

TCEQ Docket No. 2007-1774-MSW

2008 FEB -1 PM 4: 47

IN RE THE APPLICATION OF BFI WASTE § BEFORE THE
SYSTEMS OF NORTH AMERICA, INC. § TEXAS COMMISSION ON CHIEF CLERKS OFFICE
PERMIT NO. MSW-1447A § ENVIRONMENTAL QUALITY

APPLICANT'S RESPONSE TO REQUESTS FOR HEARING

Applicant BFI WASTE SYSTEMS OF NORTH AMERICA, INC. ("BFI") files this its Response to Requests for Hearing pursuant to 30 TAC §55.209(d) and other applicable rules of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission"), respectfully showing:

I. INTRODUCTION

The Sunset Farms Landfill is a Type I municipal solid waste (MSW) landfill located at 9912 Giles Road in Travis County. BFI operates the landfill, which is located on property owned by BFI and Giles Holding, L.P., under MSW Permit No. 1447. The landfill serves the solid waste management and disposal needs of the City of Austin, Travis County and the greater Austin area.

On January 20, 2006, BFI applied for a major permit amendment to expand the landfill to create additional waste disposal capacity. The Executive Director declared the application administratively complete on January 31, 2006. Various required notices were mailed and published in February and March of 2006. The Executive Director completed technical review of the application on March 21, 2007, and prepared a draft permit. Notice of the application and draft permit was mailed in late March and again in early May 2007, and was published in the *Austin American-Statesman* on multiple occasions in April and May of 2007.

A public meeting regarding the application was held in Manor, Texas, on May 24, 2007. The public comment period was extended by ten days, and public comments on the application and draft permit were accepted through June 29, 2007. The Executive Director issued his responses to the comments on October 5, 2007. Motions for reconsideration were accepted through November 5, 2007. As described in the Notice of Setting for the Commission Agenda dated January 17, 2008, the Office of the Chief Clerk has forwarded a list of 62 persons requesting a contested case hearing on the application.

A number of individuals and groups have commented on the application, and the issues raised in their comments and hearing requests are both broad and varied. BFI is filing this written response to the hearing requests pursuant to 30 TAC §55.209(d) and other applicable statutes and rules, requesting that participation in the contested case hearing be limited to "affected persons" only. It submits that, in the absence of a regulation containing a bright-line rule, persons who own property and reside more than approximately one mile from the facility boundaries should not be deemed to be affected persons unless they have otherwise shown a legal right, duty, privilege, power or economic interest affected by the application that is not common to the general public. BFI also requests that the issues that are referred to hearing be reasonably and appropriately limited, in terms of both number and scope, consistent with the provisions and purpose of TEX. WATER CODE ANN. §5.556(e) and its enabling legislation, H.B. 801 (76th Legislature, 1999).

II. ORGANIZATION OF RESPONSE

Section 55.211 of MSW rules provides that a request for a contested case hearing shall be granted if the request is made by an "affected person" and it:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter... and that are relevant and material to the commission's decision on the application;
- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of §55.201 regarding timing and contents of hearing requests.

30 TAC §55.211(c)(2). Section 55.209 states that responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or of law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing . . . ;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

Id. at 55.209(e).

This response is organized to address each of these requirements. Section III discusses whether each hearing requestor is an "affected person." Section IV discusses whether particular issues raised by commenters are appropriate for referral. It includes a table which summarizes (and, to an extent, synthesizes) the 40 issues that the Executive Director identified in his responses to public comments had been raised by the commenters. Section V contains discussions regarding those issues that should not be referred. Section VI discusses the maximum expected duration of the hearing. Section VII contains a request for time for mediation. Section VIII discusses the requests for reconsideration, which by and large did not raise any issues that had not been previously raised. Finally, the conclusion and prayer (Section

IX) contains a list of all issues that are appropriate for referral in terminology appropriate for referral, considering the relevant TCEQ regulatory language.

III. DETERMINATION OF AFFECTED PERSONS (§55.209(e)(1))

The Commission's rules provide that:

[A]n affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

Id. at §55.203(a). In determining whether an individual is an affected person, the rules require consideration of:

... all factors ... including, but not limited to, the following:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person; [and]
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person ...".

Id. at §55.203(c). A governmental entity may be an affected person if it has authority under state law over issues raised by the application, considering "their statutory authority over or interest in the issues relevant to the application." *Id.* at §55.203(b) & (c)(6).

The Commission's rules regarding hearing requests made by groups or associations are rooted in longstanding case law governing associational standing. A group or association may

request a contested case hearing only if it meets all three of the following requirements: (1) one or more of its members would otherwise have standing to request a hearing; (2) the interests that the group seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the individual members. *See id.* at §55.203(a).

Table 1 lists the hearing requestors, and states whether each is an affected person/entity with a brief summary of the reasoning for the conclusion. A more detailed narrative explanation regarding the affected person status of each hearing requestor or "petition signatory" follows the table.

**Table 1 – Affected Person Considerations
Sunset Farms Landfill**

HEARING REQUESTOR	AFFECTED PERSON?
REQUESTERS WHO SUBMITTED LETTERS	
Jeremiah Bentley, President, Harris Branch Residential Property Owners Association (HBRPOA)	No. Bentley's property is located more than 1 mile from the facility, and HBRPOA has not shown it has associational standing.
Joyce Best	No. Property located approximately 8.5 miles from the facility.
Northeast Neighbors Coalition (NNC) (submitted by Mary Carter)	Yes. The NNC appears to meet the associational standing requirements.
Trek English	No. Ms. English lives in Arlington, Texas, over 150 miles away.
Northeast Action Group, (submitted by Trek English and Joyce Best)	No. NAG has no identified members other than Best and English, neither of whom have individual standing. Thus, NAG does not have associational standing.
TJFA, L.P. (TJFA) (submitted by Dennis Hobbs)	No. TJFA was formed and is operated by a competitor of the applicant for the purpose of challenging competing facilities.
Amy Kersten	Yes. Property located approximately 1 mile from the facility.
Nora Longoria.	Yes. Property located within 1 mile of the facility.
Anne and Bill McAfee	No. Property located approximately 10 miles from the

HEARING REQUESTOR	AFFECTED PERSON?
	facility.
Mark and Melanie McAfee	Yes. While the McAfees live approximately 10 miles away from the facility, they own business property (Barr Mansion) approximately 1 mile from the facility.
Alto and Rosemary Nauert	Yes. Property located within 1 mile of the facility.
Cecil and Evelyn Remmert	Yes. Property located within 1 mile of the facility.
Delmer Rogers	No. Property located approximately 1.5 miles from the facility.
Mike and Ramona Rountree	Yes. Property located within 1 mile of the facility.
Celeste Scarborough	No. Property located more than 2 miles from the facility.
Roy and Janet Smith	Yes. Live on the Remmert property, within 1 mile of the facility.
Sen. Kirk Watson and Rep. Mark Strama	No. Do not request to be a party and do not claim a personal justiciable interest.
Williams Ltd., Evan Williams and Roger Joseph	Yes. Property located within 1 mile of the facility.
PETITION SIGNATORIES	
Elizabeth Trevino	No – address provided is more than 3 miles from facility (3.14 mi.).
Terry Cainal	Yes – address provided is less than 1 mile from facility.
Amy Williamson	Yes – address provided is less than 1 mile from facility.
James Marchak	Yes – address provided is less than 1 mile from facility.
Sherry Pyle	No – address provided is more than 2.0 miles from facility (2.38 mi.).
David Gunlock	No – address provided is more than 8 miles from facility (8.13 mi.).
Alfred Wendland	No – address provided is more than 6.5 miles from facility (6.58 mi.).
Jeffery Seider	Yes – address provided is less than 1 mile from facility.
Jocelyn Doherty	No – address provided is more than 3 miles from facility (3.02 mi.).
Tony and Amber Buonodono	Yes – address provided is less than 1 mile from facility.
Allan and Pam Luttig	Yes – address provided is less than 1 mile from facility.
Melissa Fields	Yes – address provided approximately 1 mile from the facility.
Chuck Dabbs	Yes – address provided is less than 1 mile from facility.
Kathryn E. Albee	Yes – address provided is less than 1 mile from facility.

HEARING REQUESTOR	AFFECTED PERSON?
Dan Pyka	Yes – address provided is approximately 1 from the facility.
Roland Valles	Yes – address provided is approximately 1 mile from the facility.
Michael Young	Yes – address provided is approximately 1 mile from the facility.
Weldon Long	No – address provided is almost 10 miles from facility (9.86 mi.).
Merry Rightmer	Yes – address provided is less than 1 mile from facility.
Vu Tran	Yes – address provided is less than 1 mile from facility.
Rebecca Martinez	No – address provided is more than 1 mile from facility (2.24 mi.).
Ed Attra	No – address provided is more than 2 miles from facility (2.24 mi.).
Mark Wilkerson	No – address provided is more than 1 mile from facility (1.39 mi.).
Jeremy and Karen Vest	No – address provided is more than 1 mile from facility (1.39 mi.).
Susan Morgan	No – address provided is more than 2 mile from facility (2.24 mi.).
Sean Cottle	Yes – address provided is less than 1 mile from facility.
Lionel Bess	Yes – address provided is less than 1 mile from facility.
Mary Lehman	No – address provided is more than 6 miles from facility (6.31 mi.).
Cloyce Spradling	No – address provided is more than 1 mile from facility (1.40 mi.).
Tim Fleetwood	Yes – address provided is less than 1 mile from facility.
David Williams	Yes – address provided is less than 1 mile from facility.
James Daniel	Yes – address provided is less than 1 mile from facility.
Cam and Ron Junker	Yes – address provided is less than 1 mile from facility.
Georgia Rich	No – address provided is more than 2.0 miles from facility (2.26 mi.).
Lee Cook	Yes – address provided is less than 1 mile from facility.

**Jeremiah Bentley and the Harris Branch
Residential Property Owners Association (HBRPOA)**

Jeremiah Bentley submitted several hearing request letters prior to the deadline. He has stated that he lives at 12100 Kilmartin Lane, Austin, Texas 78653. GPS mapping indicates that Mr. Bentley's property is approximately 1.3 miles from the nearest permit boundary. Because

Mr. Bentley resides over one mile from the facility and he has not provided any other information to show how or why he or his family or his property would be affected in any way that is not " common to members of the general public," he lacks a personal justiciable interest. BFI thus objects to Mr. Bentley being deemed an affected person in his individual capacity and granted party status in this matter.

Mr. Bentley's November 1, 2007 letter request states that he wrote on behalf of "other property owners" in the Harris Branch Residential Property Owners Association (HBRPOA). The letter further states that many of the houses within the Harris Branch neighborhood are within one mile of the facility. Mr. Bentley's letter, however, does not expressly state either the organization's purpose or the interests it serves to protect, and otherwise lacks sufficient information to show that it has associational standing. BFI therefore submits that HBRPOA should not be granted party status. BFI respectfully requests that Mr. Bentley and the HBRPOA be aligned if for any reason both are granted party status.

Joyce Best

While Joyce Best used to live approximately 1.5 miles from the facility (at 11400 Ashprington Cove), her November 5, 2007 letter requesting reconsideration of the Executive Director's decision states that she now resides at 4001 Licorice Lane in northwest Austin – approximately 8.5 miles away from the facility. Ms. Best's own letter acknowledges that, whatever her prior status, she is not presently an affected person when she states that "I *was* an affected party during the time I lived near the landfill" (emphasis added). While Ms. Best may ultimately be a fact witness in the hearing due to her prior residence and involvement, she is plainly not an affected person and thus should not be granted party status.

Northeast Neighbors Coalition (NNC)

Based upon statements made in its hearing request, the Northeast Neighbors Coalition (NNC) appears to meet the requirements of §55.205(a) and associational standing. BFI reserves the right to object to NNC's associational standing in the future, however, based on any additional information it may obtain during discovery.

Trek English

While Trek English used to live close to the facility, her November 5, 2007 hearing request states that she now resides at 3705 Toby Court, Arlington, Texas 76001 – over 150 miles from the facility. Nothing indicates that she still owns her previous residence near the landfill or that she otherwise maintains a justiciable interest in this matter. While Ms. English may ultimately be a fact witness in the hearing due to her prior residence and involvement, she is plainly not an affected person and thus should not be granted party status.

Northeast Action Group

Trek English and Joyce Best both submitted comments in the name of the Northeast Action Group. As discussed above, Ms. Best has moved to northwest Austin approximately 8.5 miles from the facility. Ms. English has moved to Arlington, over 150 miles from the facility. Ms. Best's and Ms. English's comments did not otherwise identify any specific members of the Northeast Action Group. The most recent comments dated November 5, 2007 state that “one or more members of the group live within a mile or more of the facility” (emphasis added). This phrasing leaves it entirely unclear whether any member lives within one mile of the facility, or whether all the members live more than one mile away from the facility. The organization thus has not specifically identified any members who have individual standing, the first requirement

for associational standing, nor has it provided information regarding its purpose or the interests it serves to protect, which is the second requirement. *See id.* at 55.203(a). BFI therefore submits that the Northeast Action Group should not be granted party status.

TJFA, L.P.

Dennis Hobbs submitted requests for hearing on behalf of TJFA, L.P., ("TJFA") a purported "real estate investment company which owns real property within one mile of the BFI Sunset Farms Landfill." BFI objects to designation of TJFA as an affected person because it has been set up and funded by the majority owner of one of BFI's competitors in the Central Texas market, Texas Disposal Systems, Inc., for what are transparently anticompetitive purposes.

TJFA is a Texas limited partnership that claims Bob Gregory as its sole limited partner and an entity that is wholly owned and controlled by Mr. Gregory, Garra de Aguila, Inc., as its managing general partner. B. GREGORY DEPO. TR., Exhibit A, at 25-27 & 31-32. Mr. Gregory also owns a controlling interest in Texas Disposal Systems, Inc. and two related companies which collectively own and operate the TDS landfill in southern Travis County (near Creedmore) as well as a waste hauling business in Central Texas. *Id.* at 27-31. Mr. Gregory has recently testified that Dennis Hobbs, who wrote the letters on behalf of TJFA, is his personal "assistant" and is an employee of TDS. *Id.* at 26-27. The fax cover page and header on the November 5, 2007 letter request that Mr. Hobbs filed on behalf of TJFA in this matter indicates that the fax was sent by Mr. Hobbs to TCEQ from the "Texas Disposal Systems" office. *See* Exhibit B.

TJFA's sole purported business consists of purchasing small parcels of land that are located within one mile of existing landfills in Central Texas that are operated by TDS's competitors and are planning to or have recently filed applications to expand (including the

Williamson County Landfill near Hutto, Sunset Farms Landfill, the Austin Community Landfill, Comal County Landfill, the IESI Type IV landfill in Travis County, and Covell Gardens). B. GREGORY DEPO. TR., Exhibit A, at 32-36. It then actively participates in efforts to defeat the applications. In this case, TJFA purchased two properties within one mile of the Sunset Farms Landfill shortly before BFI filed its expansion application but long after BFI had publicly declared its intention to file the application (a 11.224-acre property located at 5510 Blue Goose Road it purchased in November 2004, and a 5.59-acre property located at 9900 Springdale Road it purchased in December 2004).¹

TJFA's ongoing, serial efforts to manufacture "affected person" status in MSW proceedings involving its competitors by purchasing nearby properties undermines the intent and purpose of the rules governing affected persons and standing. The MSW rules do not exist to provide competitors with an avenue to use the legal process to engage in anticompetitive efforts and try to gain greater control of market share; instead, the rules are intended to provide individuals and businesses whose persons and properties might be legitimately affected by a proposed facility with an opportunity to challenge the application in a neutral forum using a structured legal framework. It is also poor public policy to allow any such activities.

Considering "all factors," TJFA should not be granted party status in this matter. *See* 30 TAC §55.203(c). Alternatively, BFI should be provided great latitude to engage in discovery of TJFA and its principals (including the true purpose and practices of the entity and its principals) before any determination is made as to TJFA's party status.

¹ The 9900 Springdale address is also located near the Austin Community Landfill, which is operated by Waste Management and is also the subject of a pending expansion application.

Amy Kersten

Amy Kersten filed a request for a hearing on November 2, 2007. She stated her address as 9038 Wellesley Dr., Austin, Texas 78754. GPS mapping indicates that Ms. Kersten's home is approximately one mile from the nearest permit boundary. BFI does not object to Ms. Kersten being deemed an affected person and granted party status in this matter.

Nora Longoria

Nora Longoria filed a request for hearing on October 31, 2007. She stated her address as 7005 Dagon Drive, Austin, Texas 78754. GPS mapping indicates that Ms. Longoria's home is within one mile of the nearest permit boundary. BFI has no objection to Ms. Longoria being deemed an affected person and granted party status in this matter. Ms. Longoria appears to live within the Harris Branch Residential Property Owners Association area, so BFI respectfully requests that Ms. Longoria and HBRPOA be aligned if both are granted party status.

Bill and Anne McAfee

Bill and Anne McAfee submitted several hearing requests that list their address as 4831 Timberline Drive, Austin, Texas 78746. This address is approximately 10.2 miles from the facility. Given this distance, BFI believes that the McAfees' interests are "common to members of the general public" and therefore do not qualify as a "personal justiciable interest." Nor have they shown there is any "likely impact of the regulated activity on the health and safety" of their family or the use of their property as required by §55.209(e)(1). Bill and Anne McAfee are thus not affected persons and should not be granted party status.

Mark and Melanie McAfee

Mark and Melanie McAfee submitted several hearing requests. While their home address is listed as 6315 Spicewood Springs Rd, which is approximately 9.15 miles from the facility, they also own the Barr Mansion & Artisan Ballroom, a business which has an address of 10463 Sprinkle Road, Austin, Texas 78754. Barr Mansion is located approximately one mile from the nearest permit boundary. BFI has no objection to Mark and Melanie McAfee being deemed affected persons in connection with their business property and granted party status in this matter.

Alto and Rosemary Nauert

Alto and Rosemary Nauert requested a hearing on October 30, 2007. The letter states that their address is 11201 Aus-Tex Acres Lane, Manor, Texas 78653. GPS mapping indicates that their home is within one mile of the nearest permit boundary. BFI has no objection to the Nauerts being deemed affected persons and granted party status in this matter. Because the Nauerts appear to live either within the Harris Branch Residential Property Owners Association area, or immediately next to it, BFI respectfully requests that the Nauerts and the HBRPOA be aligned if both are granted party status.

Cecil and Evelyn Remmert

Cecil and Evelyn Remmert submitted a hearing request on November 1, 2007. They stated their address as 11815 Cameron Road, Manor, Texas 78653. They own property adjoining the facility. BFI has no objection to the Remmerts being deemed affected persons and granted party status in this matter.

Delmer Rogers

Delmer Rogers submitted a request for hearing on June 1, 2007. He stated his address as 5901 Speyside Drive, Manor, Texas 78653. GPS mapping indicates that Mr. Rogers' home is approximately 1.5 miles from the nearest permit boundary. Given this distance, BFI believes that Mr. Rogers' interests are most reasonably construed as "common to members of the general public" and not "personal justiciable interests." However, because Mr. Rogers has identified himself as being the Secretary of the HBRPOA's Board of Directors, BFI requests that Mr. Rogers be aligned with HBRPOA if both are granted party status.

Mike and Ramona Rountree

Mike and Ramona Rountree submitted a hearing request on October 29, 2007. The request stated their address as 6920 Thistle Way, Austin, Texas 78754. GPS mapping indicates that their residence is within one mile of the nearest permit boundary. BFI has no objection to the Rountrees being deemed affected persons and granted party status in this matter. The Rountrees appear to live within the Harris Branch Residential Property Owners Association area, so BFI respectfully requests that they and the HBRPOA be aligned if both are granted party status.

Celeste Scarborough

Celeste Scarborough filed a request for hearing on October 31, 2007. Her letter states that she lives at 1632 Payton Falls Drive, which she claims is "located 1½ miles from the ... landfill." GPS mapping indicates that her residence is over 2.3 miles from the nearest permit boundary, however. At this distance, Ms. Scarborough's interests are "common to members of the general public" and therefore do not qualify as a "personal justiciable interest." Nor has she shown there is any "likely impact of the regulated activity on the health and safety" of her family

or the use of her property as required by §55.209(e)(1). As such, Ms. Scarborough has not qualified as an affected person and should not be granted party status.

