

Velva L. Price  
District Clerk  
Travis County  
D-1-GN-17-006632  
Victoria Benavides

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

ENVIRONMENTAL PROTECTION	§	IN THE DISTRICT COURT OF
IN THE INTEREST OF CALDWELL	§	
COUNTY, JAMES ABSHIER,	§	
BYRON FRIEDRICH, AND TJFA,	§	
L.P.,	§	
Plaintiffs	§	TRAVIS COUNTY, TEXAS
	§	
v.	§	
	§	
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	459th
Defendant	§	_____ DISTRICT COURT

**PLAINTIFFS’ ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs Environmental Protection in the Interest of Caldwell County (“EPICC”), James Abshier, Byron Friedrich, and TJFA, L.P. (collectively, “Plaintiffs”) file this Original Petition, seeking judicial review of decisions by Defendant Texas Commission on Environmental Quality (“Defendant” or the “Commission”), which resulted in the approval of the application by 130 Environmental Park, LLC (“130EP”) for construction and operation of a solid waste landfill in Caldwell County, Texas. For support, Plaintiffs respectfully offer the following:

**I. CASE SUMMARY**

1. This lawsuit arises out of a decision by the Texas Commission on Environmental Quality granting the application by 130EP for MSW Permit No. 2383.<sup>1</sup> This permit allows 130EP to construct and operate a 202-acre solid waste disposal facility, within a 520-acre permit boundary in northern Caldwell County. The site is surrounded by a floodplain on three sides and is just upstream and adjacent to Plum Creek Conservation District's high hazard dam and reservoir, into which 5,536 acres drain.
2. Plaintiffs contested the permit application and requested an evidentiary hearing. Caldwell County, Plum Creek Conservation District, and several individuals who reside in the area of the proposed landfill also sought to participate in a contested case hearing regarding the permit application.
3. Following a two-week hearing, the presiding administrative law judges issued a proposal for decision that noted some deficiencies in the application and recommended changes to the draft permit, if the Commission were to decide to issue it.
4. Following a public meeting, the Commission decided to issue the requested landfill permit to 130EP. This decision was reflected in a written order dated September 18, 2017.
5. Plaintiffs' substantial rights were prejudiced by the TCEQ's decision because the decision is not reasonably supported by substantial evidence, is in violation of

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<sup>1</sup> The TCEQ and SOAH docket numbers for the landfill permit application proceedings are: TCEQ DOCKET NO. 2015-0069-MSW and SOAH Docket No. 582-15-2082.

statutory and regulatory provisions, is arbitrary and capricious, an abuse of discretion and otherwise contrary to law. *See* Tex. Gov't Code § 2001.174. Because 130EP failed to meet its burden of proof that its application complies with all legal requirements, the application should have been denied by the TCEQ. Instead, it was granted. Plaintiffs therefore seek judicial review of TCEQ's decision and requests that it be reversed by this Court.

## **II. DISCOVERY**

6. This case is an appeal of an administrative agency's decision. Discovery should therefore be conducted under Level 3, in accordance with Texas Rule of Civil Procedure 190.4, if it becomes necessary.

## **III. JURISDICTION AND VENUE**

7. This Court has jurisdiction over Defendant TCEQ as an agency of the government of the State of Texas.
8. This Court has jurisdiction over the controversy because this action is brought under section 2001.171 of the Texas Government Code, section 5.351 of the Texas Water Code, and section 361.321 of the Texas Health and Safety Code.
9. Plaintiffs timely filed a motion for rehearing of TCEQ's decision, which was overruled by operation of law. All other conditions precedent have been performed or have occurred.
10. Venue is proper in this Court under section 2001.176 of the Government Code, section 5.354 of the Water Code, and section 361.321 of the Health and Safety Code.

#### IV. PARTIES

**11. Plaintiff Environmental Protection in the Interest of Caldwell County**

(“EPICC”). EPICC is a membership non-profit organization whose purposes include promoting the protection of the environment of Caldwell County. EPICC’s membership includes landowners and residents adjacent to the site of the proposed landfill that is the subject of this lawsuit, as well as other residents of Caldwell County who will be adversely impacted by the landfill in a manner distinct from members of the general public.

**12. Plaintiff James Abshier.** Mr. Abshier is a resident of Caldwell County. He owns property and resides on property less than one mile from the proposed landfill site that is the subject of this lawsuit. Mr. Abshier will be adversely impacted by the proposed landfill in a manner distinct from members of the general public.

**13. Plaintiff Byron Friedrich.** Mr. Friedrich is a resident of Caldwell County. He owns property and resides on property adjacent to the proposed landfill site that is the subject of this lawsuit. Mr. Friedrich will be adversely impacted by the proposed landfill in a manner distinct from members of the general public.

**14. Plaintiff TJFA, L.P.** TJFA owns real property less than 100 feet from 130EP’s permitted property boundary. The operation of the 130EP facility and the proposed facility permit will have an adverse impact on the use and value of TJFA property in a way that is not common to the general public because of such proximity.

15. **Defendant Texas Commission on Environmental Quality.** is an administrative agency created under the laws and Constitution of the State of Texas with the responsibility of implementing and administering the laws of Texas related to the management of municipal solid waste, including regulation of municipal solid waste landfills such as the 130EP proposed landfill. *See* Tex. Health & Safety Code § 361.002. Defendant TCEQ can be served with citation by serving its Executive Director, Richard A. Hyde, P.E., at 12100 Park 35 Circle, Austin, Texas.

#### V. FACTUAL AND LEGAL BACKGROUND

16. On September 4, 2013, 130EP filed with the Commission an application seeking a determination of the land use compatibility of a municipal solid waste landfill proposed to be sited in northern Caldwell County, about two miles north of Lockhart. This land use compatibility application is sometimes referred to as “Parts I and II” of a landfill application, because it consists of only the first two parts of an application for a landfill permit.
17. By filing only Parts I and II of the application, 130EP could only obtain, from TCEQ, a determination regarding land-use compatibility. Under no circumstance could it obtain a landfill permit with the filing of only Parts I and II.
18. The Commission’s Executive Director, via his solid waste permitting staff, declared Parts I and II “administratively complete” and commenced a technical review of the land use compatibility application.

19. Meanwhile, on December 9, 2013, the Caldwell County Commissioners Court entered an Order to “Adopt Ordinance Prohibiting Solid Waste Disposal in Caldwell County” and enacted the Caldwell County Solid Waste Disposal Ordinance (the “Ordinance”), prohibiting the processing and disposal of solid waste in certain areas of Caldwell County. *See* Tex. Health & Safety Code §§ 363.112 & 364.012. The Ordinance prohibits the processing or disposal of municipal or industrial solid waste or the operation of a solid waste facility in all portions of Caldwell County except where such activity is not prohibited in the County. The site of the proposed 130EP landfill is in an area wherein landfill facilities are prohibited under the County’s Ordinance.
20. On February 18, 2014, almost two months after the County enacted its Siting Ordinance, 130EP filed a full landfill permit application, including Parts III and IV and a significantly revised Parts I and II.
21. The Commission’s Executive Director, via his solid waste permitting staff, declared those parts administrative complete on February 28, 2014, and commenced technical review of the application.
22. On March 20, 2014—a little over a month after 130EP submitted its entire landfill permit application to TCEQ—Plaintiffs’ counsel sent a preservation of evidence letter to 130EP and its consultants, advising that they intended to contest the permit application and that therefore, all materials relevant to the landfill permit application should be preserved.

