CAUSE NO. D-1-GN-15-005510

PATRICIA GRAHAM, TERRELL GRAHAM, MARGIE HASTINGS, ASA DUNN, & GREATER EDWARDS AQUIFER ALLIANCE,	§ § § § §	IN THE DISTRICT COURT OF
Plaintiffs,	§ §	TRAVIS COUNTY, TEXAS
v.	§ §	
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY	§ § §	
Defendant.	§	53rd JUDICIAL DISTRICT COURT

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GLOSSARY OF TECHNICAL TERMS

ALJ	Administrative Law Judge
BOD	Biochemical Oxygen Demand
DO	Dissolved Oxygen
EAPP	Edwards Aquifer Protection Plan
ED	TCEQ Executive Director
NH_3-N	Ammonia Nitrogen
OPIC	Office of Public Interest Counsel
PFD	Proposal for Decision
TCEQ	Texas Commission on Environmental Quality
TLAP	Texas Land Application Permit
TSS	Total Suspended Solids

STATEMENT OF THE CASE

This case is an administrative appeal of a decision by the Texas Commission on Environmental Quality ("TCEQ") on an application filed by a property developer, DHJB Development, LLC ("DHJB" or "Applicant"), for an amendment to a wastewater discharge permit. Patricia Graham, Terrell Graham, Margie Hastings, Asa Dunn, and the Greater Edwards Aquifer Alliance ("Plaintiffs") protested this application in a contested case hearing before the State Office of Administrative Proceedings ("SOAH"). The Plaintiffs prevailed before the SOAH Administrative Law Judge, who recommended that the permit amendment not be issued to DHJB. At the TCEQ Commissioners' agenda meeting on July 1, 2015 (the "Agenda Meeting"), the Commissioners made numerous errors of substance and procedure. They reversed the ALJ's decision and determined to issue the permit amendment. The Plaintiffs filed a motion for rehearing, which was overturned by operation of law, and timely appealed the TCEQ decision to this Court.

ISSUES PRESENTED

1. *Procedural Issue*: Did the TCEQ solicit and consider evidence outside of the administrative record in violation of procedural protections of the APA?

2. *Procedural Issue*: Did the TCEQ redefine the issues that it had referred to SOAH for consideration after the contested case hearing process had concluded and in its final Order, in violation of procedural protections of the APA?

3. *Substantive Issue*: Does the Applicant's proposed wastewater discharge route constitute a state watercourse?

4. *Substantive Issue*: Did the TCEQ fail to consider its own rule in 30 Texas Administrative Code 309.12 when reviewing the Applicant's proposed permit amendment?

5. *Substantive Issue*: Did the TCEQ fail to follow the clear language contained in its Edwards Aquifer Rules, which prohibit wastewater discharges on the Edwards Aquifer Recharge Zone, when reviewing the Applicant's proposed permit amendment?

6. *Substantive Issue*: Are the proposed permit's effluent standards sufficiently protective of children and cattle pursuant to the TCEQ's own rules?

7. *Procedural Issue*: Did the TCEQ violate the Plaintiffs' constitutional due process rights?

Patricia Graham, Terrell Graham, Margie Hastings, Asa Dunn, and Greater Edwards Aquifer Alliance ("Plaintiffs") file this Initial Brief against the Texas Commission on Environmental Quality ("Commission" or "TCEQ") in the above referenced case.

This case arises from residential property development activities in Comal County where the developer and applicant, DHJB Development, LLC ("DHJB") sought a permit to discharge wastewater from a new residential development onto the property of its neighbor. Plaintiffs include the neighboring landowners who will be burdened by the discharge, and also the Greater Edwards Aquifer Alliance, which seeks to protect the Edwards Aquifer from, among other things, wastewater discharges into the aquifer's contributing and recharge zones.

Among the most critical issues, the proposed discharge route for the wastewater is not a watercourse of the state. This was established factually in the administrative contested case hearing and is supported by well-established law on state watercourses. The ALJ made numerous findings. Following the contested case, the TCEQ Commissioners undertook contorted and unlawful procedures to concoct new evidence at the Agenda Meeting, in order to turn the discharge route into a "watercourse" and in order to rationalize the extensive modifications of the ALJ's proposal for decision. The TCEQ Commissioners violated procedural rules in the process.

Plaintiffs appeal the TCEQ's decision, asking this Court to remedy the egregious violations of the Administrative Procedure Act (APA). If uncorrected, the TCEQ Commissioners will have acted as their own factfinder and successfully rendered the heavily litigated contested case into a sham proceeding. In addition to the procedural errors, Plaintiffs raise four substantive errors. Finally, due to the extreme nature of the procedural errors, Plaintiffs allege a constitutional due process violation.

STATEMENT OF FACTS

A. Procedural History

In August of 2012, DHJB filed an application with the TCEQ requesting an amendment to its existing Texas Land Application Permit ("TLAP") No. WQ0014975001 in Comal County.[1] The TLAP permit authorized the disposal of treated domestic wastewater via a public access subsurface drip irrigation system.[2] The amendment sought to change the TLAP permit to a direct discharge of treated domestic wastewater from a wastewater treatment facility.[3] The TCEQ completed the technical review of the application for the amendment on May 2, 2013, and the Executive Director ("ED") made a preliminary decision to issue the permit.[4]

After the comment period ended, the TCEQ Executive Director and the Office of Public Interest Counsel ("OPIC") recommended a contested case hearing. On April 21, 2014, the TCEQ granted a contested case on four issues: (A) whether the proposed permit will adversely impact use and enjoyment of adjacent and downstream property or create nuisance conditions; (B) whether the discharge route has been properly characterized; (C) whether the proposed permit complies with TCEQ siting regulations found in 30 TAC Chapter 309; and (D) whether the treated effluent will adversely impact the cattle that currently graze in the area.[5]

An administrative contested case hearing was held by an Administrative Law Judge ("ALJ"). Participants in the contested case were all Plaintiffs, DHJB, Johnson Ranch Municipal Utility District, the Executive Director for TCEQ, and the Office of Public Interest Counsel for TCEQ. After trial and briefing by the parties, the ALJ issued a Proposal for Decision ("PFD")

[1] 4 A.R. 54, Exh. DHJB 1.2.
[2] 1 A.R. 1.
[3] 4 A.R. 54, Exh. DHJB 1.2.
[4] 1 A.R. 19.
[5] 3 A.R. 37.

recommending that the permit should be denied.[6] On June 2, 2015, after giving all parties a chance to make objections to the PFD, the ALJ issued an Amended PFD, which again recommended that the permit should be denied.[7]

The three TCEQ Commissioners ("Commissioners") heard this matter at their Agenda Meeting on July 1, 2015 and overruled the ALJ's Proposal for Decision.[8] On September 15, 2015, the Commissioners issued an order granting DHJB's application and issuing the permit amendment.[9] Plaintiffs timely filed a Motion for Rehearing on October 9, 2015.[10] Plaintiffs' motion was overruled by operation of law.[11] This appeal followed.

B. DHJB's Wastewater Discharge

DHJB's original TLAP permit authorized it to treat and discharge up to 75,000 gallons of effluent per day via subsurface irrigation.[12] Pursuant to the proposed amendment at issue, DHJB is authorized to treat and dispose of up to 350,000 gallons per day by direct discharge at an outfall on DHJB's property.[13] During its final phase, the effluent would contain a number of contaminants, including up to 5 mg/L of Biochemical Oxygen Demand (BOD), 5 mg/L of Total Suspended Solids (TSS), 2 mg/L of ammonia nitrogen (NH_3-N), 0.5 mg/L of total phosphorus, 4 mg/L of Dissolved Oxygen (DO), single grabs of the bacteria *E. coli* of up to 399 colony forming units, and an average of 126 colony forming units of *E. coli*.[14,15] The permit does not limit

[6] 14 A.R. 83.
[7] 15 A.R. 95.
[8] 17 A.R. 110.
[9] 16 A.R. 104.
[10] 16 A.R. 105.
[11] 16 A.R. 106.
[12] 1 A.R. 1.
[13] 4 A.R. 54, Exh. DHJB 1.2.
[14] 4 A.R. 54, Exh. DHJB 1.2 at 037.
[15] 8 A.R. 59, ED-3 at 2–2b (draft permit).

Enterococci.[16]

Although not reflected in its application,[17] the uncontested evidence during the contested case hearing showed that the discharge outfall will be into a manmade ditch dug at the base of a berm constructed north of DHJB's wastewater treatment plant.[18] The effluent flows through this ditch until the edge of the berm, at which time the effluent flows (over land either in or along the natural discharge route, or as sheet flow) towards the Plaintiffs' property, then into a concretized ditch, and then onto Plaintiffs' property.[19] The proposed discharge route carries effluent approximately 1,900 feet on DHJB's property to the adjacent properties of Plaintiffs Graham and Hastings.[20]

In addition to the problems with the discharge route, DHJB's development is located partially on the area mapped as Edwards Aquifer Recharge Zone and partially on the area mapped as Edwards Aquifer Contributing Zone.[21] The proposed outfall location is less than 600 feet upstream from the Recharge Zone.[22]

During the contested case hearing, the parties disputed whether, as a matter of fact, the

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[16] *See id.*
[17] 4 A.R. 54, Exh. DHJB 1.2.
[18] *See* 12 A.R. Nov. 17, 2014 transcript, 141:16 – 142:16 (Mr. Gregory testifying for DHJB that the outfall location is into a dug ditch that flows into the creek); Nov. 19, 2014 transcript, 58:11–24 (Ms. Lee for the ED).
[19] 12 A.R. Nov. 17, 2014 transcript, 81:14 – 82:11; *see also* 7 A.R. 58, Exh. 1.7.
[20] 7 A.R. 58, Exh. 2, 14:19–21.
[21] 12 A.R. Nov. 17, 2014 transcript, 34:15–18 (Mr. Hill testifying that part of the property is mapped as recharge zone and part is mapped as contributing zone); Nov. 17, 2014 transcript, 233:4 (Dr. White testifying that the Johnson Ranch property is designated in part as being in the recharge zone and in part as being in the contributing zone); 7 A.R. 58, Exh. 2, 24:9–13 (Dr. Ross testifying that the development straddles the boundary between recharge and contributing zones); 12 A.R. Nov. 19, 2014 transcript, 71:22 – 72:3 (Ms. Lee stating that the outfall is in the contributing zone and that the recharge zone is 565 feet from this location).
[22] 12 A.R. Nov. 18, 2014 transcript, 173:6–18 (Dr. Ross, based on a GIS tool); 8 A.R. 59, ED-20, 26:17–20 (Ms. Lee stating that the proposed outfall is "approximately 565 stream feet from the Edwards Aquifer Recharge Zone).

discharged effluent will flow in a channel or will sheet flow on DHJB's property.[23] The parties also disputed whether, as a matter of law, the discharge route is a legal watercourse.[24] The parties also disputed the extent to which the discharged effluent would harm the Plaintiffs and interfere with their use and enjoyment of their properties.[25] The parties also disputed whether the Edwards Aquifer rules were properly being followed.[26]

STANDARD OF REVIEW

Review of a TCEQ order is governed by the Administrative Procedure Act.[27] Accordingly, this Court must reverse or remand a case for further proceedings "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions" are:

> (A) in violation of a constitutional or statutory provision;
> (B) in excess of the agency's statutory authority;
> (C) made through unlawful procedure;
> (D) affected by other error of law;
> (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
> (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[28]

Each of these grounds is a distinct basis for reversing the decision of an administrative agency.[29] Thus, for example, an agency action that is arbitrary and capricious must be reversed even if it is supported by substantial evidence.[30]

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[23] *See* 15 A.R. 95 at 1–3.
[24] *See id.*
[25] *Id.*
[26] *Id.* at 3–4.
[27] TEX. GOV'T CODE §§ 2001.001–.902.
[28] TEX. GOV'T CODE § 2001.174(2).
[29] *Arch W. Helton v. Railroad Comm'n of Tex. et al.*, 126 S.W.3d 111, 115 (Tex. App.—Austin 2003, pet. denied).
[30] *Tex. Health Facilities Comm'n et al. v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446, 454 (Tex. 1984).

