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June 9, 2009

VIA HAND DELIVERY

Ms. LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle
Bldg. F – 1st Floor
Austin, Texas 78753

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 JUN -9 AM 8:13
CHIEF CLERKS OFFICE

Re: TCEQ Docket No. 2007-1774-MSW; SOAH Docket No. 582-08-2178
Permit Amendment Application of BFI Waste Systems of North America,
LLC; MSW Permit No. 1447A

Dear Ms. Castañuela:

Enclosed for filing in the above referenced matter is an original and seven copies of Applicant BFI Waste Systems of North America, LLC's Response to Exceptions. All parties of record have been copied pursuant to the Certificate of Service attached to the document.

Should you have any questions, please do not hesitate to contact me at (512) 322-5867. Thank you for your attention to this matter.

Sincerely,

Paul Gosselink

PGG/ry
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Enclosure

cc: See Certificate of Service

SOAH DOCKET NO. 582-08-2178
TCEQ DOCKET NO. 2007-1774-MSW

2009 JUN -9 AM 8:13

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

CHIEF CLERKS OFFICE

APPLICANT'S RESPONSE TO EXCEPTIONS

Applicant BFI WASTE SYSTEMS OF NORTH AMERICA, LLC (BFI) files its response to the other parties' exceptions to the proposal for decision (PFD), findings of fact, conclusions of law and proposed order, respectfully showing:

I. INTRODUCTION

After considering many binders of pre-filed testimony and exhibits, nine days of live testimony, a 2,200-plus page hearing transcript and several hundred of pages of post-hearing briefing, the ALJ issued a thoughtful and comprehensive PFD and detailed findings of fact and conclusions of law. BFI has excepted to the ALJ's recommendation regarding limiting the facility's operating hours to 7:00 a.m. to 7:00 p.m. on weekdays only, but otherwise concurs with the ALJ's findings and conclusions. Protestant TJFA – a purported real estate investment company that the ALJ correctly concluded is simply a front for Texas Disposal Systems (TDS), one of BFI's competitors – filed 64 pages of exceptions challenging the ALJ's findings and conclusions regarding seven referred issues and many more sub-issues. Protestant NNC is challenging the ALJ's findings and conclusions regarding drainage, land use compatibility and nuisance. Like BFI, the Executive Director is excepting to the ALJ's hours of operation recommendation. Travis County, the City of Austin and OPIC have not filed any exceptions.

The first eleven pages of the PFD provide a good summary of the Sunset Farms Landfill and BFI's application to vertically expand the landfill. There is other "background" evidence in the record, as well as other aspects of the procedural history of this application, that provide additional context and will help to more fully inform the Commissioners as they consider the parties' exceptions. Section II of this reply discusses that evidence and some of the procedural history of this application. Section III contains a short discussion of the categories of exceptions the parties have made. Section IV sets out BFI's replies to specific exceptions that have been made using the analytical framework discussed in Section III. Finally, in Section V BFI incorporates its closing argument and its reply to the other parties' closing arguments – noting that TJFA and NNC have fundamentally failed to raise anything new in their exceptions that was not already addressed in BFI's post-hearing briefings.

Most of the exceptions that TJFA and NNC have made are simply repackaged evidence or reframed arguments that the ALJ has already duly considered and properly rejected. Some are based on made-up rules, novel interpretations of rules, and phantom standards of care. Yet others are after-the-fact efforts to rehabilitate discredited witnesses and their discredited opinions. None of their exceptions have any merit. All of them should be denied.

II. BACKGROUND

BFI, the Landfill and Competitors in the Central Texas Waste Hauling and Disposal Markets

Sunset Farms is located in northeast Travis County just outside the city limits of the City of Austin. The facility was first permitted in 1981, and opened in 1982. BFI Exh. RS-1 at 9; BFI Exh. JW-1 at 21. BFI operates the landfill and owns a portion of the land that comprises the facility (Giles Holdings owns the other tracts). BFI Exh. RS-1 at 97; BFI Exh. BD-1 at 39. The

Austin Community Landfill (ACL), which is operated by Waste Management, is located immediately to the south of Sunset Farms. BFI Exh. RS-1 at 13; BFI Exh. JW-1 at 11 & 17-18. Sunset Farms, ACL and the Texas Disposal Systems Landfill (TDSL) in southeast Travis County are all major Type I MSW facilities that serve waste disposal needs in Central Texas. PFD at 111. BFI, Waste Management and TDS (and their corporate affiliates) are competitors in the waste collection, hauling and disposal businesses in the Central Texas market.

