1985, writ ref'd n.r.e.). Additionally, an agency is not required to include findings on evidence it considered but did not find persuasive. *Meir*

Infiniti Co. v. Motor Vehicle Bd., 918 S.W.2d 95 (Tex. App.—Austin 1996, writ denied).

Here, the record in this suit for judicial review demonstrates that record evidence supports the agency's decision, and any harm to the protestants was remedied in the contested case by the ALJs. As a result, Appellants are not harmed by the claimed error. Appellants' issue is with how the ALJs and Commission weighed the evidence—an issue left to the sole discretion of the agency.

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

Appellants continue to argue that the Commission and the ALJs should have issued spoliation instructions and relied on presumptions. These arguments are likewise meritless.

In the course of discovery, it was revealed that BME, the firm hired by 130EP to prepare the Geology Report, had not retained the soil samples and field logs taken as part of the 2013 subsurface investigation. Although the Geology Report included the qualified groundwater scientists' boring logs, which contain descriptions of the soils based on

the expert' analysis,[52] and other records and data from the 2013 borings that were preserved, the soil samples themselves and the driller's field logs were not.

Mr. Snyder testified that he followed the standard instructions to Stefan Stamoulis and complied with BMW's standard document retention policies. The soil samples from the 130EP were securely stored and then disposed of as storage space was needed for other projects on which BME was working.[53]

A prolonged discovery dispute ensued. After TJFA and EPICC moved to compel access to the site to conduct their own testing, or in the alternative, sanctions for spoliation, the parties reached an agreement allowing TJFA and EPICC their requested access and testing.[54] However, after the parties were unable to agree on the terms of that access, TJFA and EPICC filed a "Second Amended Motion to Compel

[52] 49 AR 130EP-4 at 044, Appl., Part III, Attach. E2.

[53] 28 AR 209, Attach A. at 3.

[54] 19 AR 88; 21 AR 93; 20 AR 91.

Access to Property or in the Alternative, Motion for Sanctions Due to Spoliation of Evidence."[55]

In their prayer, TJFA and EPICC requested a "spoliation instruction" only conditionally: "If Protestants are not allowed to collect their own evidence regarding the subsurface of the proposed landfill site, then, Protestants request a spoliation instruction."[56] Thus, from the outset, TJFA and EPICC appear to have acknowledged that the right to conduct their own subsurface investigation was a sufficient remedy for the loss of their ability to examine the soil samples and field logs from the 2013 borings.

The ALJs granted TJFA and EPICC's Second Amended Motion and ordered 130EP to allow them access to the site to conduct their own testing.[57] Accordingly, the protestants conducted a subsurface investigation at the site in 2016, drilling ten borings, taking 292 soil samples from these borings, and lab testing eleven of those soil samples.[58]

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[55] 23 AR 119.

[56] 23 AR 119 at 20.

[57] 23 AR 138 (ALJs' Order No. 14).

[58] Order at 11, FOF 115; 30 AR 364, PFD at 40-41.

Although TJFA and EPICC contend that their results differed significantly from those set out in the Geology Report, the ALJs and the Commission found that "[t]he soil samples obtained by Protestants in 2016 and the results from testing on 11 of those samples generally support the basic findings and conclusions set forth in the Geology Report regarding the subsurface characteristics at the Site."[59] Again, this was a factual determination appropriate for the agency to make.

It was only after conducting their own examination pursuant to the order they had obtained from the ALJs, that TJFA and EPICC decided that this remedy was inadequate.[60] They then filed another motion related to the failure to retain the 2013 field logs and soil samples, a "Motion to Strike and for Sanctions Due to Spoliation of Evidence."[61] In that motion, the protestants made many of the same arguments to the Court—that the Geology Report is inherently unreliable because, under TJFA and EPICC's interpretation, those materials are necessary to

[59] Order at 11, FOF 116.