An agency acts arbitrarily if it makes a decision without regard for the facts, if it relies on fact findings that are not supported by any evidence, or if there does not appear to be a rational connection between the facts and decision.[31] Furthermore, an agency's failure to follow the clear and unambiguous language of its own rules is arbitrary and capricious.[32] When construing administrative rules, the goal is to give effect to the intent of the issuing agency, with a primary focus on the plain meaning of the words chosen.[33] Courts consider statutes and rules as a whole rather than their isolated provisions.[34] Courts will defer to an agency's interpretation of its own rules when there is vagueness or ambiguity; however, deference to an agency's interpretations of its own rules is not conclusive or unlimited, as courts will only defer to an agency's interpretation to the extent that its interpretation is reasonable.[35]

Even if an agency's order is supported by substantial evidence, the order may be arbitrary and capricious if a denial of due process has prejudiced the litigant's rights.[36] The proceedings of an agency "must meet the requirements of due process of law and the rudiments of fair play" in order to be upheld.[37] These standards require that the hearing must not be arbitrary or inherently unfair.[38] The manner in which an agency makes a decision can raise serious due process concerns if the agency arrives at a result on grounds other than those presented at the hearing; makes its decision first and then makes findings of fact to support that new result; fails to

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[31] *City of Waco v. Texas Comm'n on Envtl. Quality*, 346 S.W.3d 781, 819–20 (Tex. App.—Austin 2011, pet. denied).
[32] *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254-55 (Tex. 1999).
[33] *Gomez v. Tex. Educ. Agency, Educator Certification & Standards Div.*, 354 S.W.3d 905, 912 (Tex. App.—Austin 2011, pet. denied).
[34] *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011).
[35] *Id*.
[36] *Tex. Dep't of Ins. v. State Farm Lloyds*, 260 S.W.3d 233, 245 (Tex. App.—Austin 2008).
[37] *Grace v. Structural Pest Control Bd.*, 620 S.W.2d 157, 160 (Tex. App.—Waco 1981, writ ref'd n.r.e).
[38] *Id*.

adequately explain its departure from prior decisions; and/or fails to comply with statutory or regulatory requirements regarding changes to an ALJ's findings of fact and conclusions of law.[39]

SUMMARY OF ARGUMENT

This is not a case in which Plaintiffs protested a permit, lost before an independent factfinder in a contested case hearing, and lost again before the agency. Rather, after the TCEQ referred four issues to SOAH for independent consideration,[40] the ALJ found in Plaintiffs' favor on three of the four issues and recommended that the permit be denied.[41] But when the matter came before the Commissioners at the Agenda Meeting, they overruled the ALJ's recommendation, committing significant errors of both procedure and substance in the process.

Importantly, an agency "has limited authority to change a finding of fact or conclusion of law made by an ALJ or to vacate or modify an order of an ALJ."[42] Despite this limited authority, here the Commissioners determined that a significant portion of the ALJ's proposed findings of fact and conclusions of law were erroneous on the three issues in Plaintiffs' favor; the Commissioners found the ALJ's finding of fact and conclusions of law were correct for the other referred issue, which was in the agency's favor.[43] The Commissioners made systemic and widespread changes, additions, and deletions to the ALJ's findings of fact and conclusions of law.[44] The Commissioners' decision to issue the permit—and their findings, inferences, conclusions and actions in support of this decision—violates the APA.

[39] *Langford v. Employees Ret. Sys.*, 73 S.W.3d 560, 566 (Tex. App.—Austin 2002, pet. denied).
[40] 3 A.R. 37.
[41] 15 A.R. 95.
[42] *Travis Cnty. v. Tex. Comm'n on Envtl. Quality*, No. 07-12-00457-CV, 2014 WL 1722335, at *8 (Tex. App.—Amarillo Apr. 29, 2014) (citing TEX. GOV'T CODE § 2001.058(e)).
[43] *Compare* 15 A.R. 95 *with* 16 A.R. 104. By Plaintiffs' count, the Commission deleted twenty-two of the ALJ's findings of fact and changed the meaning of dozens of other findings of fact and conclusions of law.
[44] *Compare* 15 A.R. 95 *with* 16 A.R. 104.

First, as a matter of procedure, the Commissioners considered evidence outside of the administrative record: during the Agenda Meeting, they solicited new evidence and made their own factfindings. These actions violate the APA requirement that a final decision or order be based only on issues that are officially noticed and the requirement that decisions must be based solely on the record made before the ALJ. The Commissioners cannot act as factfinders during agenda meetings. Additionally, the Commissioners acted in an arbitrary and capricious manner by redefining the issues that were referred to SOAH, by disregarding their own rules related to these issues, and by modifying or discarding the ALJ's evidentiary findings based on those rules. These procedural errors warrant reversal of the agency decision.

Second, the Commissioners erred by modifying the ALJ's finding that the wastewater discharge will not be into a legal watercourse and determining that, instead, the route is a watercourse. Legally, the Commission's new finding is contrary to the clear case law in this area. Factually, the finding is not reasonably supported by substantial evidence considering the reliable evidence in the record. It was on this issue that the Commissioners concocted new evidence by soliciting testimony from a witness at the Agenda Meeting. Thus, this decision is arbitrary and capricious, warranting reversal of the agency decision below.

Third, during review of the permit amendment application, the TCEQ failed to review the proposed amendment against the requirements found in 30 Texas Administrative Code Section 309.12. This was more than a mere oversight because, *by their own admission*, the TCEQ staff conceded this review did not take place. The TCEQ's failure to follow the clear, unambiguous language of its own rule is arbitrary and warrants remand.

Fourth, the TCEQ also has failed to follow the clear and unambiguous language of the Edwards Aquifer rules that apply to this permit application. These rules prohibit new municipal

wastewater discharges that would create additional pollutant loading on the Edwards Aquifer Recharge Zone. By regulatory definition, a site that is located partially on the Recharge Zone and partially on the Contributing Zone is treated as if the entire site is located on the Recharge Zone. The TCEQ's interpretation, which ignores the plain definition of "site" provided by the rule, is plainly erroneous and unreasonable. The agency's failure to follow its own rules is arbitrary and capricious and warrants remand.

Fifth, the TCEQ's decision to issue the permit is arbitrary and capricious because the effluent standards are not sufficiently protective, under the TCEQ's own rules, for potential exposure to the public and livestock.

Finally, the agency's actions in this case do not meet the requirements of due process of law, do not meet the rudiments of fair play, and were inherently unfair. The manner by which the Commission modified the ALJ's decision violates constitutional due process protections. When rejecting the ALJ's findings of fact and conclusions of law, the Commission relied on extra-record evidence to justify its decision to issue the permit. That extra-record evidence was solicited by the Commissioners themselves at the Agenda Meeting, without any opportunity for Plaintiffs to respond. Relying on this new evidence, the Commission made systematic and widespread changes and additions to the ALJ's findings of fact and conclusions of law. The TCEQ Commissioners acted as their own factfinder in contravention of legislative intent to delegate independent factfinding responsibility to SOAH during contested case hearings. The Commissioners' actions at the Agenda Meeting demonstrate that the agency made a predetermined decision on the permit, and then manufactured findings of fact to support its decision on permit issuance. The due process violations have prejudiced Plaintiffs' rights; they must be remedied by judicial review.

For all these reasons, TCEQ erred in issuing an amended permit for DHJB's wastewater discharge. Accordingly, this Court should reverse and render a decision for Plaintiffs, or, in the alternative, remand the case for further proceedings.

ARGUMENT

I. The Commission's consideration of evidence outside of the administrative record is procedurally unlawful, violates the APA, and warrants reversal by this Court.

Under the APA, this Court must reverse or remand the case if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are, among other things, "in violation of a . . . . statutory provision" or "made through unlawful procedure."[45] In terms of procedure, the APA requires that a final decision or order of a state agency must be based "only on the evidence and on matters that are officially noticed."[46] Additionally, when the Commission is considering a Proposal for Decision prepared by an ALJ, the APA requires that "any amendment [to a PFD] and order shall be based solely on the record made before the administrative law judge."[47]

In this case, the TCEQ's findings and decision on one of the critical referred issues (*i.e.*, whether the discharge route properly characterized) flatly violates procedural provisions of the APA: at the Agenda Meeting following the contested case hearing, the TCEQ Commissioners took evidence outside the record and left Plaintiffs with no opportunity to respond to the new evidence. The TCEQ's decision, having been made through unlawful procedure, has prejudiced the Plaintiffs, and the Court should reverse or remand the case to the TCEQ.

A. The new evidence related to one of the key issues in the case.

One of the four referred issues for the contested case hearing was "whether the discharge

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[45] TEX. GOV'T CODE § 2001.174(2)(A) & (C).
[46] TEX. GOV'T CODE § 2001.141(c).
[47] TEX. GOV'T CODE § 2003.047(m).

route has been properly characterized."[48] Related to this referred issue, the parties disagreed whether the discharge was into a legal watercourse at all. This is critical because, if the discharge route is not a watercourse, then the TPDES permit cannot be issued and another type of permit would be required.[49] This is because only water in a watercourse, and not diffuse surface water, is the property of the State.[50] After weighing the evidence and reviewing the applicable legal standards, the ALJ agreed with the Plaintiffs on this issue. In her Amended Proposal for Decision, the ALJ found that the permit should not be issued because, among other things, the discharge is not into "water in the state."[51]

When this issue was discussed at the TCEQ Commissioners Agenda Meeting, the Commission modified this finding.[52]

B. During its Agenda Meeting, the TCEQ Commissioners solicited new evidence that contradicted evidence in the record, and made new factfindings, in order to overturn the ALJ's findings of fact and conclusions of law.

