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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Blas J. Goy, Jr., *Public Interest Counsel*
2007 FEB 1 11 4 02

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

Protecting Texas by Reducing and Preventing Pollution

February 1, 2008

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: BFI WASTE SYSTEMS OF NORTH AMERICA, INC.
TCEQ DOCKET NO. 2007-1774-MSW**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Requests for Reconsideration and Response to Hearing Requests in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Christina Mann".

Christina Mann, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: www.tceq.state.tx.us

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

TCEQ DOCKET NO. 2007-1774-MSW

2008 FEB -1 PM 4:12

IN THE MATTER OF THE
APPLICATION OF BFI WASTE
SYSTEMS OF NORTH AMERICA,
INC. AND GILES HOLDINGS, L.P.
FOR MSW PERMIT NO. 1447A

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BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY
CHIEF CLERK'S OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUESTS FOR RECONSIDERATION AND REQUESTS FOR
HEARING**

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) and files this Response to Hearing Requests in the above-referenced matter, and would respectfully recommend referring this matter to the State Office of Administrative Hearings (SOAH).

I. INTRODUCTION

BFI Waste Systems of North America, Inc and Giles Holdings, L.P. (BFI or Applicant) submitted an application for a major permit amendment to TCEQ on January 20, 2006, to authorize a vertical expansion of the existing Type I municipal solid waste landfill facility in Travis County, Texas. The current BFI landfill facility has a total capacity of 27,703,735 cubic yards (waste and daily cover) and final maximum elevation of 720 feet mean sea level (msl) and encompasses approximately 349.4 acres (approximately 251.5 acres are designated for waste disposal). The amendment would authorize the applicant to expand the landfill vertically by 75 feet to a new final maximum elevation of 795 feet msl, and increase landfill capacity by 10,630,000 cubic yards, to a total of 38,333,735 cubic yards (waste and daily cover). The expanded facility would continue to be authorized to accept municipal solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including household garbage, putrescible wastes, rubbish, ashes, brush, street cleanings, dead

animals, construction-demolition waste, and yard waste. The facility may also accept regulated asbestos-containing material from municipal sources, Class 1 industrial nonhazardous solid waste that is considered Class 1 only because of asbestos content, Class 2 industrial nonhazardous solid waste, Class 3 industrial nonhazardous solid waste, and certain special wastes identified in Part IV of the application.

The facility is located located in Travis County, Texas, approximately three quarters of a mile north of the intersection of Giles Road and U.S. Highway 290. The site is within the city limits and extra-territorial jurisdiction of the City of Austin. The address of the facility entrance is 9912 Giles Road.

BFI submitted the application on January 20, 2006 and the Executive Director (ED) declared the application administratively complete on January 31, 2006. The TCEQ Office of the Chief Clerk mailed Notice of Receipt of Application and Intent to Obtain (NORI) a Municipal Solid Waste Permit Amendment on February 6, 2006 and an amended NORI on February 22, 2006. Applicant published the amended notice in English in the *Austin American-Statesman* on February 27, 2006, and in Spanish in *El Mundo* on March 2, 2006.

The ED completed the technical review of the application on March 21, 2007, and prepared a draft permit. The TCEQ Office of the Chief Clerk mailed Notice of Application and Preliminary Decision (NAPD) for a Municipal Solid Waste Permit on March 29, 2007 and an amended (NAPD) and Notice of Public Meeting for Municipal Solid Waste Permit on May 7, 2007. BFI published its second notice April 26, 2007, May 3, 2007, May 10, 2007, and May 17, 2007, in English in the *Austin American-Statesman* and on the same dates in Spanish in *El Mundo*. A public meeting was held on May 24, 2007, in Manor, Texas. The comment period was scheduled to close on June 18, 2007, but was extended to close on June 29, 2007. The ED

prepared a Response to Public Comments (RTC), and the RTC was mailed on October 5, 2007 with the ED's final decision letter. The deadline to file a request for a contested case hearing and a request for reconsideration on this application was November 5, 2007. Based on the information submitted in the timely filed hearing requests and a review of the information available in the Chief Clerk's file on this application, OPIC recommends granting the hearing requests of Jeremiah Bentley and the Harris Branch Residential Property Owners Association (HBRPOA), Northeast Neighbors Coalition, TJFA, L.P., Amy Kersten, Nora Longoria, Mark McAfee, Melanie McAfee, Alto and Rosemary Nauert, Evelyn and Cecil Remmert, Delmer Rogers, Mike and Ramona Rountree, Celeste Scarborough, Roy and Janet Smith, and Evan Williams (Williams Ltd. and Roger Joseph).