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

[61] 27 AR 204.

determine the reliability of the conclusions contained therein, and because the additional testing that the ALJs allowed in response to their prior motions called those conclusions into question.[62]

Thus, though they had already been granted the relief they requested in response to the alleged spoliation, TJFA and EPICC again asked the ALJs to issue a spoliation instruction requiring the agency to presume that all the discarded materials were harmful to 130EP's application.[63] In addition, TJFA and EPICC contended that 130EP's subsurface methodology was so deficient that the expert testimony it offered equated to no evidence under *Daubert* and *Havner* standards and asked the ALJs to strike the Geology Report itself along with other portions of the application.[64]

Following a prehearing conference, the ALJs issued Order No. 26, denying the protestants' motion for additional relief. The ALJs, applying Texas caselaw, determined that, while 130EP breached its duty to

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[62] 27 AR 204 at 3.

[63] 27 AR 204 at 23.

[64] 27 AR 204 at 23.

preserve discoverable material, the previously granted ability to conduct an independent subsurface investigation was sufficient to address the violation.[65] Any harm arising from the failure to preserve was remedied in the manner requested by the protestants. The fact additional relief sought later was not expressly granted does not constitute reversible error or harm to Appellants.

Although the ALJs stated that "no remedy is appropriate," in the same paragraph, the ALJs stated that "no additional action: [beyond conducting an independent investigation of the site] is necessary to remedy 130EP's breach of its duty to preserve discoverable material."[66] The Commission found no error in the ALJ's handling of the dispute and adopted the ALJs' findings that this discovery violation did not render the Geology Report unreliable or otherwise require denial of the permit.

In declining to grant TJFA and EPICC additional remedies, the ALJs and the Commission acted well within their discretion. Judges have broad discretion in crafting appropriate remedies to address

[65] 28 AR 212 at 4 (ALJs' Order No. 26).

[66] 28 AR 212 (ALJs' Order No. 26).

spoliation—the goal of which is to restore the parties "to a rough approximation of what their positions would have been were the evidence available." *Brookshire Bros.*, 438 S.W.3d at 19. Being allowed to conduct their own investigation was a reasonable remedy for the loss of the field logs and soil samples, essentially allowing TJFA and EPICC to create their own versions of the missing materials. While it may be true that this was an expensive remedy, it was the very remedy the protestants initially requested, with a spoliation instruction only sought if their request was denied. This achieved the rough approximation of what the positions would have been had the evidence been available—whereas striking the Geology Report and ignoring the ample evidence supporting its conclusions would not.

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

Appellants argue that the Geology Report submitted by 130EP did not meet the requirements imposed by Commission Rules. Specifically, a geology report is required to contain:

(1) a description of the regional geology of the area;

> (2) a description of the geologic processes active in the vicinity of the facility that includes an identification of any faults and subsidence;
>
> (3) a description of the regional aquifers in the vicinity of the facility;
>
> (4) the results of investigations of subsurface conditions, including a description of all borings drilled on site to test soils and characterize groundwater; and
>
> (5) geotechnical data that describes the geotechnical properties of the subsurface soil materials and a discussion with conclusions about the suitability of the soils and strata for the uses for which they are intended.

30 Tex. Admin. Code § 330.63(e)(1)-(5).

It is effectively undisputed that 130EP's Geology Report contains all of this information. Appellants argue, however, that the information contained in the report is not sufficiently reliable or is somehow otherwise tainted procedurally. But Appellants' complaints regarding the geology and hydrology findings are essentially substantial evidence points, and there is record evidence supporting these findings.

The ALJs and the Commission properly dealt with the procedural objections, and Appellants can show no abuse of discretion or any harm necessary to support such a point of error. Arguments that the evidence is in fact not evidence simply ask the Court to re-weigh the credibility of

witnesses and weight of evidence differently from the ALJs, whose factual findings on this issue were incorporated in the Order. Further, the arguments raised by Appellants are substantially the same arguments regarding the Geology Report and related geology hydrology issues that were exhaustively addressed and rebutted in the PFD by the ALJs.[67]

The PFD states:

> Given the extensive and numerous criticisms of the Geology Report proffered by Protestants, the ALJs endeavor in this PFD to provide a thorough description of the subsurface investigations performed at the Site both by BME and Protestants. The PFD therefore explains in great detail the process and procedures that the evidence indicates were followed in sampling the subsurface materials, testing the samples both in the field and in the laboratory, and analyzing the samples and test results to reach conclusions regarding the character of the subsurface materials at the Site. After carefully reviewing the substantial and voluminous evidence presented on these issues, the ALJs find that 130EP failed to obtain pre-approval from the ED as to BME's boring plan, in violation of 30 TAC § 330.63(e)(4). Otherwise, the ALJs conclude that the Geology Report meets all other applicable requirements of 30 TAC § 330.63(e)(4) and that the arguments and criticisms of BME's subsurface investigation and resulting conclusions were ultimately unpersuasive.[68]

[67] PFD at 29-84.