During the Agenda Meeting, the statements made by Commissioner Baker and Chairman Shaw indicate that they considered new evidence that was not and is not supported by the record. These actions violate the APA's provisions and render administrative findings of fact and legal conclusions procedurally unlawful.

1. The new evidence contradicted the witness's prior testimony.

First, during the meeting, the Commission solicited testimony from Ms. Brittany Lee, a TCEQ employee who had testified during the contested case hearing, about what she saw when

[48] 3 A.R. 37.
[49] *See, generally*, 13 A.R. 74 at 37–40.
[50] *See* TEX. WATER CODE § 11.021(a); *Domel v. City of Georgetown*, 6 S.W.3d 349, 353 (Tex. App.—Austin 1999).
[51] 15 A.R. 95 at 1.
[52] 17 A.R. 110.

she walked the Applicant's property.[53] Incredibly, Ms. Lee's testimony at the Agenda Meeting was different from her sworn prior testimony during the contested case hearing that was in the record. Thus, much of her testimony in front of the Commissioners was extra-record evidence heard for the first time.

For example, Ms. Lee testified at the Agenda Meeting that portions of the discharge route became:

> just, kind of, low depressions in a discharge route that are overgrown with grass but in the general direction, you can look at the vegetation patterns and you can also see that the depression is there and the bed and banks may not be as defined as where the ditch is . . .[54]

This testimony is inconsistent with Ms. Lee's prefiled testimony during the contested case hearing. In her testimony before the ALJ, Ms. Lee stated that:

> Several areas upstream of the concrete culvert *do not depict a defined bed and banks of a channel*.[55]

In fact, the reliable evidence in the record all tended to show that portions of the discharge route completely lacked a defined bed and banks (see Section III-B, below).[56] Ms. Lee's testimony at the contested case hearing supported this finding.[57] In contrast, her new testimony at the Agenda Meeting—that the bed and banks "may not be as defined" as where the ditch is—is new evidence that should not have been allowed for the first time before the Commission. This is not simply a matter of semantics. Whether or not the discharge route has the defined bed and banks of a channel is a finding of fact that goes to a central issue in this case, and the ALJ's decision to recommend

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[53] *Id.*
[54] *Id.*
[55] 8 A.R. 59, ED-20, 19:1–2 (Ms. Lee's prefiled testimony) (emphasis added).
[56] *See, generally*, 13 A.R. 71 at 38-40.
[57] Ms. Lee confirmed on cross-examination that she had testified that there were portions of the discharge route that did not have a defined bed and banks. 12 A.R. Nov. 19, 2014 transcript, 51:21.

denial of the permit was based in part on this finding.[58]

In its Order, the Commission stated that it was relying on Ms. Lee's testimony (obviously, the *new* testimony).[59] But the APA clearly requires that any amendments to a proposal for decision, including any findings of fact, must be based "solely on the record made before the administrative law judge."[60] Ms. Lee's statements at the Agenda Meeting were inconsistent with the record before the ALJ and, since they were solicited following the hearing process, the ALJ did not consider this evidence prior to the issuance of her proposal for decision.

Whether the Commission's solicitation of and reliance on extra-record evidence is willful or accidental is irrelevant. Regardless of intent, the statements made during the Agenda Meeting are not supported by the record and unlawfully governed the Commission's decision. Agencies are simply not permitted to rewrite the record following contested case hearings.

2. Other new evidence was solicited with leading questions from the Commissioners.

Following Ms. Lee's statements, the Commission summarized their understanding of the applicable legal standards governing when a discharge route is a watercourse, and then solicited additional, extra-record testimony from Ms. Lee that comported this understanding.

Specifically, Chairman Shaw described one aspect of the legal criteria for whether or not a land feature is a watercourse (*i.e.*, whether similar conditions will produce a flow of water that recurs with some degree of regularity).[61] He then asked Ms. Lee, "Is that . . . ***Am I putting words in your mouth*** or is that an accurate characterization of what you saw?" (emphasis added).[62] Ms. Lee

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[58] 15 A.R. 95 at 25-26.
[59] 16 A.R. 104 at 13 (specifically citing to Ms. Lee's testimony).
[60] TEX. GOV'T CODE 2003.047(m).
[61] 17 A.R. 110.
[62] *Id*.

stated, unsurprisingly, that what Chairman Shaw had said was an accurate characterization.[63] Indeed, what else could she do when asked such a question by the Chairman of the agency for which she works?

The Commission, therefore, baldly solicited Ms. Lee's opinion related to whether what she saw met one prong of the legal test for a watercourse, despite the fact that there was no specific testimony at the contested case hearing from Ms. Lee that similar conditions would produce a flow of water that recurred with some degree of regularity. This too was evidence not in the record before the ALJ.

This form of procedure is absolutely not permitted under Sections 2001.141 or 2003.047(m) of the APA. It is far outside the scope of permissible agency action. The agency's findings in its Order—including findings that the discharge route "is a watercourse"—were made through unlawful procedure and in violation of these statutory requirements to base decisions solely on the evidence before the ALJ.[64]

3. Still other new evidence, with no basis in the record at all, was fabricated and relied on by the Commissioners themselves.

As yet another example of improper procedure, during the same Agenda Meeting, Chairman Shaw discussed the characterization of the stream as an intermittent stream or an intermittent stream with perennial pools.[65] In order to justify the agency's characterization of the watercourse as an intermittent stream with perennial pools, he speculated that the discharge route was dry during the permit review, and there were not pools, because of drought conditions.[66] But there was no testimony during the contested case hearing, and no evidence whatsoever in the record, that supported this conclusion. The Commissioners' alleged existence of a drought in the Bulverde area

[63] *Id*.
[64] *See* 16 A.R. 104 at 9.
[65] 17 A.R. 110.
[66] *Id.*

was an unprompted, new, speculative factfinding on an issue that was referred by the Commission to the ALJ (*i.e.*, characterization of the discharge route).

In fact, all the evidence offered at the contested case hearing contradicts the Commission's arbitrary finding of drought:

- First, Protestants' Exhibit 1.31 is a TCEQ investigation report describing soil sediment that flowed from the Applicant's property due to heavy rains in January 2014.[67]

- Second, Protestants' Exhibit 1.32 is a photo of saturated soil and soil sediment that has flowed from the Applicant's property to the Protestants property due to heavy rains in May 2014.[68]

- Third, Protestants' Exhibit 1.35 is a photo taken in June 2014 of large amounts of soil sediment that flowed to the Protestants' property from the Applicant's property.[69]

- Fourth, Protestants' Exhibits 1.33 and 1.34 are pictures taken on October 3, 2014 when the Applicant forced large volumes of soil sediment laden water onto Protestant's property.[70] This was the Applicant's clean up from recent heavy rains.

Even a cursory review of the evidentiary record, or the compliance history of the Applicant, by the Commission would have disabused the Commissioners of this arbitrary drought finding. Instead, the Commission justified its mischaracterization during the Agenda Meeting with a "fact" that was simply not in the record. In its Order, the Commission relied on this characterization of the discharge route as an intermittent watercourse with perennial pools to find that the Applicant had met its burden that the characterization of the discharge route was correct.[71]

C. Plaintiffs had no opportunity to respond to, rebut, or otherwise contest the newly solicited evidence at the agenda meeting or otherwise.

There is absolutely no legal basis for the Commissioners to take new evidence in an agenda meeting in order to modify an ALJ's findings. If this violation of procedure were not bad enough,

[67] 7 A.R. 58, Exh. 1.31.
[68] *Id.*, Exh. 1.32.
[69] *Id.*, Exh. 1.35.
[70] *Id.*, Exhs. 1.33 & 1.34.
[71] 16 A.R. 104 at 13.

the Commissioners solicited Ms. Lee's testimony only after the Plaintiffs had already used up their allotted time for oral presentation.[72] Thus, not only did Plaintiffs have no opportunity to address the new evidence through normal procedures—*i.e.*, through cross examination, the submission of contrary evidence, or argument, as would take place at the contested case hearing—but Plaintiffs did not even have an opportunity at the short Agenda Meeting itself to make any statements about the new evidence. These violations of procedure and due process have prejudiced the Plaintiffs.

D. The TCEQ Commissioners' actions warrant reversal by this Court.

One of the central legislative purposes of referring contested issues to an independent ALJ is to preserve fairness through the use of an impartial factfinder.[73] The Commission's acts during the Agenda Meeting fail to satisfy the clear statutory requirements of the APA and fail to secure the legislative objectives that underlie the requirement to base a final decision or order on the evidence in the record before the ALJ. If an agency simply elects to make its own factfindings post-hearing based on evidence that was not in the record and before the ALJ, and without any opportunity for the protestants/plaintiffs to respond, then there are no safeguards to ensure that the decisionmaking process will be fair to the participants. Here, unlawful procedures interfered with Plaintiffs' rights to (1) object that the evidence was inadmissible under the Texas Rules of Evidence, (2) to cross-examine the person presenting the evidence, and (3) to present its own evidence to rebut the same. Furthermore, Plaintiffs had already used their allowed time prior to the Commission soliciting new testimony from Ms. Lee.

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[72] *Id.*; *see* 30 TEX. ADMIN. CODE § 80.263.

[73] *See Report on the Advantages and Disadvantages to the State of Creating a Central Panel of Administrative Law Judges*, Committee on the Judiciary, House of Representatives, State of Texas, 69th Leg., Nov. 1986, at 98.

Plaintiffs urge that these procedural irregularities are harmful to their rights and contrary to the law. Plaintiffs ask that this Court reverse or remand the case pursuant to Section 2001.174(2) of the APA.

II. The TCEQ violated the APA by redefining the issues it had referred to SOAH and by arbitrarily ignoring evidence in support of those original issues.

When the TCEQ grants requests for a contested case hearing, it refers specific issues to SOAH for consideration. The Commission refers an issue for a contested case hearing when that issue involves a disputed question of fact that was raised during the public comment period and "is relevant and material to the decision on the application."[74]

Here, the Commission correctly determined that nuisance impacts to Plaintiffs, who are burdened by DHJB's wastewater discharge, as well as impacts to cattle, were relevant and material to the decision on the Application.[75] Both the ED and OPIC recommended that this issue be referred to SOAH for hearing.[76] Accordingly, Referred Issue A asked: "Whether the proposed permit will adversely impact use and enjoyment of adjacent and downstream property or create nuisance conditions." Referred Issue D asked: "Whether the treated effluent will adversely impact the cattle that currently graze in the area."[77]

But in the Agenda Meeting, and in their final Order, the Commissioners subsequently redefined the issues to exclude Referred Issues A & D and the evidence in support concerning impacts to Plaintiffs and their properties. In so doing, the Commission ignored its own rules and ignored the ALJ's factfindings supporting those two referred issues. These actions are arbitrary, procedurally irregular, and prejudiced the Plaintiffs.