23. As the staff reviewed 130EP's application, it issued 130EP several "notice of deficiencies" ("NODs"), detailing deficient information in the permit application that is required by the solid waste permitting rules. By these NOD letters, TCEQ staff requested that 130EP provide missing information or correct deficient information; this information was necessary for staff's completion of the technical review.
24. Among the deficiencies identified in the staff's NOD letters was 130EP's failure to include Plum Creek Conservation District on its list of property owners within ¼-mile of the facility and potentially affected landowners, as required by TCEQ rules.
25. Plum Creek Conservation District ("the District") owns an easement for use of a reservoir and dam ("Site 21") on the proposed landfill property. Yet, 130EP had not included the District on its list of property owners in the landfill permit application, and the District was therefore not provided with the required notice that is afforded to adjacent and potentially affected property interest owners.
26. Even after staff's NOD letter, 130EP refused to include the District on its list of property owners.
27. Another deficiency noted in at least three of the NOD letters issued by staff to 130EP was 130EP's failure to obtain the required local floodplain development authorization, as required by TCEQ's solid waste regulations, to allow construction of the landfill access road in a floodplain.

28. In response to each of the NODs requesting from 130EP its local floodplain development authorization, 130EP stated only that it had begun the County's floodplain development permit application process. Later, during the evidentiary hearing regarding 130EP's landfill permit application, testimony revealed that this response was untrue; 130EP never commenced the local floodplain development permit application process.
29. The NODs also noted a number of deficiencies regarding the Geology section of the permit application. For instance, by letter dated May 6, 2014, staff informed 130EP that the application failed to include any logs for the various wells, or piezometers, drilled on the proposed landfill site to investigate groundwater conditions; these logs are required by the Commission's solid waste regulations.
30. 130EP responded to the May 6 NOD letter and included the requested logs. During the evidentiary hearing regarding the permit application, however, testimony revealed that all data collected from the drilling of the wells had been discarded before May 6. So, the logs submitted to TCEQ in response to the May 6 NOD letter were simply duplicates of logs created for different borings; they did not reflect data collected from the drilling of the wells.
31. Ultimately, the Executive Director completed his technical review of the application, declared it technically complete, and issued a draft permit on October 28, 2014.
32. Several individual nearby landowners, as well as EPICC and TJFA, requested a contested case hearing regarding the permit application.



33. The application was referred to the State Office of Administrative Hearings for a contested case hearing regarding the application.
34. A preliminary hearing was held on March 26, 2015, and EPICC, Mr. Abshier, Mr. Friedrich, TJFA, several other individual landowners, Caldwell County, and Plum Creek Conservation District were admitted as parties.
35. During the discovery phase of the hearing process, 130EP revealed that its consultants had discarded significant data regarding its geological investigation, despite having received Plaintiffs' preservation of evidence letter.
36. Among the data that was discarded were all initial 2013 soil samples collected from the borings drilled on the proposed landfill site. Field notes from the subsurface site investigation had also been discarded. And all initial boring logs had also been discarded. Essentially, the only data regarding the borings that remained were the final logs included in the permit application. None of the data that was used to create the final logs, however, was preserved.
37. Similarly, all data from the wells, or piezometers, drilled on site had been discarded.
38. Plaintiffs, therefore, sought access to the proposed landfill site to drill a limited number of borings to attempt to verify the information included in the geology section of the permit application.
39. Plaintiffs' request was granted, and in February 2016, their expert consultants drilled a limited number of borings, collected soil samples, conducted laboratory analyses of some of the samples, and prepared their own report regarding the

inconsistencies between their subsurface investigation findings and the information included in the permit application.

40. Based on these noted inconsistencies, Plaintiffs sought a spoliation instruction regarding the geology section of 130EP's permit application. Plaintiffs alternatively sought to strike evidence submitted by 130EP regarding the geology section of the permit application.

41. By Order dated August 11, 2016, the Administrative Law Judges (ALJs) presiding over the hearing found that 130EP had a duty to preserve the discarded data, and 130EP breached that duty because it knew or should have known that there was a substantial chance that a hearing on its landfill permit application would take place and that documents in its possession or control would be material and relevant to the hearing. By discarding the initial geology data, 130EP precluded Plaintiffs from conducting the full discovery it was entitled to, the ALJs found. Nevertheless, the ALJs overruled Plaintiffs' motion, reasoning that because Plaintiffs were allowed to drill their own borings on the site, no other action was necessary to remedy the prejudice caused by the destruction of evidence.

42. The evidentiary contested case hearing was held on August 15 through 26, 2016.

43. The evidence presented during the hearing covered several contested issues, including failure to obtain required local floodplain development authorizations, the existence of a siting ordinance that prohibits operation of a landfill at the proposed location, deficient and inaccurate subsurface geology information,

surface water drainage issues, the absence of an access road within the permit boundary, and land use compatibility.

44. The evidence revealed that the proposed landfill would be surrounded by floodplains on three sides. Indeed, in some areas, the proposed facility boundary is co-terminous with the floodplain boundary.
45. The evidence also revealed that there is no access road, within the permit boundary, that connects the proposed facility to a public roadway.
46. Moreover, 130EP never commenced the process for securing authorization from Caldwell County to construct an access road over a floodplain, as required by TCEQ rules.
47. The evidence further revealed that the Plum Creek Conservation District Site 21 dam, located on the proposed landfill site, has been classified as a high hazard dam, meaning that should it fail or malfunction, the TCEQ expects that it would result in the loss of seven or more lives, three or more habitable structures, or excessive economic loss. Yet, neither 130EP nor TCEQ staff evaluated the impacts of the proposed landfill on the Site 21 dam and reservoir.
48. After the submission of the parties' closing briefs, the ALJs issued their Proposal for Decision (PFD).
49. The ALJs noted that 130EP failed to comply with TCEQ's rules regarding some issues. More specifically, 130EP failed to list the District's easement on the landowner's list, as required by TCEQ rules; 130EP failed to obtain approval of its

soil boring plan from TCEQ staff before commencing its subsurface investigation; and 130EP failed to obtain a floodplain development permit from the County.

50. None of these deficiencies warranted denial of the permit, according to the ALJs.

The failure to obtain a floodplain development permit from the County could be remedied by a special provision in the permit, requiring 130EP to obtain the required local floodplain development permit before commencing construction of the landfill, according to the ALJs. It should be noted that this proposed remedy is not contemplated in the solid waste rules, and the ALJs cite to no authority allowing 130EP to comply with this regulatory requirement *after* the landfill permit is issued.

51. The ALJs also noted that they have concerns regarding the compatibility of the proposed landfill with the Site 21 reservoir and dam and advise that the Commission must determine whether situating a landfill in close proximity to the 100-year floodplain, immediately upstream of a flood control structure needed to protect human life, is a compatible land use.

52. Nevertheless, the ALJs concluded in their PFD that 130EP met “the objective requirements of the applicable TCEQ rules.” They recommended that if the Commission finds that the noted deficiencies do not warrant denial of the application, then the Commission should issue the draft permit with some recommended changes.

53. Among the recommended changes to the draft permit was that the permit boundary be extended to include the entire length of the proposed access road

from the entrance of the facility to the public roadway—US 183. They also recommended that the permit boundary be extended to include the entire screening berm.

54. The ALJs also recommended that 130EP's request for 24-hour operations be denied, and that the standard operating hours set out in TCEQ's solid waste rules be adopted.