[68] PFD at 32-33.

Moreover, Appellant's arguments are contrary to the well-supported findings of the ALJs and the Commission. For example, the Order expressly states that 130EP did not submit false information in the Geology Report,[69] and that the methodology used by Biggs and Mathews Environmental, Inc. did not violate any Commission Rule, was adequate for the work performed, and did not result in unreliable or inaccurate findings or conclusions.[70] Appellant's arguments are nothing more than a collateral attack on those findings, which may only be reversed for lack of substantial evidence. Tex. Gov't Code § 2001.174.

And, for those allegations that were confirmed by the ALJs and Commission—i.e., the commencement of drilling prior to the boring plan's approval and the failure to retain some materials from the 2013 borings—the Commission acted within its discretion to determine that these flaws did not deprive the report of all weight, did not remove all credibility from the witness, and did not require denial of the permit.

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[69] Order at 11, FOF 114.

[70] Order at 11, FOF 112.

Commission Rules provide that an applicant's geology report must include information obtained by drilling borings at the site to test soils and characterize groundwater, and require the applicant to obtain the Executive Director's approval of its boring plan, "including locations and depths of all proposed borings . . . prior to the initiation of the work." 30 Tex. Admin. Code § 330.63(e)(4).

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

Record evidence supports this decision. Mr. Snyder testified that it was common practice to begin drilling borings prior to approval.[71] He stated that if the borings were properly done, the agency had allowed

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

applicants to use them, arguing that the rule does not specify a remedy and that it would be absurd to require an applicant to re-drill a boring that has already been correctly drilled.[72]

In post-hearing briefing, the Executive Director argued that the failure to obtain pre-approval of the boring plan was not a substantial deficiency, noting that while agency staff requested additional information concerning the borings, the Executive Director did ultimately approve the Soil Boring Plan and did not require any re-drilling.[73]

Given that the Geology Report complied with the substantive portions of the Commission Rules, the violations of the Rule's timing requirement did not result in the type of substantial deficiencies the Rule was designed to prevent. The ALJs found that the borings that were drilled were sufficient to obtain the subsurface information necessary for the Commission to determine whether the permit should be granted.[74]

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

[73] 31 AR 251 at 1 (ED's Exceptions to PFD).

[74] PFD at 60.

In following the ALJs' recommendation, the Commission acted within its discretion to interpret its own rule's timing requirement as not dispositive of the merits of the application. As explained above, not every shortcoming in an application necessarily results in a denial. And to show reversible error here, Appellants must demonstrate that the findings upon which the Commission based its approval are unsupported—simply disagreeing with them is not sufficient.

The Order was reasonable and supported by record evidence. This Court should not now re-weigh the evidence that was before the agency.

IV. The Commission acted within its authority in excluding from the permit boundary a portion of the access road and the screening berm. (Responds to Appellants' Issue No. 3.)

Although the ALJs recommended that the entire length of the access road to 130EP's landfill and a vegetative screening berm be included within the boundary of the permit, the Commission declined to do so. Contrary to the concerns of the ALJs, the Commission recognized that its enforcement authority extended beyond the landfill permit boundary. Thus, permitting the additional area was unnecessary, and

the Commission acted within its authority to exclude these areas from the permit boundary.

A. The Commission has authority to enforce its statutes and rules regarding the permit issued to 130EP without inclusion of the entire access road and the screening berm.

The Commission has statutory authority to enforce its rules and statutes as well as the terms of its permits and orders to components of the landfill that lie outside the permit boundary. Because this misunderstanding of the agency's authority was the ALJs' stated basis for recommending that the permit boundary be expanded with the entire road and berm, it was not error for the Commission to reject this recommendation. Tex. Gov't Code § 2001.058.