Roy and Janet Smith

Roy and Janet Smith requested a hearing in both May and November 2007. They stated that they live on the Remmert property, at 11815A Cameron Road, Manor, Texas 78653. GPS mapping indicates that the Smith's residence is located within one mile of the nearest permit boundary. BFI has no objection to the Smiths being deemed affected persons and granted party status in this matter. However, because their standing is based on living on the Remmerts' property, BFI requests that the Smiths be aligned with the Remmerts if both are granted party status.

Sen. Kirk Watson and Rep. Mark Strama

Senator Watson and Representative Strama filed a letter on June 29, 2007, in which they expressed concerns and issues they have on behalf of their constituents. On November 2, 2007, they submitted a second letter re-iterating that they "desire to have the Commission refer this application to SOAH for consideration through the contested case process. Issues impacting this permit application are in dispute, and a number of our constituents are 'affected persons' and intend to seek party status."

It does not appear that either Senator Watson or Representative Strama are seeking party status for themselves individually, but are only requesting that the case be referred on behalf of their constituents. BFI appreciates the concerns that Senator Watson and Representative Strama have expressed on behalf of their constituents, and desires to resolve those issues through continued cooperation with these public officials. However, neither letter complies with Commission's requirements for hearing requests, and therefore should not be granted as such.

Nevertheless, since BFI is not disputing whether certain other hearing requests that have been made by affected persons should be granted, it believes that Senator Watson's and Representative Strama's recommendations have been duly considered.

Because the letters do not comply with §55.211(c), they do not represent valid hearing requests by "affected persons" – and neither Senator Watson nor Representative Strama should be granted party status.

Williams Ltd., Evan Williams and Roger Joseph

Williams Ltd, through one of its general partners, Evan Williams, filed two requests for hearing. In the second request dated October 30, 2007, Mr. Williams stated that he also was writing on behalf of Roger Joseph. Williams Ltd. owns property adjoining the facility at 5419 Blue Goose Road. BFI has no objection to Williams Ltd. and Mr. Williams being deemed affected persons and granted party status in this matter. Assuming that Mr. Joseph is also a partner of Williams Ltd., BFI has no objection to him being deemed an affected person and granted party status. BFI reserves the right to object to Mr. Joseph's standing, based on additional information it may obtain during discovery. BFI requests that Mr. Williams, Mr. Joseph, and Williams Ltd. be aligned if more than one is granted party status.

Petition Signatories

A number of individuals did not submit letters requesting a hearing and identifying issues.² Instead, they signed a petition that simply shows their name, address and phone number. The signature pages stated: "We, the undersigned, oppose the application for expansion of the BFI Waste Systems of North America, Inc./Giles Holdings L.P. (TCEQ Permit #1447A). We

² Where a signatory to the petition also submitted an individual letter requesting a hearing, Sunset Farms has addressed that individual's standing in the section above.

further request a contested case hearing on this permit.” The cover letter that accompanied the simply petition stated that the “individuals represented here either live or work in the area in which BFI landfill is located” – but the petition and cover letter are unclear whether the addresses that were provided were home addresses or work addresses.

Because the addresses listed on the petition are the only indication of whether or not each individual is an “affected person,” BFI's analysis is limited to the issue of whether or not the addresses that have been provided are near enough to the facility that the individual possibly has a personal justiciable interest. The following petitioners have provided addresses that are within approximately one mile of the permit boundaries:

Table 2 – "Petitioners" Giving Addresses Within One Mile of Facility

Name	Address	Distance
Terry Cainal	11017 Reliance Creek Drive Austin, Texas 78754	0.90 mi.
Amy Williamson	11017 Reliance Creek Drive Austin, Texas 78754	0.90 mi.
James Marchak	6300 Thirlmare Court Austin, Texas 78754	0.90 mi.
Jeffery Seider	6605 Cairsbroke Lane Austin, Texas 78754	0.59 mi.
Amber Buonodono	11105 Seay Street Austin, Texas 78754	0.21 mi.
Tony Buonodono	11105 Seay Street Austin, Texas 78754	0.21 mi.
Pam Luttig	11105 Seay Street Austin, Texas 78754	0.21 mi.
Allan Luttig	11105 Seay Street Austin, Texas 78754	0.21 mi.
Chuck Dabbs	11410 Birchover Lane Austin, Texas 78754	0.51 mi.
Kathryn E Albee	11406 Birchover Lane Austin, Texas	0.51 mi.
Merry Rightmer	6325 Thirlmare Court Austin, Texas 78754	0.89 mi.

Name	Address	Distance
Vu Tran	6854 Thistle Hill Way Austin, Texas 78754	0.52 mi.
Sean Cottle	11009 Silo Valley Drive Austin, Texas 78754	0.97 mi.
Lionel Bess	4713 Fort Moultrie Lane Austin, Texas 78754	0.88 mi.
Tim Fleetwood	9011 Magna Carta Loop Austin, Texas 78754	0.83 mi.
David Williams	11604 Rydalwater Lane Austin, Texas 78754	0.70 mi.
James Daniel	11333 Averting Lane Austin, Texas 78754	0.39 mi.
Cam Junker	11709 Lansdowne Road Austin, Texas 78754	0.86 mi.
Ron Junker	11709 Lansdowne Road Austin, Texas 78754	0.86 mi.
Lee Cook	9500 Highway 290 East Austin, Texas 78754	0.65 mi.
Melissa Fields	3521 Long Day Drive Austin, Texas 78754	Approx. 1 mi.
Dan Pyka	8807 Newport Ln Austin, Texas 78754	Approx. 1 mi.
Roland Valles	8805 Newport Lane Austin, Texas 78754	Approx. 1 mi.
Michael Young	8901 Newport Ln Austin, Texas 78754	Approx. 1 mi.

These 24 individuals have provided information suggesting that they are presumptively affected persons and thus (at least provisionally) entitled to party status. BFI reserves the right to object to these persons' status, however, if discovery indicates that any of these individuals do not presently own or reside at the referenced properties.

The following petitioners have provided addresses that are further than a mile from the permit boundaries, and have provided no other information regarding themselves or their properties:

Table 3 – "Petitioners" Giving Addresses More Than One Mile from Facility

Name	Address	Distance
Elizabeth Trevino	12209 Little Fatima Lane Austin, Texas 78753	3.14 mi.
Sherry Pyle	1509 Payton Falls Drive Austin, Texas 78754	2.38 mi.
David Gunlock	8004 Brown Cemetery Road Manor, Texas 78653	8.13 mi.
Alfred Wendland	16519 Mahlow Road Manor, Texas 78653	6.58 mi.
Jocelyn Doherty	1103 Byers Lane Austin, Texas 78753	3.02 mi.
Weldon Long	2118 South Congress Ave. Austin, Texas 78704	9.86 mi.
Rebecca Martinez	1613 Brushy View Cove Austin, Texas 78754	2.24 mi.
Ed Attra	1613 Brushy View Cove Austin, Texas 78754	2.24 mi.
Susan Morgan	1611 Brushy View Circle Austin, Texas 78754	2.24 mi.
Mary Lehman	1110 E 37th Street Austin, Texas 78705	6.31 mi.
Mark Wilkerson	5905 Boyce Lane Manor, Texas 78653	1.39 mi.
Jeremy Vest	5917 Boyce Lane Manor, Texas 78653	1.39 mi.
Karen Vest	5917 Boyce Ln Manor, Texas 78653	1.39 mi.
Georgia Rich	1609 Brushy View Cove Austin, Texas 78754	2.26 mi.
Celeste Scarborough	1632 Payton Falls Austin, Texas 78754	2.37 mi.
Cloyce Spradling	5913 Boyce Ln Manor, Texas 78653	1.40 mi.

At these distances – and absent any other showing of any "likely impact of the regulated activity on the health and safety" of their families or the use of their properties as required by 30 TAC § 55.209(e)(1) – these persons' interests are "common to members of the general public" and

therefore do not qualify as a "personal justiciable interest." These 16 individuals have not qualified as affected persons and should not be granted party status

BFI reserves the right to object to each petitioner's standing based on additional information it may obtain during discovery. BFI also requests that any of these individuals who are granted party status in the matter be aligned as one group.

IV. ISSUES FOR REFERRAL (§55.209(e)(2-6))

Once the "affected person" analysis has occurred and eligible parties have been identified, the Commission must determine which issues that have raised by an affected person in a valid hearing request should be referred to the State Office of Administrative Hearings ("SOAH") for consideration in the contested case hearing. *See* TEX. WATER CODE ANN. §5.556. Section 5.556 also requires the Commission to limit both the number and scope of issues that are referred to SOAH for hearing. *Id.*

Table 4 below summarizes which issues should be referred to hearing in connection with this application, and why the issues should or should not be referred. The first column numbers each issue; these numbers correlate to the numbers that were used by the Executive Director in his Response to Public Comments. The second column briefly describes each issue that was requested. Conceptually similar or similarly worded issues filed by different requestors (or even the same requestor) have been combined where appropriate. The third column provides an abbreviation identifying each affected person that raised that particular issue (see Table 1 to match the abbreviation to the person or entity). The fourth column states whether the issue was raised during the public comment period as required by §55.209(e)(4). The fifth column addresses whether the issue raised is a disputed issue of fact as required by §55.209(e)(2)-(3).

The sixth column addresses whether the issue is relevant and material to the decision on the application, as required by §55.209(e)(6). The next column shows which applicable rules and/or statutes are implicated by the issue. No hearing requests were found to be based on issues raised solely in a public comment that was withdrawn by the commenter in writing (§55.209(e)(5)), so no column is provided for that requirement. The final column states whether the issue qualifies for referral under the Commission's rules.

An explanation is then provided in Section V for each issue that fails to meet any one of these criteria and thus should not be referred.

**Table 4 – Summary of Issues Considerations
Sunset Farms Landfill**

ISSUE		RAISED BY AFFECTED PERSON?	RAISED IN COMMENT?	DISPUTED FACT?	RELEVANT/MATERIAL?	MSW RULES ³	REFER?
9 & 18	Generalized Health, Welfare and Environmental Issues (Low Economic Area; Health and Environmental Risks; Environmental Impact Statement)	Yes	Yes	Yes	No	None	No
1, 2 & 3	Procedural/Notice Issues (Opposition to Expansion; Public Meeting Date; Comment Period; Issues for Hearing; Access to Application Materials)	Yes	Yes	No	Yes	Miscellaneous	No
4, 5 & 16	Applicant/Owner Identity Issues (Representative of BFI with Legal Authority Over Application; Identification of Permittee and Site Owners; Ownership and Use of 54.13-Acre Tract of Land Transferred from Giles Holdings to BFI)	Yes	Yes	No	Yes	330.52(6)-(10); 330.56(i)	No

³ Refers to MSW Rules in effect when BFI files its permit amendment application on January 20, 2006.

ISSUE		RAISED BY AFFECTED PERSON?	RAISED IN COMMENT?	DISPUTED FACT?	RELEVANT/MATERIAL?	MSW RULES ³	REFER?
6a	Permit Term and End Date for Waste Acceptance	Yes	Yes	No	No	330.55(a) & 330.63(a)	No
6b	Coordination with CAPCOG	Yes	Yes	No	Yes	330.51(b)(10)	No
7	Regional MSW Planning (Regional Capacity, Facility as a Regional Landfill, and Planning for New Location)	Yes	Yes	No	No	None	No
8	Applicable MSW Rules	Yes	Yes	No	N/A	330.1(a)	No
10a	Compliance History	Yes	Yes	Yes	Yes	30 TAC Chap. 60	Yes
10b	Complaint Response and Enforcement	No	Yes	No	No	N/A	No
11	Business Practices of Applicant	No	Yes	Yes	No	None	No
12	Application Format and Professional Responsibilities	No	Yes	No	Yes	330.51(d) & (e); 330.54(a); 330.56(d)	No
13	Land Use (Compatibility with Surrounding Community and Growth Trends)	Yes	Yes	Yes	Yes	330.53(b)(8)	Yes
14	Facility Location	No	Yes	No	Yes	N/A	No
15a	Buffer Zone	Yes	Yes	Yes	Yes	330.121(b); 330.52(b)(4)	Yes
15b	Easements	No	Yes	No	Yes	330.121(a); 330.52(b)(4); 330.53(b)(7)	No
17	Size of Facility and Visual Impact (Screening)	Yes	Yes	Yes	No	330.56(a)(1); 330.138	Only as "Visual Screening"
19	Types of Waste Accepted	No	Yes	No	Yes	Miscellaneous	No
20	Traffic/Transportation	Yes	Yes	Yes	Yes	330.51(b)(6); 330.52(b)(4); 330.53(b)(9); 330.56(a)(2)	Yes
21	Site Operating Plan	No	Yes	Yes	Yes	330.114	Not as Separate Issue
22a	Odors	Yes	Yes	Yes	Yes	330.33(a); 330.56(n) & (o);	Yes

ISSUE		RAISED BY AFFECTED PERSON?	RAISED IN COMMENT?	DISPUTED FACT?	RELEVANT/MATERIAL?	MSW RULES ³	REFER?
						330.125(b); 330.200(a); 330.201	
22b	Air Pollution (have std air permit)	Yes	Yes	Yes	No	330.125	No
23	Working Face	Yes	Yes	Yes	Yes	330.117	Yes
24	Dust	Yes	Yes	Yes	Yes	330.127(b)	Yes
25a	Operating Hours	Yes	Yes	Yes	Yes	330.118	Yes
25b	Noise and Vibrations	Yes	Yes	Yes	No	None	No
26	Tracking of Mud and Dirt onto Public Roadways	Yes	Yes	Yes	Yes	330.127	Yes
27	Windblown Trash and Roadside Litter	Yes	Yes	Yes	Yes	330.120; 330.123	Yes
28	Scavenging Animals and Vectors	Yes	Yes	Yes	Yes	330.126	Yes
29a, 35 & 38	Groundwater Protection (Liner and Leachate Collection System Design and Construction; Leachate Management and Contaminated Water Management; Subsurface Investigation; Groundwater Monitoring)	Yes	Yes	Yes	Yes	330.56(d), (e), (f), (k) & (o), 330.200-205 330.56(d) & (e); 330.231-235	Yes
29b	Slope Stability	No	Yes	Yes	Yes	330.56(d) & (j)	No
30	Effect of Vertical Expansion Over Pre-Subtitle D Waste Areas	No	Yes	No	No	N/A	No (New Rules Not Applicable)
31	Daily Cover	Yes	Yes	Yes	Yes	330.133(a)	Yes
32	Soil Stockpiles	No	Yes	Yes	No	N/A	No
33	Drainage and Erosion Controls	Yes	Yes	Yes	Yes	330.55(b); 330.56(f) & (g); 330.133	Yes
34	Cover Inspection and Repair	Yes	Yes	Yes	Yes	330.133(f)	Yes

ISSUE		RAISED BY AFFECTED PERSON?	RAISED IN COMMENT?	DISPUTED FACT?	RELEVANT/MATERIAL?	MSW RULES ³	REFER?
36	Surface Water Protection (Contaminated Water Runoff)	Yes	Yes	Yes	Yes	330.55(b); 330.56(f) & (o); 330.134; 330.139	Yes
37	Final Cover Design	Yes	Yes	Yes	Yes	330.55(b)(8); 330.253	Yes
39	Landfill Gas Management	Yes	Yes	Yes	Yes	330.56(n); 330.130	Yes
40a	Wetlands	No	Yes	No	Yes	330.51(b)(7); 330.53(b)(12); 330.56(d)(3) (C); 330.302	No
40b	Endangered Species Protection and Habitat	No	Yes	No	Yes	330.51(b)(8); 330.53(b)(13); 330.55(b)(9); 330.129	No
41	Financial Assurance	No	Yes	No	Yes	330.52(11)	No
42	Recycling	No	Yes	No	No	None	No
43	Post-Closure Care and Use of Land After Closure	No	Yes	No	Yes	330.56(l) & (m); 330.254(b); 330.255; 330.283	No
44	Comments by Applicant	No	Yes	No	No	None	No
--	Property Values	Yes	Yes	No	No	None	No (No Jurisdiction)

V. ISSUES NOT ELIGIBLE FOR REFERRAL

Section 50.115(c) of the Commission's rules states that the "commission *may not* refer an issue to SOAH for a contested case hearing unless the commission determines that the issue: (1) involves a disputed question of fact; (2) was raised during the public comment period; and (3) is relevant and material to the decision on the application" (emphasis added). 30 TAC §50.115(c). Additionally, issues must be raised in a timely request by a person who qualifies for party status

as an affected person. *Id.* at §55.211(b)(3)(A). This section of BFI's response discusses the issues that BFI submits are not appropriate for referral to SOAH. There are several reasons why some of these issues are not appropriate for referral.

The Commission has historically assessed the relevancy of an issue by considering whether that issue could form the basis of a necessary finding of fact and conclusion of law, and therefore whether or not the permit should be issued. If the issue is extraneous to that decision, it is not relevant or material to the decision on the application and should not be referred. Simply put, the Commission should ask whether an applicant's failure to sustain its burden of proof on an issue could result in denial of the application. If so, then the issue is relevant. If not, then the issue is not relevant. Since the Commission may not base a decision on factors not specifically enumerated by applicable statutes, rules, or regulations in making a decision on the application, such issues are not relevant and material. *See Starr County v. Starr Indus. Servs., Inc.*, 584 S.W.2d 352, 356 (Tex.Civ.App.—Austin 1979, writ ref'd n.r.e.).

General Health and Environment Issues

The underlying principle of environmental permits is that permits that are issued in accordance with established rules are protective of human health and the environment. To disregard this undermines the purpose and intent of the State's regulatory framework.

BFI firmly believes that the referral of general issues regarding "public health, safety, or welfare" to SOAH is contrary to H.B. 801, is legally improper, and is functionally unworkable. Referral of general issues effectively converts a limited referral of issues, as H.B. 801 contemplates, into a direct referral of the entire application. This undermines the very purpose and intent of H.B. 801 and the Commission's own rules. *See* TEX. WATER CODE ANN. §5.556(e) (referrals to hearing must limit the number and scope of issues); 30 TAC §55.211(b)(3)(A)

(stating that the factual issues to be referred to SOAH by the Commission must be "specific"). Broad-form issues such as whether a proposed facility will "adversely affect the health of a requests" or will "harm the environment" do not implicate a disputed question of fact, but instead involve *ultimate* issues and policy considerations which form the very foundation of the state's MSW statutes and the Commission's rules.

The stated legislative "policy and purpose" of the Texas Solid Waste Disposal Act (SWDA) is "to safeguard the health, welfare, and physical property of the people and the environment by controlling the management of solid waste ...". TEX. HEALTH & SAFETY CODE ANN. §361.002. In order to fulfill this policy and effect this purpose, the Texas Legislature has authorized the Commission to promulgate rules and standards pertaining to the management and control of solid waste and MSW facilities. *Id.* at §361.024. The Commission has, in turn, promulgated a comprehensive regulatory framework governing the collection, storage, transportation, processing and disposal of solid waste – *see* 30 TAC §330.1 *et seq.* – including (among other things) regulations pertaining to the classification of various wastes, waste streams and types of MSW facilities (*e.g.*, *id.* at §§330.3 & 330.5); facility permit requirements (*id.* at §330.7); general prohibitions pertaining to solid waste management (*id.* at §330.15); content requirements for permit applications for new facilities or expansions to existing facilities (*id.* at §330.57); site selection, land use compatibility criteria and location restrictions (*id.* at §§330.61 & 330.541-330.563); site development and facility design criteria (*e.g.*, *id.* at §§330.63 & 330.301-330.421); operational standards for facilities (*id.* at §§330.121-330.179); closure and post-closure (*id.* at §§330.451-330.509); and publication of technical guidelines by the Executive Director "outlining recommended methods designed to aid in compliance" with the MSW regulations (*id.* at §330.6). The Commission's regulations also include provisions for review of

permit applications for administrative completeness (*i.e.*, whether the application contains all of the information required by the State from applicants) and for technical review of the application by the agency's professional staff (*i.e.*, whether the application complies with the technical criteria that have been established by the State). *See, e.g.*, 30 TAC §§281.3, 281.17 & 281.19.

The very premise of the State's MSW framework, then, is that an MSW applicant who prepares, submits and then adequately demonstrates that its application meets or exceeds the agency's location restriction, design criteria and operational standards has proposed a facility that, by definition and consistent with the policy and purpose of the SWDA, "safeguard[s] the health, welfare, and physical property of the people and the environment." TEX. HEALTH & SAFETY CODE ANN. §361.002. At the conclusion of a contested case hearing, findings that an applicant has carried its burden of proof as to specifically referred issues showing satisfaction of the location restriction, design criteria and operational standards should lead to the ultimate finding that issuance of the permit would "safeguard the health, welfare and physical property of the people and the environment." While it is appropriate to reach such an ultimate finding, it should be made clear that such a finding is derivative of the findings on specifically referred issues, and not the subject of an independent inquiry in its own right.