55. Following issuance of the PFD, the parties submitted their exceptions to the PFD and replies to exceptions.

56. The matter was then submitted to the TCEQ Commissioners.

57. The Commissioners held a public meeting on September 6, 2017. During their deliberations, the Commissioners made no mention of the high hazard dam or the surrounding floodplains.

58. Instead, the Commissioners' deliberations focused on whether it was appropriate to limit the operating hours, as proposed by the ALJs in their PFD. As they discussed whether a remand was appropriate to allow 130EP another opportunity to present evidence to justify its request for extended operating hours, 130EP's counsel advised the Commissioners that 130EP would accept the limited operating hours proposed by the ALJs and dropped their request for 24-hour operations.

59. The Commissioners also revised some of the findings and conclusions proposed by the ALJs. More specifically, they revised the findings and conclusions that would have required 130EP to extend its permit boundary to include the entire length of the access road and the screening berm. And they revised the findings

and conclusions that acknowledged 130EP's failure to identify Plum Creek Conservation District as a property interest owner and failure to provide the District notice, as required by TCEQ rules.

60. The Commission's decision was memorialized in a written order dated September 18, 2017.

61. Plaintiffs timely filed their motion for rehearing, which was overruled by operation of law.

62. By the timely filing of this Petition, Plaintiffs now seek judicial review of the Commission's decision.

## **VI. ERRORS OF DEFENDANT**

63. Plaintiffs allege that the Commission committed several errors in its September 18, 2017 Final Order. Those errors are detailed below.

64. **Error No. 1.** The Commission erred in its September 18, 2017 order by issuing a permit that does not sufficiently address flooding risks, including flooding impacts of the landfill upon a downstream high hazard dam.

65. Since the Landfill site and facilities are located within the 100-year floodplain, the requirements of TCEQ Rule 330.63(c)(2)(C) apply. 30 Tex. Admin. Code § 330.63(c)(2)(C). That provision requires that an applicant provide information detailing the specific flooding levels and other events that impact flood protection at the facility. As noted above, the dam at the Site 21 Reservoir has been classified as a "High Hazard Dam," meaning that should it fail or malfunction the TCEQ expects that it would result in the loss of seven or more lives, three or more

habitable structures, or excessive economic loss. Yet, 130EP and TCEQ failed to evaluate the impacts of the landfill upon the downstream reservoir and dam.

66. Additionally, the landfill is in an area that could be potentially impacted by hurricane events, as demonstrated by the inclusion of Caldwell County within the recent disaster declaration issued as a result of Hurricane Harvey. Yet, 130EP did not address the rainfall amounts that could occur as a result of such an event, and TCEQ staff failed to consider impacts of hurricane events on the proposed landfill.

67. By not requiring the submission and evaluation of the materials included within Rule 330.63(c)(2)(C), such as potential hurricane impacts and the impacts resulting from the probable maximum flood, the TCEQ has failed to comply with its own rules regarding the protection of facilities from flooding.

68. Considering that the Commission has not fully evaluated flooding impacts, nor required and considered the full scope of information required to be submitted by rule, Findings of Fact 276, 278 through 281, 286 through 289, and Conclusions of Law Nos. 9, 10, 11, 12, 17, 18, 39, 53, 55 are: (1) in violation of statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

69. **Error. No. 2.** The Commission erred in its September 18, 2017 order by failing to require that 130EP submit a floodplain development permit from Caldwell County. TCEQ Rule 330.63(c)(2)(D)(ii) states that the owner or operator “shall ... for construction in a floodplain, submit ... a floodplain development permit from

the city, county, or other agency with jurisdiction over the proposed improvements.” As reflected in Finding of Fact 329, 130EP has not obtained the required floodplain development permit from the County and has not submitted the required permit to TCEQ.

70. By issuing the requested permit without requiring the submission of a floodplain development permit from Caldwell County, the Commission failed to follow its own rules. For this reason, Finding of Fact 330 and Conclusions of Law 4, 5, 10, 11, 12, 39 are contrary to evidence in the record; arbitrary and capricious; made through unlawful procedure; and affected by error of law.

71. This also presents a finality issue, in that it is possible, and likely, that 130EP may have to modify its drainage designs in order to obtain local approval, thus necessitating a change to its permit application and its permit.

72. **Error No. 3.** The Commission erred in its September 18, 2017 order by issuing a permit for a landfill that would violate the Caldwell County Siting Ordinance. The material filed by 130EP on September 4, 2013 was only a request for a land-use compatibility determination. That filing did not constitute a permit application. On December 9, 2013, the Caldwell County Commissioners Court adopted an ordinance prohibiting the location of a landfill in certain areas of the County, including the proposed landfill site.

73. It was not until February 18, 2014, almost two months after the County enacted its Siting Ordinance, that 130EP filed its permit application, including Parts III and IV and a significantly revised Parts I and II.



74. Texas Health and Safety Code Sections 363.112 and 364.012 both expressly provide that the Commission may not grant an application for a permit to process or dispose of municipal solid waste in an area in which the processing or disposal of such waste is prohibited by a county ordinance. *See* Tex. Health & Safety Code §§ 363.112(d) & 364.012(f). The issuance of 130EP's requested permit violated these statutory provisions.
75. For these reasons, Findings of Fact 8, 9, 317, 319, 325, 326, 327 and Conclusion of Law 41 were made through unlawful procedure; are not supported by evidence; are arbitrary and capricious; are contrary to law; are in violation of statutory provisions and are in excess of TCEQ's statutory authority.
76. **Error No. 4.** The Commission erred in failing to require that 130EP demonstrate a sufficient property interest in the site access road.
77. 130EP does not possess a sufficient property interest in the access route to the proposed landfill. TCEQ Rule 330.67(a) provides that a landfill permit applicant must possess or acquire a sufficient interest or right to the use of the surface estate of the property for which a permit is issued, including the access route. Finding of Fact No. 31 contained in the Commission's final order addresses the extent of 130EP's property interests, but only summarizes the contents of an affidavit contained within the application. This statement is not truly a finding of fact, since it does not resolve the dispute regarding the sufficiency of 130EP's ownership interest in the access road. 130EP did not demonstrate that it possesses

a sufficient ownership interest in that portion of the access route for the proposed landfill.

78. Considering the failure of the order to include factual findings resolving the extent of 130EP's property interest in the access road, the Order: (1) does not contain findings of fact sufficient to meet the requirements of Texas Government Code Section 2001.141, (2) is in violation of a statutory provision, (3) is made through unlawful procedure, (4) is not supported by substantial evidence, (5) is arbitrary and capricious, (6) is affected by error of law, and (7) is characterized by an abuse of discretion.

79. Considering 130EP's failure to demonstrate a sufficient property interest in the access road in compliance with Rule 330.67(a), the Commission's Conclusions of Law No. 4, 11, and 14 are in violation of statutory or constitutional provision, affected by error of law, arbitrary and capricious, not supported by substantial evidence in the record, and characterized by an abuse of discretion.

80. **Error No. 5.** The Commission erred in failing to require that the entire length of the site access road be included within the permit boundary. Changes made to the ALJs' findings and conclusions regarding the site access road did not comply with standards set out in the Health and Safety Code and the Government Code.