1. The ALJs recommended expanding the permit boundary to include the entire access road and the screening berm to achieve enforcement.

The ALJs observed first that the access road was the only item listed in the draft permit for the Facility that was not included within the proposed permit boundary. They then considered that the access road is on private property and the draft permit required 130EP to maintain the access road. The ALJs concluded that including the access road would

"clarify" TCEQ's enforcement authority over it, and furthermore, make their authority "unquestionable."[75] This was unnecessary.

Seemingly for the same reason as the access road—the need for the Commission to be able to enforce—the ALJs recommended that the screening berm be included in the permit boundary.[76] Commission Rules require that 130EP provide visual screening of deposited waste materials where the Executive Director determines it is necessary or the permit requires it. 30 Tex. Admin. Code § 330.175. 130EP proposed to build a vegetated screening berm between the landfill footprint and the northern property line and the residences to the north.[77] In the SOAH hearing, one protestant recommended inclusion of the screening berm in the permit boundary to ensure proper construction, maintenance, and enforcement.[78] The ALJs agreed with this protestant and recommended

[75] PFD at 28 (last paragraph)-29 (lns. 1-3).

[76] PFD at 201.

[77] PFD at 200 (first paragraph).

[78] PFD at 200 (last paragraph).

that the entire vegetated screening berm be included within the permit boundary.[79] Again, this was unnecessary.

2. The Commission has ample enforcement authority over landfill permits without including the access road and the screening berm.

The Commission disagreed with the need to include the access road and screening berm.[80] Generally, the Commission first concluded that neither the plain language of Commission Rules nor evidence in the record require or support expansion of the permit boundary for the road or the berm.[81] As to the screening berm specifically, the Commission concluded no rules require the berm to be within the permit boundary.[82]

Next, the Commission pointed out that its rules specifically contemplate that portions of an access road may be outside of the permit boundary. The Commission cited to 30 Texas Administrative Code section 330.153, particularly the language that "all-weather roads must be provided from the facility to access public roads." Appellants take

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[79] PFD at 201 (last paragraph).

[80] Order at 39-40, Explanation of Changes No. 3

[81] Order at 39-40, Explanation of Changes No. 3

[82] Order at 39-40, Explanation of Changes No. 3

issue with the Commission's reliance on this rule, claiming the "rule merely requires a road from the facility to a public road."[83] But the Rule requires more than that—it requires removal of mud and debris from a public road when it is caused by the solid waste operations; it requires control of dust not only from "on-site" roads, but also from "access" roads; and, again, it requires maintenance of both "on-site" and "access" roads:

> (a) All-weather *roads must be provided from the facility to access public roads and within the facility* to the unloading area(s) designated for wet-weather operation. Tracked mud and associated debris at the access to the facility on the public roadway must be removed at least once per day on days when mud and associated debris are being tracked onto the public roadway. . . .
>
> (b) Dust *from on-site and other access roadways* must not become a nuisance to surrounding areas. . . .
>
> (c) All *on-site and other access roadways* must be maintained in a clean and safe condition. . . .

30 Tex. Admin. Code § 330.153.

The Rule, read in its entirety, recognizes that public or private access roads—contrasted to roads "within the facility" or "on-site"—are also subject to regulations imposed upon a facility. Appellants are

[83] App. Br. at 55.

mistaken when they say that the Rule is silent as to whether a road outside the boundary is governed by the permit.[84] Thus, the Commission correctly stated the language of the Rule envisions that at least a portion of an access road may be outside the permit boundary.

In light of the Commission's ability to enforce permit requirements and regulations outside the permit boundary, Appellants' argument that the access road is a part of the Facility, or an appurtenance or improvement, does not justify the need for the road to be included in the permit boundary. Further, Appellants argue that, because the TCEQ Office of Public Interest is "well-versed" in legal aspects of Commission Rules and enforcement, and it urges inclusion of the access road, that is a basis for it being correct.[85] The Executive Director is also a party in the case and also is well-versed in Commission Rules and enforcement, and that party expressed no concern with the need to include the road. That weighs in favor of the Commission.

Most importantly, the Commission cited to Texas Water Code section 7.002 and Texas Health and Safety Code section 361.032 as

[84] App. Br. at 55.