II. REQUESTS FOR RECONSIDERATION

A. Applicable law

Any person may file a request for reconsideration or a request for contested case hearing, or both, no later than 30 days after the TCEQ Chief Clerk's transmittal of the TCEQ Executive Director's ("ED") decision and response to comments. TEXAS WATER CODE ANN. §5.556; 30 TEX. ADMIN CODE ("TAC") §55.201(a) and (e). The request for reconsideration must state the reasons why the decision should be reconsidered. 30 TAC §55.201(e).

B. Analysis

Ms. Joyce Best requests reconsideration of the Executive Director's decision because the current landfill facility had negative impacts on Ms. Best's prior use and enjoyment of her property due to odors, dust, mud, truck traffic, and operation problems. TJFA, L.P. also requests reconsideration of the ED's decision based upon numerous concerns including negative impact

to use of its property in part due to odor, debris, vectors, and groundwater contamination resulting from the proposed expansion.

OPIC agrees that these requests for reconsideration raise issues that are relevant to the Commission's decision on this application. However, OPIC cannot support granting the above requests for reconsideration. An evidentiary record would be necessary for OPIC to make a recommendation to the Commission regarding whether the permit amendment should be denied based on the issues raised in these requests. Accordingly, a contested case hearing would be necessary to develop a record before any decision could be made on the issues. While, OPIC recommends that the commission deny the requests for reconsideration, OPIC recommends granting certain hearing requests, as discussed below.

III. REQUESTS FOR CONTESTED CASE HEARING

A. Applicable Law

The Executive Director declared this application administratively complete on January 31, 2006. As the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of Texas Water Code section 5.556, added by Act 1999, 76th Leg., ch. 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are

the basis of the hearing request; and provide any other information specified in the public notice of the application. 30 TEXAS ADMIN. CODE ("TAC") § 55.201(d).

Under 30 TAC Section 55.203(a), an "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." This justiciable interest does not include an interest common to the general public. *Id.* Relevant factors that will be considered in determining whether a person is affected include:

- (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, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application. 30 TAC § 55.211(c).

The Commission has also set forth specific criteria for judging whether a group or organization should be considered an "affected person." 30 TAC § 55.205(a) states that a group or association may request a hearing if:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;

- (2) the interests the group or association 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 in the case.

Any group or association which meets all of these criteria shall be considered an "affected person."

Accordingly, 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 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 by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comment;
- (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.

30 TAC § 55.209(e).

B. Determination of Affected Persons

The Chief Clerk received many timely filed individual hearing requests. In addition, TCEQ received a petition attached to a hearing request filed by Ms. Joyce Best dated June 28, 2007 and received on June 29, 2007 with the signatures of 43 additional individuals (Petitioners).¹ In addition, State Senator Kirk Watson and State Representative Mark Strama co-signed a letter encouraging the Executive Director to issue a direct referral for a contested case hearing for this application. It does not appear that the State Senator Kirk Watson and State Representative Mark Strama have requested a hearing in their individual capacities. OPIC notes that issues raised in their letter have been echoed by many other hearing requesters. As detailed

¹ Signatories Joyce Best, Jeremiah Bentley, Celeste Scarborough, and Janet and Roy Smith also filed separate individual hearing requests.

below, OPIC recommends referring this application to the State Office of Administrative Hearings for a contested case hearing.

Individual Hearing Requests

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

Mr. Bentley states that he speaks on behalf of himself and the Association members. He notes that he is a resident of the Speyside subdivision of Harris Branch, and that many of the homes of Harris Branch are within 1 mile of the facility and the remaining homes are within 2.5 miles of the facility. He expresses concerns regarding nuisance odors, compliance with operational requirements, health and the environment, as well as the use and enjoyment of his property. Mr. Bentley has a personal justiciable interest related to a legal right affected by this application. The proximity of Mr. Bentley's property to the facility (within 2.5 miles) combined with his stated interests support a finding that he is an affected person. Therefore, OPIC recommends that the Commission find that Mr. Bentley is an affected person. Likewise, OPIC recommends the Commission find HBRPOA to be an affected person. Mr. Bentley is a member and President of the HBRPOA. Because of the proximity of the identified member's residence to the facility and the environmental concerns raised by the HBRPOA on behalf of its members, there is a reasonable relationship between the interests claimed and the activity regulated.

Mr. Bentley does not state the specific purposes of the HBRPOA. However, a property owners' association's purposes typically include protection of the use and enjoyment of members' property. Therefore, the interests that the HBRPOA seeks to protect are likely germane to the purpose of the HBRPOA. Neither the claims asserted nor the relief requested by the HBRPOA requires the individual participation of any of its members in the case. Therefore,

OPIC recommends that the commission find the HBRPOA to be an "affected person" in accordance with 30 TAC § 55.205(a).

2. Joyce Best

Ms. Best states that she no longer lives at the address near the subject facility, but nevertheless requests a hearing. Although OPIC sympathizes with Ms. Best's concerns related to her past experiences living near the facility, OPIC cannot find Ms. Best to be an affected person because she does not give any information that would demonstrate why her current interest is not common to the general public.