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[74] 30 TEX. ADMIN. CODE § 50.115(c).
[75] 3 A.R. 37.
[76] 3 A.R. 34; 3 A.R. 35.
[77] *Id.*

A. The issues on which the parties presented evidence during the contested case hearing were ignored and rewritten during the Agenda Meeting and in the TCEQ's final order, undermining the process and depriving Plaintiffs of fair opportunity to present their case.

At the contested case hearing, the parties presented evidence on the referred issues A & D, and the ALJ, in her Amended PFD, found that the permit would adversely impact the use and enjoyment of downstream property, would create nuisance conditions, and would adversely impact cattle.[78] Then, the Commission, at the Agenda Meeting and in its Order, apparently determined that Referred Issues A and D should be redefined to only encompass issues related to the TCEQ's current implementation of the Texas Surface Water Quality Standards (TSWQS).[79] Specifically, Commissioner Baker's discussion of these issues at the Agenda Meeting was confined to rules found in 30 Texas Administrative Code Chapter 307.[80] In the final Order, the Commission specifically excluded findings of fact that were relevant to Referred Issue A.[81]

As an initial matter, it is arbitrary and procedurally unlawful to refer specific issues for consideration by SOAH—which the agency may only do if the issues are "relevant and material to the decision on the application"—and then simply redefine these issues later and discard factfindings made pursuant to the originally referred issues. The same body undertook both of these actions. This is the very definition of an arbitrary agency action. The Commission could have simply referred the issue of whether the permit would comply with the TCEQ's current implementation of the TSWQS, but it did not do so.[82] Counsel for the ED of the TCEQ could have made a motion to certify a question to the Commission regarding its jurisdiction over the

[78] 15 A.R. 95.
[79] *See* 16 A.R. 104 at 12.
[80] 17 A.R. 110.
[81] 16 A.R. 104.
[82] *See* 3 A.R. 37.

referred issues, but it did not do so.[83] Instead, the Commission specifically referred issues for consideration by SOAH, which induced the Plaintiffs to expend considerable resources to address those issues, and present compelling evidence. When the Commissioners then redefine those issues at the Agenda Meeting after the close of the hearing, it denies Plaintiffs fair procedure and due process.

The Referred Issues are submitted as part of the contested case hearing process for a reason: so that the parties can fairly develop evidence on them and demonstrate that the application does or does not meet its burden of complying with all relevant statutory and regulatory requirements implicated by the referred issues. Here, based on the issues that were *actually referred*, Plaintiffs proved up the facts of the issues, were successful on three issues, and the ALJ determined that the Applicant did not meet its burden.[84] When the Commission, in effect, rewrites or crafts new versions of referred issues, then all of the hard work by the Plaintiffs at the contested case, which resulted in a successful outcome for Plaintiffs, is undermined. When the agency undercuts that successful outcome by redefining the SOAH referred issues, it acts in an arbitrary and capricious manner.

Of further note, due process rights are implicated when the losing party at the Agenda Meeting does not have the opportunity to present evidence related to the newly crafted issues.

B. By ignoring Referred Issues A and D, the TCEQ Commissioners ultimately disregarded relevant TCEQ rules that have the purpose of protecting Plaintiffs and their property.

The TSWQS in 30 TAC Chapter 307 require that the proposed amended permit "maintain the quality of water in the state consistent with public health and enjoyment."[85] Further, the proposed permit must comply with 30 Texas Administrative Code Sections

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[83] 30 TEX. ADMIN. CODE § 80.131.
[84] 15 A.R. 95.
[85] 30 TEX. ADMIN. CODE § 307.1.

305.122(d) and 309.10, which prohibit injury to private property and the invasion of the property rights and require minimization of exposure to nuisance conditions.[86] These rules, which mirror the broader language in Referred Issue A on nuisance impacts, encompass an important set of issues for consideration by the ALJ and the Commission. The Commissioners act arbitrarily by redefining the issues and ignoring Issues A because, in the process, they failed to consider nuisance impacts as provided for in the above regulatory provisions of their own rules.

Specifically, the Commission failed to give effect to its own rules by abdicating any authority over impacts related to erosion, stormwater, and access along the discharge route on the Plaintiffs' property. Erosion is an analyzable issue under the TSWQS: these standards require that surface waters "must be essentially free of settleable solids conducive to changes in flow characteristics of stream channels"[87] and that waste discharges "must not cause substantial and persistent changes from ambient conditions of turbidity[.]"[88] Erosion caused by the proposed discharge will potentially violate both of these standards, but the Commission refused to even consider these impacts.

By contrast, the ALJ made numerous findings in Protestants' favor in the PFD on these issues.[89] The Commissioners' redefinition of the scope of the referred issues at the Agenda Meeting and in its Order has the effect, whether intentional or not, of overturning a number of the ALJ's factfindings that were supported by the record. Specifically, in its Order, the Commission deleted or omitted the following findings of fact from the ALJ's PFD without a rational basis:

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[86] "The issuance of a permit does not authorize any injury to persons or property or an invasion of other property rights . . ." 30 TEX. ADMIN. CODE § 305.122(d).
"The purpose of this chapter is . . . to minimize the possibility of exposing the public to nuisance conditions . . ." 30 TEX. ADMIN. CODE § 309.10(b).
[87] 30 TEX. ADMIN. CODE § 307.4(b)(3).
[88] 30 TEX. ADMIN. CODE § 307.4(b)(5).
[89] 15 A.R. 95.

38. The moistened soils will inhibit vegetative growth on Protestants' property.
39. The flow of effluent will increase the potential for exposed soils to erode.
41. Erosion on the Graham-Hastings property will cause the loss of pastureland used for cattle grazing.
42. Erosion on the Graham-Hastings property will impact the Grahams' use and enjoyment of the property.
43. If the TPDES permit is issued, the effluent discharge will diminish Protestants' opportunities to walk along their property and to eat the wild fruits that grow there.
44. Access by the Grahams and Ms. Hastings to their western property line to repair fences and address other property management issues will be made more difficult because of the presence of discharged effluent.
45. A TPDES permit will impair the Protestants' access to and enjoyment of the western portion of their property.[90]

The Commission did not state that it disagreed with these findings of fact. Instead, it simply abdicated any responsibility for its actions with reference to these impacts, despite the fact that it had referred nuisance impacts as Issue A, as "relevant and material to the decision on the application," and the fact that statutory provisions and its own rules provide for the consideration of these issues.

C. The Commissioners' disregard for specific Referred Issues, and thus entire categories of evidence developed in support of those issues, warrants reversal.

By ignoring the plain meaning of Referred Issues A and D, the Commission has acted arbitrarily, and ignored or misinterpreted the Texas Water Code and its own rules by failing to consider nuisance impacts caused by the wastewater discharge. The Commission has acted unlawfully and prejudicial to the Plaintiffs' rights by redefining its own referred issues and ignoring factfindings made pursuant to those issues. The issues and the factfindings that the Commissioners disregarded are directly supportive of Plaintiffs' health, enjoyment of property, and protection of property. Consequently, this Court should reverse or remand the case for further proceedings.

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[90] *See* 15 A.R. 95.

III. <u>The Applicant's wastewater discharge will not be into a watercourse, and thus the Commission's decision to issue the permit amendment is unlawful, arbitrary and capricious, and not reasonably supported by substantial evidence</u>.

The Amended PFD found that an amendment should not be issued to TLAP Permit No. WQ0014975001 because, among other things, the discharge would not be into "water in the state."[91] In its Order, the Commission modified this finding.[92] This finding is unlawful, arbitrary and capricious, and not reasonably supported by substantial evidence considering the reliable evidence in the record as a whole.

A. The law on watercourses is well established.

Texas law categorizes surface water into one of two types: diffuse surface water and water in a watercourse.[93] Discharging wastewater into watercourses of the State is allowed under Texas law.[94] This is because water in watercourses, as categorized under Texas law, is the property of the state.[95] But before the State may burden a watercourse, it must be determined whether a watercourse exists.[96] If an applicant is discharging outside of a watercourse, a discharge permit is not authorized by law.

In the PFD, the ALJ correctly outlined the legal principles applicable to the determination of whether a particular land feature is a watercourse.[97] Analyzing the seminal case of *Hoefs v. Short*, 273 S.W. 785 (Tex. 1925), the ALJ stated that a watercourse has (1) a defined bed and banks, (2) a current of water, and (3) a permanent source of supply.[98] The Texas Supreme Court

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[91] *Id.*
[92] 16 A.R. 104.
[93] *Domel*, 6 S.W.3d at 353.
[94] *Id.* at 360.
[95] *Id.* at 353.
[96] *Id.*
[97] 15 A.R. 95. "Water in the state" includes streams and creeks, including the beds and banks of all watercourses. TEX. WATER CODE § 26.001(5).
[98] 273 S.W. at 787.

held that, as a general rule, swales are not watercourses, even though they may sometimes be.[99] The ALJ also analyzed and compared the facts of *Domel v. City of Georgetown*, a more recent watercourse law case, with the facts of DHJB's proposed discharge route.[100]

B. The great weight of record evidence demonstrated that no watercourse existed.

The evidence in the record supported that, based on the legal definition, a watercourse did not exist. The property at issue is in Comal County where legal watercourses are fewer, and sloughs, swales, and the like are numerous. The Applicant in this case is a property developer arguably looking for a more profitable solution than having to construct piping or ditches to convey the new wastewater to an actual watercourse (or alternatively construct TLAP fields). In so doing, the developer chose to invent a watercourse where one does not exist, and thereby to burden its neighbors with the issues caused by the new development.

In her PFD, the ALJ carefully analyzed the record evidence and made a number of findings of fact supporting the conclusion that the proposed discharge would not be into water in the state. The ALJ considered Ms. Lee's characterization of the discharge route, but found that she had relied on exhibits that were unclear or did not actually support a finding that a watercourse existed.[101] The Applicant did not meet its burden to prove the discharge route had been properly characterized.[102] The Applicant did not put on any credible evidence characterizing the discharge route. The Applicant's expert witnesses only provided bare, unsupported, conclusory statements without any basis, and, in so doing, failed to meet its burden on this issue.

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[99] *Id.*; *see also Turner v. Big Lake Oil Co.*, 62 S.W. 2d 491, 493 (Tex. Civ. App.—El Paso 1933), *aff'd*, 128 Tex. 155 (Tex. 1936) (holding that an area of land at issue was a "draw," falling within the rule announced in *Hoefs* that ravines, swales, and similar features at not generally considered watercourses).
[100] *See* 15 A.R. 95.
[101] *Id.* at 25.
[102] *Id.*

Additionally, the applicant DHJB judicially admitted in filings during the contested case hearing that a watercourse did not exist on the Graham property. Specifically, the Applicant pled that Plaintiff Terrell Graham had built a dam (actually an earthen berm) on the Graham's property in violation of Texas Water Code § 11.086.[103] (DHJB also filed suit in Comal County District Court against the Grahams alleging the same.)[104] But the court in *Domel* was clear that "[s]ection 11.086 . . . concern[s] the diversion of surface water *before it enters a watercourse*, which has nothing to do with the body of law governing water in a watercourse."[105] The judicial admission by DHJB—conceding that any water flowing on the Grahams' property was diffuse surface water pursuant to 11.086 and not water in a watercourse—was inconsistent with their position that the discharge route is in fact a legal watercourse.