[85] App. Br. at 52.

authorizing the Commission to compel compliance with the Rules, order, and permits even outside the permit boundary. Therefore, the Commission correctly deleted proposed Findings of Fact Nos. 69 and 70 and Conclusion of Law No. 21 concerning inclusion of the access road and Finding of Fact No. 394 concerning inclusion of the screening berm. Substantial evidence supports the Commission's deletion of these findings of fact, and, as a matter of law the Commission was legally correct in deleting the conclusion of law.

B. The Commission correctly exercised its authority to delete proposed findings of fact and a conclusion of law.

Overall, Appellants challenge the Commission's rejection of Conclusion of Law No. 21 on procedural grounds, invoking Health and Safety Code section 361.0832(d), which provides,

> The commission may overturn a conclusion of law in a contested case only on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules.

This standard for overturning an ALJ's conclusion was addressed by this Court in *Hunter Industrial Facilities, Inc. v. Texas Natural Resources Commission*, 910 S.W.2d 96 (Tex. App.—Austin 1995, writ denied). The *Hunter* Court, upholding the agency's rejection of findings

and conclusions, wrote that the agency (a predecessor of TCEQ) may reverse findings and conclusions when they are clearly erroneous, i.e., when the agency "is left with the definite and firm conviction that a mistake has been committed." *Id.* at 104. This Court described the standard as one that "is generally considered to give the [agency] broader authority than is allowed under 'substantial evidence' review because a decision may be overturned despite its theoretical reasonableness." *Id.*

Under this deferential standard, the Commission did not err in rejecting proposed Conclusion of Law No. 21 or so-called Finding of Fact No. 70, which was simply an abbreviated restatement of Conclusion of Law No. 21 (and not a finding of fact at all). Both were based on the ALJs misunderstanding of the law about the extent of the Commission's enforcement authority. Likewise, the Commission did not err in overturning proposed Finding of Fact No. 69 concerning the access road[86] or proposed Finding of Fact No. 394 concerning the screening berm. They were superfluous once the Commission held that no rule required 130EP

[86] "130EP has not justified why the entire length of the access road is not included within the Permit Boundary. . . ." PFD at 7, FOF 69.

to include the entire access road or the screening berm in the permit boundary.

Accordingly, the Commission did not err.

V. The applicant met applicable requirements of Commission Rules concerning drainage patterns, floodplains, and, relatedly, land-use compatibility. (Responds to Appellants' Issue No. 4.)

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

A. 130EP's surface water drainage analysis complied with Commission Rules and showed no adverse alteration to existing drainage patterns.

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

Initially, Appellants accuse the Commission of misinterpreting its own Rules requiring a drainage analysis. But the Commission correctly determined that 130EP had complied. Concerning drainage, floodplains, and land-use compatibility, the Commission made numerous Findings of Fact including Nos. 239 through 320. All were supported by substantial evidence.

Commission Rule 330.63(c) requires an applicant to provide a surface water drainage report showing that the operator will design and operate the landfill to meet the requirements of Subchapter G of Chapter 330. Agency rules, including Commission Rule 330.305, require 130EP to manage run-on and runoff during the peak discharge of the

volume of water resulting from a 25-year rainfall event, to ensure that the landfill will not *adversely* alter existing drainage patterns.

Appellants contend that 130EP's drainage analysis failed to comply with the rules, implying the study did not center on the Facility. But the report did. The record includes a drainage analysis prepared by 130EP's expert engineer, Mr. Tyson Traw, after he conducted an analysis using 12 perimeter points to compare the existing drainage patterns with the patterns created by the Facility once its drainage system is in place.[87] The analysis, which the ALJs found was properly prepared,[88] encompasses all the required information including an analysis based on the required 25-year rainfall event, design of all drainage facilities, sample calculations to verify that existing drainage patterns will not be adversely altered,[89] and a description of the hydrologic method and calculations to estimate peak flow rates and runoff volumes.[90] (As noted

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[87] 46 AR 130EP-2 (Appl. Part III, Vol. 2 of 5 at 47-468 [Attach. C]). The index to the administrative record mistakenly refers to Volume 46 of the administrative record as Volume 47.