3. Northeast Neighbors Coalition

Mary Carter submitted hearing requests on behalf on the Northeast Neighbors Coalition (NNC). Ms. Carter demonstrates that the NNC should be considered an "affected person." She identifies an individual member that would have standing in her own right, describes the purposes of the NNC, and asserts that the individual participation of the NNC members is not required for the claim asserted and relief requested.

According to the NNC's November 5, 2007 hearing request, Ms. Evelyn Remmert is a member and owns about 104 acres with her family adjacent to the landfill. She raises an issue related to her economic interest in her property and also disputes the ED's response related to land use compatibility, nuisance odor, and numerous other issues protected by the law under which the application will be considered. Because of the proximity of the identified member's property to landfill and the environmental concerns raised by the NNC on behalf of its members, there is a reasonable relationship between the interests claimed and the activity regulated.

The NNC's purposes include civic and educational purposes related to organizing and educating neighbors of the landfill and proposed expansion. Therefore the interests that the NNC

seeks to protect are germane to the purpose of the NNC. Neither the claims asserted nor the relief requested by the NNC requires the individual participation of any of its members in the case. Therefore, OPIC recommends that the commission find the NNC to be an "affected person" in accordance with 30 TAC § 55.205(a).

4. Ms. Trek English and the NorthEast Action Group

Ms. English states that she no longer lives at the address near the subject facility, but requests a hearing for herself and on behalf of the NorthEast Action Group (NAG). Although OPIC sympathizes with Ms. English's concerns related to her past experiences living near to the facility, OPIC cannot find her to be an affected person. Although Ms. English remains in contact with her former neighbors and perhaps advises them on issues related to this permit application, OPIC cannot find that this current interest is sufficient to demonstrate that she is an affected person in a manner not common to the general public.

Ms. English states that the NorthEast Action Group has one or more members within one mile of the facility, but she does not identify any member. The Commission may grant the request for NAG only if it finds that NAG is an affected person in accordance with the group or association requirements found in 30 TAC § 55.205 (a). Since NAG did not submit the name of one or more members that would otherwise have standing in their own right, as required by 30 TAC § 55.205 (a)(1), OPIC cannot recommend the Commission find NAG to be an affected party. NAG may file a reply to this response identifying at least one individual member that would have standing in his or her own right. OPIC would evaluate this information, and revise its recommendation to the Commission if warranted. In addition, should a hearing be granted for other requesters, NAG may appear at the preliminary hearing held by the State Office of Administrative Hearings (SOAH) and attempt to be named a party at that time.

5. TJFA, L.P.

Dennis L. Hobbs submitted hearing requests on behalf of TJFA stating that TJFA owns about eleven acres across the street from the landfill and is concerned about negative impact to use of its property in part due to odor, debris, vectors, and groundwater contamination resulting from the proposed expansion. These are interests which are governed by the law applicable to the application. TJFA has a personal justiciable interest related to a legal right affected by this application. The proximity of TJFA's property to the facility (across the street) combined with its stated interests support a finding that TJFA is an affected person.

6. Amy Kersten

Amy Kersten submitted a hearing request in which she states that she lives about 1 mile from the current landfill. She further describes issues related to negative impacts to the use and enjoyment of her property and health concerns related to the current operation of the facility. She has raised issues governed by the law applicable to the application. OPIC recommends the Commission find Ms. Kersten to be an affected person. The proximity of her property to the proposed expansion together with her stated interests in issues relevant to the Commission's decision on the application supports such a finding.

7. Nora Longoria

Nora Longoria states that she lives about 1 mile from landfill. She expresses concerns related to odor and public safety and health. Ms. Longoria has raised issues related to her health and the environment. OPIC recommends the Commission find Ms. Longoria to be an affected person because of the location of her home relative to the regulated activity and because there is a reasonable relationship between her health interests and the regulation of the landfill.

8. Anne and Bill McAfee

Anne McAfee raises issues related to public health and the environment, including odor concerns in her hearing request. Ms. McAfee raises issues governed by the law applicable to the application. However, she does not provide information about how she would be personally affected in a manner not common to the general public. Therefore, at this time, OPIC cannot recommend that the Commission find Anne or Bill McAfee to be affected persons. Anne or Bill McAfee may submit a reply to the responses to hearing requests detailing how they would be affected and OPIC would evaluate this information, and revise its recommendation to the Commission if warranted.

9. Mark McAfee

Mark McAfee states that he owns a historic property located within one mile of the landfill. He uses his property, Barr Mansion, as primarily as wedding venue, and rents it for other uses. He raises issues related to odor, compatibility with surrounding area growth trends, and compliance history issues which are governed by the law applicable to the application. Because of the location of his property relative to the regulated activity and his economic interests in the uses of his property, OPIC recommends the Commission find Mark McAfee to be an affected person.