Further, the ALJ found that maps prepared by DHJB's own consultant, SWCA, were convincing.[106] These maps showed large areas of "disturbance" that interrupted any evidence of water in the state, meaning that any watercourse features were disjointed or severed and not continuous on the property.[107] They called into question the existence of a watercourse.

These SWCA maps showing disturbances were produced from data gathered in January 2014.[108] Brittany Lee visited the property in October 2014.[109] Thus, Ms. Lee's visit took place nine months after DHJB began developing the property, including the discharge route by impounding the diffuse surface water. Even with some development of the property, Ms. Lee

[103] 14 A.R. 86 at 2.
[104] Plaintiff Terrell Graham, in seeking a self-help remedy against the Applicant discharging sewage effluent, soil sediment, construction debris, and excess stormwater flows, built a dam on his property.
[105] *Domel,* 6 S.W.3d at 360.
[106] 15 A.R. 95 at 25–26.
[107] *Id*.
[108] *See* 7 A.R. 58, Exh. 1.9.
[109] 8 A.R. 59, ED-20, 17:23.

could not find clear evidence of a watercourse in various areas, and thus she testified that portions of the discharge route on DHJB's property lacked bed and banks.[110]

With all of this evidence, including the SWCA reports, Ms. Lee's testimony, and other testimony from other witnesses, the ALJ compared all of the facts as applicable to DHJB's proposed discharge route with the facts in *Hoefs* and *Domel* and found that the discharge route was not a watercourse.

Ultimately, the ALJ made specific findings of fact based on the evidence in the record to support her decision, including the following: several portions of the discharge route do not have defined beds and banks; the outfall location did not have the beds or banks of a channel; no aquatic resources on the Johnson Ranch are permanent; the maps in evidence show a land feature that is "significantly interrupted" in several places; the connectivity of the discharge route is completely severed at several places; the discharge route is dry under normal conditions; the grassy swale at the property line has native grasses growing in it; the discharge route on the Graham property is best characterized as a swale with smooth banks and upon which cattle graze; and on the southern end of the discharge route, the soil is relatively flat and there is no regular flow of water.[111] This is the record evidence.

C. The TCEQ Commissioners decision contradicts the record evidence, is also contrary to the law, and warrants reversal and rendering a decision for Plaintiffs.

Courts review an agency's legal conclusions for errors of law and its factual findings for support by substantial evidence.[112] Here, the Commission disregarding the ALJ's factfindings

[110] *See, e.g.*, *id.* at 19:1–3.
[111] 15 A.R. 95, at Findings of Fact Nos. 87–96.
[112] *Heat Energy Advanced Tech., Inc. v. West Dallas Coal. for Envtl. Justice*, 962 S.W.2d 288, 294–95 (Tex. App.—Austin 1998, pet. denied).

and conclusions of law, and found that the discharge route was a watercourse.[113] The Commission's decision is not supported by substantial evidence considering the reliable and probative evidence in the record, and it relies on a misunderstanding of and/or a misapplication of the applicable legal principles.[114]

1. The Commission's decision is not supported by substantial evidence.

The Commission's explanation of changes lists two reasons for its changing the ALJ's findings: the Commission makes a cursory statement that the discharge route is "more than a wide valley or mere surface drainage and similar conditions will produce a flow of water that will recur with some degree of regularity."[115] The Commission cited to Ms. Lee's characterization of the discharge route as evidentiary support.

During the contested case hearing process, the ALJ considered Ms. Lee's testimony and explicitly discussed why the evidence did not support her characterization.[116] Ms. Lee's own testimony during the contested case was that there were several areas upstream of the concrete culverts (*i.e.*, downstream of the discharge point) that "do not depict a defined bed and banks of a channel."[117] Her testimony in front of the Commissioners, as outlined above, was inconsistent with this testimony and should have not been relied on during their deliberations because the evidence was outside the record of the hearing.

Furthermore, the Commission's conclusory statement that the discharge route is "more than a wide valley or mere surface drainage" is not supported by the substantial record evidence. It is obvious the Commission was trying to convert land features in the vicinity of the discharge route into a "watercourse." But pictures included in the application itself are indicative of

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[113] 16 A.R. 104.
[114] TEX. GOV'T CODE § 2001.174(2)(E).
[115] 16 A.R. 104.
[116] 15 A.R. 95.
[117] 8 A.R. 59, ED-20, 19:1–3.

nothing more than a "wide valley."[118] In *Domel*, the court found that all of the photographs in evidence depicted a channel with well-defined bank and beds.[119] Photographs can be used by the factfinder. And indeed, the ALJ weighed the evidence in this case and found that the Applicant's photographs "do not show any beds or banks of a watercourse";[120] the SWCA report showed that the development lacks bed and banks characteristics and any possible flow would be "broken[]" by disturbances on the property;[121] and Ms. Lee testified that there were portions without bed and banks.[122] There was simply no credible evidence, let alone substantial evidence, supporting the Commission's statement.

The Commission erred by resolving a purported conflict in the evidence where no conflict actually existed. If it were so entitled, it would be acting as its own factfinder, despite the statutory delegation of the factfinding role to the ALJ.[123] The sole basis for the Commission's conclusion appeared to be Ms. Lee's testimony from the Agenda Meeting, which was inconsistent with her testimony at the contested case hearing. As such, Ms. Lee's new testimony should not count as lawful and credible evidence that aids the Commission in making its decision.

2. The Commission's decision is erroneous as a matter of law.

In its Order, the Commission cited to the same legal authorities—the seminal Texas cases *Hoefs* and *Domel*—that were analyzed by the ALJ.[124] But the Commission has misunderstood these authorities and/or misapplied their legal tests.

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[118] 4 A.R. 54, Exh. 1.2 – 061–068.
[119] 6 S.W.3d at 354; *see also* 15 A.R. 95 at 21 (ALJ stating the same).
[120] 15 A.R. 95 at 22.
[121] *Id.* at 24.
[122] 8 A.R. 59, ED-20, 19:1–3.
[123] *State v. Mid-South Pavers, Inc.*, 246 S.W.3d 711, 722-23 (Tex. App.—Austin 2007).
[124] 16 A.R. 104 at 13.

Under *Hoefs*, a watercourse must have (1) a defined bed and banks, (2) a current of water, and (3) a permanent source of supply.[125] In her prefiled testimony, Ms. Lee concluded that some areas of the discharge route were more like swales than a defined stream.[126] According to her testimony, these areas did "not depict a defined bed and banks."[127] In other words, Ms. Lee's position was inconsistent with the law requiring watercourses to have these features, and thus does not satisfy the legal test. Yet the Commissioners decided the legal test was met.

Hoefs also held that swales are generally not watercourses.[128] Despite this, during the contested case hearing, the ED attempted to argue, without citing a source, that a discharge of effluent into a grassy swale is authorized because grassy swales convey water in the state.[129] The ALJ rejected this argument based on "the lack of evidence," and stated that she could not determine "that the Commission's policy is to allow wastewater to be discharged into swales."[130] At no point during the contested case process did the ED explain, or even attempt to explain, what the distinguishing feature of a grassy swale is that makes it a legal watercourse.[131] The ALJ thus concluded that "a swale or water that free flows over land does not have a defined bed and banks, a current of water, and a permanent source of supply."[132] It was clear that the legal test was not being met. In reaching the opposite conclusion, the Commission apparently misunderstands the legal authority.

Further, the court in *Hoefs* opined that the channel's "denuded condition, absence of soil and vegetation, and presence of boulders and gravel" demonstrated the long persistence of a

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[125] 273 S.W. at 787.
[126] *See* 15 A.R. 95 at 21.
[127] 8 A.R. 59, ED-20 at 19:1–2.
[128] 273 S.W. at 787.
[129] *See* 15 A.R. 95, at 2 (ALJ's Response to Exceptions).
[130] *Id.*
[131] *See generally* 15 A.R. 95.
[132] *Id.* at 26.

regular current.[133] Thus, a lack of vegetation and soil is used as a factor in the legal determination of the existence of a watercourse.[134] Here, the evidence in the record establishes, and the ALJ found, that the discharge route had soil supporting vegetation, upon which cattle grazed.[135] At the Agenda Meeting, Ms. Lee even confirmed that portions of this route were "overgrown with grass."[136] This evidence firmly supports the ALJ's finding, based on legal precedent, that the discharge route is not a legal watercourse.

In its Order, the Commission cited the applicable case law, but the Commission's legal analysis was only a cherry-picking of *Hoefs'* legal principles to fit the testimony of Ms. Lee at the Agenda Meeting. The Commission ignored the other legal factors that the *Hoefs* and *Domel* courts considered relevant to a watercourse inquiry. The Commission also discarded and/or ignored the great weight of the evidence that affected the analysis of these legal factors. This is particularly hard to understand because the ALJ thoroughly analyzed these applicable factors and considered the record evidence to find that no watercourse existed.[137]

For example, the Commission found in its Order that a grassy swale existed upstream of the Plaintiffs' properties on DHJB's property.[138] But there was no evidentiary or legal basis for concluding that this swale is a watercourse. Additionally, the Commission's cursory statement in

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[133] 273 S.W. at 786.
[134] *See Oklahoma v. Texas*, 260 U.S. 606, 632 (1923) ("When we speak of the bed we include all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time; and we exclude the lateral valleys, which have the characteristics of relatively fast land and usually are covered by upland grasses and vegetation, although temporarily overflowed in exceptional instances when the river is at flood").
[135] 15 A.R. 95 at 26.
[136] 17 A.R. 110.
[137] *See* 15 A.R. 95.
[138] 16 A.R. 104, Finding of Fact No. 95.

its Order that the discharge route "is more than a wide valley or mere surface drainage" does not meet the first prong of the *Hoefs* test.[139] This is erroneous as a matter of law.

In yet another legal error, the Commission erred in adopting Ms. Lee's view that a discharge route constitutes a watercourse so long as water flows in a "general direction." In its Order, the Commission erroneously concluded, based on this testimony, that similar conditions will produce a flow of water that will recur with some degree of regularity.[140] This is contrary to Texas law.

During the contested case hearing, Ms. Lee concluded that water flowed along DHJB's property in a general direction.[141] At the Agenda Meeting, she stated that there were indications that "water flow[ed] to [a] general direction."[142] This characterization, besides being inaccurate as a matter of fact,[143] is not the legal test for a watercourse. It is also a nonsensical basis to establish a watercourse.