The Planned Expansion and Heightened Scrutiny of the Facility

Although BFI filed its permit amendment application in January 2006, its plans to expand Sunset Farms date back almost ten years to the beginning of this decade. BFI's plans have drawn an intense amount of attention at the city, county and state level since they first became public in the 2000-01 time frame. BFI and its representatives have made a number of appearances before the Austin City Council, the Travis County Commissioners Court, the TCEQ Commissioners and other governmental bodies in connection with the planned expansion. The expansion has been the subject of many newspaper articles and television news stories. Every step of the expansion process has been challenged by vocal, well-organized and well-funded opponents. The challenges have been both legal and political in nature.

The facility itself has been subject to high levels of scrutiny since BFI's plan to expand the landfill became public – including a number of TCEQ investigations of odor complaints starting in 2001, a comprehensive odor study by a TCEQ “Strike Force” team in 2002, and City of Austin and TCEQ investigations of complaints involving stormwater runoff between 2002 and 2005. *See* PFD at 46-51 & 115. As the ALJ noted in the PFD, the TCEQ's staff “does take odor complaints seriously and investigates them intently when reasonably warranted by a high number of complaints.” PFD at 51. Despite hundreds of investigations, the facility was cited for only a

single nuisance-level odor violation in 2002. PFD at 16. The TCEQ Strike Force team did not document a single nuisance-level odor despite round-the-clock monitoring for a week with sophisticated equipment during the peak of the complaints from the protestants. *See* BFI Exh. SL-3. No stormwater runoff violations were documented despite city and state investigations triggered by four separate complaints that were made by Joyce Best, one of NNC's leaders. Tr. 1959-66; *see* Exh. BFI-29. Notably, the 2002 notice of violation (NOV) is the only NOV in the 27-year history of the facility. PFD at 47.

These matters were all addressed in detail at the evidentiary hearing. After reviewing the evidence, the ALJ correctly found BFI's response to the 2001-02 era odor complaints and the 2002 NOV to be both aggressive and successful. PFD at 45-55; *see* BFI Exh. MS-5. Among other things, BFI expanded the landfill gas (LFG) collection and control system to 180 extraction wells that now cover the entirety of the landfill and ship LFG to an on-site gas-to-energy plant. PFD at 53; Tr. 871; BFI Exh. MS-1 at 18-19; BFI Exh. MS-6. It eliminated the liquid waste stabilization basin, and no longer accepts liquid wastes that do not pass the paint filter test. BFI Exh. BD-1 at 13. It stopped recirculating leachate and condensate, which are now shipped to an off-site publicly-owned wastewater treatment plant. *Id.* It agreed not to use alternate daily cover. BFI Exh. SL-1 at 33-34. It installed and uses a mister system. BFI Exh. RS-1 at 56-57. It developed and implemented an Odor Management Plan, and, as part of that plan, conducts daily odor inspections at the site. BFI Exh. SL-1 at 33-34. There have been no citations for odor violations since the 2002 NOV, and there has been a drastic reduction in number of complaints since that time (despite the incentive for protestants to make complaints during the pendency of an application). *See* PFD at 49. The ALJ correctly concluded that the conditions that gave rise

to the odor complaints in 2001-02 and the 2002 NOV do not exist and will not exist under the permit amendment. PFD at 47.