10. Melanie McAfee

Melanie McAfee states that "we own a historical business" within one mile of the facility. OPIC understands that business to be the Barr Mansion described by Mark McAfee in his hearing request. Melanie McAfee raises many of the same issues as Mark McAfee. OPIC, likewise, recommends the Commission find Melanie McAfee to be an affected person.

11. Alto and Rosemary Nauert

Alto and Rosemary Nauert state that they live within ½ mile of the landfill, and they raise issues related to the landfill's affect on their health, odor, and groundwater contamination. These interests are governed by the law applicable to the application. OPIC recommends that the Commission find Alto and Rosemary Nauert to be an affected persons because of the location of their home relative to the regulated activity and because there is a reasonable relationship between their stated interests and the regulation of the landfill.

12. Evelyn and Cecil Remmert

Evelyn and Cecil Remmert state that they live approximately ½ mile north of the landfill. They raise odor and health issues, which are interests governed by the law applicable to the application. The proximity of their property to the facility combined with their stated interests support a finding that they have interests not common to the general public. Therefore, OPIC recommends that the Commission find that Evelyn and Cecil Remmert are affected persons.

13. Delmer Rogers

Delmer Rogers states that he lives in the Speyside subdivision of Harris Branch. Although he does not describe this neighborhood's location relative to the landfill, OPIC recognizes that this is the same neighborhood that Mr. Jeremiah Bentley describes above as being within either 1 mile of the facility and or 2.5 miles of the facility. Mr. Rogers states interests related to health, environmental and odor concerns. These are all interests governed by the law applicable to the application. The proximity of the neighborhood in which Mr. Rogers lives combined with his raised issues demonstrates that he has interests which are not common to the general public. Therefore, OPIC recommends that the Commission find Delmer Rogers to be an affected person.

14. Mike and Ramona Rountree

Mike and Ramona Rountree state that they live about 1.5 miles northeast of the landfill. They complain of an inability to use and enjoy their property because of odors and of health concerns. These interests are governed by the law applicable to the application. The proximity of Rountrees' home combined with their stated interests support a finding that they have interests which are not common to the general public. OPIC recommends that the Commission find Mike and Ramona Rountree to be affected persons.

15. Celeste Scarborough and Pioneer Farms

Celeste Scarborough states that she and her family live within 1 ½ miles of the landfill. Ms. Scarborough complains of odors and health concerns, issues which may be addressed under the law governing the application. There is a reasonable relationship between her concerns and the operation of the landfill because of the proximity of her home to the landfill. OPIC recommends the Commission find Celeste Scarborough to be an affected person.

Ms. Scarborough also states concerns related to the operation of Pioneer Farms, a nearby living history museum. It is not clear to OPIC whether she is requesting a hearing on behalf of Pioneer Farms in addition to her individual hearing request. Therefore, OPIC recommends that Ms. Scarborough submit a reply if she wishes to clarify her request to also request a hearing for Pioneer Farms.

16. Roy and Janet Smith

The Smiths live on the Cecil and Evelyn Remmert property, approximately 2500 feet north of the landfill, and raise health concerns related to odor and vectors. They state that the use and enjoyment their property is already negatively impacted, and would be worsened with an expansion. There is reasonable relationship between the Smith's health and odor concerns and

the operation of landfill because of the proximity of their home to the landfill. OPIC recommends the Commission find Roy and Janet Smith to be affected persons.

17. Evan Williams (Williams Ltd. and Roger Joseph)

Evan Williams states that he represents Williams Ltd. and Roger Joseph and that all three are owners of property immediately adjacent to the landfill on the west downhill side. He is concerned about any increase in water runoff and erosion that would result from a vertical expansion of the landfill. Mr. William's property would likely be impacted by any increase in runoff or erosion because of the proximity of his property to the landfill. OPIC recommends the Commission find Evan Williams to be an affected person.

Petitioners²

As stated above, TCEQ also received a petition with 43 signatories attached to a hearing request submitted by Joyce Best on June 29, 2007. The hearing request raises issues which are protected by the law under which the application will be considered. Each signatory provides his or her address. While this response was being prepared, OPIC did not have the benefit of the map, which is often prepared by the ED to assist in evaluating hearing requests. Although Ms. Best states that the individuals "either live or work in the area," there is insufficient information for OPIC to recommend a hearing for those individuals who have signed the petition.