In the past, the Commission has framed the broader health, safety and environmental impacts inquiries at contested case hearings on MSW applications in terms of this very premise: if the applicant satisfies its burden to show that its application and proposed facility meet the Commission's regulatory standards for the specific issues that are referred (*e.g.*, drainage, flood protection or control of windblown waste), then the proposed facility will by definition safeguard public health and welfare and the environment and otherwise satisfy the policy and purpose of

the Solid Waste Disposal Act and the MSW regulations. BFI submits that the Commission's established approach should be followed here, and that broad-form issues should not be referred.

A recent trend, however, has been to refer a general health-effects issue along with specific issues. General health issues have been referred on at least three recent occasions.⁴ The consequence of these referrals remains uncertain. There are now at least two sets of SOAH Administrative Law Judges grappling with general health issues in those contested case hearings. Those ALJs, the applicants, and all other parties need the Commissioners' guidance on the appropriate manner in which to address the broad-form general health issue.

The question of how to address broad-form referral issues – *i.e.*, whether broad-form issues should be referred at all in light of H.B. 801 and, if so, how they should be addressed by the ALJ and the parties at hearing – is not an abstract legal or academic question. Instead, broad-form referrals present very real problems which need to be addressed and resolved by the Commissioners *before* any referral is made. In the McCarty Road Landfill⁵ proceeding (proposed MSW Permit No. 261B), for example, last year the Commission referred a broad-form health effects issue to hearing to SOAH (whether the proposed expansion will negatively impact the health of the requestors and their families). McCarty Road Landfill filed a motion to certify a question to the Commission regarding the construction and application of that issue at hearing – and its potential effect on the respective burdens of proof and persuasion in the hearing, scope and duration of discovery, length of the proceeding, costs, and the very nature of the claims and issues at hearing. (A copy of McCarty Road Landfill's Motion to Certify is attached as Exhibit C

⁴ McCarty Road Landfill, TX, LP, TCEQ Docket No. 2006-1830-MSW; Blue Ridge Landfill, TX LP, TCEQ Docket No. 2007-0614-MSW; IESI TX Landfill, LP, TCEQ Docket No. 2007-1302-MSW. For purposes of full disclosure, McCarty Road Landfill TX, LP and Blue Ridge Landfill, TX, LP are corporate affiliates of the applicant in this proceeding, BFI Waste Systems of North America, Inc.

⁵ For purposes of full disclosure, McCarty Road Landfill TX, LP is a corporate affiliate of the applicant in this proceeding, BFI Waste Systems of North America, Inc.

hereto.) That motion was denied by the ALJ, *see* Exhibit D, but the underlying issues raised by the applicant in its motion to certify in that proceeding were not resolved by the ALJ's ruling and have not yet been clarified by the Commission on a more global or uniform basis. This application presents the Commissioners with such an opportunity to clarify.

Because the broad-form, general health issue is now pending in three other contested case hearings and is before the Commission in this case, BFI respectfully submits that if a health effects issue is referred here (as discussed above, BFI believes such a referral is not consistent with H.B. 801), the issue should be referred in a manner that narrows its scope and clarifies the burdens of proof and persuasion. Specifically, BFI submits that any such issue should be referred with the instruction/clarification that if BFI has shown that its application complies with the MSW regulations for the specific design or operational issues that have been referred, then it has presumptively satisfied its burden to show that the proposed facility will be protective of human health and the environment – and that an ultimate finding that the facility will be protective of the health of the requestors and the requestors' families should ensue. This presumption could be rebutted, however, if a protestant were to come forward at hearing with specific proof that his or her health would be adversely affected by the expanded facility – even if it were designed, constructed and operated in accordance with the permit and the MSW regulations. Upon coming forward with such evidence, the burden of persuasion would shift to BFI, as applicant, to show that this is not the case. Based on the evidence, the ALJ would then prepare findings of fact and conclusions of law which the Commission could use in determining whether the application should be granted.

Procedural/Notice Issues

Several threshold issues are essentially procedural issues about which there are no disputed facts: denying the requested expansion; the public meeting notice, date, and comment period; and access to application materials.

Several commenters requested that the Commission simply deny the proposed expansion. However, there is no disputed issue of fact that BFI has filed the necessary documents and taken the necessary procedural steps to seek an expansion. Whether or not that expansion should be granted will be determined through the contested case process. It is not a separate issue for referral.

Some requestors raised concerns about the clarity of the notices for the public meetings, the deadline for comments, and which issues would be referred for hearing. Others raised concerns about the access to the application and revisions. With respect to both of these issues, there are no disputed facts about the technical adequacy of the notices or whether BFI met the procedural requirements for notice and the comment period and for providing for public access to the application (as evidenced, at least in part, by the very existence of these requestors' written comments).

Travis County Judge Samuel Biscoe commented that Travis County had requested and received the initial application, but not subsequent revisions. Not only is BFI not required to provide the County with these documents under the MSW rules, but the County has not requested a hearing – so this concern was not raised by an “affected person” in its written request for a hearing.

These procedural/notice issues should not be referred.

Applicant/Owner Identity Issues

Some requestors raised issues related to who has legal authority over the application, the identification of the permittee and site owners, and BFI's purchase of 54 acres in the northeast quadrant of the site from Giles Holding.

The identification of the permittee and site owners, and who is legally responsible for the landfill, has been clarified in BFI's amended application and the updated draft permit. The issue has thus been mooted through the application process, and no disputed issue of fact exists.

The location of the 54.13-acre tract is shown in Figure 1.F in Part I of the application. The reason for BFI's purchase of the tract is not stated in the application and is not required by the MSW rules. The substantive issues that are potentially related to the 54.13-acre tract, such as runoff and drainage, are addressed in the relevant portions of the application. Those substantive issues have also been raised by requestors and, when the other requirements for referral have been satisfied, are properly referred to SOAH.

For the foregoing reasons, this issue should not be referred.

Permit Term and End Date for Waste Acceptance

Some requestors raised the issue of a closing date for the landfill – particularly the November 1, 2015 date that had been discussed with the County. As a rule, the permit term is neither relevant nor material to the decision on the application. The MSW rules require only that an "estimate" of the operating life of the site be provided. 30 TAC §330.55(a)(4).⁶ The permit is based on the volume and final contour and is issued for the actual life of the site. 30 TAC §330.63(a). Because the permit is issued for the actual life of the site, the site is subject to the rules for its actual life – not only the life-span estimated in the application. Thus, even if the

⁶ All citations are to the rules in effect when the Sunset Farms application was declared administratively complete in January 2006.

requestor was able to prove that the landfill would be open for longer than the estimate, this would not constitute a basis for denying the application, and thus the issue is not material and relevant.

In any event, this issue has been mooted. At the request of BFI, the Executive Director has included a special permit provision that requires the site to close on November 1, 2015. The deadline for receiving waste will thus be enforceable as a permit provision. Neither BFI nor any affected person is contesting the inclusion of that special provision, so no disputed issues remain to be referred. The issue therefore should not be referred to SOAH.

Coordination with CAPCOG

While the MSW rules do require a demonstration of compliance with the regional solid waste plan (which, in this case, is the Capital Area Council of Governments or "CAPCOG"), *see* 30 TAC §330.51(b)(10), there is no issue here that such coordination with CAPCOG took place; that CAPCOG has determined that the proposed vertical expansion will conditionally conform with the regional solid waste management plan; or that BFI agreed in its amended application "that all waste receipt will cease at the Sunset Farms Landfill facility no later than November 1, 2015, conditioned on the continued determination by CAPCOG that the proposed landfill expansion is in conformance with their Regional Solid Waste Management Plan ...". A true and correct copy of CAPCOG's final letter of conditional conformance, which is dated August 23, 2006, was included in Section II.K of the amended application and is also attached as Exhibit E to this response. Because there is no disputed question of fact, this issue should not be referred.

Regional MSW Planning

Aside from the demonstration of compliance with the CAPCOG regional solid waste plan (see above), the MSW rules do not require BFI or other MSW applicants to engage in independent regional solid waste planning or analysis in connection with an application or to include additional materials pertaining to regional MSW planning in the application. Thus, there is no disputed issue of fact pertaining to "Regional MSW Planning," nor is such planning material or relevant to the application review process. This issue should not be referred to contested case hearing for both of these distinct reasons.

Applicable MSW Rules

Several requesters (including NNC) raised the issue of which rules were used to process BFI's application, arguing that the application or parts thereof should be governed by the rules that become effective on March 27, 2006. The issue of which regulations govern the permit application (*i.e.*, those in effect at the time the application was filed) is an question of law. BFI filed its application on January 20, 2006, and it was declared administratively complete on January 31, 2006. These facts are not disputed. Because the applicability of various regulations to this application is an issue of law and there are no underlying disputed facts pertaining to the relevant dates, this issue should not be referred.

Complaint Response and Enforcement

Some requestors (Joyce Best and Trek English) asserted that the agency has not responded to complaints or taken sufficient enforcement actions. As discussed in Section III above, Ms. English lives over 150 miles away from the facility in Arlington and Ms. Best lives approximately 8.5 miles from the facility. As such, neither is an affected person. As further

discussed, Northeast Action Group lacks associational standing and thus is also not an affected person. The issue could and should be denied on this basis alone. In addition, however, this issue is neither relevant nor material to the review of the application. The issue of complaint response and enforcement is directed towards the agency action. In contrast, the issue of BFI's compliance history at the facility addresses its past actions at the site, and BFI has agreed that "compliance history," as that term is defined and used in the MSW statutes and rules, should be referred to SOAH in connection with this application. See Tables 4 and 6.

Business Practices of Applicant

One or more commenters raised the issue of BFI's business practices, including its setting of disposal fees, but BFI cannot find any instance where an affected person raised this issue. Moreover, while BFI disputes the allegations, they are not material or relevant to this proceeding. No MSW regulation requires information regarding or consideration of the applicant's general business practices or price structure in connection with an application. The regulations provide a clear and specific list of issues that are relevant to "compliance history." The primary element is "any final enforcement orders, court judgments, consent decrees, and criminal convictions of this state and the federal government relating to compliance with applicable legal requirements under the jurisdiction of the commission or the EPA. 'Applicable legal requirement' means an environmental law, regulation, permit, order, consent decree, or other requirement." 30 TAC §60.1(c). The rest of the listed factors in the compliance history section similarly focus on environmental issues. BFI's compliance with environmental requirements at the site are at issue in this proceeding (as "compliance history"), not its economic/business practices.

Application Format and Professional Responsibilities

One requester (TJFA) commented that the application was improperly signed and sealed by engineers and that figures in Part III, Attachment 4 lacked page numbers. As discussed in Section III above, TJFA should not be deemed an affected person, and this issue could and should be denied on this basis alone. Moreover, as the Executive Director properly noted in his response to comments, the application was properly sealed by the responsible engineers and geoscientists, and the figures in Attachment 4 were assigned separate figure numbers that were arranged in a logical numbering scheme. There is no disputed issue of fact with respect to the professional seals or other aspects of the format of the application under the governing rules, and this issue should not be referred.

Facility Location

One requester (Trek English) stated that the facility location in the draft permit is incorrect. As discussed in Section III above, Ms. English lives over 150 miles away from the facility in Arlington and is not an affected person. As further discussed, Northeast Action Group lacks associational standing and thus is also not an affected person. The issue could and should be denied on this basis alone. However, the agency has specified that the location specified in the draft permit – approximately $\frac{3}{4}$ of a mile north of the intersection of Giles Road and US Highway 290, in Travis County, Texas – is accurate. So there is no disputed issue of material fact, and referral of this issue is not appropriate for this additional reason.

Easements

One requester (TJFA) commented that there is no discussion of easements in Part III of the application. As discussed in Section III above, TJFA should not be deemed an affected

person, and this issue could be denied on this basis alone. In any event, however, as the Executive Director noted in his response to comments, the MSW rules do not require applicants to discuss easements in Part III. Instead, matters pertaining to easements must be discussed in Parts I and II, which BFI did in its application. Because there is no disputed issue of fact pertaining to discussions of easements in the application consistent with the MSW rules, this issue should not be referred.

Size of Facility and Visual Impact

Several requesters (including Melanie and Mark McAfee) commented on the visual impact of the vertical expansion. BFI notes that there are no MSW regulations that place a *per se* limit on the size and, more particularly for the purposes of this application for a vertical expansion only, the permitted height of a landfill. Nor are there any rules that specifically address the "visual impact" of a proposed facility. However, the MSW rules do include a provision for visual screening of deposited waste. *See* former rule 30 TAC §330.138 (amended and adopted as §330.175 effective March 27, 2006). BFI submits that issues pertaining to the "size" of the landfill should not be referred because they are not material or relevant to the Commission's decision, but agrees that an issue pertaining to whether the application adequately provides for visual screening of deposited wastes under the rules should be referred.

Types of Waste Accepted

BFI is not aware of any comment made by an affected person that can be fairly construed as raising a fact issue as to the types of waste that should be accepted at the facility under the amended permit. NNC made comments regarding certain types of waste that are handled at the facility, but those comments were made in the context of odor management, which BFI agrees should be referred as an issue. Trek English made cursory references to waste streams in her

letter dated May 24, 2007, but that part of the letter only stated that she would be submitting comments on various matters at a later date. There is no discussion regarding her specific concerns pertaining to waste streams. Moreover, as discussed in Section III above, Ms. English lives over 150 miles away from the facility in Arlington and is not an affected person. As further discussed, Northeast Action Group lacks associational standing and thus is also not an affected person. For the foregoing reasons, this issue should not be referred.

Site Operating Plan

Vague concerns relating to the Site Operating Plan were raised only by the Northeast Action Group, which lacks associational standing and is not an affected person for the reasons described in Section III above. Because this issue was not raised by an affected person, it should not be referred – certainly not in a broad form.

BFI does not object to referral of specific issues that pertain to site operations (such as control of windblown waste and roadside litter; hours of operation; control of vectors) that were timely raised by one or more affected persons in their hearing requests and are material and relevant to the application. See Tables 4 and 6 for a summary of operational issues that BFI agrees should be referred.

Two requesters – Trek English and TJFA – commented on the fire protection plan in their written comments. As discussed in Section III above, neither Ms. English nor TJFA are affected persons. Northeast Action Group lacks associational standing and thus is also not an affected person. Accordingly, the adequacy of the application's fire protection plan (or parts thereof) should not be referred because this issue was not raised by an affected person.

Air Quality/Pollution

Several requesters included comments regarding air quality/pollution. Under the rules governing this application, air quality/air pollution issues are not relevant or material. Instead, air issues at the landfill are regulated under a separate permitting regime and separate permits that have already been obtained for the facility (Standard Permit Registration No. 70311 and General Operating Permit No. O-01452). Because there is a separate process for evaluation of air emissions from landfills, this issue is not material or relevant to this application and this issue should not be referred to SOAH. (BFI notes parenthetically that the Commission has not referred air issues in recent MSW permitting proceedings where air pollution had been raised by commenters.)

Noise and Vibrations

Several requesters (including Melanie McAfee and the Smiths) included comments regarding noise. One requester (Trek English) included a single reference to "vibrations." As discussed in Section III above, Ms. English lives over 150 miles away from the facility in Arlington and is not an affected person. As further discussed, Northeast Action Group lacks associational standing and thus is also not an affected person.

Issues regarding noise and vibration are not relevant or material to the decision on the application. There are no noise regulations in the TCEQ rules relevant to this application. While the Commission has promulgated rules against excessive noise for transfer stations/registrations, but has not promulgated any similar rules for landfills. *See id.* at §§330.59(b)(7), 330.65(e)(8), 330.71(f)(8) & 330.73(e)(8).

The regulations prohibit the facility from creating a nuisance. *Id.* at §330.5(a)(2). But noise and vibrations are not included in the Commission's regulatory definition of "nuisance," which provides as follows:

Municipal solid waste that is stored, processed, or disposed of in a manner that causes the pollution of the surrounding land, the contamination of groundwater or surface water, the breeding of insects or rodents, or the creation of odors adverse to human health, safety, or welfare.

Id. at §330.2. While the issues of noise and vibration are not relevant under the rules, the issue of the facility's operating hours, which the Executive Director responded to together with noise and vibration, is relevant. BFI has agreed that the issue of the operating hours should be referred to SOAH. See Tables 4 and 6.

Slope Stability

Trek English mentioned "slope stability" in her letter dated May 24, 2007 and again in her letter of November 5, 2007. There is no discussion regarding her specific concerns pertaining to slope stability, however. As discussed in Section III above, Ms. English lives over 150 miles away from the facility in Arlington and is not an affected person. As further discussed, Northeast Action Group lacks associational standing and thus is also not an affected person.

TJFA asserts in its June 29, 2007 letter that the stability analysis in Part III, Attachment 4 of the application is "not done to the industry standard of practice." As discussed above, TJFA is not an affected person either.

Issues pertaining to slope stability should not be referred because they have not been raised by an affected person. Additionally and alternatively, Ms. English's passing reference to slope stability cannot be fairly construed to raise a fact issue warranting referral.

Vertical Expansion Over Pre-Subtitle D Areas

The only requester who raised this issue is Joyce Best, who (along with Northeast Action Group) is not an affected person for the reasons discussed in Section III above. Moreover, this issue is a purely a question of law and policy, and does not present a disputed question of fact. The applicable MSW rules in effect when the clearly allow for a vertical expansion over pre-subtitle D areas.⁷ See 30 TAC §330.200(a) (*eff.* October 9, 1993) (requiring Subtitle D liners for "new" units and "lateral expansions" but not for vertical expansions of existing facilities).

(While issues of law and policy are not appropriate for referral, BFI notes parenthetically that it has agreed that an issue pertaining to groundwater protection should be referred.)

Soil Stockpiles

Trek English commented on the soil stockpiles in her letter dated November 5, 2007. As discussed above, neither she nor Northeast Action Group are not affected persons. The issue should be denied because it has not been raised by an affected person.

Wetlands

Vague wetland concerns were raised only by Joyce Best and Northeast Action Group. These hearing requestors are not affected persons for the reasons described in Section III. Because this issue was not raised by an affected person, it should not be referred.

Endangered Species and Habitat

The only requester who specifically raised endangered species as an issue was Amy Kersten, who asserted in her November 2, 2007 letter that she has seen "Mexican Spotted Owls

⁷ The rules governing vertical expansions over pre-Subtitle D areas have changed *since* this application was filed. See 30 TAC §330.331(a) (*eff.* March 27, 2006). The amended rule does not govern this application.

(an endangered species) ...” and other birds in the vicinity of Walnut Creek. Delmer Rogers, who lives approximately 1.5 miles from the facility, raised wildlife "habitat destruction" in his June 1, 2007 letter but did not specifically mention endangered species. His letter only discussed “Waste Management’s Wildlife Habitat Park” and did not raise any habitat issues pertaining to the Sunset Farms' facility or property.

While the potential impact of a facility on endangered species can be an issue for contested case hearing in MSW permitting proceedings, no legitimate disputed fact issue has been raised here by an affected person. As discussed in Section III above, Mr. Rogers should not be considered an affected person because he does not reside within one mile of the facility. Moreover, as the Executive Director correctly noted in his response to public comments, BFI included the required coordination letters with federal and state agencies in its application. The only listed species for the area surrounding the facility is the horned lizard, which no commenter mentioned. Ms. Kersten has not provided any basis to show that she has any training, expertise or experience as a biologist or birder, or that she has actually seen (much less documented) a listed endangered or threatened species at the site (which has been in operation for over 20 years). Travis County is not listed by federal or state agencies as known habitat for the Mexican Spotted Owl and, indeed, the facility is 500 miles from that species’ known habitat. Mr. Rogers has not raised any habitat issues specifically pertaining to endangered species. Moreover, his discussion of habitat pertains to property that is not owned or controlled by BFI.

Without a disputed question of fact raised by an affected person, this issue should not be referred.

Financial Assurance

The only requester who commented on financial assurance is Trek English, who made some passing references to financial assurance in her letter of November 5, 2007. Her letter does not appear to raise any specific issues as to the facility or the application. (Note: As the Executive Director correctly noted in his responses to comments, the facility is not in corrective action and thus a cost estimate and financial assurance pertaining to a corrective action are not required under the MSW rules.)

Moreover, as discussed above, Ms. English lives over 150 miles away from the facility in Arlington and is not an affected person. As further discussed, Northeast Action Group lacks associational standing and thus is also not an affected person. Issues pertaining to financial assurance should not be referred because they have not been raised by an affected person.