**BFI's Commitments and the Non-Opposition
of the City, the County and CAPCOG**

In the course of its almost decade-long effort to secure a permit for this expansion, BFI has engaged in hard negotiations with both the City of Austin and Travis County. BFI has made a number of binding commitments to the City and County as a result of these negotiations – commitments that are contained in the proposed permit. *See* PFD at 7; ED Exh. ED-1. First and foremost, undoubtedly, is BFI's commitment to cease accepting waste at the facility by a date certain (November 1, 2015). PFD at 47; BFI Exh. RS-1 at 14, 21 & 96. BFI has also agreed not to use the site as a waste transfer station in the future. PFD at 47; BFI Exh. RS-1 at 96. The November 1, 2015 cessation-of-waste acceptance date, coupled with the no-transfer-station agreement and other commitments, resolved Travis County's concerns regarding the expansion as well as those the Capitol Area Council of Governments (CAPCOG), which issued a conditional conformance letter. TC Exh. 1 at 10; BFI Exh. RS-1 at 21 & 36-37; BFI Exhs. RS-31, RS-32 & RS-33. BFI has agreed to each of the terms of CAPCOG's letter. PFD at 7; BFI Exh. RS-33. BFI has also entered into a separate written agreement with the City of Austin in which BFI has confirmed the November 1, 2015 cessation-of-waste date and no-transfer-station commitments, and has agreed to implement a number of enhanced erosion and sediment controls at the facility, limit truck traffic on certain roads in the vicinity of the landfill, "paint" the landfill with mixtures of native grasses and wildflowers upon closure, and secure a site development permit from the City for the expansion (which BFI has since done). BFI Exh. RS-42; *see* Tr. 2046-47 & 2073.

As a result of these hard-bargained commitments, neither Travis County nor the City of Austin oppose issuance of the permit as it has been amended to incorporate BFI's commitments.

The Evidentiary Hearing

The hearing on the merits was held between January 20th and January 31st in Austin (nine days of testimony). The record in the case is well-developed. It includes over 975 pages of pre-filed testimony from 37 different witnesses; 247 pre-filed hearing exhibits and 86 other hearing exhibits; a 2,294-page hearing transcript; several written stipulations between the parties; and several hundred pages of post-hearing briefing that were submitted by all parties. All parties were represented by counsel at the hearing, or were aligned with parties that were represented by counsel.

BFI

BFI's direct case included the testimony of 14 witnesses:

- the lead project engineer (Ray Shull, P.E.);
- a professional geoscientist (Mike Snyder, P.G.)
- a geotechnical engineer (Gregg Adams, P.E.);
- a groundwater specialist (Kevin Carel, P.G.);
- a drainage engineer (Adam Mehevec, P.E.);
- a landfill gas expert (Matt Stutz, P.E.);
- an air emission and odor expert (Shari Libicki, Ph.D.)
- a transportation engineer (Mike McInturff, P.E.);
- two land use consultants (John Worrall and Charles Heimsath);
- a design expert (Donna Carter);
- a bird expert (Bill Southern, Ph.D.);
- an endangered species expert (Lee Sherrod); and
- a BFI corporate representative (Brad Dugas).

Steve Mobley also provided testimony regarding ownership and operation of the facility during Giles Holdings' direct case. BFI met its burden of proof with respect to each of the 26 issues that the Commissioners referred to hearing. BFI is excepting to only one aspect of the PFD, findings

of fact, conclusions of law and proposed order: the ALJ's *sua sponte* recommendation to limit the operating hours of the facility.

TJFA

TJFA presented three testifying expert witnesses as its direct case:

- a civil/geotechnical engineer (Pierce Chandler, P.E.);
- a geoscientist (Robert Kier, Ph.D.); and
- a drainage engineer (Steve Stecher, P.E.).

Each of these witnesses has performed extensive work for TDS at the TDSL landfill. Tr. 1446-49, 1690-93 & 1697-98. Two of these witnesses (Chandler and Kier) testified that the Sunset Farms Landfill was leaking – a very serious allegation – based on a tortured interpretation of a dotted-and-dashed line in BFI's application and little else. Tr. 1519-21, 1594-96, 1614 & 1724-26. Neither the ALJ nor anyone else bought that argument. *See* PFD at 30-34. TJFA withdrew the pre-filed testimony of a fourth witness (an engineer named James Neyens) during the hearing, and the evidence showed that TJFA had retained a fifth witness (a groundwater scientist named Matthew Uliana who spent 156.5 hours looking at groundwater quality at and around Sunset Farms) who never prepared pre-filed testimony and was not called to testify. Tr. 805, 1704-05 & 1707; *see* Exh. BFI-20. No TJFA representative presented any testimony regarding the partnership, its property, or any alleged impact of the landfill or the expansion on TJFA's property.

The PFD cogently explains much of the TJFA-sponsored evidence and why it did not hold up at the hearing. TJFA has excepted to substantial portions of the PFD, findings of fact and conclusions of law pertaining to seven referred issues (drainage, groundwater and surface water, slope stability, groundwater monitoring, cover, land use compatibility and erosion) and multiple sub-issues. It has also excepted to discussions, findings and conclusions that the ALJ

has made regarding who or what TJFA really is and why TJFA should pay half of the transcript costs. The ALJ's discussions regarding TJFA in the PFD are spot on. Indeed, those discussions regarding TJFA are an integral part of the record in this case and provide an essential context for a number of the findings and conclusions.