81. The access road is a "facility" subject to regulation, which should be included within the permit boundary. The ALJs concurred with this position. By proposed Finding of Fact 69, the ALJs found that "130EP has not justified why the entire length of the access road is not included within the Permit Boundary, even though

it is a Facility authorized by the Permit.” Further, by proposed Finding of Fact 70, the ALJs acknowledged that the “entire length of the access road from US 183 should be included within the Permit Boundary.”

82. The Commission must include the entirety of the access road within the permit boundary in order to assure that roads used to access the site are adequate and available, as required by TCEQ Rule 330.61(i), and in order to assure compliance with the access road design and operating specifications set forth in TCEQ Rule 330.153.

83. Considering that the Commission did not include the full length of the private access road within the permit boundary, the Commission’s deletion of the ALJs’ Findings of Fact 69 and 70, as well as Conclusion of Law No. 21, are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

84. For this same reason, Conclusions of Law Nos. 4, 9, 11, 12, 19, 20, and 42 are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

85. In addition, the changes to the findings and conclusions were erroneous, in that the Commission failed to comply with the Health and Safety Code Section 361.0832 (setting the standards for the Commission’s changes to ALJs’ findings and

conclusions) and Chapters 2001 and 2003 of the Government Code, regarding deletions of these findings of fact.

86. The ALJs' findings were supported by the evidence—indeed, by the great weight of the evidence. The findings also complied with TCEQ's own rules and with relevant statutes. By contrast, by deleting these findings, the Commission's decision is not supported by the established facts or by applicable rules and statutes.

87. **Error No. 6.** The Commission erred in failing to require a demonstration of competency by the 130EP.

88. TCEQ Rule 330.59(f) requires that a landfill permit applicant demonstrate itself to be competent to operate a permitted facility. In addition, Texas Health and Safety Code Section 361.089(a) and (g) authorizes TCEQ to deny landfill permits based on compliance histories of the members, officers, and owners of a landfill permit applicant. TCEQ Rule 330.59(f)(4) tracks the language of this statute, requiring the landfill permit applicant to fully disclose the “names of the principals and supervisors of the owner's or operator's organization ... together with previous affiliations with other organizations engaged in solid waste activities.” 30 Tex. Admin. Code § 330.59(f)(4).

89. Green Group Holdings, Ernest Kaufmann, and David Green were all principals of 130EP at the time the landfill permit application was submitted to TCEQ, and all except Ernest Kaufmann remained so at the time the Commission issued its decision. Even so, the competence and compliance history of these entities were

not considered by the TCEQ. There is no explanation in the Final Order regarding why this entity and these individuals need not be included in the application.

90. Despite the applicable law, and the relevant facts, the Commission wrongly determined that 130EP was not required to demonstrate competency, and determined that Green Group Holdings, Ernest Kaufman, and David Green need not be identified or considered in determining whether 130EP was competent to construct and operate the proposed landfill.
91. Moreover, by allowing 130EP to avoid disclosure of the aforementioned principals of 130EP, neither TCEQ nor the other parties possessed the means to evaluate the compliance history authorized by Section 361.089 of the Health and Safety Code.
92. For these reasons, Findings of Fact 41 through 44 and 46 through 48, as well as Conclusions of Law Nos. 4, 9, 11, 13, 15, 16, and 51 are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.
93. **Error No. 7.** The Commission erred in failing to include the screening berm within the permit boundary. Changes made to the ALJs' findings and conclusions regarding the screening berm did not comply with standards set out in the Health and Safety Code and the Government Code.
94. TCEQ Rule 330.175 requires visual screening of deposited wastes. 130EP proposes to address this requirement through a screening berm, but that berm is proposed to be located outside of the permit boundary. By proposed Finding of

Fact 394, the ALJs determined that the screening berm should be located within the permit boundary. The location of the berm within the permit boundary is necessary to provide an enforceable condition implementing TCEQ's Rule 330.175. Yet, TCEQ revised the ALJs' proposed findings and conclusions requiring the screening berm to be included within the permit boundary; the Commissioners refused to extend the permit boundary to include the screening berm.

95. For these reasons, the Commission's decision to delete proposed finding of fact 394, and the Commission's adoption of Findings of Fact 389, 392, and 393, as well as the adoption of Conclusions of Law Nos. 9, 11, 42, 49, 50, 54 and 57 are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

96. In addition, the changes to the findings and conclusions were erroneous, in that the Commission failed to comply with the Health and Safety Code Section 361.0832 (setting the standards for the Commission's changes to ALJs' findings and conclusions) and Chapters 2001 and 2003 of the Government Code.

97. The ALJs' findings were supported by the evidence—indeed, by the great weight of the evidence. The findings also complied with TCEQ's own rules and with relevant statutes. By contrast, by deleting these findings, the Commission's decision is not supported by the established facts or by applicable rules and statutes.

98. **Error No. 8.** The Commission erred in failing to enforce its rules requiring 130EP to provide adequate notice to the Plum Creek Conservation District. The Commission erred in altering the ALJs' findings and conclusions with regard to requiring notice to the District, and it erred in changing the ALJs' conclusions related to 130EP's failure to provide notice to Plum Creek Conservation District (Conclusions of Law Nos. 7(a), 13, and 51).
99. The proposed landfill property is subject to an easement owned by Plum Creek Conservation District for use of Site 21. The PFD and the findings in the Final Order acknowledge that Site 21 should be considered in the land use compatibility analysis. In other words, the District's property right—its easement—is impacted by any decision to permit a landfill on the proposed site. Yet, the District was not named as an easement holder in the landfill permit application, and the District was therefore not provided with the required notice that is afforded to adjacent and potentially affected property interest owners.
100. Notice to potentially affected property interest owners is a requirement that must be satisfied before the State Office of Administrative Hearings may take jurisdiction of the permit application and commence a contested case hearing.
101. As an affected landowner, and owner of an impacted easement, the District was entitled to notice of the application under the TCEQ rules, and the Commission's findings and conclusions on this issue are incorrect.
102. Accordingly, the Commission's decision to change Conclusions of Law 7(a), 13 and 51 are (1) in violation of a statutory provision, (2) made through unlawful

procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

103. For the same reason, the Commission's adoption of Conclusions of Law Nos. 2, 4,5, 9, 12, 14, 51, 52, and 57 are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

104. **Error No. 9.** The Commission erred in determining that 130EP complied with all requirements related to transportation and traffic.

105. TCEQ Rule 330.61(i) requires that an applicant (1) provide data on the availability and adequacy of roads that the owner or operator will use to access the site; (2) provide data on the volume of vehicular traffic on access roads within one mile of the proposed facility, both existing and expected, during the expected life of the proposed facility; and, (3) project the volume of traffic expected to be generated by the facility on the access roads within one mile of the proposed facility. The Commission erred in finding that 130EP had complied with this regulation.

106. The traffic analysis assumed a certain configuration of the private access road used for ingress to, and egress from, the facility. The evidence does not support such an assumption, since the off-site nature of the access road will allow its reconfiguration to utilize other public roadways.