Recycling

Recycling was raised by requestors Trek English and Delmer Rogers. Ms. English, Mr. Rogers and Northeast Action Group are not affected persons for the reasons discussed above. Moreover, there is no disputed issue of fact with respect to recycling, nor is the issue material or relevant to any inquiry on the application. While recycling is an allowable part of an MSW facility, it is not a requirement under the regulations. *See* 30 TAC §330.4(g). This issue should not be referred for all of these reasons.

Post-Closure Care and Use of Land After Closure

The only requester who commented on post-closure care or use of the land after closure is Trek English, who made some passing references to post-closure in her letter of November 5, 2007. As discussed in Section III above, Ms. English lives over 150 miles away from the facility

in Arlington and is not an affected person. As further discussed, Northeast Action Group lacks associational standing and thus is also not an affected person. Issues pertaining to post-closure care and use of land after closure should not be referred because they have not been raised by an affected person.

Comments by Applicant

The Executive Director included a response to comments made by BFI on the draft permit in his list of issues. BFI had noted that: (1) the cover page misidentifies Giles Holdings, L.P. as a co-applicant; (2) Section III.D incorrectly represents waste acceptance rates; (3) Section IV.H should be revised to include the word "significant" in the phrase "any significant increase in bird activity"; and (4) Section VIII.D, referring to preconstruction meetings, should be deleted, because the proposed facility will neither be a new facility or a lateral expansion. All of these issues have been addressed in the revised draft permit, and there is no disputed issue of material fact. Nor has any affected person raised this "issue" in its hearing request. This issue should not be referred.

Property Values

Williams, Ltd. and Evan Williams raised diminution of property values as an issue in their letter dated October 30, 2007. Property values are not relevant and material to the decision on this application. As noted in the Executive Director's Response to Comments and in the Executive Director's response to comments in previous MSW proceedings, the Commission has repeatedly acknowledged that it has no authority (jurisdiction) to consider property values when reviewing MSW permit applications. *See, e.g., Executive Director's Response to Public Comments Concerning Application by Panama Road Landfill, TX, LP, MSW Permit No. 2296, p. 8 (Nov. 1, 2002); Executive Director's Response to Public Comments Concerning Application*

by *City of Shamrock MSW Permit No. 2281*, Docket No. 2001-0702-MSW pp. 13-14 (May 11, 2001); *Executive Director's Response to Hearing Requests, Hereford MSW Permit No. MSW 2289*, Docket No. 2002-0653-MSW p. 12 (June 3, 2002). The Commission has supported this position by not referring property value issues when they have been requested.

VI. DURATION OF HEARING (§55.209(e)(7))

Responses to hearing requests must address the maximum expected duration of the hearing from the first day of the preliminary hearing to the issuance of the proposal for decision. BFI suggests that, given the number of parties and number and complexity of issues, eleven (11) months is an appropriate duration.

VII. MEDIATION

BFI also respectfully requests that four (4) weeks be allowed for mediation between the parties, to be conducted by TCEQ mediators, prior to referral to SOAH.

VIII. REQUESTS FOR RECONSIDERATION

In addition to requests for hearings, requests for reconsideration were received from Joyce Best and TJFA. BFI respectfully requests denial of these requests for reconsideration in light of its recommendation for mediation and the Commission's referral for a contested case hearing.

IX. PRAYER

BFI does not object to a finding that the following persons are affected persons (subject to additional information related to standing obtained during discovery):

AFFECTED PERSONS/PARTIES
Amy Kersten
Northeast Neighbors Coalition
Nora Longoria.
Mark and Melanie McAfee
Alto and Rosemary Nauert
Cecil and Evelyn Remmert
Mike and Ramona Rountree
Roy and Janet Smith
Williams Ltd., Evan Williams and Roger Joseph (if a partner)
Terry Cainal
Amy Williamson
James Marchak
Jeffery Seider
Amber Buonodono
Tony Buonodono
Pam Luttig
Allan Luttig
Chuck Dabbs
Kathryn E Albee
Merry Rightmer
Vu Tran
Sean Cottle
Lionel Bess
Tim Fleetwood
David Williams
James Daniel
Cam Junker
Ron Junker
Lee Cook
Melissa Fields
Dan Pyka
Roland Valles
Michael Young

It respectfully requests that the Commission find that all other requestors are not affected persons for the reasons discussed herein. BFI submits that the issues listed in Table 6 below, and only

those issues, be referred to SOAH for consideration in the contested case hearing. All such issues that are referred should be stated in terms that are limited in scope and otherwise conform to the requirements set out in the MSW regulations so that the parties, SOAH and, ultimately, the Commissioners can properly focus on the regulatory standards that must be met. The most effective way to ensure that the application is considered against the specific design criteria and operational standards of the rules is to frame the issues in terms of the specific language of the rules.

Table 6 – Issues for Referral

REFERRAL ISSUES
Whether the facility is compatible with surrounding land uses
Whether the application complies with applicable buffer zone requirements
Whether the application complies with applicable visual screening requirements
Whether the application complies with odor management and dust control provisions
Whether the application complies with applicable traffic and transportation provisions
Whether the application adequately provides for managing the working face
Whether the application complies with provisions pertaining to operating hours
Whether the application proposes appropriate measures for preventing the tracking of mud and dirt onto public roadways and access roads
Whether the application provides adequate provisions for controlling windblown waste and roadside litter
Whether the application provides for adequate control of scavenging animals and vectors
Whether the application provides for the protection of groundwater
Whether drainage patterns will be significantly altered by the expansion
Whether the application provides for the protection of surface water and erosion
Whether the application provides for managing landfill gas

REFERRAL ISSUES
Whether the application complies with provisions pertaining to daily cover
Whether the application complies with provisions pertaining to final cover
Whether the application adequately provides for cover inspection and repair

BFI requests that a duration of eleven months be allowed for the hearing, and that six weeks be allowed for mediation between the parties prior to referral to SOAH.

BFI requests that the Commission deny all requests for reconsideration.

If any of the hearing requestors write to the Commission and inform the agency that they are not going to pursue their hearing request prior to the time at which the Commission meets to refer the issues, BFI requests that any issues raised solely by those hearing requestors not be referred to SOAH.

BFI prays for any and all other relief to which it is entitled.

Respectfully submitted,

**LLOYD GOSSELINK BLEVINS
ROCHELLE & TOWNSEND, P.C.**

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By: *Paul Gosselink*
PAUL G. GOSSELINK
State Bar Number 08222800

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Certificate of Service

I certify that a true and correct copy of this document was served on the following entities or individuals by certified mail (return receipt requested), hand delivery and/or facsimile at the addresses listed below on February 1, 2008:

Paul G. Gosselink
Paul G. Gosselink *By Pearson*
JSR
2

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DOCKET NO. 2007-1774-MSW; PERMIT NO. 1447A

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TCEQ Docket No. 2007-1774-MSW

IN RE THE APPLICATION OF BFI WASTE § BEFORE THE
SYSTEMS OF NORTH AMERICA, INC. § TEXAS COMMISSION ON
PERMIT NO. MSW-1447A § ENVIRONMENTAL QUALITY

APPLICANT'S RESPONSE TO REQUESTS FOR HEARING

Exhibit A

ORAL DEPOSITION OF BOBBY EDWARD GREGORY
SOAH DOCKET NO. 582-06-3321 TCEQ DOCKET NO. 2005-0037-MSW

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
(FOR THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY)
AUSTIN, TEXAS

IN THE MATTER OF:) SOAH DOCKET NO.
WILLIAMSON COUNTY RECYCLING) 582-06-3321
& DISPOSAL FACILITY) TCEQ DOCKET NO.
) 2005-0037-MSW

ORAL DEPOSITION OF BOBBY EDWARD GREGORY

TUESDAY, NOVEMBER 7, 2006

ORAL DEPOSITION OF BOBBY EDWARD GREGORY,
produced as a witness at the instance of TJFA, LP, and
duly sworn, was taken in the above-styled and numbered
cause on Tuesday, November 7, 2006 from 1:30 p.m. to
4:41 p.m., by William C. Beardmore, a Certified
Shorthand Reporter in and for the State of Texas,
reported by computerized stenotype machine at the
Offices of Vinson & Elkins, 2801 Via Fortuna, Suite
100, Conference Room, Austin, Texas 78746-7568,
pursuant to the Texas Rules of Civil Procedure.

CONDENSED TRANSCRIPT

Kennedy Reporting Service, Inc.
1801 Lavaca, Suite 115
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512.474.2233 - phone
512.474.6704 - fax
Kennedyrpt@aol.com

TUESDAY, NOVEMBER 7, 2006

Page 2	Page 4
<p style="text-align: center;">APPEARANCES</p> <p>1 2 3 MR. JOHN A. RILEY, Vinson & Elkins, LLP, 4 2801 Via Fortuna, Suite 100, Austin, Texas 78756-7568, 5 (512)542-8520, appearing on behalf of WASTE MANAGEMENT 6 OF TEXAS, INC. 7 8 MR. R. MARK DIETZ, Dietz & Jarrard, P.C., 106 9 Fannin Avenue East, Round Rock, Texas 78664, 10 (512)244-9314, appearing on behalf of the APPLICANT, 11 WILLIAMSON COUNTY. 12 13 MR. LAWRENCE G. DUNBAR, Dunbar, Harder & 14 Benson, LLP, One Riverway, Suite 1850, Houston, Texas 15 77056, (713)782-4646, appearing on behalf of TJFA, LP. 16 17 MR. ANTHONY TATU, Staff Attorney, Texas 18 Commission on Environmental Quality, MC-173 P.O. Box: 19 13087, Austin, Texas 78711-3087, (512)239-4761, 20 appearing on behalf of THE EXECUTIVE DIRECTOR OF THE 21 TEXAS COMMISSION ON ENVIRONMENTAL QUALITY. 22 23 DR. ORLYNN EVANS, 112 Guadalupe Dr., Hutto, 24 Texas 78634, appearing on behalf of MOUNT HUTTO AWARE 25 CITIZENS.</p>	<p style="text-align: center;">TABLE OF CONTENTS</p> <p>1 2 PAGE</p> <p>3 TELEPHONE CONFERENCE (Judge Seitzman and Parties) 9</p> <p>4 DEPOSITION OF BOBBY EDWARD GREGORY 5/23</p> <p>5 EXAMINATION (RILEY) 23</p> <p>6 EXAMINATION (EVANS) 117</p> <p>7 JURAT 124</p> <p>8</p> <p>9</p> <p>10 REPORTER'S CERTIFICATE 125</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

Page 3	Page 5
<p style="text-align: center;">APPEARANCES</p> <p>1 2 3 Also present: 4 Nicole Adame Winningham, Attorney, Vinson & Elkins 5 Chris Macomb, Governmental Affairs Director with 6 Waste Management of Texas 7 Ruth Muelker, Sr. Legal Counsel, Waste Management 8 Don Smith, Vice President of Waste Management of 9 Texas, Inc. 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: center;">PROCEEDINGS</p> <p>1 TUESDAY, NOVEMBER 7, 2006 2 (1:30 p.m.) 3 4 MR. RILEY: Mr. Dunbar? 5 MR. DUNBAR: I'm Larry Dunbar 6 representing TJFA, and I just wanted to make it clear 7 and get an understanding of who's in attendance at 8 this deposition and who'll be taking the deposition. 9 MR. RILEY: Under what rights do you 10 have to gain that information? 11 MR. DUNBAR: My understanding is, my 12 client has agreed to take the deposition or have a 13 deposition taken on behalf of Williamson County who's 14 a party -- 15 MR. RILEY: In fact, I have a transcript 16 from the preliminary hearing. 17 MR. DUNBAR: -- who is a party to this 18 deposition -- a party of this proceeding. And we're 19 more than happy to give the deposition based upon 20 questions asked of a party to this proceeding or its 21 designated counsel. 22 MR. RILEY: Waste Management was 23 accepted by the Administrative Law Judge in this 24 matter. Are you objecting? 25 MR. DUNBAR: As what?</p>

Page 6

1 MR. RILEY: It's on the record.
2 MR. DUNBAR: As what?
3 MR. RILEY: It's on the record.
4 MR. DUNBAR: Well, my understanding is,
5 the Administrative Law Judge has not accepted Waste
6 Management as a party.
7 I have the order from the Administrative
8 Law Judge, and on the very first page it talks about
9 who the parties are and I don't see Waste Management
10 as designated as a party.
11 MR. RILEY: Are you denying that the
12 Administrative Law Judge is allowing Waste Management
13 to participate in support of this application?
14 MR. DUNBAR: I have no idea what the
15 Administrative Law Judge is doing, other than I don't
16 see Waste Management being a party.
17 I'm more than happy to have any party
18 attend this deposition and ask questions of my client.
19 MR. RILEY: Then I'll ask questions on
20 behalf of Williamson County.
21 MR. DUNBAR: If you want to say here
22 that you represent Williamson County, then that's
23 fine.
24 MR. RILEY: I represent Waste Management
25 as I described at the preliminary hearing.

Page 7

1 MR. DUNBAR: I'm sorry. If you don't
2 represent Williamson County, then we need counsel for
3 Williamson County to ask questions or any other party
4 who wants to ask questions.
5 MR. RILEY: Then I guess we're done --
6 MR. DUNBAR: Okay.
7 MR. RILEY: -- and we'll seek sanctions
8 from the Administrative Law Judge.
9 MR. DUNBAR: Not a problem. Is there
10 any other party who wants to ask questions?
11 MR. RILEY: I don't know.
12 MR. DUNBAR: Williamson County, Mark
13 Dietz?
14 MR. RILEY: We're paying for the
15 deposition. So --
16 MR. DUNBAR: Mark Dietz, would you like
17 to ask questions on behalf of Williamson County?
18 MR. DIETZ: I will have questions, but
19 we're also going to rely upon questions by the
20 operator at the outset of this proceeding.
21 MR. DUNBAR: But they are not a party to
22 this proceeding.
23 MR. RILEY: What is the nature of your
24 objection, sir?
25 MR. DUNBAR: That Waste Management is

Page 8

1 not a party to this proceeding and, therefore, is not
2 entitled to depose my client. I'm sorry.
3 MR. RILEY: Waste Management was
4 described on the record to the Administrative Law
5 Judge.
6 In fact, I have it right in front of me
7 where the Administrative Law Judge granted me the
8 authority to take Mr. Gregory's deposition. You were
9 there. You know this very well.
10 MR. DUNBAR: My understanding -- and I
11 talked with Mark Dietz about --
12 MR. RILEY: If you would like us to go
13 back to the Administrative Law Judge and seek
14 clarification --
15 MR. DUNBAR: I would like that.
16 MR. RILEY: -- and seek sanctions --
17 MR. DUNBAR: Whatever you need to do.
18 MR. RILEY: -- we'll be happy to do so.
19 MR. DUNBAR: Whatever you need to do.
20 I'm willing to have the deposition of my client taken
21 by Williamson County or its designated attorney,
22 Mr. Mark Dietz, who is present or any other party
23 who's here who would like to ask questions by their
24 counsel, no problem with that.
25 I do have a problem with Waste

Page 9

1 Management.
2 MR. RILEY: Let's see if we can get the
3 Administrative Law Judge on the phone. There are
4 other parties here. Does anybody else have an
5 objection to us taking this deposition?
6 (No response)
7 MR. RILEY: No objection.
8 MR. DUNBAR: That's fine.
9 MR. RILEY: Why don't we see if we can
10 get the ALJ on the phone.
11 MR. DUNBAR: Not a problem.
12 (Off the record - 1:34 p.m. to
13 2:02 p.m.)
14 (Whereupon, a telephone conference with
15 SOAH ALJ Howard Seitzman, along with the parties, took
16 place as follows:)
17 TELEPHONE CONFERENCE
18 MR. RILEY: Judge, this is John Riley.
19 Let me begin again by putting my appearance on the
20 record. Then I guess we'll take turns from there.
21 JUDGE SEITZMAN: Okay.
22 MR. RILEY: My name is John Riley. I'm
23 with the law firm of Vinson & Elkins. I represent
24 Waste Management of Texas, Inc., which is an operator
25 of the Williamson County landfill.

Page 22

1 considerations by which you object in me
 2 participating, and as the Judge has just said I
 3 should, then I would ask you as a professional and
 4 under your ethical obligations to make that known now.
 5 MR. DUNBAR: I put my objections on the
 6 record.
 7 MR. RILEY: You realize that if you sit
 8 there idly by and you allow me to commit an ethical
 9 violation that you're in violation of your ethical
 10 responsibilities. Do you realize that?
 11 MR. DUNBAR: I put my objections on the
 12 record.
 13 MR. RILEY: Thank you. Before we
 14 proceed, Mr. Dietz, do you have any concern with me
 15 proceeding as designated by Williamson County to take
 16 this deposition?
 17 MR. DIETZ: No.
 18 MR. RILEY: Do you know of any reason
 19 that Williamson County would object to me taking this
 20 deposition?
 21 MR. DIETZ: No.
 22 MR. RILEY: Okay.
 23
 24
 25

Page 23

1 BOBBY EDWARD GREGORY,
 2 having been first duly sworn, testified as follows:
 3 EXAMINATION
 4 BY MR. RILEY:
 5 Q Mr. Gregory, please state your name and
 6 address.
 7 A My name is Bobby Edward Gregory. My address
 8 is 2939 Westlake Cove, Austin, Texas.
 9 Q "Bobby," is that your given name?
 10 A That is my given and legal name.
 11 Q In what capacity do you appear here today for
 12 this deposition?
 13 A As President of Garra de Aguila, Incorporated
 14 that serves as the General Partner of TJFA, LP.
 15 Q Garra de Aguila -- am I pronouncing that
 16 correctly?
 17 A Yes.
 18 Q Is that in the Spanish language?
 19 A Yes, sir.
 20 Q What does it mean, if you know?
 21 A I think it means -- is that what your
 22 question was?
 23 Q Yes.
 24 A I think it means talon of the eagle or
 25 something like that. It was not my name choice, but I

Page 24

1 believe that's what it --
 2 Q Who chose the name?
 3 A Dennis Hobbs.
 4 Q Who is Dennis Hobbs?
 5 A He is the vice president of that company.
 6 Q And you're the president of the company.
 7 Correct?
 8 A That is correct.
 9 Q Does the company have any employees?
 10 A No, it does not.
 11 Q Is it a for-profit entity?
 12 A Yes, it is.
 13 Q Is it registered with the Secretary of State?
 14 A Yes.
 15 Q When was the company formed?
 16 A I don't recall exactly. I think we
 17 determined in the hearing the other day that TJFA was
 18 in 2004, approximately two years ago.
 19 Q But I was speaking of Garra de Aguila.
 20 A I think it was about the same time. So I
 21 assume it was about that period.
 22 Q What type of business is Garra de Aguila?
 23 A It's a real estate development and investment
 24 company.
 25 Q Why did you form Garra de Aguila?

Page 25

1 A For real estate investment.
 2 Q Has Garra de Aguila made any real estate
 3 purchases?
 4 A It is a holding company for different
 5 investments including its general partnership position
 6 in TJFA, LP.
 7 MR. RILEY: Objection, nonresponsive.
 8 Q (By Mr. Riley) I asked you a simple
 9 question, Mr. Gregory. I know you've had your
 10 deposition taken before, and if you can answer my
 11 question with either a "yes" or "no" truthfully, I
 12 would appreciate it if you would do so.
 13 MR. DUNBAR: I'll object to badgering my
 14 client.
 15 MR. RILEY: Okay.
 16 Q (By Mr. Riley) Okay. Does Garra de Aguila
 17 have any real estate holdings?
 18 A Not that I recall.
 19 Q You mentioned that Garra de Aguila, then, is
 20 a holding company and is the general partner in
 21 another entity. Is that correct?
 22 A That is correct.
 23 Q And that's TJFA?
 24 A That's correct.
 25 Q Who are the other partners in TJFA?