TJFA is no garden-variety opponent to BFI's permit application. It shares mailing and physical addresses, phone and fax numbers, and office space with TDS and TDSL. Tr. 1683-85. It has no employees. BFI/TJFA Stipulation (Feb. 3, 2009). Its current president is employed as TDS's "Director of Special Projects." *Id.* Bob Gregory owns 99% of TJFA as its sole limited partner and owns the other 1% through a corporation, Garra de Aguila, that he also owns. *Id.* Gregory is the president, chief executive officer and principal owner of TDS and TDSL. *Id.* TDS, TDSL and Gregory directly compete with BFI in the Central Texas waste hauling and waste disposal markets.

TJFA and Gregory plainly came looking for a fight. TJFA purchased a relatively small tract of land catty-corner from Sunset Farms in December 2004, well after BFI's expansion plans were made public but before BFI submitted its permit application to the TCEQ. Tr. 1711-12; *see* Exh. BFI-15. TJFA and its representatives have lobbied the Austin City Council, the Austin Solid Waste Advisory Council, CAPCOG and its Solid Waste Advisory Council, and the Travis County Commissioners Court relentlessly throughout this multi-year permitting process. TJFA prepared and submitted public comments opposing the expansion (on at least one occasion sending the comments under cover of a TDS fax cover sheet), and later sought and obtained "affected person" status in this proceeding based on the property it had recently purchased. It retained two lawyers from a good law firm, and hired at least five expert witnesses to challenge the technical aspects of BFI's application – three of whom ultimately testified. The evidentiary

record shows that TJFA spent \$150,000 or more in expert witness fees alone *simply preparing for the hearing*. Tr. 1704-11; BFI Exhs. 15 & 20. It has undoubtedly spent much more since then. One can reasonably infer that, to date, TJFA has spent perhaps a half million dollars or more in attorney and expert witness fees “protecting” a piece of property that the Travis County Appraisal District has appraised at less than \$90,000. *See* Exh. BFI-15.

The record further shows that TJFA serially protests expansion applications for landfills that are owned and operated by TDS’s competitors. Tr. 1696-98 & 1825-27. Over the past half decade, TJFA has opposed at least four separate permit applications in Central Texas (in each case using a piece of property it had recently purchased as the basis for claiming affected person status): the Mesquite Creek (Comal County) Landfill, the Williamson County Landfill, Sunset Farms, and the Austin Community Landfill. Each of those applications has gone through a full-blown contested case hearing.

TJFA is clearly not a “real estate investment company” in any traditional or meaningful sense of that phrase. Its apparent business plan of buying an inexpensive piece of property near an existing landfill and then spending hundreds of thousands of dollars fighting an expansion of that facility is neither sensible nor sustainable unless one considers the financial benefits that would inure to TDS, TDSL and Gregory if a competitor’s permit application is denied. In that context, TJFA’s participation as a protestant makes sense. TJFA is, as the ALJ has apparently recognized, a vehicle that one competitor appears to be using to try to hijack environmental permitting proceedings and then use them for hardball business purposes. *See* PFD at 81.

The use or abuse of environmental permitting proceedings for hardball business purposes is certainly a policy issue that the Commissioners and/or the Legislature need to address. Despite all this, however, it is important to note that the ALJ rejected TJFA’s case on the *merits*

and not based on lack of standing or TJFA's now well-documented affiliation with TDS, TDSL and Gregory. As a result, the resolution of TJFA's exceptions is straightforward: TJFA simply failed to make a persuasive case on either the facts or the law, and its exceptions should be denied forthwith.

TJFA's Expert Witnesses

TJFA has excepted to several discussions in the PFD that pertain to TJFA's expert witnesses – primarily witnesses Pierce Chandler (an engineer) and Robert Kier (a geoscientist) – and has requested that those portions be removed. The ALJ's discussions regarding these witnesses was once again spot on, and are essential to understanding his findings and conclusions regarding the issues that were referred.