[88] PFD at 143.

[89] 46 AR 130EP-2 at 68-158.

[90] 46 AR 130EP-2 at 81-158.

by the ALJs,[91] increases in peak flows and velocities are generally the main concerns regarding alteration of drainage patterns.)

Mr. Traw's analysis, which specifically addresses the Site 21 Reservoir and Dam in the demonstration that there will be no adverse change to drainage, shows that stormwater and runoff will be managed via a perimeter drainage system and detention ponds.[92] As required, the analysis includes discussions and detailed designs, calculations, and operational considerations for collection, control, and discharge of storm water from the landfill. The drainage system described in the application consists of drainage swales, down chutes, perimeter channels, detention ponds, and outlet structures.[93]

Consistent with Commission Rules, the perimeter drainage system, which will be constructed as each sector of the landfill is developed, is designed to collect, convey, and discharge the 25-year peak flow rate from the developed landfill. The perimeter channels are designed to convey

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[91] 30 AR 364, PFD at 144.

[92] 46 AR 130EP-2 (Appl. Part III, Vol. 2 of 5 at 68-70 [Attach. C1, Section 7]).

[93] 18 AR 54 at 30 (ED's Response to Comments).

the runoff from a 100-year rainfall event. Detention ponds are designed in accordance with rules to provide the necessary storage and outlet control to mitigate impact to the receiving channels downstream of the landfill.[94]

In testimony, Mr. Traw described the drainage requirements for landfills and the models that should be used to calculate drainage analysis. He identified 130EP-2 as an exhibit that summarized differences between existing and post-development drainage patterns.[95] He explained the three factors he considered: peak discharge, run-off volume, and velocity.[96] He said that he modeled both the 100-year and 25-year storm events—in an effort to go above and beyond the requirements of the Rules.[97]

At most comparison points along the permit boundary, there will be minimal changes in peak discharge, volume, and velocity during the 25-

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[94] *See* 46 AR 130EP-2 (Appl. Part III, Vol. 2 of 5 at 68-70 [Attach. C1, Section 7]). Design storms and floods, such as the 24-hour, 25-year storm or the 100-year flood, are statistically derived from extensive weather data and published.

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

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

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

year, 24-hour storm.[98] The most significant changes along the permit boundary occur at points CP7 and CP8, with decreases in peak discharge rates of 41 percent and 12 percent respectively and slight changes in velocity.[99] The evidence shows that reductions in peak discharge rates and velocities do not typically result in adverse alterations of existing drainage patterns.[100] Although discharge volume will increase at point CP7,[101] the reductions in peak flow and velocity mean it will not result in an adverse alteration in existing drainage patterns along the permit boundary.[102] At point CP8, development of the Facility will result in a decrease in volume of 16.5 percent, which will be offset by the increase in volume at CP7.[103] The net increase between the two points in a 25-year

[98] PFD at 144.

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

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

[101] 46 AR 130EP-2 at 69, 79; Tr. 1902-1903 (Odil).

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

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

storm event will amount to an increase in volume of about one percent of Site 21 Reservoir's capacity; and that increase would be insignificant.[104]

The Commission's Executive Director was a party to the contested case hearing. His witness, TCEQ permit engineer Steve Odil, testified that the 25-year peak discharge "reduces significantly" as a result of the landfill.[105] Mr. Odil described how an increase in volume at one point along the permit boundary can be offset by other factors such as a lower volume at another point, a decrease in peak discharge, a slower rate of release, and the existence of a downstream reservoir.[106] He also said that that staff in the Commission's municipal solid waste program had consulted with staff in the Commission's dam safety program and determined that the one percent expected increase in volume would be insignificant since it represents less than one percent of the reservoir's capacity during a 25-year storm event.[107]

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[104] Tr. 1904:22-25; Tr. 1911:13-17 (Odil); 30 AR 364, PFD at 145-146.

[105] Tr. 1904:22-25; Tr. 1911:13-17 (Odil); 30 AR 364, PFD at 145-146.

[106] Tr. 1902-1911 (Odil); 30 AR 364, PFD at 135-136 (summarizing ED's position).

[107] 58 AR ED-SO-1 at 26.