Page 26	Page 28
<p>1 A Right now I am the only limited partner in 2 TJFA. 3 Q So the general partner is Garra de Aguila in 4 which you're the president, and the only other partner 5 in TJFA is you, yourself, as an individual? 6 A That's correct. 7 Q Okay. Is there a Board for Garra de Aguila? 8 A There is a president and a vice president and 9 secretary, and that is Dennis Hobbs and myself. 10 Q Who's the secretary? 11 A I believe Dennis Hobbs is. 12 Q Is Dennis Hobbs otherwise an employee of 13 yours? 14 A He is. 15 Q In what capacity? 16 A He serves as an assistant to virtually 17 everything that I deal with, all the businesses and 18 nonprofit organizations that I'm involved in. 19 Q Assistant to you, then, personally -- a 20 personal assistant? 21 A He is a personal assistant to me in all of 22 the businesses and nonprofit organizations that I'm 23 involved in. 24 Q Does he draw a paycheck? 25 A He does draw a paycheck, yes.</p>	<p>1 know what I'm referring to if I refer to it as "TDS, 2 Inc"? 3 A Yeah. Let me just point out that often we 4 refer to the company as "TDS" meaning Texas Disposal 5 Systems, Inc. and Texas Disposal Systems Landfill. 6 Inc. and even some of the other operation companies. 7 So I'll ask you to help me keep them 8 separate. I'm not going to try to confuse it and I 9 don't think you're going to try to confuse it. 10 So if you ask me a generic question 11 about TDS, I'm not exactly sure you're going to -- 12 we'll try to figure it out as we go. Okay? 13 Q Fair enough. 14 A Okay. 15 Q So far we have TDS, Inc. as the hauling 16 company and the collection business? 17 A Correct. 18 Q Are there any other TDS entities other than 19 TDS, Inc. and TDS Landfill, Inc? 20 A They are the only ones that carry that in 21 their name. Texas Disposal Systems Landfill, 22 Incorporated you mentioned is the company that owns 23 land where the landfill is in southeast Travis 24 County, owns the permit and owns some other permits 25 related to transfer stations.</p>
Page 27	Page 29
<p>1 Q And what from what entity does he draw a 2 paycheck? 3 A Texas Disposal Systems, Inc. 4 Q How much is he paid? 5 A I don't recall. Just under \$100,000, I 6 believe. 7 Q Does he have a title with Texas Disposal 8 Systems, Inc.? 9 A He's my assistant. 10 Q Is that the full extent of his title? 11 A I believe that is his title. 12 Q How long have you known Mr. Hobbs? 13 A Since the early '80s, I guess. 14 Q How long has he worked for you? 15 A Since 1987, I believe. 16 Q Texas Disposal Systems, Inc. is an entity you 17 mentioned. What is the nature of that entity's 18 business? 19 A Of Texas Disposal Systems, Inc? 20 Q Yes, sir. 21 A Texas Disposal Systems, Incorporated is a 22 hauling company that it has contracts throughout 23 Central Texas and is in the hauling/collection 24 business for solid waste and recyclables. 25 Q How long has -- may I call it "TDS"? Do you</p>	<p>1 The other entities generally referred to 2 as "TDS" are Texas Landfill Management, a company that 3 operates those permitted facilities. So those are 4 kind of the three main ones that are generally 5 referred to often by many as TDS. 6 Q Let me see if I can get the TDS corporate 7 structure as best I can clear. Are any of the TDS 8 entities a parent over the other? 9 A No, they are separate corporations. 10 Q They are all separate corporations? 11 A That's correct. 12 Q Are you president of all three or -- excuse 13 me -- all the TDS corporations? 14 A I'm president of all three of those 15 corporations, yes. 16 Q Okay. And if I understood you correctly, 17 then. TDS. the physical landfill. is owned by TDS 18 Landfill, Inc. Is that correct? 19 A That's correct. 20 Q But TDS Landfill Management Company is the 21 operator of that landfill? 22 A It's not TDS Landfill. It's just called 23 "Texas Landfill" -- 24 Q I'm sorry. 25 A -- TLM, "Texas Landfill Management.</p>

Page 30

1 Incorporated."
2 Q If I refer to that as "TLM," we'll know what
3 we're talking about?
4 A That's correct.
5 Q All right.
6 A TDSL is the landfill -- that may be easier --
7 and TDS is the hauling company and TLM is the
8 management company of the permitted facility.
9 Q Okay. So I think we can work with those.
10 A That will be easier.
11 Q All right. I want to go back to Mr. Hobbs
12 just briefly. Is it still accurate to say that he is
13 paid by TDS?
14 A Yes.
15 Q Does he receive any compensation from any
16 source that you're aware of or that you're affiliated
17 with other than TDS?
18 A Not that I'm aware of. Perhaps he's had
19 reimbursements of cash tickets or expenses related to
20 different corporations that I don't follow, but that's
21 a probability, but I'm not aware of any payroll checks
22 from other entities.
23 Q Okay. He may have other investments that
24 you're not familiar with, but as far as the companies
25 you're president of, he doesn't receive compensation

Page 31

1 from those companies other than from TDS. Is that a
2 correct statement?
3 A Not in the form of payroll. He may receive
4 compensation in the form of reimbursement for
5 restaurant tickets or things like that. I'm actually
6 not aware --
7 Q That's just reimbursement of expenses,
8 though?
9 A Yes.
10 Q What was the net profit from Garra de Aguila
11 in 2005?
12 A I don't recall.
13 Q Was there any profit?
14 A I signed the tax returns, but I have no
15 recollection of what it would have been -- a profit or
16 a loss.
17 Q Garra de Aguila is the holding company.
18 Correct?
19 A That is a real estate development company
20 that serves -- I mentioned it only from the basis that
21 I am here as the general partner of TJFA, and as that
22 general partner I serve as that general partner as
23 president of Garra de Aguila.
24 Q Okay. I thought I heard you describe it
25 earlier as a holding company. And what I was getting

Page 32

1 to was, does it hold anything other than TJFA?
2 A Not that I'm aware of.
3 Q And as president and only one other person,
4 Dennis Hobbs as vice president, we can assume that you
5 would be aware of anything that it was holding other
6 than TJFA?
7 A You can assume that. I have a lot of
8 businesses, but I don't think it has any other --
9 Q How many businesses do you have?
10 A I would have to think about it and count them
11 up, but they are different investment companies that I
12 own.
13 Q TJFA, then -- any employees for TJFA?
14 A No.
15 Q Is it fair to say that you control all the
16 activity with respect to TJFA as president of Garra de
17 Aguila and then as the limited partner?
18 A I think you could say that, yes.
19 Q What holdings does TJFA have?
20 A I believe TJFA owns 10 different pieces of
21 property.
22 Q All right. Picking anyone that you like, why
23 don't we start listing them and then we'll try to
24 identify all 10.
25 A Okay. Well, let's start with Williamson

Page 33

1 County. I own two -- I say "I own" -- TJFA owns two
2 pieces of property in Williamson County within a mile
3 of the Williamson County landfill.
4 I marked those on the map in this
5 hearing. I think you're familiar with those pieces of
6 property.
7 Q Okay.
8 A It owns --
9 Q Are we going to a different county?
10 A I'm going to Travis County.
11 Q Travis County?
12 A I'm headed south. It owns two pieces of
13 property in Travis County in the vicinity of the old
14 closed Travis County -- the Allied Waste and the Waste
15 Management Austin Community Landfill.
16 Q You say "in the vicinity." Would they also
17 be within a one-mile radius of the Waste Management
18 and Allied landfills in Travis County?
19 A I believe they would be within a one-mile
20 radius of those two. I'm not sure that one of them is
21 within a mile of the old closed county site.
22 Q I'm not so concerned --
23 A I've not measured it off, but I'm not sure
24 it's within a mile.
25 Q I'm not so concerned with the old county

Page 34

1 landfill that's been closed. But within the two
2 active landfills or within one mile of the two active
3 landfills, does TJFA -- or the property you identified
4 in Travis County as owned by TJFA, is that within or
5 are those parcels within the one-mile radius of the
6 Waste Management and Allied landfills?
7 A Yes.
8 Q Any other property owned by TJFA in Travis
9 County?
10 A Heading further south on Burlson Road there
11 is a small tract that is owned by TJFA in the vicinity
12 of the ISI landfill. It's also known as "Travis
13 County Landfill."
14 It's not owned by the county, but that's
15 just the name of it -- "Travis County Landfill." I
16 don't believe it's within a mile --
17 Q That's a --
18 A -- of the city of Austin landfill, which is
19 also in that area.
20 Q That's a Type IV landfill, the ISI landfill?
21 Is that --
22 A Both the city of Austin and the ISI landfills
23 are Type IV landfills.
24 Q And that small tract -- how big is a small
25 tract to you?

Page 35

1 A An acre-and-a-half or something. I'm sorry.
2 I don't recall exactly, but it's a small tract.
3 Q And that would also be within one mile, then,
4 of either of these --
5 A At least the ISI landfill.
6 Q Please continue. In Travis County, anything
7 else?
8 A Yes. TJFA owns two tracts adjacent to the
9 TDSL landfill on Carl Road.
10 Q And anything else in Travis County?
11 A No. Going further south to Comal County,
12 TJFA owns two tracts in the vicinity of the Comal
13 County landfill, which is a Waste Management-owned
14 facility, as you know.
15 Q Now, you were a little less specific here,
16 but I'll probe a little further. You say two tracts
17 within the vicinity of that landfill, would you say
18 that that was within a one-mile radius of the Waste
19 Management --
20 A One tract is certainly within a mile and I
21 believe the other one is. If not, it's just outside.
22 It's approximately one mile.
23 Q Anything else in Comal County?
24 A No. Going further south there is one tract
25 that TJFA owns in the vicinity of the Covell Gardens.

Page 36

1 COURT REPORTER: Covell? I'm sorry?
2 WITNESS GREGORY: C-o-v -- is it a-l?
3 MR. RILEY: It's e-l.
4 WITNESS GREGORY: C-o-v-e-l --
5 COURT REPORTER: Thank you.
6 A -- Gardens Landfill on Covell Road.
7 Q (By Mr. Riley) And would you say that was
8 within one mile? If you said that already, I
9 apologize.
10 A It is. And I believe that's all 10 tracts.
11 Does that total 10?
12 Q Let me count them up -- 1 -- or 2, 4, 5, 7, 9
13 and 10.
14 A Okay. I thought that was all of them.
15 Q So then it's fair to say, then, all of TJFA's
16 real estate holdings are within one mile of some
17 landfill. Is that correct?
18 A That is correct.
19 Q And was that by design?
20 A Yes.
21 Q And what is the design for TJFA? Why does it
22 purchase property within a one-mile distance of
23 landfills?
24 A Well, when I moved -- I know what I know
25 about landfills and about the regulations.

Page 37

1 Part of my investment interest includes
2 buying land close to landfills with the belief that
3 the improvement in regulations, those landfills will
4 be operated better and the property values will
5 increase and our ability to lease those properties and
6 gain income from those properties both as appreciation
7 and also as rental income from those properties going
8 up will be a good investment.
9 Q What is your current rental income from all
10 the TJFA properties?
11 A I don't have the documents in front of me,
12 but different rates -- if you want me to start again
13 at the top, I believe it's 575 and 750 -- \$750 and
14 \$575 in Williamson County for those two. I do
15 remember those.
16 Q Let's go Williamson County, then.
17 A Okay.
18 Q You mentioned two pieces of property. I
19 believe one of them is approximately -- well, it's a
20 residence-type property, a small piece of property.
21 Is that correct?
22 A Both in Williamson County are residential
23 properties with houses on them and they are both
24 leased for people who live in it.
25 Q Does one have more property than the other?

Page 38

1 A One is five or six acres -- maybe a little
2 bigger -- and then the other one is something like an
3 acre-and-a-half or two.
4 Q Let's start with the smaller tract first.
5 A The smaller tract I recall is -- I think I
6 recall exactly -- is 550 or -- I'm sorry -- 750 or
7 \$775 per month.
8 Q How much did you pay for that property?
9 A Approximately \$70,000.
10 Q Was it rented prior to your purchasing it?
11 A It had been rented prior to -- well, you
12 know, maybe it was owned. Maybe it was the owner that
13 lived in it. It was occupied before I purchased it --
14 being TJFA purchased it.
15 But when it was purchased, as I recall,
16 it was empty but was rented shortly afterwards.
17 Q And the five to six-acre property, is that
18 rented?
19 A I believe that the person that owned that
20 died. It went on the market. TJFA purchased it. It
21 has been rented -- sometime after that time it was
22 remodeled immediately, and it's been rented since then
23 as I recall.
24 Q And the rental value --
25 A I believe it's \$550 per month. It's a larger

Page 39

1 tract of land, but it's a smaller house.
2 Q How much did you pay for the property
3 originally?
4 A Approximately \$70,000.
5 Q Approximately the same amount as --
6 A Both of those were approximately \$70,000.
7 Q Do you know of the name of the tenant in the
8 smaller tract or -- I'm sorry -- the one-and-a-half to
9 two-acre tract that rents for 750 to \$775, do you have
10 a current tenant there?
11 A There are tenants in both of them. I am
12 terrible with names. I'm sorry. I don't recall
13 either name of either tenant. They are both Spanish
14 surnames, but I don't recall the name.
15 Q But they are both occupied and rented?
16 A Yes.
17 Q Have they been rented since the time that you
18 purchased them?
19 A The larger tract with the smaller house which
20 was remodeled and rented after the remodeling has been
21 rented for -- I'm not sure -- a year, maybe.
22 The smaller tract with the larger house
23 has been rented for some time, and I don't recall
24 exactly the time frame of that lease.
25 Q Are you making an adequate return on your

Page 40

1 investment?
2 A I think so, yeah.
3 Q Have either of these properties gone
4 unoccupied for any period of time while you have been
5 the owner other than what you've already described in
6 the remodeling of the --
7 A Not other than as I've described. I believe
8 it's the -- no. Actually, there was someone that
9 rented one of them and then bought a house and moved
10 into a house that they purchased and then someone --
11 I think there's been three tenants between the two
12 houses since we purchased them as TJFA.
13 Q So if I understood your testimony a moment
14 ago correctly, you believe that investment in real
15 estate close to landfills is a wise investment?
16 A Yes.
17 Q During the preliminary hearing on this
18 matter, do you remember me asking you some questions
19 when you were testifying?
20 A Yes, I do.
21 Q And do you remember being asked the question
22 of whether you purchased this property for the purpose
23 of becoming an affected person in the contested case
24 matter should any of -- excuse me. Let me stop there.
25 Do you remember being asked the question

Page 41

1 of whether you purchase the property for the purpose
2 of becoming an affected person?
3 A I remember you asking a question along that
4 line. I don't remember exactly how the question and
5 answer went.
6 Q Okay. Well, let me ask it again, then: Did
7 you purchase this property or did TJFA purchase this
8 property with the intention of qualifying as affected
9 person in the event that the Williamson County
10 landfill filed for an expansion?
11 A As I explained earlier, TJFA buys property in
12 the vicinity of landfills with the belief that as
13 those landfills are operated properly and as rules
14 improve, the value of that land and an ability to
15 lease and draw income for that land will improve.
16 I bought the properties under that
17 assumption. Knowing what I know about landfills and
18 about the ability to permit and seek permit
19 amendments, it provides TJFA the assurance that if
20 permit applications are submitted that do not meet the
21 rules or are done in a manner that circumvent the
22 rules, then it allows -- that allows me as a partner
23 and TJFA to seek clarification or challenge.
24 So I did know that you could take party
25 status if necessary. It was not purchased for the

Page 42

1 expressed purpose to take party status. So I hope
2 that answers your question.
3 Q Not so much, but let's try it again. Did you
4 purchase the property within a one-mile radius of the
5 Williamson County landfill for the purpose of
6 qualifying as an affected person under the TCEQ rules?
7 A The answer would be "no" for the expressed
8 purpose. However, I knew that I would be able to if
9 the need arose.
10 I believe that's how I answered the
11 question in the public -- the first day of public
12 hearing.
13 Q When you purchased this property, was the
14 application for expansion of the Williamson County
15 landfill pending? By "this property," I'm referring
16 to the Williamson County properties, either one of
17 them.
18 A It would have been because the application
19 was made, I believe, in 2003 which was three years
20 ago, and I believe these properties have been
21 purchased since then.
22 Q So the application had been filed. Correct?
23 A As I recall.
24 Q And you were aware of it. Correct?
25 A As I recall.

Page 43

1 Q In fact, you participated in a variety of
2 different --
3 A I have since then, yeah.
4 Q And prior to owning the property or -- excuse
5 me. Prior to TJFA owning the property, have you, Bob
6 Gregory, been active in Williamson County regarding
7 the permit application as the subject of this
8 proceeding?
9 A I have to put on a different hat. When I say
10 I participated, I have participated representing Texas
11 Disposal Systems Landfill, Inc. or TDSL, as we agreed
12 to call it, and to a limited extent -- to the extent
13 that hauling is involved, representing TDS, and I have
14 been involved in that and actively involved.
15 And as you and the county are aware,
16 because much of what I've done has been in writing, it
17 is made available to the county. But, again, that's
18 me representing TDS and TDSL.
19 I have not participated representing
20 TJFA in any of that as representing TJFA.
21 Q And you distinguish that how?
22 A I distinguish it just from the basis of how I
23 represent myself when I do it and from the position
24 that I state in the writings and the documents that
25 I've produced.

Page 44

1 Q Let me say it back to you and you can tell me
2 where I've gotten it wrong. You did not own property
3 around the Williamson County landfill prior to TJFA
4 purchasing the two tracts that we've been
5 discussing -- you in any form or fashion?
6 A Actually, I think for a very short period of
7 time it was in my name.
8 Q Your personal name?
9 A My personal name. As I recall, one of the
10 tracts was. That's when TJFA was in the process of
11 being formed.
12 I'm not exactly sure on that, but I
13 think I have a recollection of one of the properties
14 bought in my personal name that was transferred over
15 into TJFA.
16 Q Let's go back. Let's walk forward
17 chronologically. From the point of time where you
18 became aware that Williamson County had filed for an
19 expansion of the Williamson County landfill, do you
20 recall approximately what date that might have been?
21 A I do not recall.
22 Q Do you recall what year that might have been?
23 A It probably was 2004.
24 Q And is it your testimony that you were aware
25 of the application in whatever capacity you were

Page 45

1 acting prior to purchasing any property within a
2 one-mile radius of the Williamson County landfill?
3 A I think I was. If you could give me the date
4 that I purchased the property, I may be able to tell
5 it better. I'm not trying to be difficult at all.
6 I'm just trying to answer your question accurately.
7 I very well may have been aware that the
8 application had been filed, but I'm not positive.
9 Q Let me throw out some dates and see if they
10 refresh your recollection. The first public notice
11 for the land use only, Parts 1 and 2 of the Williamson
12 County application, was published on December 16,
13 2003. Does that sound about right to you?
14 A I have no recollection of a date. I remember
15 hearing about it. I don't know if it was in December
16 or a month later or two months later.
17 Q In July -- specifically July 22, 2004 -- you,
18 Bob Gregory, purchased 5.04 acres on County Road 130
19 in Williamson County.
20 Does that sound about right?
21 A I take your word for it. I don't have a
22 reason to doubt it.
23 Q I think these are --
24 A But I don't recall when that was, to be
25 honest with you.