Nevertheless, OPIC reserves its right to revise the recommendation upon reviewing a map that is filed by the ED. In addition, each signatory has the opportunity to reply to the response to

² Kathryn Albee, Ed Attra, Lionel Bess, Tony Buonodono, Terry Cainal, Lee Cook, Sean Cottle, Chuck Dabbs, James Daniel, Jocelyn Doherty, Melissa Fields, Tim Fleetwood, David Gun Lock, Cam Junker, Ron Junker, Mary Lehman, Weldon Long, Nora Longoria (previously recommended to be an affected person based upon individual hearing request), Allan Luttig, Pam Luttig, Amber Lutti-Buonodono, James Marchak, Rebecca Martinez, Susan Morgan, Dan Pyka, Sherry Pyle, Georgia Rich, Merry Rightmer, Celeste Scarborough (previously recommended to be an affected person based upon individual hearing request), Jeffery Seider, Janet and Roy Smith (previously recommended to be an affected person based upon individual hearing request), Cloyce Spradling, Vu Tran, Elizabeth Trevino, Roland Valles, Jeremy Vest, Karen Vest, Alfred Wendland, Murk Wilkerson, David Williams, Amy Williamson, and Micheal S. Young.

hearing requests and OPIC would evaluate this information, and update its recommendation to the Commission if warranted. In addition, should a hearing be granted for other requesters, anyone may appear at the preliminary hearing held by the State Office of Administrative Hearings (SOAH) and attempt to be named a party at that time.

C. Issues Raised

The following issues were raised by affected persons in the hearing requests submitted:

1. Whether the proposed permit amendment is compatible with land use in the surrounding area?
2. Whether the proposed permit amendment is compatible with the surrounding area's growth trends and patterns?
3. Whether roads within a mile of the facility have been properly identified in the application?
4. Whether the landfill's operational hours are appropriate?
5. Whether TCEQ's new Chapter 330 rules for odor control could be utilized to compensate for a history of poor compliance related to odor control?
6. Whether the application and draft permit adequately address odor control?
7. Whether the application and draft permit adequately address other air quality issues?
8. Whether surface water drainage is adequately addressed by the draft permit?
9. Whether TCEQ's new Chapter 330 rules relating to surface water drainage could be utilized to address surface water drainage issues?
10. Whether the application and draft permit ensures compliance with the requirements for non-erodible velocities, minimizing soil losses, and stability of final cover?
11. Whether the amendment application is consistent throughout regarding cover inspection and erosion repair?
12. Whether the erosion control methods identified in the application and draft permit are sufficient?
13. Whether allowing operation on weekends and evenings without requiring inspections for final and intermediate cover during those periods is protective?
14. Whether alternate daily cover is appropriate?
15. Whether the onsite materials are suitable for landfill construction purposes?
16. Whether onsite soils are appropriate to be utilized as soil liner?
17. Whether the analysis of pollution migration pathways should address the migration possible from the adjacent Waste Management landfill?
18. Whether the storage, treatment, and disposal of contaminated water is adequately addressed in the application and draft permit?
19. Whether the Soil and Liner Quality Control Plan adequately addresses the specific conditions at the site?
20. Whether the landfill gas collection systems are protective of human health and the environment, due to removal of gas probes between landfill boundaries?

21. Whether the demonstration of no significant alteration of natural drainage patterns was inappropriately based upon a comparison of current permit conditions and proposed permit conditions rather than a pre-development conditions and proposed permit conditions?
22. Whether the leachate collection system is adequate?
23. Whether the Applicant's compliance history warrants denial of the application?
24. Whether the groundwater monitoring system is sufficient?
25. Whether the application and draft permit is protective of groundwater?
26. Whether the application and draft permit is protective of human health and the environment?
27. Whether the draft permit and application adequately protect against dust and windblown debris?
28. Whether the draft permit and application adequately address vectors?
29. Whether the draft permit and application addresses the noise expected from the proposed activities?
30. Whether the application and draft permit address the hazardous traffic conditions resulting from the operation of the facility?
31. Whether the applicant should visually screen its facility from neighboring business, Barr Mansion?
32. Whether the draft permit should address the fact that applicant has been unwilling to pick up litter found within 2 miles of the facility?
33. Whether BFI's expansion complies with the regional solid waste management plan for Travis County and surrounding areas?
34. Whether TCEQ has adequately responded to enforcement-related complaints filed?
35. Whether the buffer zone should include part of a road?
36. Whether a large working face on the landfill is appropriate to visual impacts on the community?
37. Whether the proposed activities will negatively impact the local wildlife habitat?
38. Has the Applicant been properly identified such that TCEQ and the public understand who the responsible entity is?

D. Issues Disputed

There is no agreement of the parties on the issues discussed above. In the Executive Director's Response to Comments, the ED, based on the information submitted by Applicant to the ED, determined that a landfill in this location is compatible with surrounding land use, that it meets the required regulations and has issued a draft permit. As evidenced by the Requesters

hearing requests, the Requesters dispute the positions of the Executive Director on the issues listed above. Therefore, the issues set forth above are disputed.¹

E. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. *See* 30 TAC §55.211(b)(3)(A) and (B). The requestors raise specific factual issues in their hearing requests, rather than issues of law or policy, and these issues are appropriate for referral to hearing.³

F. Issues raised in Comment Period

All of the issues raised in the hearing requests were raised in the comment period and have not been withdrawn. 30 TAC §§55.201(c) and (d)(4), 55.211(c)(2)(A).

G. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.⁴ Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued. The TCEQ does not have jurisdiction to consider whether BFI's expansion complies with the regional solid waste management plan for Travis County and surrounding areas. OPIC agrees with the ED that local governmental entities such as the Capitol Area Council of Governments have jurisdiction over

¹See 30 TAC Section 50.115(c)(1); 30 TAC Section(s) 55.201(d)(4), 55.209(e)(2), and 55.211(c)(2)(A).

³ 30 TAC § 55.211(b)(3)(A), (B).

⁴ *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

regional solid waste planning.⁵ Therefore, this issue is not relevant and material to the Commission's decision. While TCEQ is the regulating agency, OPIC cannot find that the adequacy of TCEQ's response to complaints can be addressed in a hearing on this application. However, OPIC finds that the remaining issues are relevant and material to the commission decision on the application:

The issues are relevant and material because they concern community growth trends⁶, land use,⁷ health and safety,⁸ and transportation.⁹ All of these interests are addressed by the permit application and protected by the law under which the application will be considered. Visual impacts were evaluated by the ED under 30 TAC §330.138 and are therefore relevant and material. Likewise issues related to groundwater and gas monitoring are relevant and material as the application details the groundwater monitoring plans and the ED agrees that "monitoring of groundwater for release of contaminants and monitoring for landfill gas emissions will be required while the facility is active and during the post-closure care period."¹⁰ The issue of noise and facility operation times relates most closely with compatibility of surrounding land uses since the TCEQ does not have rules which specifically address noise. However, noise may be relevant to the extent it creates a nuisance condition prohibited by 30 TAC §330.15(a)(2). Issues related to odor management are relevant as there are procedures for odor management specified in Section 15 of the Site Operating Plan (SOP) (Part IV of the application) as required 30 TAC §330.125(b), effective December 2, 2004. Issues related to buffer zones are relevant, as well.¹¹

⁵ See Executive Director's Response to Public Comment, Response 7, Page 8.

⁶ 30 TAC §330.53 (8)(C)

⁷ 30 TAC §330.53 (8)

⁸ 30 TAC §330.5

⁹ 30 TAC §330.53 (9)

¹⁰ See Executive Director's Response to Public Comment, Response 18, Page 14.

¹¹ 30 TAC §330.121(b)

Issues related to erosion and management of runoff and stormwater are relevant and material to the Commission's decision.¹² Issues related to the Soil and Liner Quality Control plan are addressed by 30 TAC §330.205, and are therefore relevant and material. Issues related to air quality are relevant to the extent that the municipal solid waste rules address air quality. Issues related to protections from vectors are addressed by 30 TAC §330.126. Habitat concerns are relevant as well.¹³

Therefore, OPIC recommends that the Commission find the following issues to be relevant and material, disputed issues of fact:

1. Whether the proposed permit amendment is compatible with land use in the surrounding area?
2. Whether the proposed permit amendment is compatible with the surrounding area's growth trends and patterns?
3. Whether roads within a mile of the facility have been properly identified in the application?
4. Whether the landfill's operational hours are appropriate?
5. Whether TCEQ's new Chapter 330 rules for odor control could be utilized to compensate for a history of poor compliance related to odor control?
6. Whether the application and draft permit adequately address odor control?
7. Whether the application and draft permit adequately address other air quality issues?
8. Whether surface water drainage is adequately addressed by the draft permit?
9. Whether TCEQ's new Chapter 330 rules relating to surface water drainage could be utilized to address surface water drainage issues?
10. Whether the application and draft permit ensures compliance with the requirements for non-erodible velocities, minimizing soil losses, and stability of final cover?
11. Whether the amendment application is consistent throughout regarding cover inspection and erosion repair?
12. Whether the erosion control methods identified in the application and draft permit are sufficient?
13. Whether allowing operation on weekends and evenings without requiring inspections for final and intermediate cover during those periods is protective?
14. Whether alternate daily cover is appropriate?
15. Whether the onsite materials are suitable for landfill construction purposes?

¹² See 30 TAC §330.55(b)(2), which addresses discharge from a 25-year storm. See 30 TAC §330.55(b)(3), which requires a runoff management system. See 30 TAC §330.55(b)(4) and 30 TAC §330.55(b)(5)(E) also address surface water quality run-off concerns.