107. Furthermore, the estimates of traffic associated with the facility were premised on nothing more than conclusory opinions, as submitted by 130EP corporate officers, which do not constitute competent evidence. Relevant site specific factors, such as the dangers associated with the nearest major intersection, were not considered by 130EP's expert witness. In fact, a significant number of fatal crashes have occurred at this intersection in recent years, but 130EP's expert witness did not consider those fatalities to be a relevant concern in his analysis.
108. In evaluating the impact of traffic associated with the facility, in Finding of Fact 62 TCEQ asserts that TxDOT considered issues related to the access road such as structural integrity. There is no evidence in the record to support a finding that TxDOT reviewed the structural integrity of the access road, and, in fact, the evidence establishes that the opposite is true.
109. For these reasons, Findings of Fact Nos. 49 through 51, 55, 58, 59, 60, 62, 65 and 66, as well as Conclusions of Law Nos. 9, 10, 12, 19 and 20 are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.
110. **Error No. 10.** The Commission erred in finding that 130EP's application satisfied the requirements of TCEQ Rule 330.63(e) related to the geology report. The geology report was unreliable and constituted no evidence.
111. 130EP's consultants provided no competent evidence addressing TCEQ's rules regarding subsurface geology and hydrogeology. Instead, 130EP's consultants

continuously elevated form over substance. That is, so long as they included some information in the application that purported to address the rules, they considered their job done, without regard to the substance or reliability of that information.

112. The problem with the findings of fact in the Commission's Order regarding geology and soils is that they simply recite that 130EP included certain information in the Geology Report, as required by the rules, and then, summarily conclude that the information was accurate and reliable. But there is no analysis demonstrating how the Commission (or the ALJs) determined that the information included in the application was accurate and reliable. The Commission simply failed to vet 130EP's geology information for accuracy and competency.
113. There is nothing consistent or reliable about the geology report contained in the application, and there is no factual basis—no verifiable evidence—to support the assumptions and opinions included in the geology report. Indeed, the expert opinions included in the geology report were not and could not be tested because all of the data that formed the basis for the report were destroyed.
114. The only reliable evidence presented regarding the subsurface geology revealed that the actual facts regarding the subsurface varied from the assumed facts in the geology report. Data in the geology report regarding secondary features, soil characteristics, even elevation data were shown to be inaccurate.

115. Moreover, the overwhelming evidence presented at the hearing established that 130EP's expert witnesses failed to abide by professional and industry standards in collecting data and preparing the geology report. And they violated professional and legal duties by discarding data without reasonable excuse.
116. For this reason, Findings of Fact Nos. 73-80, 86-90, 92, 93, 106-113, 114 and 116, as well as Conclusions of Law Nos. 9, 10, 12, 23-27, and 53 are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.
117. **Error No. 11.** Certain "findings of fact" entered by the Commission simply summarized the evidence, and thus were not proper findings of fact, as contemplated by the Texas Administrative Code.
118. Findings of Fact 73 through 80, 86, 87, 88, and 89 are mere summations of information included in the application. They do not actually "find" or resolve any relevant issue. These findings are thus contrary to Texas Government Code Section 2001.141; a violation of a statutory provision; and arbitrary and capricious.
119. Findings of Fact 92 and 93 also violate Section 2001.141 of the Government Code, in that they do not resolve an issue raised by the protesting parties (*i.e.*, Plaintiffs) and disputed by 130EP: that the Leona formation exists at the proposed landfill site. The application states that it does not exist at the proposed site; yet the findings do not resolve this disputed issue. By failing to

acknowledge the presence of the Leona at the proposed landfill site, these findings are also unsupported by the evidence in the record.

120. For these reasons, Findings of Fact 73 through 80, 86 through 89, 92, 93, and 123 are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

121. **Error No. 12.** Finding of Fact 123, describing the Leona as located several miles south of the site, is inaccurate and unsupported by evidence in the record, and is contrary to the great weigh of evidence. No competent, reliable evidence was presented to support Finding 123.

122. Overwhelming evidence in the record—reliable and verifiable, competent evidence—reveals that the Leona is extensive within the area.

123. **Error No. 13.** Finding of Fact 109, finding that the soils at the site will be suitable for construction and operation of the proposed landfill, is inaccurate and unsupported by evidence in the record, and is contrary to the great weigh of evidence. No competent, reliable evidence was presented to support Finding 109.

124. The undisputed evidence presented demonstrated that the Leona is present at the site, and its presence indicates a more transmissive geologic formation than the stratigraphy described in the Geology Report. This more transmissive geologic material represents a greater risk, which is inconsistent with FOF 109 regarding the suitability of soils at the site.

125. **Error No. 14.** The Commission failed to include findings addressing evidence demonstrating inconsistencies and errors in 130EP's geology report. Findings of Fact 115 and 116, which generally state that soil samples collected by Plaintiffs generally supported the findings and conclusions in 130EP's geology report are erroneous, arbitrary, and unsupported by evidence in the record.
126. Plaintiffs' experts drilled a number of borings on the proposed landfill site, not to conduct their own subsurface investigation, but rather to determine whether the representations in 130EP's Geology Report were supported by the actual conditions at the site. Following the drilling of a limited number of borings and analysis of a limited number of soil samples, Plaintiffs' experts established that 130EP's Geology Report was not supported by actual site conditions.
127. Moreover, Plaintiffs' experts were also present during a subsequent subsurface investigation conducted by 130EP in 2016. Plaintiffs' experts' observations of 130EP's second subsurface investigation also contradicted the findings and conclusions reflected in the 130EP's Geology Report.
128. This evidence included soil classification information that was inconsistent with the data in the geology report; numerous secondary features that were not included in the geology report; significant gravel deposits that were not accounted for in the geology report; and the presence of a fault. These contradictions are not mentioned in the Commission's Order.

129. **Error No. 15.** The Commission erred in admitting and considering Exhibit 130EP-7 (the “May 2016 supplement” to the geology report), and further erred in admitting and considering testimony relying upon Exhibit 130EP-7.
130. Exhibit 130EP-7 consisted of documentation related to 2016 field work performed at the proposed landfill site by 130EP. This document is relied on extensively for the Commission’s conclusion that the Geology Report contained in the application, and geological information submitted by 130EP, was sufficient to establish compliance with the TCEQ rules related to geology. TCEQ’s final order also significantly rests upon testimony that itself relied upon this exhibit.
131. Exhibit 130EP-7 should not have been admitted into the record; nor should this evidence have been considered by the Commission. This exhibit, and all testimony relying upon this exhibit should have been struck from the record.
132. The ALJs erred when they overruled Plaintiffs’ objections and admitted Exhibit 130EP-7, and the Commission perpetuated this error by relying on this evidence that should have been excluded.
133. Exhibit 130EP-7 should not have been admitted because it was not submitted by 130EP in a timely fashion; it did not comply with TCEQ procedure; it was not reliable; and the Commission’s admission and reliance on this evidence thus unduly prejudiced Plaintiffs.
134. The Geology Report is intended to be prepared based on borings that have been “approved by the executive director prior to initiation of work.” 30 Tex. Admin.

Code § 330.63(e)(4). The borings that were drilled during 2016 by 130EP and that form the basis for the supplemental reports offered as Exhibit 130EP-7 were not approved by the Executive Director. For this reason alone, Exhibit 130EP-7 and any testimony referring to this exhibit should have been struck, as it failed to comply with TCEQ's own rules.

135. The material contained in Exhibit 130EP-7 constituted an attempt by 130EP to revise significant portions of the application late in the administrative proceedings, which unduly prejudiced Plaintiffs. This is particularly so, considering that the supplemental reports contradict the representations included in the application materials.

136. Accordingly, it was improper for the ALJs to admit Exhibit 130EP-7, and it was improper for the Commission to rely upon the material in this exhibit.