ORAL DEPOSITION OF BOBBY EDWARD GREGORY
SOAH DOCKET NO. 582-06-3321 TCEQ DOCKET NO. 2005-0037-MSW

Page 46

1 Q But my purpose in going through the dates is
2 hopefully pretty clear. You didn't own property,
3 there was an application on file and you purchased
4 property within a one-mile radius.
5 MR. DUNBAR: Objection, form.
6 Q (By Mr. Riley) Do you agree with that
7 statement?
8 A I know I purchased property within a mile
9 radius, meaning TJFA. The exact time of whether I was
10 aware of whether a permit had been filed on the first
11 one, I can't say, but I don't know that that matters.
12 When TJFA bought the second tract,
13 there's no question I knew at that point that a permit
14 had been filed.
15 Q Well, let me --
16 A So if that's what you are trying to get to, I
17 know it was the case on the second tract. I'm not
18 positive it was on the first.
19 Q My purpose in asking these questions is
20 twofold. One is to drill down on what you've said is
21 TJFA's investment strategy. All right?
22 And to that end, what I'm asking you is,
23 when you purchased this property you were aware that
24 the application for expansion had been requested or --
25 excuse me -- had been filed and, therefore, it was

Page 47

1 part of your investment strategy or acknowledged in
2 your investment strategy that the landfill could be
3 expanded. Is that correct?
4 A It certainly was that understanding on the
5 second tract --
6 Q Okay.
7 A -- that I knew that there was a permit being
8 filed -- had been filed and that the landfill might be
9 expanded.
10 Q Okay. I have two dates here. The first date
11 that I have that you as an individual purchased
12 property is July 22, 2004, and that's the five-acre
13 tract or approximately five-acre tract.
14 Does that date sound about right to you?
15 A I told you I don't recall, but I have no
16 reason to doubt you.
17 Q Okay. I also have a date of December 29,
18 2004 where you also -- excuse me -- not you, but TJFA
19 purchased property from a Ronica Renee Ledesma. Does
20 that sound correct?
21 A That's the second tract. I do remember the
22 Ledesma name.
23 Q So the first in time tract would have been
24 the July tract -- the five-acre tract in July of
25 2004 --

Page 48

1 A Yes.
2 Q -- which would have been --
3 A The five acre one was the first tract. The
4 date, I'm taking your word on.
5 Q And it would have been approximately seven
6 months after the first public notice of the -- excuse
7 me -- of the Williamson County application to expand
8 the landfill.
9 So each of these pieces of property were
10 purchased after there was public notice of the intent
11 to expand the landfill?
12 A I'm taking your word on those dates and your
13 word being -- if your word is accurate, then that's
14 correct, obviously.
15 Q Okay. So when you purchased this property,
16 either you as an individual or you as the president of
17 Garra de Aguila, the general partner for TJFA, you
18 purchased it with the expressed purpose of being
19 within a one-mile radius and seeking affected person
20 status in that application. Is that true?
21 A The first part is true. The last part is not
22 true. It wasn't with the expressed purpose of seeking
23 party status.
24 There is an investment philosophy and
25 strategy that I've tried to explain to you that is a

Page 49

1 fact. That's an issue, and that's relative to all of
2 our facilities.
3 I don't automatically buy the property
4 to take party status, and I've demonstrated that with
5 at least one of the tracts that I purchased.
6 Q And which tract is that that you're referring
7 to?
8 A That's the tract next to the Covell Gardens
9 landfill in Bexar County in San Antonio.
10 Q Do you intend to seek affected person or --
11 excuse me -- party status in the pending applications
12 of Waste Management for expansion of the Comal County
13 landfill which you referred to as Comal County and the
14 Austin Community landfill?
15 A I don't know. That is a possibility.
16 Q Well, have you not already sought party
17 status in the Comal County landfill expansion?
18 A The opportunity has not made itself
19 available. There's not even been a public meeting on
20 it, let alone the start of a public hearing where one
21 would take party status.
22 Q Are you not aware that you requested a
23 contested case hearing in the Comal County landfill
24 expansion referred to as "Mesquite Creek"?
25 A As I understand it, my attorneys identified

Page 50

1 issues that we felt -- TJFA felt needed to be dealt
2 with and corrected and made those known in the process
3 of seeking improvement to that.
4 That was about the time as I recall that
5 a public -- that the draft permit was issued and a
6 public meeting notice was issued -- very similar to
7 the position taken by my attorneys on the Williamson
8 County landfill where issues were identified that TJFA
9 was seeking corrections in the permit application.
10 Q So you're not seeking denial of the permit in
11 either case; you're seeking merely technical
12 corrections. Is that correct?
13 A I'm seeking denial of a permit in the event
14 that it is -- that it doesn't meet the requirements
15 under the regulations under the law.
16 Q Well, if I understood your testimony, your
17 testimony is that you benefit as TJFA by the adherence
18 to the state regulation regarding the operation of
19 landfills. Is that correct?
20 A That is correct.
21 Q So your economic interest is improved when a
22 landfill meets the requirements of the state. Is that
23 correct?
24 A That's correct.
25 Q So your economic interest is simply to see

Page 51

1 that the rules and requirements of the state are met
2 by a landfill in the area where you own property?
3 MR. DUNBAR: Objection, form.
4 A That is correct. However, if a landfill
5 applicant and/or the Executive Director choose not to
6 follow the rules and meet the requirements of those
7 regulations as a property owner within a mile of the
8 facility that chooses to take party status and
9 participate in a hearing, one can go to the point of
10 seeking denial of the permit amendment or the permit
11 approval.
12 That's the position of safety that TJFA
13 has from an investor standpoint, that it can influence
14 that process, that the facility operate properly, that
15 the agency permit properly in hopes that it will rise
16 to the occasion and do so.
17 If it doesn't do it, then it's the
18 prerogative of TJFA and any other party with
19 justiciable interest to seek a denial of the permit.
20 Q (By Mr. Riley) That's a lot of words,
21 Mr. Gregory. I didn't ask you the question.
22 A I think I was responsive to your question.
23 Q Let me try to get to the question, then, and
24 maybe you can give me a more succinct answer.
25 A Please do.

Page 52

1 Q If a landfill was operated in accordance with
2 the requirements of the state -- all the rules, laws,
3 permits -- it enhances your investment according to
4 what you've said the purpose of TJFA is?
5 A That's correct.
6 Q Does denial of a permit enhance your
7 investment?
8 A It can.
9 MR. DUNBAR: Objection, form.
10 A As you know, a denial of an amendment to a
11 permit just takes you back to where the permit stood
12 prior to the amendment being requested. So it doesn't
13 close the landfill, necessarily. It just takes the
14 opportunity to do an amendment.
15 There is no question that it's better --
16 there is no question it's better to have a denial of
17 that permit amendment than it is for the permit
18 amendment to be granted in a fashion that is
19 inconsistent with the rules or illegal.
20 Q (By Mr. Riley) Regarding the Williamson
21 County application, what specifically do you think is
22 illegal about the application and/or the draft permit?
23 MR. DUNBAR: Objection, form.
24 A I will answer your question as specific as I
25 can, although I will also refer you to the two sets of

Page 53

1 comments that TJFA attorneys have submitted -- one in
2 May of this year and one in July of this year -- that
3 we've tried to articulate what our concerns are.
4 But, initially, going from the top as
5 best I can recall, the way the application was filed
6 in the name of Waste Management as well as Williamson
7 County we think is inappropriate.
8 Q (By Mr. Riley) How does that improve the
9 value of your property one way or the other?
10 A We believe that if Waste Management, given
11 the way they operate facilities, becomes the
12 controller of this landfill and the one who under its
13 contract and permit takes over the control of this
14 from Williamson County that it will reduce the
15 probability of the values going up surrounding this
16 site and our ability to lease land, because we know
17 how Waste Management has operated in this area.
18 Q So you don't have any problem with the
19 technical aspects of the application. You have a
20 problem with the operator of the landfill. Is that
21 correct?
22 A I do have problems with the technical aspect
23 of the application. And, again, that's why I referred
24 you to the comments that were submitted. Those
25 particular issues primarily were dealt with in May

ORAL DEPOSITION OF BOBBY EDWARD GREGORY
 SOAH DOCKET NO. 582-06-3321 TCEQ DOCKET NO. 2005-0037-MSW

Page 122

1 time? That's what we're -
 2 DR. EVANS: To him? No, I don't think I
 3 could add anything to what's happened here.
 4 MR. DUNBAR: Okay.
 5 MR. RILEY: Well, I think what we
 6 usually say, because we're going to do more
 7 depositions, is, when you're through asking questions
 8 of the witness, if you want to pass the witness, then
 9 you just say "pass the witness."
 10 DR. EVANS: Pass.
 11 MR. DUNBAR: I have no questions at this
 12 time. Thank you.
 13 (Proceedings concluded at 4:41 p.m.)
 14 WITNESS: BOBBY EDWARD GREGORY DATE: 11-7-2006
 15 CHANGES AND SIGNATURE
 16 PAGE LINE CHANGE REASON
 17 _____
 18 _____
 19 _____
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Page 123

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Page 124

1 _____
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 9 _____
 10 I, BOBBY EDWARD GREGORY, have read the
 foregoing deposition and hereby affix my signature
 that same is true and correct, except as noted above.
 11 _____
 12 _____
 13 BOBBY EDWARD GREGORY
 14 THE STATE OF _____)
 15 COUNTY OF _____)
 16 Before me, _____, on this day
 17 personally appeared BOBBY EDWARD GREGORY, known to me
 or proved to me on the oath of _____
 18 or through _____ (description of
 identity card or other document) to be the person
 19 whose name is subscribed to the foregoing instrument
 and acknowledged to me that he/she executed the same
 for the purposes and consideration therein expressed.
 20 _____
 21 Given under my hand and seal of office on
 22 this _____ day of _____,
 23 _____
 24 NOTARY PUBLIC IN AND FOR
 THE STATE OF _____
 25 My Commission Expires: _____

Page 125

1 TRANSCRIPT OF PROCEEDINGS
 2 BEFORE THE
 3 STATE OFFICE OF ADMINISTRATIVE HEARINGS
 (FOR THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY)
 4 AUSTIN, TEXAS
 5 IN THE MATTER OF:) SOAH DOCKET NO.
 6 WILLIAMSON COUNTY RECYCLING) 582-06-3321
 & DISPOSAL FACILITY) TCEQ DOCKET NO.
 7) 2005-0037-MSW
 8)
 9)
 10 REPORTER'S CERTIFICATE
 ORAL DEPOSITION OF BOBBY EDWARD GREGORY
 TUESDAY, NOVEMBER 7, 2006
 11 I, William C. Beardmore, Certified Shorthand
 Reporter in and for the State of Texas, hereby certify
 12 to the following:
 That the witness, BOBBY EDWARD GREGORY, was
 13 duly sworn and that the transcript of the deposition
 is a true record of the testimony given by the
 14 witness:
 That the deposition transcript was duly
 15 submitted on _____ to the attorney/witness
 for examination, signature and return;
 16 That pursuant to information given to the
 deposition officer at the time said testimony was
 17 taken, the following includes all parties of record
 and the amount of time used by each party at the time
 18 of the deposition:
 John Riley (Two Hours, 9 minutes)
 19 Attorney for Waste Management of Texas, Inc.
 Orlynn Evans (6 minutes)
 20 Party Representative For Mount Hutto Aware
 Citizens
 21 _____
 22 _____
 23 I further certify that I am neither counsel
 24 for, related to, nor employed by any of the parties in
 25 the action in which this proceeding was taken, and

ORAL DEPOSITION OF BOBBY EDWARD GREGORY
SOAH DOCKET NO. 582-06-3321 TCEQ DOCKET NO. 2005-0037-MSW

Page 126

1 further that I am not financially or otherwise
2 interested in the outcome of the action.
3 Certified to by me this 10th day of November,
4 2006.

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William C. Beardmore,
Certified Shorthand Reporter
CSR No. 918 - Expires 12/31/06
Firm Certification No. 276
Kennedy Reporting Service, Inc.
Cambridge Tower
1801 Lavaca Street, Suite 115
Austin, Texas 78701
512.474.2233

33 (Page 126)

TUESDAY, NOVEMBER 7, 2006

TCEQ Docket No. 2007-1774-MSW

IN RE THE APPLICATION OF BFI WASTE § BEFORE THE
SYSTEMS OF NORTH AMERICA, INC. § TEXAS COMMISSION ON
PERMIT NO. MSW-1447A § ENVIRONMENTAL QUALITY

APPLICANT'S RESPONSE TO REQUESTS FOR HEARING

Exhibit B

TEXAS DISPOSAL SYSTEMS, INC.
TEXAS DISPOSAL SYSTEMS LANDFILL, INC.



P.O. Box 17126
Austin, Tx 78760-7126
(512) 421-1300 Office
(512) 243-4123 Fax
www.texasdisposal.com

FACSIMILE
TRANSMISSION MEMORANDUM

DATE: November 5, 2007

NUMBER OF PAGES TRANSMITTED: 5 (including cover)

MESSAGE IS FOR: LaDonna Castañuela, Office of the Chief
Clerk, Texas Commission on Environmental Quality

MESSAGE IS FROM: Dennis L. Hobbs

FAX NO. CALLED: 239-3311

REGARDING: Please see attached letter re: Application of
BFI Waste Systems of North America, Inc.; MSW Permit No. 1447A

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone (collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

CHIEF CLERKS OFFICE
2007 NOV - 5 PM 3: 51
TEXAS COMMISSION
ON ENVIRONMENTAL
QUALITY

TJFA, L.P.

P.O. Box 17126
Austin, TX 78760
(512) 619-9103
(512) 243-4123

November 5, 2007

*Via Facsimile: (512) 239-3311
and Federal Express*
LaDonna Castañuela
Office of the Chief Clerk - MC 105
Texas Commission on Environmental Quality
12100 Park 35 Circle
Austin, Texas 78753

CHIEF CLERKS OFFICE

2007 NOV - 5 PM 3: 50

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: Application of BFI Waste Systems of North America, Inc.;
MSW Permit No. 1447A

Dear Ms. Castañuela:

This letter is being submitted on behalf of TJFA, L.P. ("TJFA") in response to the Executive Director's Response to Public Comment and the opportunity to request a contested case hearing dated October 5, 2007 from the Chief Clerk's Office on the above-referenced application. TJFA is opposed to this proposed permit amendment, and hereby requests the Executive Director reconsider his decision for the reasons explained herein, and again TJFA also requests a contested case hearing on this application. TJFA previously submitted comments and requested a contested case hearing on June 15, 2007.

TJFA is a real estate investment company which owns real property within one mile of the BFI Sunset Farms Landfill. TJFA is an affective person because it owns approximately 11 acres across the street from the landfill on the north side of Blue Goose Road in the Lucas Munos Survey Abstract No. 513. TJFA is concerned about the negative impact to the use and value of its property due to foul odors, dust, windblown debris, vectors, noise, traffic, methane gas migration, contaminated groundwater contamination migration, and other negative affects. Thus, TJFA has a justiciable interest related to the legal rights, duties, privileges, powers, or economic interests in this property that are adversely affected by this application in a way that is not common to the general public because of such close proximity. TJFA incorporates by reference and raises again the disputed issues of fact submitted in its June 15, 2007 public comments. TJFA further disputes the Executive Director's Responses to Comments in 1-44 and more particularly asserts:

LaDonna Castañuela
November 5, 2007
p. 2

Applicant Identification, Comment No. 5

In response to comments, the Executive Director has changed the Draft Permit to identify the applicant as BFI Waste Systems of North America, Inc. as the sole permittee, and to identify that BFI Waste Systems of North America, Inc. and Giles Holdings, L.P. are the property owners. This landfill, however, has a history of non-compliance with matters that directly impact TJFA's property. Therefore, TJFA must be sure there is a responsible entity for the operations at this landfill. The permittee must be responsible and responsive when these impacts occur, without shifting responsibility to some other entity.

Permit Term, Comment No. 6

TJFA supports the special provision that has been included in the permit that specifies that BFI shall receive no waste after November 1, 2015. It must be understood by all parties that no amendments are allowed and no transfer station will be allowed at this site.

Compatibility with Surrounding Community and Growth Trends, Comment 13.

The proposed permit amendment is not compatible with land use in the surrounding area. The adverse impact of this facility upon the community, property owners and individuals is unacceptable. Community growth patterns indicate that this is a rapidly growing residential area, incompatible with a nearly 200-foot tall landfill. Comments 13, 14 and 17.

The character of the surrounding land uses within one mile of the proposed facility is generally residential and the growth trends of the nearest community are also residential. This expansion is in the community's preferred growth corridor designated as the "desired development zone." Expansion of a landfill is not compatible with these trends and growth patterns. 30 TAC §330.53(b)(8). Comments 13, 24, 26, 27, and 28.

Roads within a mile of the facility have not been fully identified by the applicant. Accordingly a reviewer cannot determine the adequacy of the access roads, availability of roads or volume of traffic. 30 TAC § 330.53(b)(9). Comment 20.

The draft permit authorizes this landfill to be open 24 hours a day 7 days a week which is unacceptable based on its proximity to residential neighborhoods. The landfill should be completely closed on Sundays, and closed from 9:00 p.m. to 5:00 a.m. nightly for all activities including waste acceptance, landfill construction and maintenance, waste composting and processing and the use of any heavy construction equipment. Comment 25.

Because of the landfill's history of odor violations, the New 330 rules should be followed for odor control. 30 TAC § 330.149 requires that the site operating plan have an odor management plan that addresses the "sources of odors and includes general instructions to control odors or sources of odors. Plans for odor management must include the identification of wastes that require special attention such as septage, grease trap waste, dead animals and leachate." Comments 22 and 33.

LaDonna Castañuela
November 5, 2007
p. 3

It was evident from comments presented at the public meeting held on May 24, 2007, that this facility already has a problem with surface water drainage. Accordingly, the New 330 rules should be used for erosion and sediment control in order to protect the surrounding properties. 30 TAC §§ 330.301 through 330.305. Comment 33.

It does not appear that compliance with requirements for non-erodible velocities, minimizing soil losses, and stability of final cover has been demonstrated. 30 TAC § 330.55(b)(5)(E), § 330.56(f)(4)(A)(vi), § 330.56(f)(4)(A)(vii), § 330.133(b), and/or § 330.55(f). Comment 34.

There is significant contradiction between various parts of the Amendment Application regarding cover inspection and erosion repair. 30 TAC § 330.113(b)(B). § 330.133(g), § 330.55(b)(1). Comment 34.

It is stated that the inspections for erosion of final and intermediate cover will occur only Monday through Friday, yet, the landfill would be permitted to operate 24 hours per day, 7 days a week. 30 TAC §§ 330.133, 330.55(b)(1). This is another reason not to authorize this landfill being open 24 hours per day, 7 days a week. Comments 31 and 34.

It is unclear whether the use of alternate daily cover is authorized by the permit amendment. Standard Permit Condition VIII, I. TJFA regards alternate daily cover as unacceptable for this permit application and should be prohibited, primarily because of the severe violations of nuisance odor requirements. 30 TAC § 330.133 (a) and (c). Comment 31.

The onsite materials may be unsuitable for landfill construction purposes without specific information regarding the very high plasticity characteristics. It is also not clear from the application that the onsite soils can be successfully used for soil liner. 30 TAC § 330.56 (d) (5) (B). Comment 32.

The discussion regarding likely pathways of pollution migration does not address contaminant migration possible from the Waste Management site adjacent to the BFI site. 30 TAC § 330.56 (d) (5) (C) (iv). Comments 35 and 38.

The storage, treatment and disposal of contaminated water must be detailed in the application. There does not appear to be a description that demonstrates that the facility meets the criteria to ensure that runoff from daily cover is not potentially contaminated. 30 TAC § 330.56 (o) (1). Comment 36.

The SLQCP does not appear to address the specific conditions at this site. 30 TAC §§ 330.56(j) and 330.205. Comment 29.

The landfill gas collection systems, are not protective of human health and the environment, because of the removal of gas monitoring probes between the BFI and Austin County Landfill boundary. 30 TAC § 330.56 (n) (1) (B). Comment 39.

The demonstration of no significant alteration of natural drainage patterns was based on a comparison of the existing permit with the proposed permit amendment rather than

LaDonna Castañuela
November 5, 2007
p. 4

predevelopment conditions. 30 TAC §330.55(b) (5) (D), §330.56 (f) (2), and/or §330.56 (f) (4) (A) (iv). Comments 33 and 36.

The leachate collection system may not work adequately because of problems related to the sump. It appears that leachate levels will accumulate above one foot on the liner and flood the waste above the pump. 30 TAC § 330.5 (e) (6) (A) (ii). Comment 35.

This Applicant's compliance history, specifically with regard to odor conditions, gas emissions, contaminated storm water, and the leachate collection system is a material and relevant issue. Comment 10.

Finally, TJFA is still opposed to expansion of this landfill and dispute that the Application complies with applicable rules. Comment 1

Accordingly, TJFA re-urges its request for a contested case hearing.

Very truly yours,



Dennis L. Hobbs

TCEQ Docket No. 2007-1774-MSW

IN RE THE APPLICATION OF BFI WASTE § BEFORE THE
SYSTEMS OF NORTH AMERICA, INC. § TEXAS COMMISSION ON
PERMIT NO. MSW-1447A § ENVIRONMENTAL QUALITY

APPLICANT'S RESPONSE TO REQUESTS FOR HEARING

Exhibit C

SOAH Docket No. 582-07-2485
TCEQ Docket No. 2006-1830-MSW

2007 MAY 30 PM 2:36

In re: the Application for
MSW Permit No. 261B
(McCarty Road Landfill TX, LP)

§
§
§

Before the State Office of
CHIEF CLERK'S OFFICE
Administrative Hearings

**APPLICANT McCARTY ROAD LANDFILL TX, LP'S
MOTION TO CERTIFY QUESTIONS TO THE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Applicant McCARTY ROAD LANDFILL TX, LP (McCarty Road Landfill) hereby requests that the ALJ certify certain questions regarding Issue "U" of the March 29, 2007 Interim Order issued by the Texas Commission on Environmental Quality (TCEQ or the Commission) referring this case to the State Office of Administrative Hearings (SOAH) for hearing. McCarty Road Landfill moves for certification of these questions pursuant to 30 TAC §80.131, 7 TAC §155.35(b) and other applicable law, respectfully showing:

I. INTRODUCTION

This contested case hearing involves McCarty Road Landfill's application to vertically expand its Type I municipal solid waste (MSW) facility in Harris County. In its interim order dated March 29, 2007, the Commission referred 23 issues for consideration in the hearing. Issue U is "[w]hether the proposed expansion will negatively impact the health of the requesters and their families." This issue fails to narrow the issues for hearing, as Section 5.556 of the Texas Water Code requires, if it is construed expansively and in a manner that is not consistent with the Commission's established approach to addressing matters pertaining to the public health impacts of a proposed facility.