That water flows in a general direction is a necessary, but not a sufficient condition for a legal watercourse to exist.[144] Applying Ms. Lee's overly broad interpretation, any uphill landowner could legally discharge sewage effluent on any downhill neighbor, without limitation. Similarly, if water sheet-flowed across a piece of property because of elevation differences across the property, then a watercourse would exist on that property. This is a nonsensical and overly broad reading of the case law that should be afforded no deference. Ms. Lee's view

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[139] 16 A.R. 104 at 13.
[140] *Id*.
[141] 15 A.R. 95 at 21.
[142] 17 A.R. 110.
[143] The ALJ clearly found that the Applicant's own consultant's report stated that any aquatic resources on the property were interrupted and the connectivity of any beds and banks was completely severed at several places. 15 A.R. 95 at 24.
[144] *See Hoefs*, 273 S.W. at 788 (stating that the water must be confined in a channel having a bed and banks).

cannot serve as the basis for the Commission's finding that the discharge route would have a permanent source of supply of water, as required by *Hoefs*.

For all of these reasons, the Commission erred as a matter of law in concluding that the Applicant's proposed discharge route meets the legal test for a watercourse articulated in *Hoefs* and *Domel*. The Commission's modification of the PFD on the watercourse issue was not reasonably supported by substantial evidence in the record and was also erroneous as a matter of law.

IV. The Commission ignored its own rule in 30 Texas Administrative Code 309.12, rendering its decision arbitrary and capricious.

Under established law, an agency abuses its discretion when it fails to consider legally relevant factors.[145] An agency decision—here, a decision to approve the permit amendment—is arbitrary if it fails to follow the clear, unambiguous language of its own regulations.[146] In this case, TCEQ staff, *by their own admission*, failed to review the permit amendment application against 30 Texas Administrative Code 309.12. Given their failure to follow the clear, unambiguous language of its own regulations, the Commission has acted arbitrarily by recommending the Application be granted.

A. The regulations found in Chapter 309 were specifically referred to SOAH for consideration.

The Commission referred the issue of whether the proposed permit complies with the TCEQ siting regulations found in chapter 309.[147] Chapter 309 contains TCEQ's rules for domestic wastewater effluent limitation and plant siting.[148] Subchapter A contains regulations on

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[145] *Kawasaki Motors Corp. USA v. Tex. Motor Vehicle Com'n*, 855 S.W.2d 792, 795 (Tex. App.—Austin 1993); *see also Consumers Water, Inc. v. Pub. Util. Comm'n of Texas*, 774 S.W.2d 719, 721 (Tex. App.—Austin 1989).
[146] *Pub. Util. Comm'n of Texas v. Gulf States Utilities Co.*, 809 S.W.2d 201, 207 (Tex. 1991).
[147] 3 A.R. 37.
[148] 30 TEX. ADMIN. CODE § 309.

effluent limitations; Subchapter B contains regulations on location standards (*i.e.*, the siting regulations); and Subchapter C contains regulations specific to land disposal of sewage effluent.

The purpose, scope, and applicability section of the location standards regulations (Rule 309.10) states that "[t]his chapter establishes minimum standards for the location of domestic wastewater treatment facilities."[149] The chapter applies to "domestic wastewater permit applications and construction plans and specifications filed on or after October 8, 1990, for new facilities and existing units which undergo substantial change for the continued purpose of domestic wastewater treatment."[150] The purpose of the chapter is:

> to condition issuance of a permit and/or approval of construction plans and specifications for new domestic wastewater treatment facilities or the substantial change of an existing unit *on selection of a site that minimizes possible contamination of ground and surface waters*; to define the characteristics that make an area unsuitable or inappropriate for a wastewater treatment facility; to minimize the possibility of exposing the public to nuisance conditions; *and to prohibit issuance of a permit for a facility to be located in an area determined to be unsuitable or inappropriate*, unless the design, construction, and operational features of the facility will mitigate the unsuitable site characteristics.[151]

One of Chapter 309's central purposes is to minimize the possible contamination of groundwater and surface water. Rule 309.12 contains site selection criteria to protect groundwater or surface water.[152] The rule states that the Commission may not issue a permit for a new facility "*unless it finds* that the proposed site, when evaluated in light of the proposed design, construction or operational features, *minimizes possible contamination of surface water and groundwater*."[153] The rule states that the Commission may consider specific factors in making this determination, including "groundwater conditions such as groundwater flow rate, groundwater quality, length of flow path to points of discharge and aquifer recharge or discharge

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[149] 30 TEX. ADMIN. CODE § 309.10(a).
[150] *Id*.
[151] 30 TEX. ADMIN. CODE § 309.10(b) (emphasis added).
[152] 30 TEX. ADMIN. CODE § 309.12.
[153] *Id.* (emphasis added).

conditions," "soil conditions such as . . . hydraulic conductivity of strata," and "separation distance from the facility to the aquifer and points of discharge to surface water."[154]

Rule 309.12 applies on its face to the permit amendment application. The Subchapter that contains this rule states that it specifically applies to domestic wastewater permit applications filed on or after October 8, 1990.[155] Based on the structure of Chapter 309, these rules apply to both discharge permits and TLAPs. Subchapter C ("Land Disposal of Sewage Effluent") provides additional requirements specific to TLAPs.

B. By the TCEQ's own admission, the TCEQ did not consider these applicable rules for the Applicant's permit amendment.

During the hearing, the TCEQ's permit review employee, Mr. Urbany, testified that he did not review the Applicant's TDPES permit application against the Rule 309.12 requirements.[156] While he thought the rule applied only to TLAPs, Mr. Urbany agreed that there is nothing in the language of the rule or the title of the rule that limits these requirements to TLAPs.[157] And he agreed that there is an entirely separate section in Chapter 309 explicitly addressing TLAPs.[158] During OPIC's cross-examination, Mr. Urbany testified that there is not a memorandum or other guidance that says that Rule 309.12 is not looked at for a TPDES permit.[159] Testimony at the hearing conclusively established that DHJB did not do any review of groundwater impacts.[160] The Protestants put on evidence at the hearing tending to show that the proposed site does not minimize possible contamination of surface water and groundwater.[161]

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[154] 30 TEX. ADMIN. CODE § 309.12(2)–(3).
[155] 30 TEX. ADMIN. CODE § 309.10(b).
[156] 8 A.R. 59, ED-1, 22:9-11.
[157] 12 A.R. Nov. 19, 2014 transcript, 29:9–13.
[158] *Id.*, 29:14–17.
[159] *Id.*, 37:16-20.
[160] *See, generally*, 13 A.R. 74 at 52–53 (quoting the Applicant's experts stating the same).
[161] *See id.* at 53–55.

By their own admission, the TCEQ failed to apply Rule 309.12 during its review of DHJB's permit amendment application. In their Closing Arguments, OPIC agreed with the Plaintiffs that the factors laid out in this rule should have been considered by the ED when determining compliance with the requirements in Chapter 309.[162] The plain language of Rule 309.12 requires that the TCEQ make an affirmative finding about protection of surface water and groundwater: "The commission may not issue a permit . . . *unless it finds* that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of surface water and groundwater."[163] The ED made no such determination in this case. Nothing in the record supports a finding that the TCEQ found or made a determination that the site "minimizes possible contamination" of surface water and groundwater.

C. The TCEQ's failure to follow its own rules is a basis for reversal.

The Commission acted arbitrary and abused its discretion by failing to follow the plain, unambiguous language of its own regulations.[164] Texas courts have consistently held that they will not defer to an agency's interpretation if it is "plainly erroneous or inconsistent with the language of the statute, regulation, or rule."[165] The TCEQ's interpretation of the inapplicability of Rule 309.12 is plainly erroneous and inconsistent with the plain language and structure of the rule. The TCEQ's failure to undertake any analysis or make any findings pursuant to this rule is arbitrary and capricious. Any findings of fact or conclusions related to compliance with Chapter 309 in its Order are arbitrary, an abuse of discretion, and are not reasonably supported by the substantial evidence in the record.

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[162] 13 A.R. 73 at 11.
[163] 30 TEX. ADMIN. CODE § 309.12 (emphasis added).
[164] *Gulf States Utilities Co.*, 809 S.W.2d at 207.
[165] *TGS-NOPEC*, 340 S.W.3d at 438.

V. <u>The Commission failed to follow the clear and unambiguous language of the Edwards Aquifer Rules, which renders the decision arbitrary and capricious and not in accordance with the law</u>.

The proposed discharge violates the Edwards Aquifer rules' prohibition against new municipal wastewater discharges that would create additional pollutant loading on the Edwards Aquifer recharge zone.[166] The Commission acted arbitrary by its issuance of a permit that violates the plain and unambiguous language of these rules.

A. Designed to prevent negative impacts to the sensitive Edwards Aquifer, the rules prohibit new municipal wastewater discharges on the recharge zone.

30 Texas Administrative Code Chapter 213 contains the Edwards Aquifer rules. Subchapter A of Chapter 213's purpose is to regulate activities "having the potential for polluting the Edwards Aquifer and hydrologically connected surface streams in order to protect existing and potential uses of groundwater and maintain Texas Surface Water Quality Standards."[167] The activities addressed in this Subchapter "are those that pose a threat to water quality."[168]

Subchapter A provides rules for regulated activities on the Edwards Aquifer Recharge Zone. The "recharge zone" is defined as "that area designated as such on official maps located in the agency's central office and in the appropriate regional office."[169] The rules prohibit construction of any regulated activity until an Edwards Aquifer Protection Plan (EAPP)—which contains a Water Pollution Abatement Plan (WPAP), organized sewage collection system plan, underground storage tank facility plan, aboveground storage tank facility plan, or modifications

[166] 30 TEX. ADMIN. CODE § 213.6(a)(1).
[167] 30 TEX. ADMIN. CODE § 213.1.
[168] *Id.*
[169] 30 TEX. ADMIN. CODE § 213.3(27).

and exceptions granted by the executive director—has been filed with the appropriate regional office, has been reviewed by the TCEQ, and has been approved by the executive director.[170]

All parties involved in the contested case agreed that the rules in Subchapter A of Chapter 213 prohibit discharges on the recharge zone.[171] This prohibition is found in two separate sections in Subchapter A. First, in a rule specific to wastewater treatment and disposal systems, new industrial and municipal wastewater discharges "into or adjacent to water in the state that would create additional pollutant loading are prohibited on the recharge zone."[172] Second, this prohibition is also specifically found in the rule on prohibited activities, which prohibits new municipal and industrial wastewater discharges "into or adjacent to water in the state that would create additional pollutant loading" on the recharge zone.[173]

Subchapter B regulates activities on the contributing zone of the Edwards Aquifer. The rules define the contributing zone, and this definition includes all remaining areas within Comal County that are not mapped as recharge zone.[174] Regulated activities are allowed to be conducted under this subchapter only by applicants who apply for and are granted a contributing zone plan.[175] The subchapter defines "site" to include "[t]he entire area within the legal boundaries of the property described in the application."[176] This definition clarifies that "[r]egulated activities on a site located partially on the recharge zone and the contributing zone must be treated as if the