137. Similarly, Exhibits Snyder-6 and Snyder-7 offered by 130EP should have been struck from the record, as they are photos of soils from the 2016 subsurface investigation. Furthermore any testimony of Mr. John Michael Snyder, P.G. referencing or relying upon Exhibit 130EP-7 should have been struck from the record, and it was improper for the Commission to rely upon such testimony.

138. For these reasons, Findings of Fact 80-83, 85, 87-90, 106-114, 126, 127, 133, 136-141, 142-146 and 148-155, as well as Conclusions of Law 10, 12, 23-27, 53, and 57 are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and

capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

139. **Error No. 16.** The Commission erred in admitting and considering evidence and opinions regarding geology despite 130EP's spoliation of evidence related to geology. The ALJs erred in failing to provide an appropriate remedy after finding that 130EP had improperly spoliated evidence. The Commission's Final Order adopts and perpetuates this error. This was an abuse of discretion and error of law.

140. As discussed above, 130EP discarded soil samples, field notes, and field logs developed during the subsurface investigations performed at the site.

141. The ALJs properly found that 130EP had a duty to preserve this material. The ALJs abused their discretion when they found that 130EP knowingly breached or violated its duty to preserve evidence, but provided no remedy for this breach. The Commission's findings regarding the Geology Report were based on spoliated evidence and the failure to provide a remedy for this spoliation. They are thus affected by error of law, based on improper procedure, and constitute an abuse of discretion.

142. **Error No. 17.** The Commission erred in admitting and considering opinions and evidence that were not reliable because they failed to meet the standards for expert opinions as established in *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 713 (Tex. 1997).



143. The opinions of 130EP's expert geologist, Mr. Snyder, are reflected in the Geology Report that he signed and sealed.
144. Yet, Snyder was not even present during the drilling of the borings or piezometers that presumably provided the data for the Geology Report, except on a few occasions. He did not personally observe the soils as they came out of the ground and did not prepare the initial field notes or original logs; nor did he observe all of the samples that were collected and sent to the lab for analysis. Field observations that were recorded, such as those recorded in boring logs and field notes, and samples gathered in the field were destroyed.
145. Mr. Snyder's lack of familiarity with the geological information gathered, and the fact that material documenting the site investigation was discarded, renders 130EP's findings and conclusions unreliable, as a matter of law.
146. The results of the subsurface investigation, as represented in the Geology Report, were also implausibly simplistic. Other evidence revealed that this implausibly simplistic representation of the subsurface was unreliable and incompetent. The TCEQ improperly relied upon that investigation and those findings.
147. For these reasons, Findings of Fact 87, 106, 113, and 114 are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

148. **Error No. 18.** The Commission erred in issuing the permit despite 130EP's failure to obtain approval of its soil boring plan before commencing subsurface investigations, as required by Rule 330.63.
149. The findings and conclusions in the Final Order acknowledge 130EP's failure to obtain approval of its soil boring plan before commencing its subsurface investigation. And the Order acknowledges that this violated TCEQ's rules. But the Order nevertheless concludes that the permit should be granted. This is error; it reflects improper procedure; it's arbitrary and capricious; and it's an abuse of discretion. Failure to comply with this requirement warrants denial of the requested permit.
150. **Error No. 19.** The Commission erred in issuing the permit despite 130EP's failure to comply with the requirements of the TCEQ rules that an applicant maintain material relied upon to complete the application.
151. TCEQ Rule 305.47 imposes a duty on a permittee (and thus an applicant) to retain all data used to complete the final application and any supplemental information.
152. 130EP did not retain all such data. Instead, 130EP discarded much of the information relied upon to develop the portions of the application addressing geology.
153. For this reason, Findings of Fact 85-90, 106-114, 116, 118, 133, 144, 151, 154, and 155, as well as Conclusions of Law 10, 12, 23-27, 53, and 57 are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not

supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

154. **Error No. 20.** The Commission erred in finding that 130EP's application satisfied the TCEQ requirements related to hydrogeology and groundwater monitoring. The evidence presented by 130EP was unreliable and constituted no evidence.
155. The findings and conclusions regarding hydrogeology are devoid of any substantive analysis. Rather, they simply recount what 130EP included in the application without taking a hard look at whether the evidence supports those representations. In fact, there is no evidence to support several of the findings regarding hydrogeology. The representations included in the application are not based on reliable and competent evidence. Thus, those representations and the opinions of 130EP's experts constitute no legally sufficient evidence.
156. Because the groundwater monitoring plan relied on the incompetent and unreliable evidence presented by 130EP, the groundwater monitoring plan was also based on no evidence.
157. TCEQ Rule 330.63(e)(5)(F) requires a permit applicant to include groundwater flow direction and rate, and the basis for such identification. The 130EP application states that groundwater occurs at the interface between Strata II and III. 130EP relied on a surface contour map to estimate groundwater flow directions and velocity; the interface between Strata II and III was assumed to strongly resemble the surface topography.

158. There was no evidence to support this opinion regarding surface topography or the Stratum II—Stratum III interface as a basis for estimating either groundwater flow or velocity. In fact, the uncontroverted evidence that was presented during the hearing demonstrates that 130EP’s assumptions regarding groundwater flow are not accurate. In addition, 130EP’s (unreliable) piezometer data do not support this description.
159. Indeed, 130EP’s piezometer data constitute no evidence. The piezometer data were shown to be unreliable and inaccurate.
160. Moreover, the evidence presented established that groundwater migrates via secondary features. These secondary features were not described in borings from 130EP’s 2013 field investigation, even though TCEQ rules require applicants to identify secondary features because they provide a significant migration pathway. 130EP also did not measure hydraulic conductivity; the in-situ slug tests that were required by the boring plan were not performed by 130EP. And the laboratory tests were unreliable.
161. The Commission’s Findings of Fact 138 and 142 fail to acknowledge other migration pathways that were shown to exist at the site, such as the various fractures and the fault. This failure renders the findings inaccurate and improper. Further, the Order does not contain findings of fact sufficient to meet the requirements of Texas Government Code Section 2001.141 because it fails to resolve the contradictory evidence regarding preferential migration pathways—*i.e.*, secondary features.

162. The evidence presented failed to support, and in fact contradicted, 130EP's theory of groundwater movement and potential leachate migration from the proposed landfill. Since 130EP's theory of groundwater movement and potential leachate migration is not supported by the evidence, its estimates of the directions and velocities of groundwater and potential leachate migration from the proposed landfill are also unsupported and contradicted by the clear evidence.
163. These groundwater estimates are also, therefore, an inadequate basis for design of a groundwater monitoring system, assessing the risk of groundwater contamination, and an inadequate basis for issuance of a permit.
164. Moreover, 130EP's attempts to correct the errors regarding their groundwater gradient evaluation via its 2016 "supplement" to the Geology Report was improper, and the ALJs' (and subsequently, the Commission's) decision to rely on this belated "supplement," was improper. In fact, the 2016 "supplement" highlights the significant inaccuracies affecting the assumptions and representations regarding groundwater flow, and it demonstrates that the hydraulic conductivities in the initial application were inaccurate and unreliable.
165. In addition, there is no evidence to support the Commission's findings that groundwater flows in a southerly or easterly direction from the south end of the landfill, but not in a southeasterly direction. In fact, the reliable and competent evidence in the record established that groundwater would indeed flow in a southeasterly direction at the south end of the proposed landfill.