In the past, the Commission has framed health-impacts inquiries at contested case hearings on MSW applications in terms of the applicant's ability to show that its proposed facility will satisfy the detailed facility design criteria and operational standards contained in the MSW regulations: if the applicant satisfies its burden to show that its application and proposed facility meet the Commission's regulatory standards for the specific issues that are referred (*e.g.*, drainage, flood protection or control of wind-blown waste), then the proposed facility will by definition safeguard public health and otherwise satisfy the policy and purpose of the Solid Waste Disposal Act and the MSW regulations. McCarty Road Landfill submits that the Commission's established approach should be followed here. If Issue U is construed more broadly, however, the scope of this hearing would expand into uncharted territories – and could effectively transform this proceeding (and potentially all subsequent MSW permitting matters) into toxic tort-type cases involving analyses of current and unspecified future medical conditions, medical risks (if any) and medical causation.

Issue U is highly problematic for a variety of reasons discussed in more detail below – including substantive, procedural, evidentiary, logistical and public policy reasons. The identification and interpretation of the applicable rules and statutes, as well as clarification of the Commission's policies as they pertain to Issue U, are necessary to understand the scope of matters to be addressed and the evidence to be considered in this hearing, streamline the proceeding (including discovery), and promote judicial economies and efficiencies. Accordingly, McCarty Road Landfill moves to certify the following questions to the Commission:

Regarding Issue U of the March 29, 2007 Interim Order ("Whether the proposed expansion will negatively impact the health of the requesters and their families"):

- 1) What specific rules and statutory provisions are applicable to adjudication of this issue at contested case hearing?
- 2) For any rules and statutory provisions identified in response to Question 1 above, what is the Commission's interpretation of those rules or statutes as they pertain to the burden of proof that an MSW applicant has to show that the proposed facility will not negatively impact the health of individual requesters?
More specifically:
 - a) Is the burden of proof for Issue U cumulative of the applicant's burden of proof on the other issues that were concurrently referred by the Commission and are rooted in specific MSW location restrictions, design criteria and operational standards (*i.e.*, if the applicant meets its burden for the other 22 issues that have been referred has it also met its burden for Issue U)?; or
 - b) Is the burden of proof for Issue U separate and distinct from the applicant's burden of proof on the other issues that were concurrently referred and, if so, what is that burden?
- 3) Is it the Commission's policy to place the burden on MSW applicants to prove that a proposed landfill or landfill expansion will not cause any "negative impacts on the future health of individual requesters and their families" in addition to showing that the proposed facility meets applicable MSW location restrictions, design criteria and operational standards for the issues that were referred? If so:
 - a) What potential future health impacts of the requesters and their families must be addressed?;
 - b) For what duration must the health impacts on the requesters and their families be addressed?;
 - c) What specific waste streams, conditions or activities associated with the expansion must be addressed?; and
 - d) What legal, scientific and medical standards apply to the issue of whether the proposed expansion will

negatively impact the future health of the requesters and their families?

II. BACKGROUND

The Application and the Interim Order

The McCarty Road Landfill is a 464-acre Type I MSW landfill facility located at 5757A Oates Road in Houston. The facility is owned and operated by McCarty Road Landfill TX, LP, a limited partnership that is affiliated with the country's second largest waste management company, Allied Waste, Inc. McCarty Road Landfill submitted its application for a major permit amendment in April 2004 to expand the permitted height, but not the footprint, of the existing waste disposal area. The application was declared technically complete, and the Executive Director recommended approval of the draft permit, in November 2004.

Several entities and individuals protested the application. One day after its agenda of March 28, 2007, the Commission issued its interim order referring 23 listed issues to SOAH for adjudication in this contested case hearing. (A copy of the March 29, 2007 Interim Order is attached as Exhibit A.) While the other 22 issues that were referred are generally traceable to specific MSW design criteria or operational standards contained in the Texas Administrative Code, Issue U ("Whether the proposed expansion will negatively impact the health of the requesters and their families") is not.

The Solid Waste Disposal Act and the MSW Regulations

The stated legislative "policy and purpose" of the Texas Solid Waste Disposal Act (SWDA) is "to safeguard the health, welfare, and physical property of the people and the environment by controlling the management of solid waste ...". TEX. HEALTH & SAFETY

CODE ANN. §361.002. In order to fulfill this policy and effect this purpose, the Texas Legislature has authorized the Commission to promulgate rules and standards pertaining to the management and control of solid waste and MSW facilities. *Id.* at §361.024. The Commission has, in turn, promulgated a comprehensive regulatory framework governing the collection, storage, transportation, processing and disposal of solid waste – *see* 30 TAC §330.1 *et seq.* – including (among other things) regulations pertaining to the classification of various wastes, waste streams and types of MSW facilities (*e.g.*, *id.* at §§330.3 & 330.5); facility permit requirements (*id.* at §330.7); general prohibitions pertaining to solid waste management (*id.* at §330.15); content requirements for permit applications for new facilities or expansions to existing facilities (*id.* at §330.57); site selection, land use compatibility criteria and location restrictions (*id.* at §§330.61 & 330.541-330.563); site development and facility design criteria (*e.g.*, *id.* at §§330.63 & 330.301-330.421); operational standards for facilities (*id.* at §§330.121-330.179); closure and post-closure (*id.* at §§330.451-330.509); and publication of technical guidelines by the Executive Director “outlining recommended methods designed to aid in compliance” with the MSW regulations (*id.* at §330.6). The Commission's regulations also include provisions for review of permit applications for administrative completeness (*i.e.*, whether the application contains all of the information required by the State from applicants) and for technical review of the application by the agency's professional staff (*i.e.*, whether the application complies with the technical criteria that have been established by the State). *See, e.g.*, 30 TAC §§281.3, 281.17 & 281.19.

The very premise of the State's MSW framework, then, is that an MSW applicant who prepares, submits and then adequately demonstrates that its application meets or

exceeds the agency's location restriction, design criteria and operational standards has proposed a facility that, by definition and consistent with the policy and purpose of the SWDA, "safeguard[s] the health, welfare, and physical property of the people and the environment." TEX. HEALTH & SAFETY CODE ANN. §361.002. Depending upon how it is construed, Issue U may turn this premise on its head – in several respects.

III. ARGUMENT AND AUTHORITIES

A. **Issue U fails to limit the scope of this hearing and imposes new burdens on applicants if the Commission's established approach is not followed here.**

1. Broad-form issues such as Issue U are contrary to the issue-narrowing purpose of §5.556 of the Texas Water Code.

Section 5.556 of the Texas Water Code governs requests for contested case hearings and Commission referrals of issues to hearing. TEX. WATER CODE ANN. §5.556. The statute specifically requires the Commission to "limit the number and scope of the issues to be referred to [SOAH] for hearing." *Id.* at §5.556(e). Unless (and only if) Issue U is construed and addressed strictly in the context of the narrower issues that were concurrently referred by the Commission – that is, unless the "established approach" discussed above applies here – Issue U fails to limit the scope of this hearing in any meaningful respect and is contrary to both the letter and intent of Section 5.556. It is no more limiting than other potential broad-form issues such as "whether the facility will harm the environment" or "whether the facility will safeguard the welfare of the public" which necessarily require an analysis of more specific location, facility design and facility operation issues that have properly been raised in connection with an application.

2. The issue, if broadly construed, substantially expands the scope of this proceeding and imposes greater burdens on MSW applicants.

Since the enactment of Section 5.556, the practice of the Commission has been to refer specific issues to hearing for consideration – with the burden resting on the applicant to show how or why its proposed facility satisfies the standards established by the Commission for those specific issues and thereby show that the public health is safeguarded. *See generally* 30 TAC §80.17. The Commission has not required applicants to show at a more general level that a proposed facility, if permitted, will not negatively impact the health of either the public at large or any individual protestant even if the applicant has otherwise proved compliance with the regulatory criteria and standards for the specific issues that were referred.

If it is construed expansively, Issue U would increase the scope of this proceeding and expand the burden of proof that is placed on an MSW applicant in three distinct ways. First, it would impose upon the applicant new and additional burdens regarding issues that were not even referred to hearing – thus undermining the issue-narrowing purpose of the referral process. Second, it would potentially require the applicant to show that the regulations themselves adequately protect the health of the protestants. Third, it would raise new issues and impose new burdens of proof pertaining to the future health of *individual* requesters. As such, a broadly construed Issue U would substantially enlarge the overall burden of proof traditionally placed on applicants from a "Does this application satisfy the statutory and regulatory criteria for the specific issues that were referred?" standard to include new "Are the MSW regulations protective of public health?" and "What possible health effect might an expansion have on individual requesters?" burdens.

- a. *The issue places the burden on the applicant to prove up aspects of its application that were not referred or were specifically rejected for referral.*

If it is construed broadly, Issue U raises the prospect of back-door inquiries into issues that were not referred by the Commission and, in certain circumstances, issues that were specifically rejected for referral. Here, for example, several protestants raised air quality issues in their public comments or requests for hearing. The Commission, however, did not refer any air issues (the landfill has obtained all necessary governmental authorizations related to air quality.) Yet, an expansive interpretation of Issue U would place the burden on McCarty Road Landfill to show that the facility expansion will not have *any* negative impacts on *any* aspect of the health of the requesters or their families – thus theoretically opening up a potential Pandora's Box of prospective medical conditions that have air-quality aspects such as asthma and emphysema. This would require McCarty Road Landfill to prove that the expansion *of a landfill that already has shown that it has the necessary air quality authorizations* will not cause or contribute to any such air-related medical conditions *even though requests for hearing pertaining to air issues were rejected*. Surely the Commission did not intend to limit the scope of this hearing by denying referral of certain issues only to open the door to consideration of those issues in the same order.

- b. *A broadly-construed Issue U would require the applicant to prove up the programmatic purpose of the MSW regulations.*

Requiring McCarty Road Landfill to prove at a general level that the expansion will not "negatively impact the health of the requesters and their families" will, in effect, require it to prove that the State's MSW design criteria and operational standards

themselves are sufficiently protective of public health. Put another way, at hearing McCarty Road Landfill would have to prove both (i) that the proposed expansion satisfies the applicable design criteria and operational standards *and* (ii) that these criteria and standards adequately protect human health. This would place a new, broad burden on the applicant to prove at a *programmatic level* that the MSW statutes and regulations sufficiently serve their stated policy and purpose of safeguarding the public health – despite the fact that the programmatic inquiry has already been done at the legislative level (through the legislative process) and agency level (through the rulemaking process).

If it is expansively construed, Issue U would put the State's MSW program on trial in this proceeding – and then place the burden on the applicant to prove that the program itself safeguards human health. This is a wholly inappropriate role for an applicant, whether McCarty Road Landfill in this proceeding or any other future applicant in another proceeding. It is also a wholly inappropriate endeavor for a permitting proceeding, which is not the proper forum for addressing the adequacy or sufficiency of individual regulations. The Commission would undoubtedly reserve the authority to define and defend its own regulations and not leave the issue of the adequacy and sufficiency of its regulatory standards to applicants, protestants and individual ALJ's in a contested case proceeding.

c. *A broadly-construed Issue U would impose new burdens of proof pertaining to individual health.*

If Issue U is construed expansively, the scope of this proceeding would potentially¹ expand into the realm of individualized medical inquiries for perhaps one

¹ McCarty Road Landfill submits that the Commission does not have the statutory authority to adjudicate the future medical impacts that a facility might have on any one individual.

hundred or more people. This would, in turn, place new burdens of proof on the applicant – including, for example, burdens involving or related to medical causation (or lack thereof) discussed below.

B. Issue U implicates complex legal and evidentiary issues pertaining to causation of indeterminate future health and medical conditions.

1. Issue U will create a medical causation quagmire if the scope of the inquiry here broadens beyond design criteria and operational standards.

Issue U will present a quagmire of legal causation issues if McCarty Road Landfill must show, at a general level, that the expansion will not negatively impact the health of the requesters in addition to showing that the proposed facility satisfies the MSW design criteria and operational standards. The issue implicates complex issues of medical causation that are typically reserved for toxic tort lawsuits involving prior exposures of injured plaintiffs to specific constituents or contaminants. *See, e.g., Mobil Oil Corp. v. Bailey*, 187 S.W.3d 265, 267-75 (Tex.App.–Beaumont 2005, pet. denied) (analyzing medical causation issues where plaintiffs alleged lung cancer resulting from prior exposure to asbestos); *Frias v. Atlantic Richfield Corp.*, 104 S.W.3d 925, 928-31 (Tex.App.–Houston [14th Dist.] 2003, pet. denied) (analyzing medical causation issues where plaintiffs alleged aplastic anemia resulting from prior exposure to benzene). Such causation issues are far outside the province of typical environmental permit hearings.

Any causation analysis in this proceeding will be even *more* complicated than the causation issues that are raised in a typical trial setting, however, because the analysis here involves unspecified *future* health issues. Because the issue has been so broadly framed, McCarty Road Landfill would have to speculate as to any and all conceivable effects of a landfill expansion on the health of the requesters and their families, and then

address, through expert scientific and medical testimony, any potential cause or causes of these yet-to-be-determined future medical conditions. Matters such as the ages, occupations, prior medical histories and current health of the requesters and their families will all be relevant to any such analysis (and would thus be subject to discovery).

The causation analysis is yet more complex here, however, because medical causation necessarily entails analyzing all events, conditions or activities which might have caused the medical condition or conditions that are at issue. But Issue U is not framed in terms of any specific waste stream, constituent, condition or activity associated with the proposed expansion. The causation analysis implicated by this issue would thus involve determining whether "Future Condition or Activity A" at the landfill might cause or contribute to "Future Medical Condition B" for each requester and family member – where neither "A" nor "B" have been specified by the Commission.

And there are at least three other layers of complexity to the causation issues implicated by Issue U. First, the causation analysis here would apply to perhaps one hundred or more individuals instead of claims involving a single plaintiff or a handful of plaintiffs. Second, the causation analysis would require that *other* events, activities or conditions must be eliminated as possible causes of or contributing factors to the medical condition or conditions at issue. The potential health impacts of the landfill expansion on the requesters and their families would thus have to be sorted out from the potential impacts that all other events, conditions and activities which occur in the vicinity of their residences, workplaces and schools might have on their future health – including for example (depending on the medical condition or conditions at issue) sources, categories and levels of air pollutants in these areas (Houston is an ozone non-attainment area),

potential sources of odors (the neighborhoods at issue are in the vicinity of U.S. Highway 90), and the health habits of the requesters (it is highly likely that some are smokers). *See, e.g., Bailey*, 187 S.W.3d at 273-75 (holding that plaintiffs failed to show that asbestos, and not heavy smoking, caused lung cancer). Third, causation necessarily requires a showing that an individual was actually *exposed* to a particular event, condition or constituent, and that the exposure itself was in reasonable medical probability the cause of the particular disease or medical condition in question (also referred to as “specific causation”). *See Frias*, 104 S.W.3d at 928-931.

2. Issue U shifts the burden of proof on causation issues.

Applicants generally bear a preponderance-of-the-evidence burden of proof in MSW proceedings. *See* 30 TAC 80.17(a). Issue U shifts the burden that typically applies to medical causation issues: whereas civil court plaintiffs bear a preponderance-of-the-evidence burden on causation evidence, here the burden is placed on McCarty Road Landfill to show by a preponderance of the evidence that expansion will not cause any of the yet-to-be-specified future medical conditions.

C. A broadly-construed Issue U will add substantial procedural and logistical complexities to this proceeding.

1. Issue U will expand all aspects of this proceeding if it is construed broadly.

If Issue U is not addressed in this hearing using the Commission’s established approach to potential health impacts, the issue vastly changes the landscape of this proceeding and transforms it into what essentially will be a hybrid administrative permitting proceeding and toxic tort case (without any toxic tort). Litigation of the

health-impacts issue will substantially expand the scope and duration of both pre-hearing discovery and the evidentiary hearing itself. The issue adds matters for discovery that are not specifically related to the applicant, the application, or the facility, such as matters pertaining to the individual health and medical histories of the requesters and their families. Among other things, medical records must be obtained for each of the individuals whose health is (or will be) made an issue (raising privacy concerns and lengthening the duration of discovery). Each of these individuals will likely need to be deposed, creating inevitable scheduling problems and making the 50-total-hour deposition limit untenable. *See* 30 TAC §80.152(c). The scope of the evidentiary hearing itself will expand from the engineering, geological/geotechnical and waste management practice arenas into matters pertaining to health and medicine. Additional expert witnesses – perhaps three or more per side – will be needed to address the medical, scientific and epidemiological sub-issues that a broad construction of Issue U raises. The volume of evidence will increase (both in terms of documents and testimony), and the scope and complexity of the proposed findings of fact and conclusions of law will expand.

2. Litigation of Issue U will likely press the maximum eleven-month time limit for completing the proceeding.

In its interim order, the Commission set the maximum duration of this hearing at eleven months from the first day of the preliminary hearing to the date the proposal for decision is issued by SOAH. For all of the reasons discussed above, Issue U makes this 11-month maximum duration infeasible as a practical matter. Mass tort lawsuits in Texas involving 49 or more individual plaintiffs typically take years to litigate and try.

D. Issue U is vague and overbroad if it is construed in any manner other than the Commission's established approach to public health impacts of a proposed facility.

1. The issue lacks any specific (or specified) basis in any statute or regulation.

Issue U was referred without reference to any particular statutory provision or regulation. No statutory or regulatory basis for consideration of any possible negative impact to any individual's health is provided as a reference or guide in the order. No Commission guideline, policy or precedent was provided. While the SWDA does include policy statements regarding public health – *see, e.g.*, TEX. HEALTH & SAFETY CODE ANN. §§361.002 – the term "negatively impact" is not used anywhere in the statute in terms of public or individual health. Similarly, the MSW regulations make various references to "public health" or "human health," but there is no regulation that uses the term "negatively impact" in this particular context – much less defines the term or establishes any specific health protection or risk-assessment criteria, standards or guidelines.

2. The issue is vague if construed outside the Commission's established approach.

Issue U is vague in several respects if it is not construed consistent with the Commission's established approach to potential public health impacts of a facility. The term "negatively impact" is not defined in the order, the SWDA or the MSW regulations. It does not have any specific or generally accepted legal or technical meaning, and no scientific or medical standards have been provided or referred to by the Commission. Moreover, the term has not been phrased or framed in terms of acceptable or relative levels of risk, duration, degree, or technological or economic feasibility.

The phrase "health of the requesters and their families" is also vague. The order does not discuss what aspect or aspects of the health of the requesters and their families must be addressed by the applicant or considered by the fact finder. It also fails to refer to any proposed waste stream, design criterion, operating standard or any other condition or activity at the facility that might conceivably impact health. While "requesters" presumably refers to the 49 "individual requesters" listed in Exhibit A to the order, Issue U does not specifically employ the phrase "individual requesters" (a public advocacy group, a governmental entity and the Weingarten corporations and partnerships also requested a hearing and are identified as "affected persons/entities" in the order), and the order does not specifically name or identify the requesters whose health must be addressed. It is thus unclear whether members of the public advocacy group or employees of the other affected entities fall within the scope of this issue.

3. The issue is overbroad unless it is construed strictly within the context of the other 22 issues that were referred.

Issue U is also overbroad and open-ended in several respects unless the issue is addressed consistently with the Commission's established approach to potential health impacts of a facility. First, the issue is not limited or framed in terms of any existing or proposed waste stream, constituent, condition or activity at the site. Second, the issue is not limited in terms of what health or medical impacts of the requesters must be considered or addressed. Third, the issue is not limited in terms of time: the Commission has not framed the health-impacts inquiry in terms of the duration of active waste disposal at the site due to the proposed expansion, the post-closure period, the lifetimes of the requesters and their families, or any other defined time frame.

E. Clarification of Issue U and the policy or policies underlying the issue is necessary to define the scope of this proceeding, streamline the litigation, and promote judicial economies.