¹³ TCEQ rules at 30 TAC §330.51(b)(8), §330.53(b)(13), §330.55(b)(9), and §330.129 require that the application include information about endangered or threatened species and habitat

16. Whether onsite soils are appropriate to be utilized as soil liner?
17. Whether the analysis of pollution migration pathways should address the migration possible from the adjacent Waste Management landfill?
18. Whether the storage, treatment, and disposal of contaminated water is adequately addressed in the application and draft permit?
19. Whether the Soil and Liner Quality Control Plan adequately addresses the specific conditions at the site?
20. Whether the landfill gas collection systems are protective of human health and the environment, due to removal of gas probes between landfill boundaries?
21. Whether the demonstration of no significant alteration of natural drainage patterns was inappropriately based upon a comparison of current permit conditions and proposed permit conditions rather than a pre-development conditions and proposed permit conditions?
22. Whether the leachate collection system is adequate?
23. Whether the Applicant's compliance history warrants denial of the application?
24. Whether the groundwater monitoring system is sufficient?
25. Whether the application and draft permit is protective of groundwater?
26. Whether the application and draft permit is protective of human health and the environment?
27. Whether the draft permit and application adequately protect against dust and windblown debris?
28. Whether the draft permit and application adequately address vectors?
29. Whether the draft permit and application addresses the noise expected from the proposed activities?
30. Whether the application and draft permit address the hazardous traffic conditions resulting from the operation of the facility?
31. Whether the applicant should visually screen its facility from neighboring business, Barr Mansion?
32. Whether the draft permit should address the fact that applicant has been unwilling to pick up litter found within 2 miles of the facility?
33. Whether the buffer zone should include part of a road?
34. Whether a large working face on the landfill is appropriate to visual impacts on the community?
35. Whether the proposed activities will negatively impact the local wildlife habitat?
36. Has the Applicant been properly identified such that TCEQ and the public understand who the responsible entity is?

H. Maximum Expected Duration of Hearing

Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the

date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be 12 months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission grant the contested case hearing requests of Jeremiah Bentley and the Harris Branch Residential Property Owners Association (HBRPOA), Northeast Neighbors Coalition, TJFA, L.P., Amy Kersten, Nora Longoria, Mark McAfee, Melanie McAfee, Alto and Rosemary Nauert, Evelyn and Cecil Remmert, Delmer Rogers, Mike and Ramona Rountree, Celeste Scarborough, Roy and Janet Smith, and Evan Williams) and refer this matter to the State Office of Administrative Hearings for a hearing of 12 months on the issues described above.

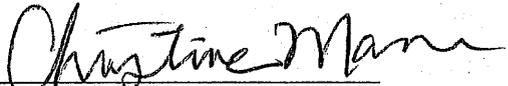
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
Christina Mann
Assistant Public Interest Counsel
State Bar No. 24041388
P.O. Box 13087 MC 103
Austin, Texas 78711
(512) 239-6363 PHONE
(512) 239-6377 FAX

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2008, the original and eleven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Reconsideration and Response to Requests for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Christina Mann

MAILING LIST
BFI WASTE SYSTEMS OF NORTH AMERICA, INC.
TCEQ DOCKET NO. 2007-1774-MSW

FOR THE APPLICANT:

Brad Dugas
South Central Texas District Manager
BFI Waste Systems of North America, Inc.
4542 Southeast Loop 410
San Antonio, Texas 78222-3925
Tel: (210) 648-5222
Fax: (210) 648-5227

Ray L. Shull, P.E., President
Associated Consulting Engineers, Inc.
901 South MoPac Expressway
Building II, Suite 165
Austin, Texas 78746-5748
Tel: (512) 329-0006
Fax: (512) 329-0096

FOR THE EXECUTIVE DIRECTOR:

Steve Shepherd, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

Arten Avakian, Technical Staff
Texas Commission on Environmental Quality
Waste Permits Division, MC-124
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4419
Fax: (512) 239-2007

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE

RESOLUTION:

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

REQUESTERS:

See attached list.