As the ALJ noted in the PFD, nobody challenged the credentials of any of these expert witnesses. PFD at 11. Nor was their testimony questioned simply because they were paid for their services. Most expert witnesses are compensated for their work. It was their *credibility* that was at issue in this case, for a variety of reasons.

First, to put it bluntly these witnesses took some fairly silly positions that severely strained their credibility. Kier's and Chandler's opinion that dotted-and-dashed lines on some of the geologic cross-sections in the application indicated a liner leak was one such position. Tr. 1519-21, 1594-96, 1614 & 1724-26. Chandler's criticism of 18 borings that even he readily conceded were superfluous was another. Tr. 1430-31 & 1467-76.

Second, the witnesses didn't perform analyses or even look for basic facts to back up several of their opinions. Kier's fundamental failure to look at post-1998 geochemical/groundwater quality data to confirm (or refute) his landfill-is-leaking theory is an example of this. Tr. 1526-27, 1617, 1620 & 1738. Chandler's failure to perform any computer

analyses in support of his slope stability criticisms, despite access to a computer and software and an apparently large budget, is another. Tr. 1500-02.

Third, these witnesses regularly applied standards or regulatory interpretations that they created out of whole cloth. Chandler's unique interpretation of §330.305 (pertaining unstable areas) is a prime example of this. He even admitted at the hearing that nobody (including the Executive Director) shares his interpretation of this regulation. Tr. 1482-83.

Fourth, the witnesses took positions that conflicted with work they had previously done on other MSW projects. Chandler's insistence on the use of a factor of safety of 2.0 when he himself had used 1.5 or lower on other permitting projects is a quintessential example of this. Tr. 1506-07. So was his criticism of the boring logs that BFI's consultants had prepared when the evidence showed that he and Kier had done exactly the same thing on another project.

Fifth, TJFA's witnesses took positions that frequently conflicted with or undermined each other's positions. Kier testified that leachate was mounding *inside* the landfill; Chandler opined that leachate was mounding *under* the landfill. Tr. 1518 & 1719-20. Chandler insisted upon use of the 2.0 factor of safety; Kier acknowledged that 1.5 was the industry and regulatory standard. Tr. 1504-06 & 1777; *see* PFD at 64. Chandler computed a whopping 30 tons/acre/year of soil erosion loss using the Revised Universal Soil Loss Equation (RUSLE) due in large part to his unreasonably low assumption of 40% vegetative cover; Stecher's RUSLE calculations confirmed that soil erosion loss would be within the acceptable limit of two to three tons/acre/year. Tr. 1536-37 & 1894-95; *see* TJFA Exh. PC-19. Sixth, the witnesses refused to take positions that could be seen to harm the TDSL landfill – even if those positions conflicted with the ones they were taking in this case. Kier's (proper but hypocritical) refusal to interpret materials from the TDSL permit application in the same manner he was interpreting BFI's application as an

indication of leakage was perhaps the best example of this. PFD at 30-34; Tr. 1764-70. His refusal to admit that the proposed 32-well groundwater monitoring system at Sunset Farms compares favorably to the six-well groundwater monitoring system he had designed at the similarly-sized and situated TDSL facility is another example.

Finally, these witnesses made a lot of “kitchen sink” observations that ranged from purely petty to downright frivolous. Chandler’s eleven pages of pre-filed testimony criticizing 18 borings that he agreed were not necessary for this application are but one example. TJFA Exh. PC-1 at 33-45; Tr. 1428-30 & 1467-70. Many of these observations were part of the “spaghetti on the wall” strategy that TJFA employed in this hearing: throw as much as possible out there and hope that something will somehow stick. Nothing did, and nothing should have.

NNC

NNC (and parties aligned with the group) presented the testimony of a number of lay witnesses as their direct case – primarily individuals who own property and/or reside in the vicinity of the landfill. NNC did not offer any expert witness testimony at the hearing on any referred issue. Instead, it attempted to develop its case on drainage, land use compatibility and nuisance concerns largely through cross-examination of other parties' witnesses. It failed to do so, and its exceptions are simply repackaged versions of arguments that the ALJ has already considered and has properly rejected.