The District, which is responsible for the Site 21 Dam and Reservoir, did not argue that the landfill would interfere with its operation of the dam or ability of the dam to protect downstream life and property. The PFD noted that the ALJs attached significance to that fact.[108]

Similarly, Appellants' complaint that 130EP was required under Rule 330.63(c)(2)(C) to include additional information in its surface water drainage analysis ignores the undisputed evidence that waste is being disposed of only in the landfill footprint,[109] which is outside the 100-year floodplain.[110] Nor do Appellants overcome the substantial record evidence—the testimony of Mr. Traw and Mr. Odil along with Mr. Traw's written analysis included in the application—supporting the Commission's determination that there will be no adverse alteration to

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[108] PFD at173.

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

[110] Mr. Traw, who analyzed and determined the location of the floodplain in the area, testified that the landfill footprint and solid waste storage and processing units will be outside the floodplain. Tr. 550-551; 700-702 (Traw). *See also* 52 130EP-24, 52 130EP-25 (maps).

existing drainage patterns, and that the landfill is a compatible land use.[111]

B. Substantial evidence supports that the Facility is compatible with surrounding land uses.

Appellants again point to the dam as a basis for reversing the Commission's Order by contending that the landfill is incompatible with the dam in the event of a "probable maximum flood." However, the rule they cite for this alleged deficiency is in a chapter of the Commission's Rules governing criteria for the design of proposed dams and reservoirs, 30 Texas Administrative Code section 299.15(a)(1)(A). Had 130EP applied for a permit to construct a dam, this Rule would have applied. But the "probable maximum flood" standard cited by Appellants is not applicable to a municipal solid waste permit applicant's drainage analysis.[112]

Neither the Texas Health and Safety Code nor applicable rules define land-use compatibility or set a specific standard to guide the

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[111] *See*, e.g., Order, FOF 259, 263-264, 286-289 and COL 9-12, 17-18, 36-37, 39, 53, and 55.

[112] *See* PFD at 146.

agency's determination of it, but the Commission's Rule 330.61(h) provides the general framework for consideration. Tex. Admin. Code § 330.61(h). This Court has previously examined the precursor to Commission Rule 330.61(h)[113] and suggested that compatibility should be determined by balancing an array of factors. *Ne. Neighbors Coal. v. Tex. Comm'n on Envtl. Quality*, No. 03-11-00277-CV, 2013 WL 1315078 (Tex. App.—Austin March 28, 2013, pet. denied) (mem. op.). "Once made," the Court said, "a land-use-compatibility decision is subject to the substantial-evidence review" with the court presuming that the agency's decision is supported by the substantial evidence. *Id*. at *9.

Although Appellants allege that the Commission omitted the Dam from its land-use analysis, the record shows that 130EP thoroughly addressed potential adverse impacts of the landfill on the Site 21 Reservoir and Dam. The ALJs recognized that 130EP dealt with these potential impacts in the context of surface water drainage and floodplains, and substantial evidence showed that the landfill will not

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

adversely impact the District's operation of the Site 21 Reservoir and Dam.[114] Consequently, the Commission's decision that the landfill is compatible with surrounding uses is supported.

CONCLUSION

To obtain reversal or remand of an agency decision, a party must show the agency committed an error that prejudiced substantial rights. Tex. Gov't Code § 2001.174(2). Appellants contend that their substantial rights have been prejudiced. They set out ways in which they are affected as property owners and residents nearby the permitted landfill. But the Appellants have not shown that the Commission committed any error in its findings or conclusions, or in its ultimate decision to grant the landfill permit to 130EP. For this reason, the Commission's Order should be upheld.

PRAYER

Appellee Texas Commission on Environmental Quality requests that the Court affirm the district court's Final Judgment that affirmed the Order issued by the Commission on September 18, 2017, granting to

[114] *See* PFD at 173.

130 Environmental Park, LLC, a permit to construct and operate a landfill in Caldwell County, Texas.

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(i)(3), I certify the foregoing computer-generated document contains 11,284 words, excluding the portions of the Brief exempt from the word count under Tex. R. App. P. 9.4(i)(1), relying on the word count feature of Microsoft Word used to prepare this document.

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CERTIFICATE OF SERVICE

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