166. The Commission's findings and conclusions furthermore failed to acknowledge the proximity and extent of the proposed landfill to the Carrizo-Wilcox Aquifer in relation to the proposed landfill site, even though this is the area that is most likely to transmit contaminants to the aquifer if there were a liner breach.
167. By failing to present an accurate subsurface characterization, including preferential migration pathways for contamination, 130EP discounted the risks of contaminants escaping from the landfill and into the Carrizo-Wilcox and nearby water wells. And its groundwater monitoring system cannot be considered adequately protective because it fails to account for site-specific conditions. The Commission's findings to the contrary are in error and unsupported by the evidence. 130EP simply failed to comply with TCEQ's rules, and the Commission's conclusions of law to the contrary are in error.
168. For these reasons, Findings of Fact 118, 119, 123, 128, 129, 131-134, 138-142, 146, 149, 150, 151, 152, 154, 155, and Conclusions of Law 24, 25, 26, and 27 are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.
169. Findings of Fact 138, 142, 146, 150, and 151 do not satisfy the requirements of Texas Government Code Section 2001.141 because they fail to resolve the contradictory evidence regarding preferential migration pathways—*i.e.*, secondary features.

170. **Error No. 21.** The Commission erred in failing to require a soil balance.
171. TCEQ Rule 330.63(e)(5) requires an applicant to provide “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.”
172. In this case, 130EP intends to rely upon on-site soils as the source of soil for liners and daily cover. Without the inclusion of a soil balance, 130EP’s geotechnical evaluation fails to demonstrate that the on-site soils are suitable for use as source material for the liner and cover needs at the facility.
173. Finding of Fact 191 states that no soil balance was required or warranted. Such a soil balance is necessary to demonstrate the suitability of the soils and strata at the site for the uses for which they are intended as required by TCEQ Rule 330.63(e)(5). Accordingly, this finding is: (1) in violation of statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.
174. Conclusions of Law Nos. 4, 9, 11, 12, 23, 24, and 53 reflect a conclusion that the requirements of 330.63(e) have been met. Due to the absence of a soil balance, this legal requirement has not been met. Accordingly, these conclusions of law are: (1) in violation of statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

175. **Error No. 22.** The Commission erred in concluding that 130EP satisfied TCEQ rules requiring an endangered and threatened species assessment and requiring a species protection plan.
176. The assessment that was undertaken by 130EP's consultant was based on unreliable methods that resulted in unreliable data. Moreover, 130EP's consultant's assessment was cursory; it did not comply with professional or legal standards.
177. Moreover, the species protection plan included in the SOP is inadequate and fails to comply with TCEQ requirements. Accordingly, the ultimate finding (FOF 221) that the landfill and its operation will not result in destruction or adverse modification of critical habitat of endangered or threatened species or cause or contribute to the taking of said species is not supported by the evidence or the underlying facts.
178. For these reasons, Findings of Fact 215, 217, 218, 219, 220, 221, and Conclusion of Law 32 are in error. The findings and conclusion are not supported by evidence in the record. Furthermore, the findings are arbitrary and capricious, in that the methods used to collect the data that is described in the findings are contrary to TCEQ rules and unreliable. The corresponding conclusion is also in error in that it relies upon unsupported and unreliable evidence.
179. **Error No. 23.** The Commission erred in finding that 130EP's application satisfied the requirements of TCEQ Rule 330.337 related to slope stability. In evaluating the slope stability at the facility, 130EP's expert selected



“recommended” safety factors derived from the Corps of Engineers’ “Design and Construction of Levees” manual. This manual, however, does not indicate that it is to be used in the evaluation of landfills. 130EP’s expert, Mr. Greg Adams, did not adjust the factor of safety selected in light of any of the particular circumstances at this site.

180. In this case, there are numerous ways in which the conditions at the Landfill will potentially differ from the conditions assumed in the slope stability modeling. Most fundamentally, the model used was a two-dimensional model. At the landfill site, forces will be exerted in three dimensions, and the forces being ignored by 130EP’s model could make a slope failure more likely or less likely. Because the model is only two-dimensional, it does not account for the irregular or “amoeba” shape of the proposed landfill.
181. The stability analysis also did not account for all weight that will be contributing to the driving forces potentially causing a failure at the landfill. The design of the final cover of the landfill includes numerous sideslope swales. The weight of these swales was improperly ignored in the slope stability analysis.
182. The stability analysis did not account for the stability of on-site waste processing units, and the application did not provide the necessary information regarding these facilities as required by TCEQ rules.
183. Furthermore, 130EP failed to establish that the properties of the relevant material at the site and facility will conform to the assumptions utilized in evaluating the slope stability at the site.

184. For these reasons, Findings of Fact 163-164, 192-195, as well as Conclusions of Law Nos. 9, 10, 29 and 30 are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

185. **Error No. 24.** The Commission erred in concluding that 130EP's application satisfied TCEQ requirements related to landfill gas management, including those contained in TCEQ Rule 330.63(g) and Subchapter I of Chapter 330.

186. In designing the landfill gas management plan, 130EP failed to comply with TCEQ Rule 330.371(b)(1), requiring an applicant to consider soil conditions, hydrogeologic conditions, and hydraulic conditions. Further, the evidence presented demonstrates that the surface waters present at the site are vulnerable to contamination by leaking landfill gases, and the proposed monitoring system is not designed to detect and prevent such contamination of surface waters.

187. For these reasons, Findings of Fact 198, 208, 210, 212, 213, and 214, as well as Conclusion of Law 31 are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

188. **Error No. 25.** The Commission erred in concluding that 130EP's application satisfied the requirements of the TCEQ rules related to wetlands. 130EP did not perform the full analysis required to determine the presence of wetlands at the

site, because 130EP improperly assumed that the scope of wetlands for purposes of the TCEQ and Texas law is identical to the scope of wetlands for purposes of federal law. Because of the shortcut of the site investigation process, 130EP's wetlands report presents incomplete data on conditions at many of the areas of interest at the proposed landfill site.

189. Additionally, at the time of 130EP's wetlands evaluation the area of the 130EP project had suffered a two-year (and two-growing-season) run of dry and extremely dry conditions. A sufficient wetlands evaluation was not possible based upon observations at the site under only such conditions.
190. For these reasons, Findings of Fact Nos. 225, 226, 227, 229, 230, 231, 232, 233, 237, as well as Conclusions of Law Nos. 4, 9, 10, 33, 34 and 52 are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.
191. **Error No. 26.** The Commission erred in concluding that 130EP's application satisfied the requirements of the TCEQ rules related to drainage.
192. The Commission improperly considered the net impact of the alteration of drainage patterns at a point downstream of the Site 21 Reservoir, rather than premising its drainage analysis upon changes occurring at the permit boundary.
193. According to TCEQ rules, and consistent with prior TCEQ decisions, this determination should have been premised upon an examination of alterations at the permit boundary.

194. To the degree that 130EP was allowed to rely on drainage pattern mitigation outside of the permit boundary, it was error for the TCEQ to allow 130EP to rely upon these patterns without obtaining drainage easements in the areas where mitigation would be occurring. Indeed, without the required drainage easements, 130EP failed to satisfy TCEQ Rule 330.67 requiring a showing of a sufficient property interest.
195. Furthermore, the landfill will increase the volume of flow entering the Site 21 Reservoir downstream of the landfill. This constitutes an adverse alteration of drainage patterns, which should prevent issuance of a permit under the governing TCEQ regulations.
196. To compound these problems, 130EP's expert also utilized unjustified technical assumptions in evaluating the drainage impacts at the site.
197. Additionally, TCEQ Rule 330.305(e) requires that the surface water protection and erosion control practices must provide long-term, low-maintenance geotechnical stability to the final cover.
198. No specific analysis was performed regarding the local stability of the drainage swales at the site. Thus, there was no basis to conclude that the surface water protection practices at the site would provide long-term, low-maintenance geotechnical stability to the final cover.
199. For these reasons, Findings of Fact Nos. 259, 263, 264, and 268, as well as Conclusions of Law Nos. 36 and 37 are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence,

(4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

200. **Error No. 27.** The Commission erred in concluding that 130EP has sufficiently addressed the potential adverse impacts of flooding at the landfill site.