BFI will address NNC's exceptions in more detail in Section III below, but it is worth noting that no drainage expert who has reviewed BFI's drainage submissions in this case – whether BFI's (Mehevec and Shull), the Executive Director's (Udenenwu), the City of Austin's (Kelly) or even TJFA's (Stecher) – agrees with NNC's counsel's argument that natural drainage patterns will be significantly altered. Nor was NNC able to show how or why the proposed

expansion is incompatible with surrounding land uses when, indeed, the evidence clearly shows (among other things) that: (i) there are no zoning restrictions or municipal ordinances prohibiting a landfill at the site; (ii) the site is located in an area that has historically been used for landfills; (iii) most of the property in the immediate vicinity of the landfill is classified as "industrial" or "open"; and (iv) residential growth has been quite robust within both one and five miles for the past 15 years despite the existence of two operational landfills (Sunset Farms and ACL). BFI Exh. JW-1 at 16-18, 20 & 23-24; BFI Exh. CH-1 at 44.

The City of Austin and Travis County

The City of Austin presented the testimony of four City employees as its direct case. Travis County presented the testimony of one of its employees. All of these witnesses testified that BFI's commitments adequately resolved their concerns.

The Executive Director

The Executive Director presented the testimony of two expert witnesses (Arten Avakian, P.G. and Matthew Udenenwu, P.E.) at the conclusion of the hearing. These individuals, who were present for most if not all of the testimony, both testified that BFI's application satisfies the provisions of the applicable MSW regulations and that nothing they had heard at the hearing had altered their opinions. Tr. 2250 & 2275.

III. CATEGORIES OF EXCEPTIONS

The exceptions that NNC and TJFA have made fall into several categories:

1. **Repackaged Evidence and Arguments.** Many if not all of the exceptions are simply attempts to reassert evidence or regurgitate arguments that TJFA and NNC already made in their closing arguments and replies to BFI's closing argument. They present nothing new.

Instead, they attempt to (i) repackage and then re-hash evidence that the ALJ has already properly weighed, considered and summarized, and (ii) remake arguments that the ALJ has already considered and properly rejected. None of TJFA's and NNC's repackaged evidence and arguments meets any legal threshold warranting overturning the PFD, findings of fact or conclusions of law. *See generally* TEX. HEALTH & SAFETY CODE ANN. §§361.0832(c) & (d).¹

2. Made-Up Rules and Standards of Care. Several of TJFA's exceptions are based on made-up rules, novel interpretations of rules, and phantom standards of care. TJFA insists, for example, that the proposed groundwater monitoring system doesn't satisfy the "Kier standard" when, in fact, the evidence clearly shows that proposed system easily surpasses the pre-March 27, 2006 regulatory standards (the ones that govern this application) and, indeed, exceeds the heightened requirements of the current regulations (which are not applicable here). It also argues that Chandler's unique interpretation of the "unstable areas" location restriction rule should apply when everyone else – including, quite clearly, the ALJ and Executive Director – uses a different interpretation.

3. Misplaced Focus on ACL and Applied Materials. Several of TJFA's exceptions focus on items or locations that have little or nothing to do with this application – including matters pertaining to the ACL facility and the Applied Materials site. It appears to BFI that

¹ For each of these re-hashed arguments, there was abundant evidence, agency precedent or other legal bases to support the ALJ's findings and conclusions. This is starkly different from the ALJ's recommendation regarding operating hours. BFI put on its direct case to maintain its existing 24/7 operating hours. It proved that it had always had 24/7 operating hours. It showed that other, competing facilities in the Austin area have similar hours. No party asked for a reduction in operating hours. There was virtually no testimony offered by any other party regarding operating hours. Moreover, there is established precedent and policy that, in the absence of some compelling circumstance (which does not exist in this case), all landfills in the same market can and should be treated in a regulatorily similar manner. Finally, there are compelling policy reasons favoring extended operating hours – including minimizing truck traffic in downtown, commercial and campus areas during periods of heavy traffic and use; collecting bar and restaurant garbage and trash in a timely fashion; making the facility available to the public on a weekend day; and minimizing air pollution (especially tailpipe emissions) as the Austin region flirts with nonattainment status. *See* BFI's Exceptions; *see also* TEX. HEALTH & SAFETY CODE ANN. §361.0832(e).

TJFA's exceptions to the ALJ's discussions, findings and conclusions regarding ACL and Applied Materials are, in large part, an effort to cut off any collateral damage that may occur in another permitting proceeding involving the ACL landfill in which TJFA is a party-protestant.