Issue U can be construed in at least two ways. If the issue is construed consistent with the Commission's established approach, health-impact and public health issues pertaining to a contested MSW application should be addressed at hearing in terms of whether the applicant has met its burden with respect to the regulatory design criteria and operational standards that are applicable to specific issues that have been referred. If the applicant meets its burden, then the proposed facility is deemed to be protective of health. If Issue U is expansively construed, however, the scope of the hearing would be vastly different from the "established approach" and would venture into the realm of medicine, medical causation and individual health. The Commission's order, however, does not address which construction applies here – and creates uncertainty as to the scope and shape of this hearing.

For all of the reasons discussed above, clarification of Issue U and the Commission's policies as they pertain to this issue is necessary to ensure that the issue is properly, fully and fairly litigated by the parties and addressed at the evidentiary hearing. Clarification is also necessary to ensure that matters which the Commission considers duplicative, not relevant to its decision-making, or are outside its statutory authority are not unnecessarily litigated. As such, the issue should and must be clarified at the outset of this proceeding to streamline the litigation and promote judicial economies.

F. The construction and application of Issue U in this case has agency-wide implications.

How Issue U will be construed and addressed in this case would have far-reaching implications in the MSW permitting arena. A shift away from the agency's "established approach" to the health-effects issue will affect both pending and future MSW applications and would represent a significant shift in agency policy. As a practical matter, applicants might be forced to preemptively include health-effects analyses in their applications for technical review by an agency that presently does not have medical review personnel on its staff, has no regulations or guidelines governing such review, and no procedure in place for any such review procedures. The scope and nature of pending and future contested proceedings involving MSW applications in which issues identical or similar to Issue U would be substantially enlarged to include the "toxic tort" type issues discussed above – thus fostering all of the problems discussed above.

IV. CONCLUSION AND PRAYER

For all of the foregoing reasons, McCarty Road Landfill respectfully prays that the following questions be certified to the Texas Commission on Environmental Quality:

Regarding Issue U of the March 29, 2007 Interim Order ("Whether the proposed expansion will negatively impact the health of the requesters and their families"):

- 1) What specific rules and statutory provisions are applicable to adjudication of this issue at contested case hearing?
- 2) For any rules and statutory provisions identified in response to Question 1 above, what is the Commission's interpretation of those rules or statutes as they pertain to the burden of proof that an MSW applicant has to show that the proposed facility will not negatively impact the health of individual requesters?
More specifically:
 - a) Is the burden of proof for Issue U cumulative of the applicant's burden of proof on the other issues that

were concurrently referred by the Commission and are rooted in specific MSW location restrictions, design criteria and operational standards (*i.e.*, if the applicant meets its burden for the other 22 issues that have been referred has it also met its burden for Issue U)?; or

- b) Is the burden of proof for Issue U separate and distinct from the applicant's burden of proof on the other issues that were concurrently referred and, if so, what is that burden?
- 3) Is it the Commission's policy to place the burden on MSW applicants to prove that a proposed landfill or landfill expansion will not cause any "negative impacts on the future health of individual requesters and their families" in addition to showing that the proposed facility meets applicable MSW location restrictions, design criteria and operational standards for the issues that were referred? If so:
- a) What potential future health impacts of the requesters and their families must be addressed?;
 - b) For what duration must the health impacts on the requesters and their families be addressed?;
 - c) What specific waste streams, conditions or activities associated with the expansion must be addressed?; and
 - d) What legal, scientific and medical standards apply to the issue of whether the proposed expansion will negatively impact the future health of the requesters and their families?

McCarty Road Landfill also prays for any and all other relief to which it is justly entitled.

Respectfully submitted,

By: 

Paul G. Gosselink
Texas Bar No. 08222800

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OF COUNSEL:

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing motion was served on the following counsel/parties of record by certified mail (return receipt requested), regular U.S. mail, facsimile transmission and/or hand-delivery on May 29, 2007:

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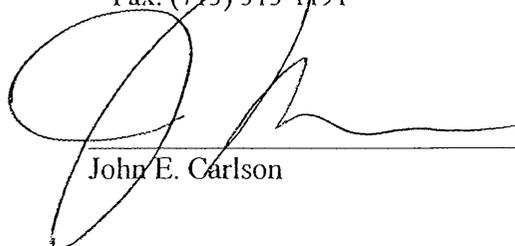
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2007 MAY 30 PM 2:36

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

TCEQ Docket No. 2007-1774-MSW

IN RE THE APPLICATION OF BFI WASTE § BEFORE THE
SYSTEMS OF NORTH AMERICA, INC. § TEXAS COMMISSION ON
PERMIT NO. MSW-1447A § ENVIRONMENTAL QUALITY

APPLICANT'S RESPONSE TO REQUESTS FOR HEARING

Exhibit D

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AGENCY: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
(TCEQ)

STYLE/CASE: APPLICATION OF MCCARTY ROAD LANDFILL TX, LP, FOR
AN AMENDMENT TO A TYPE 1 MSW PERMIT, NO. 261B

SOAH DOCKET NUMBER: 582-07-2485
TCEQ DOCKET NUMBER: 2006-1830-MSW

STATE OFFICE OF ADMINISTRATIVE
HEARINGS

KERRY D. SULLIVAN
ADMINISTRATIVE LAW JUDGE

PARTIES

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SOAH DOCKET NO. 582-07-2485
TCEQ DOCKET NO. 2006-1830-MSW

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PAGE 2

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WRI/7080 EXPRESS LANE, INC.; AN/WRI
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MEMBER OF CONGRESS FOR THE 18TH
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xc: Docket Clerk, State Office of Administrative Hearings
Docket Clerk, Office of the Chief Clerk, TCEQ, Fax No. (512) 239-3311

TCEQ Docket No. 2007-1774-MSW

IN RE THE APPLICATION OF BFI WASTE § BEFORE THE
SYSTEMS OF NORTH AMERICA, INC. § TEXAS COMMISSION ON
PERMIT NO. MSW-1447A § ENVIRONMENTAL QUALITY

APPLICANT'S RESPONSE TO REQUESTS FOR HEARING

Exhibit E



Capital Area Council of Governments
2512 IH 35 South, Suite 200
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www.capcog.org

August 23, 2006

Richard C. Carmichael, Ph.D., P.E.
Manager, Municipal Solid Waste Permits Section
Waste Permits Division (MC 124)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

RE: BFI Waste Services of North America, Inc. Application for Permit
Amendment

Dear Dr. Carmichael:

The Solid Waste Advisory Committee (SWAC) of the Capital Area Council of Governments (CAPCOG) has reviewed the application for a Permit Amendment by BFI Waste Services of North America, Inc. to expand their facility at 9912 Giles Road based on the following factors:

- Land Use Compatibility
- Conformance with the RSWMP
- Local Facility Siting Concerns

The SWAC endorsed comments made by Travis County, the host local government of this project. The attached Travis County comments pointed out that the proposed expansion of this facility will not conform with current and future land use in that area and furthermore, there are significant local concerns about the site. The Travis County comments also outlined the steps necessary to address their concerns.

The CAPCOG Executive Committee has made the determination that the proposed expansion of the facility will conditionally conform if BFI Waste Services of North America, Inc. agrees to the following six conditions set forth in the attached comments by Travis County:

- All waste handling, including both disposal and operation of a transfer station, ends at BFI's Sunset Farms Landfill by November 1, 2015.
- New landfills may be located in the Desired Development Zone if they include adequate buffer zones and other safeguards to avoid incompatible land use.

Chairman
Judge Ronnie McDonald
Bastrop County

1st Vice-Chairman
Commissioner Maurice Pitts
Lee County

2nd Vice-Chairman
Mr. Bill Hamilton
City of Rollingwood

Secretary
Mayor Susan Narvaiz
City of San Marcos

Mayor James Arndt
City of Giddings

Mayor James Bartram
City of Lockhart

Judge Samuel T. Blease
Travis County

Mr. Eric Carlson
City of Elgin

Ms. Tina Collier
City of Cedar Park

Commissioner
Will Conley
Hays County

Commissioner
Gerald Daugherty
Travis County

Judge John C. Dorrler
Williamson County

Judge R. G. Floyd
Udall County

Judge Bill Guthrie
Blanco County

Judge Ed Janocka
Fayette County

Council Member Jennifer Kim
City of Austin

Judge David L. Kilb
Burnet County

Mayor Pro Tom
Alan McGraw
City of Round Rock

Mayor Caroline Murphy
Village of Bee Cave

Judge Jim Powers
Hays County

Judge H. T. Wright
Caldwell County

- CAPCOG opposes any landfill application by BFI Sunset Farms for a permit to operate as a waste disposal site and/or transfer station after November 1, 2015.
- CAPCOG continues to strongly encourage BFI Waste Services of North America, Inc. to locate and permit a Greenfield site in another location and relocate from its current site in northeast Travis County as soon as possible thereafter.
- CAPCOG strongly encourages BFI Sunset Farms to commit to take the same quantity of waste that it has taken during recent years, including factoring in annual increases.
- CAPCOG strongly encourages BFI Sunset Farms to commit to bring no waste into Travis County from out of Texas.

Therefore, the CAPCOG Executive Committee voted on August 9, 2006 to notify TCEQ that the BFI Waste Services of North America, Inc. permit amendment application conditionally conforms with the Regional Solid Waste Management Plan (RSWMP) if BFI Waste Services of North America, Inc. agrees to the above mentioned six conditions.

Sincerely,

A handwritten signature in black ink, appearing to read "Betty Voights", is written over the typed name and title.

Betty Voights
Executive Director

Enclosure

As provided on p. 34 of the Regional Solid Waste Management Plan that was approved by the CAPCOG Executive Committee on July 10, 2002, BFI Waste Management Systems of North America Inc.'s application for expansion of the Sunset Farms Landfill does not conform for the following reasons:

1. Consideration will be given to conformance with the goals and objectives of the Regional Solid Waste Management Plan. The application does not conform to "Goal #7: Ensure the proper management of disposal of municipal solid waste." Specifically, the application does not conform to this requirement in the following respects:

- "Track and understand compliance histories of all MSW facilities and MSW facility operators in the region."

TCEQ fined the applicant for serious violations that resulted in nuisance odors that affected neighbors and communities. Given applicant's history of serious violations, there is a risk of future violations, and the applicant must demonstrate that it has taken steps to mitigate this risk. The applicant's Conformance Checklist demonstrates no more than a willingness to comply with TCEQ minimum requirements. This is insufficient to mitigate the risk of future violations that may result in nuisance conditions.

- "Promote siting and management of facilities that does not pose a nuisance to neighbors and communities."

Adjacent land owners will suffer visual, olfactory, and other impairments to the use and enjoyment of their private property rights from the expansion of the landfill. The applicant has a history of serious violations that resulted in nuisance odors that affected neighbors and communities. There are almost a thousand residences within one mile of the site. Moreover, the site is in the community's preferred growth corridor, known as the Desired Development Zone. Many residences, commercial buildings, and employment sites have been and in the near future will be constructed near the site. The application acknowledges that this is the fastest growing sector of the Austin metropolitan area. In terms of siting facilities to avoid nuisances to neighbors and communities, this site is a poor choice. Section 2.10 of the Conformance Checklist requires the applicant to demonstrate that it has addressed the risk of nuisance conditions. The applicant essentially states nothing more than that it will comply with state and local regulatory minimums. This is an inadequate response to the Checklist.

2. Consideration will be given to proposed methods of operation. Specifically, the application does not conform to this requirement in the following respects:
 - Given applicant's history of serious violations, there is a risk of future violations, and the applicant must demonstrate that its methods of operation mitigate this risk. Section 2.10 of the Conformance Checklist requires the applicant to demonstrate that it has addressed the risk of nuisance conditions. The applicant's response to the Conformance Checklist demonstrates no more than a willingness to comply with TCEQ minimum operating requirements. This is insufficient to mitigate the risk of future violations that may result in nuisance conditions.
3. Consideration will be given to the compliance history of the company. Specifically, the application does not conform to this requirement in the following respects:
 - Given applicant's history of serious violations, there is a risk of future violations, and the applicant must demonstrate that its methods of operation mitigate this risk. The applicant's Conformance Checklist demonstrates no more than a willingness to comply with TCEQ minimum operating requirements. This is insufficient to mitigate the risk of future violations that may result in nuisance conditions.
4. Consideration will be given to the general compatibility of the proposed facility with surrounding land use. Specifically, the application does not conform to this requirement in the following respects:
 - The facility is within the community's preferred growth corridor, known as the Desired Development, and is adjacent to numerous homes, schools, historic sites, and other sensitive receptors. Specifically, there are almost a thousand residences within one mile of the site. Many residences, commercial buildings, and employment sites have been and in the near future will be constructed near the site. The application acknowledges that this is the fastest growing sector of the Austin metropolitan area. The land use pattern that will prevail for the foreseeable future in the vicinity of the site is incompatible with ongoing waste disposal activities. Moreover, Section 2.12 of the Conformance Checklist requires the applicant to provide documentation from local governments that the site is not incompatible with existing and planned land uses in the vicinity of the site. The applicant has not provided this documentation.

As provided on p. 37 of the Regional Solid Waste Management Plan that was approved by the CAPCOG Executive Committee on January 10, 2005, BFI Waste Management Systems of North America Inc.'s application for expansion of the Sunset Farms Landfill does not conform for the following reasons:

1. "Ensure that the use of a site for a MWS facility does not adversely impact human health or the environment by evaluating and determining impact of the site upon counties, cities, communities, groups of property owners, or individual in terms of compatibility of land use, zoning in the vicinity, community growth patterns, and other factors associated with the public interest."
 - The facility is within the community's preferred growth corridor, known as the Desired Development Zone, and is adjacent to numerous existing—and future--homes, schools, historic sites, and other sensitive receptors. Specifically, there are over a thousand residences within one mile of the site. In terms of siting facilities to avoid nuisances to neighbors and communities, this site is a poor choice. Many residences, commercial buildings, and employment sites have been and in the near future will be constructed near the site. The application acknowledges that this is the fastest growing sector of the Austin metropolitan area. The land use pattern that will prevail for the foreseeable future in the vicinity of the site is incompatible with ongoing waste disposal activities. Moreover, the applicant's Conformance Checklist provides no documentation regarding compatibility with existing and planned land uses in the vicinity of the site as required by Section 2.12 of the checklist.
2. "Ensure that MSW facilities comply with local zoning requirements, siting ordinances, and other local government land use regulations."
 - The applicant has not provided the documentation from Travis County and the City of Austin required by Section 2.8 of the Checklist confirming that the applicant can obtain site development plan approval.
3. "Ensure that MSW facilities' impacts on roads, drainage ways, and other infrastructure are assessed, that both existing and planned future land uses near the facility are considered, and that infrastructure problems created by the facility and the potential for land use conflicts between MSW facilities and existing and planned development are fully and adequately taken into account and addressed."
 - Applicant has engaged only in token coordination with local governments regarding infrastructure. The applicant is proposing only to meet TCEQ-required minimum practices. Travis County and the City of Austin are responsible for streets, drainage, and other infrastructure in the area surrounding the site. The applicant

has not obtained documentation from governmental entities regarding infrastructure issues as required by Section 2.11 of the Checklist.

4. "Ensure that MSW facilities are good neighbors, by assessing and considering every applicant's five-year compliance history in Texas to the fullest extent allowed by TCEQ."
 - TCEQ assessed the applicant fines for serious violations that resulted in nuisance odors that affected neighbors and communities. Given applicant's history of serious violations, there is a risk of future violations, and the applicant must demonstrate that it has taken steps to mitigate this risk. The applicant's Conformance Checklist demonstrates no more than a willingness to comply with TCEQ minimum requirements. This is insufficient to mitigate the risk of future violations that may result in nuisance conditions.

5. "Encourage programs that provide incentives for using landfills instead of illegal dumping including but not limited to conducting and increasing awareness of community cleanup events, efforts to curtail illegal dumping, litter abatement and waste reduction programs, public education programs, lower rates for waste collection events, etc."
 - The applicant's response to Section 2.2 of the Conformance Checklist mentions participation in locally sponsored events and willingness to have discussion with unnamed groups, but fails to describe any real program or plan to systematically address this issue. This is an inadequate response to the Checklist.

6. "Avoid if possible, or minimize if avoidance is not possible, concerns about visual and aesthetic impacts for MSW facilities on adjacent land uses by incorporating "context sensitive" design, appropriate buffers and setbacks into facility design,. Ensure that operators take reasonable and appropriate steps to avoid such impacts if possible or minimize them if complete avoidance is not possible."
 - With the exception of designing the final configuration of the landfill to minimize visual and aesthetic impacts, the applicant's response to Section 2.13 of the Conformance Checklist demonstrates no more than a willingness to comply with TCEQ minimum requirements. With the exception of the design of the final configuration, this is an inadequate response to the Checklist.

7. "Address local land use concerns about the long term and cumulative effects of MSW facilities and protect the public interest in a natural landscape, avoid if possible, or minimize if not possible, major disruptions to the landscape and other adverse long

term and cumulative effects by ensuring that the permitted and maximum potential (theoretical geometric calculation) height and capacity of a MSW facility are accurately calculated and taken into account.”

- The applicant’s response to Section 2.15 of the Conformance Checklist fails to assess how the natural landscape is impacted by increasing the elevation of the natural ground at the site to an elevation of 740 feet above MSL.
8. “Avoid if possible, or minimize if avoidance is not possible, nuisance conditions associated with MSW facilities that generate community concerns by ensuring that applicants implement reasonable and appropriate measures and best management practices to prevent and control litter, stormwater runoff, vectors, odor, excessive noise, light pollution, and other nuisance conditions.”
- The facility is within the community’s preferred growth corridor, or Desired Development Zone, and is adjacent to numerous existing and planned homes, schools, historic sites, and other sensitive receptors. Specifically, there are almost a thousand residences within one mile of the site. The application acknowledges that this is the fastest growing sector of the Austin metropolitan area. The land use pattern that will prevail for the foreseeable future in the vicinity of the site is incompatible with ongoing waste disposal activities. In terms of siting facilities to avoid nuisances to neighbors and communities, this site is a poor choice. The existing and future land uses surrounding the site are incompatible with ongoing waste disposal activities. Furthermore, TCEQ assessed the applicant fines for serious violations that resulted in nuisance odors that affected neighbors and communities. Given applicant’s history of serious violations, there is a risk of future violations, and the applicant must demonstrate that it has taken steps to mitigate this risk. The applicant’s responses to Sections 2.10 through 2.15 of the Conformance Checklist demonstrates little or no coordination with local governments and essentially states no more than that applicant will comply with TCEQ minimum requirements. This is insufficient to mitigate the risk of future nuisance conditions and does not satisfy the requirement of the Conformance Checklist that the applicant address these issues at the time of the conformance review.

Proposal for SWAC for 8/2/06

The applicant can address the foregoing deficiencies in response to the Conformance Checklist in the following ways:

- The applicant must provide an adequate response to illegal dumping issues as required by Section 2.2 of the Conformance Checklist.
- The applicant must make a good faith effort to obtain the documentation from the City of Austin and Travis County regarding zoning, siting, and other land use regulations required by Section 2.8 of the Conformance Checklist.
- Rather than simply stating that it intends to comply with TCEQ regulations, the applicant must provide a plan for addressing the risk of nuisance conditions as required by Section 2.10 of the Conformance Checklist.
- The applicant must make a good faith effort to obtain the documentation from local governments regarding infrastructure issues as required by Section 2.11 of the Conformance Checklist.
- The applicant must make a good faith effort to obtain the documentation from local governments regarding land use compatibility as required by Section 2.12 of the Conformance Checklist.
- The applicant must provide an assessment of and a plan for addressing the visual impacts as required by Section 2.13 through Section 2.15 of the Conformance Checklist.
- **Notwithstanding the foregoing deficiencies, the application would conform if all waste handling, including both disposal and operation of a transfer station, ends at BFI's Sunset Farms Landfill by November 1, 2015.**
- New landfills may be located in the Desired Development Zone if they include adequate buffer zones and other safeguards to avoid incompatible land use.
- CAPCOG opposes any landfill application by BFI Sunset Farms for a permit to operate as a waste disposal site and/or transfer station after November 1, 2015.
- CAPCOG continues to strongly encourage BFI to locate, acquire, and permit a greenfield site in another location and relocate from its current site in northeast Travis County as soon as possible thereafter.

Proposal for SWAC for 8/2/06

- CAPCOG strongly encourages BFI to commit to take the same quantity of waste that it has taken during recent years, including factoring in annual increases.
- CAPCOG strongly encourages BFI to commit to bring no waste into Travis County from out of Texas.