[170] 30 TEX. ADMIN. CODE § 213.4(a)(1); *see also* 30 TEX. ADMIN. CODE § 213.3(9) (definition of EAPP).
[171] 12 A.R. Nov. 18, 2014 transcript, 173:4–5 (Dr. Ross testifying that you cannot discharge anything on the recharge zone that would be an additional pollution loading); Nov. 18, 2014 transcript, 253:10–12 (Mr. Urbany testifying that if a discharge "goes into the recharge zone, then it would be prohibited"); Nov. 19, 2014 transcript, 17:18 – 18:22 (Mr. Urbany discussing the prohibition against discharges from wastewater treatment plants on the recharge zone); Nov. 19, 2014 transcript, 72:17–18 (Ms. Lee testifying that she would consider the prohibition against discharge points located in the recharge zone).
[172] 30 TEX. ADMIN. CODE § 213.6(a)(1). Because the addition of any pollutant would constitute "additional pollutant loading." Any discharge that has limits for pollutants above zero, such as the permit amendment application at issue here, would violate this prohibition.
[173] 30 TEX. ADMIN. CODE § 213.8(a)(6).
[174] 30 TEX. ADMIN CODE § 213.22(2)(B).
[175] 30 TEX. ADMIN CODE § 213.21(d)–(e).
[176] 30 TEX. ADMIN CODE § 213.22(7).

entire site is located on the recharge zone, subject to the requirements under Subchapter A of this chapter (relating to Edwards Aquifer in Medina, Bexar, Comal, Kinney, Uvalde, Hays, Travis, and Williamson Counties)."[177]

All parties agree that the rules in Chapter 213 apply to this permit application.[178] TCEQ staff, in point of fact, determined that Chapter 213 did apply to this permit amendment application and was part of the agency's review.[179] However, the agency has acted arbitrary by failing to follow the clear and unambiguous language of its own rules.

B. The Applicant's site is legally considered within the recharge zone.

The parties agreed, and the Commission has found, that the site is mapped partially on the recharge zone and partially on the contributing zone.[180] Subchapter B of Chapter 213 defines the word "site" for purposes of these regulations. The rule provides that the "site" includes "[t]he entire area within the legal boundaries of the property described in the [Edwards Aquifer Protection Plan application]."[181] This definition clarifies that:

> [r]egulated activities on a site located partially on the recharge zone and the contributing zone *must be treated as if the entire site is located on the recharge zone, subject to the*

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[177] *Id*.

[178] 12 A.R. Nov. 17, 2014 transcript, 71:17 (Mr. Charlie Hill testifying that he believes the permit is in compliance with the Edwards Aquifer rules); Nov. 18, 2014 transcript, 177:17–20 (Dr. Ross testifying that she believes that when a site spans both the recharge and contributing zones, as this one does, Subchapter A applies); Nov. 18, 2014 transcript, 241:9–14 (Mr. Urbany stating that he reviews Chapter 213 "[w]henever we have a permit that it applies to," and that this Chapter was reviewed for this application).

[179] *See, e.g.*, 12 A.R. Nov. 18, 2014 transcript, 241:14 (Mr. Urbany).

[180] 12 A.R. Nov. 17, 2014 transcript, 34:15–18 (Mr. Hill testifying that part of the property is mapped as recharge zone and part is mapped as contributing zone); Nov. 17, 2014 transcript, 233:4 (Dr. White testifying that the Johnson Ranch property is designated in part as being in the recharge zone and in part as being in the contributing zone); 7 A.R. 58, Exh. 2, 24:9–13 (Dr. Ross testifying that the development straddles the boundary between recharge and contributing zones); 12 A.R. Nov. 19, 2014 transcript, 71:22 – 72:3 (Ms. Lee stating that the outfall is in the contributing zone and that the recharge zone is 565 feet from this location).

[181] 30 TEX. ADMIN CODE § 213.22(7); *see also* 30 TEX. ADMIN CODE § 213.3(31) (same definition of "site" in Subchapter A).

> *requirements under Subchapter A of this chapter* (relating to Edwards Aquifer in Medina, Bexar, Comal, Kinney, Uvalde, Hays, Travis, and Williamson Counties).[182]

Thus, when a site—i.e., the entire area within the legal boundaries of the property described in the application—spans both the recharge zone and the contributing zone, the site owner must operate under the requirements of Subchapter A.

The evidence in the record established that the site for DHJB's Edwards Aquifer Protection Plan is the full 750 acres of land that makes up the Johnson Ranch Development. The Applicant in this case applied for a Water Pollution Abatement Plan (WPAP), which was approved by letter dated October 24, 2007.[183] This WPAP was one part of an approved Edwards Aquifer Protection Plan (EAPP), which is required under Subchapter A of Chapter 213.[184] TCEQ approved a modification of this WPAP—and, therefore, approved a modification to the approved EAPP—by letter dated October 10, 2012.[185] The approval letter for the EAPP contains an description of the "site": it explicitly states that the site is 751.3 acres of land, which is equal to the 767.32 acres described in an attached exhibit, save and except 16.05 acres of land which was deeded to Comal Independent School District in 2007.[186] Mr. Charles Hill of DHJB Development testified during the hearing that the EAPP for the development covers the entire Johnson Ranch site.[187] This is consistent with DHJB Development applying for an EAPP for the entire Johnson Ranch property, as opposed to an EAPP for the portion of the property on the recharge zone as well as a contributing zone plan (under Subchapter B) for the portion of the property on the contributing zone.

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[182] *Id.* (emphasis added).
[183] 7 A.R. 58, Exh. 5, 4.
[184] *See* 30 TEX. ADMIN. CODE § 213.3(9) (definition of EAPP).
[185] 7 A.R. 58, Exh. 5, 4–8.
[186] *Id.* at 3, 9.
[187] 12 A.R. Nov. 17, 2014 transcript, 33:24 – 34:8.

The "site," therefore, for DHJB's Edwards Aquifer Protection Plan lies partially on the recharge zone and partially on the contributing zone. For this reason, regulated activities on the site must be treated as if the entire site is located on the recharge zone.[188] Wastewater discharges are "regulated activities" under the Edwards Aquifer rules.[189] Because wastewater discharges are prohibited on the recharge zone and the entire site of the Johnson Ranch is, per the definition found in the Edwards Aquifer rules, treated as being located on the recharge zone, the discharge proposed by the permit amendment is prohibited and the permit amendment should have been denied.

C. The language of the Edwards Aquifer rules is clear but was disregarded by the TCEQ, warranting reversal.

When a court construes administrative rules, the goal is to give effect to the intent of the issuing agency, with a primary focus on the plain meaning of the words chosen.[190] The Edwards Aquifer rules clearly prohibit wastewater discharges on the Edwards Aquifer Recharge Zone. Additionally, the rules provide for a clear definition of "site" and unambiguously state that when a site is located partially on the Recharge Zone and partially on the Contributing Zone, the regulated activities on that site must be treated as if the entire site is located on the recharge zone. This language is clear and unambiguous. The agency's interpretation, which ignores the plain definition of "site" provided by rule, is plainly erroneous and inconsistent with the language of Chapter 213. This Court should reject TCEQ's interpretation as unreasonable.

New municipal waste discharges on the Recharge Zone are prohibited by TCEQ rules. The Commission has ordered that DHJB's permit application be granted. In so doing, the

[188] 30 TEX. ADMIN. CODE § 213.22(7).
[189] *See* 30 TEX. ADMIN. CODE § 213.3(28)(A)(iv) (defining a regulated activity as "any other activities that may pose a potential for contaminating the Edwards Aquifer and hydrologically connected surface streams").
[190] *Gomez*, 354 S.W.3d at 912.

Commission has acted arbitrarily and unlawfully by approving a permit application that must be denied under clear and unambiguous rules.

VI. <u>The permit's effluent standards are not sufficiently protective of children or cattle under TCEQ's own rules, and thus the Commission's decision to issue the permit amendment is arbitrary, capricious, and not supported by substantial evidence</u>.

Related to Referred Issues A and D, in her Amended PFD, the ALJ found that the proposed permit would adversely impact the Plaintiffs' use and enjoyment of their properties, that the permit would not be protective of children, and that the permit would not be protective of cattle that would come into contact with and ingest the effluent.[191] The ALJ's findings of fact 78 through 86 were arbitrarily struck. The Commission's decision to issue the permit in spite of this record evidence is arbitrary, capricious, an abuse of discretion, and violates its own rules.

A. Due to the dry nature of the discharge route and the potential for exposure to children and livestock, the effluent standards are not sufficiently protective.

The discharge route (both on DHJB's own property and the Plaintiffs Graham-Hasting's property) is dry except during storm events when water flows across the land.[192] On the Plaintiffs' property, the discharge route is a dry grassy swale or low spot in a pasture area into which undiluted effluent would flow.[193] This is not a typical case in which discharged effluent would flow into a watercourse through which a current of water normally runs. The TCEQ has promulgated specific standards for water quality that it has deemed safe for unintentional human contact with undiluted effluent.[194] These standards have been established as minimum standards by the TCEQ. But the proposed effluent standards in the permit amendment approved by the

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[191] 15 A.R. 95 at 16; 48-49.
[192] 7 A.R. 58, Exh. 1, 3:27–28; *see also* 15 A.R. 95 (ALJ's PFD stating that the discharge route on the Graham-Hastings property is dry).
[193] 15 A.R. 95 at 16.
[194] *See, generally*, 30 TEX. ADMIN. CODE Ch. 210.

TCEQ do not meet these standards. For this reason, the TCEQ's decision to issue the permit amendment is arbitrary and capricious.

Based on the evidence in the record, the ALJ found that undiluted effluent would reach the Graham-Hastings property, that there was no evidence that it is safe for children to play in or drink effluent treated at the levels the Applicant has proposed, and that there was no evidence that it is safe for cattle to come into contact with or ingest effluent treated at the proposed levels.[195] The facts underlying these findings were well supported. The ALJ's findings were premised on the accurate understanding that the discharge would be comprised of undiluted effluent into a dry creek.[196]

B. The TCEQ's own rules for land application undermine its position that DHJB's effluent standards are sufficiently protective.

Chapter 210 of the TCEQ rules contains standards for land application of undiluted wastewater effluent (*i.e.*, reuse water). These rules include effluent limitations for bacteria that are much stricter than those that were proposed in the permit amendment. These rules provide standards for so-called Type 1 and Type 2 effluent. Type 1 effluent uses include irrigation "or other uses in areas *where the public may be present* during the time when irrigation takes place or other uses where the public may come in contact with the reclaimed water."[197] Among these other specific uses are for "[i]rrigation of pastures for milking animals."[198] The water quality standards for such uses include limits of 20 CFU/100ml for a 30-day mean of *E. coli* and 75 CFU/100ml for a single grab.[199] The proposed permit amendment allows for a single grab of 399

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[195] 15 A.R. 95 at 16; 48-49.
[196] *See id.* at 16.
[197] 30 TEX. ADMIN. CODE § 210.32(1) (emphasis added).
[198] *Id.*
[199] 30 TEX. ADMIN. CODE § 210.33(1).