4. Misplaced Attempts to Rehabilitate the Credibility of TJFA's Witnesses. A good portion of TJFA's exceptions are devoted to trying to rehabilitate the credibility of TJFA's witnesses. BFI submits that the ALJ, who was present at the hearing and heard all the evidence, is the best judge of the credibility of individual witnesses.

5. Misguided Attempts to Impugn the Integrity of BFI's Witnesses. As they did in their closing arguments, TJFA and NNC have taken some uncalled-for pot shots at BFI's witnesses and their integrity. The allegation that Gregg Adams, BFI's geotechnical engineer, supposedly "destroyed" evidence is perhaps the best example of this. NNC's insinuations about the motives of NNC's drainage engineer, Adam Mehevec, are other examples. The ALJ, who had an opportunity to observe the witnesses and their demeanor, found these attempts to impugn BFI's witnesses unpersuasive. So should the Commissioners.

6. Do-Overs. Several of the exceptions are fairly naked attempts at "do-overs": after-the-fact explanations about what a witness supposedly said or meant to say because the hearing transcript apparently didn't come out as the lawyers had hoped.

IV. RESPONSES TO EXCEPTIONS

TJFA's Explanation of the Permitting Process

TJFA offers its understanding of the permitting process (what it calls the “proper focus of a contested landfill hearing”) on pages 9 to 13 of its exceptions and attempts to “further explain its experts’ opinions in a more cogent fashion.” This discussion, which is not an exception, sheds no light on anything. Its “more cogent” description of its case doesn’t make a difference anyhow – it’s still saying the same things and citing the same evidence the ALJ already considered.

What happened in this proceeding process-wise is thoroughly consistent with state law, the MSW regulations, and standard environmental permitting practices and procedures. BFI submitted a three-volume application that the Executive Director found to be both administratively and technically complete. Public comments were made, followed by requests for a contested case hearing. The Commissioners referred the application to SOAH on 26 separate issues. Affected persons (including TJFA) were determined at a jurisdictional hearing. Written and oral discovery took place. The parties all prepared and filed pre-filed testimony and exhibits. A nine-day hearing was held in which the parties all had an opportunity to cross-examine the other parties’ witnesses. Two rounds of post-hearing briefing occurred. The ALJ considered the administrative record and prepared the PFD, findings of fact and conclusions of law.

The “focus” of this entire multi-year process was the sufficiency of BFI’s permit application. The Executive Director and now the ALJ have found it sufficient. TJFA, which has participated in every step of the process, is not entitled to a do-over just because it doesn’t like the result.

Drainage (Referred Issue A)

TJFA and NNC both except to the ALJ's finding that the proposed expansion will not significantly alter natural drainage patterns. As the ALJ properly noted, both entities have manufactured drainage challenges that are based "solely on their lawyers' interpretation of documents." PFD at 20.

TJFA's primary exception is essentially procedural in nature: it claims that the agency engaged in unauthorized rulemaking when it issued Guidance Document RG-417, which pertains to drainage. It contends that the guidance is incorrect and that BFI should not have been allowed to use the existing permitted condition for the definition of "natural drainage patterns." This unique position is not and has not been shared by the Executive Director (as reflected by the agency's historically consistent treatment of the issue and as set out in RG-417), the Commission, the ALJ or, significantly, even NNC's lawyer. NNC's lawyer has not challenged the concept of using the existing permitted condition as the "natural condition" baseline, and, indeed, has embraced its applicability because he wants to argue that BFI used the wrong numerical values for the peak discharge, volume and velocity for the existing permitted condition. Neither of these arguments is new; both are completely recycled from these parties' closing arguments. Both of these lawyer-driven theories were properly rejected by the ALJ. *See* PFD at 22.

Three basic concepts should drive any analysis of TJFA's and NNC's drainage-related exceptions. First, as discussed earlier every expert witness who testified on this issue – Adam Mehevec and Ray Shull (BFI), Mathew Udenenwu (Executive Director), Mike Kelly (City of Austin) and, perhaps most significantly, TJFA's expert on the subject, Steve Stecher – concluded that there will be no significant alteration in natural drainage patterns. *See id.* Second, TJFA's

and NNC's positions are fundamentally at odds with each other because NNC has accepted the definition of "natural drainage patterns" that everyone but TJFA uses. Third, while NNC has accepted the correct definition of natural drainage patterns, its lawyer's effort to make an apples-to-oranges comparison of the wrong predevelopment and post-development conditions is simply not a truth-seeking exercise.