THE HONORABLE MARK STRAMA
TEXAS HOUSE OF REPRESENTATIVES - DIST 50

PO BOX 12068
AUSTIN TX 78711

LEE COOK
9500 E HIGHWAY 290
AUSTIN TX 78724-2316

DENNIS L HOBBS
PO BOX 17126
AUSTIN TX 78760-7126

THE HONORABLE KIRK WATSON
PO BOX 12068
AUSTIN TX 78711-2068

SEAN COTTLE
11009 SILO VALLEY DR
AUSTIN TX 78754

CAM JUNKER
11709 LANSDOWNE RD
AUSTIN TX 78754-5817

KATHRYN E ALBEE
11406 BIRCHOVER LN
AUSTIN TX 78754

CHUCK DABBS
11410 BIRCHOVER LN
AUSTIN TX 78754

RON JUNKER
11709 LANSDOWNE RD
AUSTIN TX 78754-5817

ED ATTRA
1613 BRUSHY VIEW CV
AUSTIN TX 78754

JAMES DANIEL
11333 AVERING LN
AUSTIN TX 78754

AMY KERSTEN
9038 WELLESLEY DR
AUSTIN TX 78754-5016

JEREMIAH BENTLEY
12100 KILMARTIN LN
MANOR TX 78653

JOCELYN DOHERTY
1103 BYERS LN
AUSTIN TX 78753

MARY LEHMAN
110 E 37TH ST
AUSTIN TX 78705

LIONEL BESS
4713 FORT MOULTRIE LN
AUSTIN TX 78754

B TREK ENGLISH
3616 QUIETTE DR
AUSTIN TX 78754-4927

WELDON LONG
2118 S CONGRESS AVE
AUSTIN TX 78704

JOYCE BEST
4001 LICORICE LN
AUSTIN TX 78728

B TREK ENGLISH
3705 TOBY CT
ARLINGTON TX 76001

NORA LONGORIA
7005 DAGON DR
AUSTIN TX 78754-5762

TONY BUONODONO
11105 SEAY ST
AUSTIN TX 78754-5766

MELISSA FIELDS
3521 LONG DAY DR
AUSTIN TX 78754-5921

ALLAN LUTTIG
11105 SEAY ST
AUSTIN TX 78754-5766

TERRY CAINAL
11017 RELIANCE CREEK DR
AUSTIN TX 78754

TIM FLEETWOOD
9011 MAGNA CARTA LOOP
AUSTIN TX 78754

PAM LUTTIG
11105 SEAY ST
AUSTIN TX 78754-5766

MARY W CARTER
BLACKBURN CARTER PC
4709 AUSTIN ST
HOUSTON TX 77004-5004

MR DAVID GUNLOCK
8004 BROWN CEMETERY RD
MANOR TX 78653-4986

AMBER LUTTIG-BUONODONO
11105 SEAY ST
AUSTIN TX 78754-5766

JAMES MARCHAK
6300 THIRLMARE CT
AUSTIN TX 78754

CECIL & EVELYN REMMERT
11815 CAMERON RD
MANOR TX 78653-9792

VU TRAN
6854 THISTLE HILL WAY
AUSTIN TX 78754

REBECCA MARTINEZ
1613 BRUSHY VIEW CV
AUSTIN TX 78754

GEORGIA RICH
1609 BRUSHY VIEW CV
AUSTIN TX 78754

ELIZABETH TREVINO
12209 LITTLE FATIMA LN
AUSTIN TX 78753

ANNE C MCAFEE
4831 TIMBERLINE DR
AUSTIN TX 78746

MERRY RIGHTMER
6305 THIRLMARE CT
AUSTIN TX 78754

ROLAND VALLES
8805 NEWPORT LN
AUSTIN TX 78754

MARK MCAFEE
10463 SPRINKLE RD
AUSTIN TX 78754-9604

DELMER D ROGERS
5901 SPEYSIDE DR
MANOR TX 78653

JEREMY VEST
5917 BOYCE LN
MANOR TX 78653

MARK & MELANIE MCAFEE
6315 SPICEWOOD SPRINGS RD
AUSTIN TX 78759

MIKE & RAMONA ROUNTREE
6920 THISTLE HILL WAY
AUSTIN TX 78754

KAREN VEST
5917 BOYCE LN
MANOR TX 78653

MELANIE MCAFEE
6315 SPICEWOOD SPRINGS RD
AUSTIN TX 78759-7703

CELESTE SCARBOROUGH
1632 PAYTON FALLS DR
AUSTIN TX 78754

ALFRED WENDLAND
16519 MAHLOW RD
MANOR TX 78653-3529

SUSAN MORGAN
1611 BRUSHY VIEW CV
AUSTIN TX 78754

JEFFREY SEIDER
6605 CARISBROOKE LN
AUSTIN TX 78754

MURK WILKERSON
5909 BOYCE LN
MANOR TX 78653

ALTO S & ROSEMARY NAUERT
11201 AUS TEX ACRES LN
MANOR TX 78653-3646

JANET SMITH
11815 CAMERON RD
MANOR TX 78653

DAVID WILLIAMS
11604 RYDALWATER LN
AUSTIN TX 78754

DAN PYKA
8807 NEWPORT LN
AUSTIN TX 78754

JANET & ROY SMITH, JR
11815A CAMERON RD
MANOR TX 78653

EVAN M WILLIAMS
524 N LAMAR BLVD STE 203
AUSTIN TX 78703

SHERRY PYLE
1509 PAYTON FALLS DR
AUSTIN TX 78754

CLOYCE SPRADLING
5913 BOYCE LN
MANOR TX 78653

EVAN M WILLIAMS
PO BOX 2144
AUSTIN TX 78768

AMY WILLIAMSON
11017 RELIANCE CREEK DR
AUSTIN TX 78754

MICHAEL S YOUNG
8901 NEWPORT LN
AUSTIN TX 78754