201. 130EP's delineation of the 100-year floodplain was in error due to its reliance on improper assumptions.

202. The Commission also failed to consider the anticipated and foreseeable future alterations in the 100-year floodplain at the site.

203. For these reasons, Findings of Fact 276, 278 through 281, 286 through 289, and Conclusions of law Nos. 9, 10, 11, 12, 17, 18, 39, 53, 55 are: (1) in violation of statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

204. **Error No. 28.** The Commission erred in concluding that the landfill was a compatible land use.

205. The close proximity of the waste footprint to the 100-year floodplain and the proximity of the landfill to the Site 21 Reservoir and high hazard dam create a significant risk that the landfill will have negative impacts under flood conditions. The proximity of the floodplain the reservoir, and the high hazard dam render the proposed landfill an incompatible land use.

206. Yet, the Commission failed to address the proximity of the landfill to the Site 21 Reservoir, high hazard dam, and the 100-year floodplain in its evaluation of

whether the landfill is a compatible land use at the proposed site. The proposed landfill is not a compatible land use.

207. For these reasons, Finding of Fact 320 and Conclusions of Law Nos. 9, 10, 12, 17, 18 and 52 are (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.
208. **Error No. 29.** The Commission erred in concluding that the proposed Site Operating Plan met all applicable requirements.
209. The Site Operating Plan set forth in the application lacks sufficient detail to enable meaningful public review and meaningful agency enforcement of the operating plan.
210. A site operating plan must consist of more than just a promise to develop a plan in the future. Yet, for many issues, the site operating plan developed by 130EP lacks sufficient detail and amounts to little more than a plan to develop a plan.
211. The Site Operating Plan lacks adequate detail with regard to water supply for the facility, fire protection, access roads, flood protections, waste acceptance rates, alternate daily cover, windblown waste, visual screening, as well as vector control and scavenging.
212. For these reasons, Findings of Fact Nos. 335, 345, 349, 351, 352, 355, 359, 371, 381, 382, 389, and 390, and Conclusions of Law 9, 10, 11, 12, 41, 42, 43, 44, 45, 48, 49, 54, and 57 are (1) in violation of a statutory provision, (2) made through

unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

213. **Error No. 30.** The Commission erred in concluding that the Application met applicable requirements related to odor.

214. Rules 330.61(h), 330.63(a) and 330.149 are relevant to a determination of whether a facility's design and operations are sufficient to control and prevent nuisance odors. Rule 330.61(h) generally addresses the need to consider the impact of a facility upon the surrounding area, often referenced as "land use compatibility." Rule 330.63(a) requires that Part III of an application include criteria that in the selection and design of a facility will provide for the safeguarding of the health, welfare, and physical property of the people and the environment. Rule 330.149 requires that an applicant develop an odor management plan to address the sources of odor and instructions to control odor.

215. With regard to odor, TCEQ erred in solely addressing Rule 330.149, without considering the odor impacts in its evaluation of compliance with Rules 330.61(h) and 330.63(a). Even with regard to Rule 330.149, the final order only addresses this requirement in a perfunctory and conclusory manner.

216. The evidence and testimony on this matter was itself conclusory, and did not provide support for the Commission's final decision to issue the permit.

217. For these reasons, Findings of Fact 377 through 380 and Conclusion of Law 47 are (1) in violation of a statutory provision, (2) made through unlawful

procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.

218. **Error No. 31.** The Commission erred in granting the application despite the submission of false information by 130EP.
219. TCEQ Rule 330.57(d) states that submission of false information *shall* constitute grounds for denial of the permit application. In this case, the application was replete with false information, and should have been denied on that basis.
220. During the application process, 130EP provided the Commission with false information on a variety of topics, including geology, competency, and the status of its floodplain development permit from Caldwell County.
221. For this reason, the Commission's decision to issue the Permit is (1) in violation of a statutory provision, (2) made through unlawful procedure, (3) not supported by substantial evidence, (4) arbitrary and capricious, (5) affected by error of law, and (6) characterized by an abuse of discretion.
222. **Error No. 32.** The Commission erred in granting the application despite the identical boundaries of the landfill permit and 130EP's transfer station authorization.
223. **Error No. 33.** Finding of Fact No. 8 is not supported by evidence. 130EP filed a land-use only application, seeking a land use compatibility determination in September 2013. This finding does not accurately describe the submission made by 130EP in September 2013.



224. **Error No. 34.** Finding of Fact No. 9 is not supported by evidence. In February 2014, a complete landfill permit application was submitted, not just Parts III and IV. Parts I through IV were submitted, and Parts I and II were significantly different than what had been previously submitted in September 2013. This was an entirely new landfill permit application. This finding does not accurately describe what was submitted in February 2014, based on the evidence in the record.
225. **Error No. 35.** Finding of Fact 21 is not supported by the evidence. 130EP did not supplement its application in March 2015. It did so in May 2015, in response to a request by TCEQ staff.
226. **Error No. 36.** Finding of Fact 22 is not supported by evidence and is based on improper procedure and an abuse of discretion. More specifically, 130EP did not submit to the TCEQ staff a supplement to its Application in May 2016. In fact, the Executive Director's witnesses testified that they no longer had jurisdiction to review supplements to the application. The Executive Director's staff attorney made the same argument during a prehearing conference. The ALJs erred and abused their discretion in allowing into evidence 130EP's purported "supplement" to its application, and the Commission's decision was arbitrary and capricious and based on improper procedure because its decision is based, at least in part, on this improper attempt to revise an application during the SOAH hearing process and after the Executive Director had lost jurisdiction to review the application.

227. **Error No. 37.** Finding of Fact 25 is erroneous. Although this finding may be an accurate recitation of the ALJs' pretrial rulings, Plaintiffs those rulings were erroneous and challenged by Plaintiffs. The rulings resulted in the admission of 130EP's experts' opinion testimony, even though that testimony was based on unreliable and incompetent data, which had been destroyed or spoliated by 130EP.

## VII. CONCLUSION & PRAYER

The errors described above render the Commission's decision to issue to 130EP a landfill permit erroneous; the decision was in excess of the agency's statutory authority; it was made through unlawful procedure; it was affected by error of law; it was arbitrary and capricious and characterized by an abuse of discretion. Furthermore, the Commission's decision was not reasonably supported by substantial evidence considering the reliable and probative evidence in the record. Therefore, Plaintiffs pray that this Court reverse the Commission's issuance of MSW Permit No. 2383 to 130EP. Plaintiffs further pray that TCEQ Docket No. 2015-0069-MSW (the matter in which the complained of order was issued) be remanded to the Commission for further proceedings consistent with the Court's decision. Plaintiffs, finally, pray for temporary and any further relief to which they may show themselves entitled.

Respectfully Submitted,

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