CFUs/100ml per grab sample of *E. coli*.[200] Under the Type 1 effluent rules, turbidity limits and limits for *Enterococci* also exist and are stricter than in the proposed permit amendment.[201] Type 1 standards are the minimum standards the Commission has determined would be safe for human contact with undiluted wastewater effluent on dry land. Yet the discharge authorized by DHJB's permit amendment, which is undiluted wastewater effluent applied onto dry land, does not meet these standards.

In fact, the effluent that will be discharged under DHJB's permit amendment will not even meet Type 2 standards. Type 2 effluent standards, which are intended for unintentional human contact, are much less stringent than Type 1 standards.[202] The effluent standards in the permit amendment also do not meet the standard for what is considered safe for unintentional human contact with undiluted effluent discharged to land via subsurface area drip.[203]

These TCEQ-approved standards are specifically protective of irrigation of areas in which livestock are fed and other areas in which human contact is possible. Because DHJB's permit amendment proposed discharging effluent into a low spot in a pasture surface area (*i.e.*, a grassy swale), without any dilution, the proposed discharge is functionally equivalent to the undiluted discharge of effluent to dry land. But because the permit amendment's effluent limitations do not meet the Type 1 effluent standards, do not meet the Type 2 effluent standards, and do not meet the standards for effluent discharged via subsurface area drip, there is a presumption that the effluent will not be protective for these uses—uses that are similar to, if not identical to, the uses of the discharge route at issue in this case.

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[200] *See* 8 A.R. 59, at ED-1.
[201] 30 TEX. ADMIN. CODE § 210.33(1).
[202] *See* 30 TEX. ADMIN. CODE § 210.33(2).
[203] *See* 30 TEX. ADMIN. CODE § 309.3(g)(4) ("All effluent discharged to land via a subsurface area drip dispersal system *to which there is a potential for human contact* shall be disinfected and shall comply with an [*E. coli*] bacteria effluent limitation of 126 colony forming units per 100 milliliters of water") (emphasis added).

C. The TCEQ's decision that fails to protect human health and livestock use of property must be reversed.

An agency decision is arbitrary if the agency weighs relevant factors, but reaches a completely unreasonable result.[204] In this case, the Commission simply ignored the particular circumstances of issuing this discharge permit, ignored the purpose of its own rules, and ignored the structure of specific rules that protect for effluent's application to land to which both the public and livestock will have access. It is arbitrary to set specific bacteria and turbidity standards for land application to which the public might have access and then to not enforce those standards in situations that meet the antecedent conditions for triggering those effluent standards. The TCEQ's unreasonable interpretation of its own rules and failure to follow its own regulatory standards is arbitrary, and the case should be reversed or remanded for further proceedings.

VII. Plaintiffs have been denied due process.

A state agency must respect the due process rights of parties that appear before it in a contested case. Even if an agency's order is supported by substantial evidence, the order may be arbitrary and capricious if a denial of due process has prejudiced the litigant's rights.[205] The proceedings of an agency "must meet the requirements of due process of law and the rudiments of fair play" in order to be upheld.[206] These standards require that the hearing must not be arbitrary or inherently unfair.[207] The TCEQ's actions in this case do not meet the requirements of due process of law, do not meet the rudiments of fair play, and were inherently unfair. Plaintiffs have been prejudiced by these actions, and this Court should reverse or remand the case accordingly.

[204] *City of El Paso v. Public Util. Comm'n*, 883 S.W.2d 179, 184 (Tex. 1994).
[205] *Tex. Dep't of Ins. v. State Farm Lloyds*, 260 S.W.3d at 245.
[206] *Grace v. Structural Pest Control Bd.*, 620 S.W.2d at 160.
[207] *Id*.

As explained, in this case, after hearing all of the evidence at the contested case hearing, the ALJ found in Plaintiffs' favor on three of the four referred issues and recommended denial of the permit.[208] The Commission met on July 1, 2015, to consider the ALJ's recommendations at the Agenda Meeting. At this meeting, the Commission solicited testimony from the ED's witness, Ms. Lee, and made its own factfindings that were not supported by the record in order to justify its modification of the ALJ's proposal.[209] The evidence was solicited following the oral presentation by the Plaintiffs, so that Plaintiffs could not object, respond, or contest the new evidence in any way. Then, immediately following the Commission's deliberation, Commissioner Baker stated that he and Chairman Shaw agreed on a path forward and "actually [had] a motion to that effect" already drafted.[210] He then read from this already-prepared motion and asked the Applicant to draft revised findings of fact and conclusions of law.[211]

The Commission ultimately granted the application and signed the Applicant's revised proposed final order.[212] This Commission's final Order made extensive changes and additions to the ALJ's findings of fact and conclusions of law.[213]

The manner by which the Commission modified the ALJ's decision violates due process protections. First, as argued above, the Commission relied on testimony that was inconsistent with the administrative record, essentially put words in the mouth of its own witness, made its own factfindings, and based its decision on one of the central issues—*i.e.*, whether the discharge

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[208] 15 A.R. 95.
[209] 17 A.R. 110.
[210] *Id*.
[211] Plaintiffs also note that the Applicant made extensive changes to the ALJ's findings of fact and conclusions of law that exceeded the scope of TCEQ's Interim Order. *See* 15 A.R. 96 (TCEQ Interim Order); 15 A.R. 97 (Applicant's proposed Order); 16 A.R. 98 (Protestants' proposed edits); 16 A.R. 101 (letter from Protestants arguing that the Applicant had made arbitrary and unsupported modifications to the ALJ's PFD).
[212] 16 A.R. 103.
[213] *Id.*

route is a legal watercourse—on evidence not in the record before the ALJ. This form of procedure is unlawful under the APA.[214] It is also unconstitutional. These errors prejudice the Plaintiffs, who put forward evidence during the contested case hearing that the ALJ relied on in issuing her proposal for decision and who were denied an opportunity to cross-examine Ms. Lee or otherwise contradict the new "facts" from Agenda Meeting that the Commission relied on to issue its final order.

Second, and relatedly, the Commission's findings of fact and conclusions of law made widespread changes to the ALJ's findings of fact and conclusions of law. In another administrative act review case, the third court of appeals of Texas stated that such "systematic and widespread changes and additions" to an ALJ's findings of fact, and changes to particular facts, can suggest that an agency is "acting as its own fact finder despite having delegated that duty to the ALJ."[215] The Supreme Court of Texas has stated that agencies who delegate the factfinding role to an independent factfinder "cannot then ignore those findings with which it disagrees and substitute its own additional findings."[216]

Plaintiffs contend that the Commission has acted in this case in this illegal manner by extensively deleting findings of fact from the ALJ's proposal without any rational basis;[217] simply ignoring whole categories of factfindings and deleted these from its final order;[218] redefining its own referred issues at the agenda meeting; solicited evidence from a witness that

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[214] *See* TEX. GOV'T CODE § 2001.141(c) (requiring that a final decision be based on the evidence that are officially noticed); TEX. GOV'T CODE § 2003.047(m) (requiring that an amendment to a PFD be based solely on the record before the ALJ).
[215] *Langford v. Employees Ret. Sys.*, 73 S.W.3d at 566.
[216] *Montgomery Indep. Scho. Dist. v. Davis*, 34 S.W.3d 559, 564 (Tex. 2000).
[217] *See* 16 A.R. 103; 15 A.R. 95. For example, the Commission arbitrarily modified the ALJ's finding that the discharge route lacks the beds and banks of a channel (finding of fact #88), simply removed findings of fact #94 through #96, and simply added conclusory findings of fact stating that the discharge route is a watercourse.
[218] *See id*. The Commission simply removed whole sections of findings of fact related to nuisance conditions.

contradicted the evidence in the record; and applying its own additional factfindings, some of which were made for the first time at the agenda meeting, to an erroneous and wholly unreasonable understanding of the law.

These actions undermine the legislative policy for creating SOAH and employing an independent factfinder to review agency decisions. The legislature created SOAH in 1991 with the goal and purpose to "create an administrative judiciary independent of the agency that could hear objectively administrative disputes."[219] Parties who participate in contested case hearings must have some confidence that an ALJ's extensive factfindings on the record will not be modified on the basis of evidence that was not presented at the contested case hearing.[220] Otherwise, an agency is simply acting as its own factfinder, which contravenes legislative intent and raises due process concerns for all the parties involved.

Third, serious due process violations occur when an agency makes its final decision first, and then makes findings of fact to support that new result.[221] In this case, during the Agenda Meeting, Commissioner Baker read from a prepared motion that summarized the Commission's findings; this motion was clearly prepared prior to the Agenda Meeting, and clearly anticipated that Ms. Brittany Lee would give the very testimony that the Commissioners solicited from her at the Agenda Meeting.[222] The Commission's decision to issue the permit was made prior to the Agenda Meeting—expecting that new "facts" would be delivered. The Commissioners solicited extra-record evidence from Ms. Lee and made its own factfindings to justify its decision, and it was all predetermined. Then, the Commission ordered the Applicant to craft findings of fact and

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[219] Tex. Att'y Gen. Op. DM-231 (June 24, 1993) (citing Hearings on Senate Bill 884 Before the Senate Comm. on State Affairs (Apr. 8, 1991) (testimony of Senator Montford, author)).
[220] *See Langford*, 73 S.W.3d at 566 (stating that an agency arriving at a result on grounds other than those presented at the hearing raises serious due process concerns).
[221] *See id*.
[222] 17 A.R. 110.

conclusions of law consistent with the motion. In short, the entire Agenda Meeting was nothing more than window dressing for the Commissioners' desired end result—issuing the permit amendment contrary to the majority of findings of fact and conclusions of law made by the ALJ. This is egregious, and warrants reversal by this Court.

Plaintiffs have been denied due process in the proceedings below. These violations have prejudiced Plaintiffs because the errors have served as the basis for the Commission modifying the ALJ's proposal for decision that recommended the permit be denied. The permit's issuance harms the Plaintiffs by authorizing the discharge of pollutants on their property when no water course even exists. Accordingly, this Court should reverse the agency decision due to the Commission's improper procedures and violations of due process and fair play.

CONCLUSION AND PRAYER

For the foregoing reasons, the Commission's final decision issuing a permit to DHJB was procedurally and substantively erroneous. Plaintiffs respectfully request that this Court reverse and render a decision for Plaintiffs, or in the alternative, remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Initial Brief contains 14,934 words in the pertinent parts of the document, as calculated by the computer program used to prepare the document.

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CERTIFICATE OF SERVICE

On this 19 day of August, 2016, a true and correct copy of the foregoing instrument was served on all attorneys of record by the undersigned via regular U.S. mail and/or electronic mail.

/s/ Charles W. Irvine
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