Overview of BFI's Drainage Analysis. Issue A asks "whether the application demonstrates that natural drainage patterns will not be significantly altered by the expansion, in accordance with agency rules, including 30 TAC §330.56(f)(A)(iv)." The referenced regulation requires an applicant to provide "discussion and analysis to demonstrate that natural drainage patterns will not be significantly altered as a result of the proposed landfill development." The rule essentially establishes a three-part drainage inquiry. First, what are the natural drainage patterns? Second, how will the proposed landfill development alter or affect these patterns – if at all? Third, is any alteration significant?

In order to satisfy its burden of proof on this issue an applicant such as BFI has to show that there will be no significant change in the peak flows, volumes or velocities of the off-site drainage as a result of the proposed development. In order to evaluate this and demonstrate compliance with the regulations, the first step is to define and quantify the actual on-the-ground pre-development runoff conditions using the current methodologies and site characteristics so that there is a baseline against which to measure any change. It is then necessary to use the same methodology and incorporate the engineering design of the proposed improvements to predict the impact of the post-development condition. Finally, it is necessary to compare the proposed (post-development) conditions to the existing (pre-development) conditions using the same methodologies so that an apples-to-apples comparison can be made.

The TCEQ (and its predecessors) has been the agency vested with the authority to determine whether proposed landfill projects meet this regulatory requirement since the rule's inception in 1980. After years of evaluating drainage submissions, the TCEQ developed Guidance Document RG-417 in 2004. In RG-417, the agency memorialized the demonstration required of applicants and developed a step-by-step process that was designed to help reduce confusion within the regulated community and the agency by streamlining the submission and review process. *See* BFI Exh. RS-34. RG-417 confirms that the agency requires applicants to use the existing (*i.e.*, currently permitted) conditions as the baseline for making comparisons. *See id.* at pp. 5-6.

BFI followed the process laid out in RG-417 when it submitted its application for the proposed expansion in 2006. It did this using two different methodologies – one required by the TCEQ and another required by the City of Austin – and demonstrated no significant increase in peak flows, volumes or velocities at any of the landfill's six outfalls for both 25-year and 100-year rainfall events. Adam Mehevec, BFI's drainage expert, described how this demonstration was performed, and his testimony was not refuted or challenged by any other witness in the hearing. BFI Exh. AM-1 at 15-17. The Executive Director approved the demonstration as part of the issuance of the draft permit, and reaffirmed its conclusion in Matthew Udenenwu's testimony at the hearing. ED Exh. ED-MU-1 at 11. Every expert who testified on this issue reached the same conclusion. The ALJ correctly concluded that BFI met its burden of proof on this issue in all respects. PFD at 22.

RG-417 and the Definition of "Natural Drainage Patterns." On pages 5 and 6 of its exceptions, TJFA re-asserts its challenge to RG-417 and the agency's interpretation and application of the phrase "natural drainage patterns." In a nutshell, TJFA is claiming that,

through RG-417, the Agency is wrongly requiring applicants who are seeking permit amendments to expand their facilities to use the existing (currently permitted) condition as the baseline for making drainage comparisons. TJFA made this procedural argument for the first time in its post-hearing briefings, which it has incorporated into its exceptions.

For a detailed discussion of this issue, see pages 35-42 of BFI's reply to the other parties' closing arguments. As BFI has previously pointed out, TJFA's argument ignores the TCEQ's basic authority to issue and then interpret regulations, issue guidance documents, or issue any clarification, information or suggestions for regulatory compliance. *See PUC v. Gulf States Utilities Co.*, 809 S.W.2d 201, 207 (Tex. 1991) (holding that the "Commission's interpretations of its own regulations [are] entitled to deference by the courts"). It also overlooks the fact that, in the context of landfill expansions, the Commission has *always* interpreted "natural drainage patterns" to mean the currently permitted condition. The Commission has always applied the rule in the manner now memorialized in RG-417. And, TJFA's argument employs a dictionary definition of "natural" that nobody uses and is far too narrow and unworkable.

In the PFD, the ALJ cites the Code Construction Act and correctly notes that the phrase "natural drainage patterns" has developed a "technical or particular meaning" in connection within the TCEQ and the MSW permitting arena: the currently permitted condition. PFD at 16-18. He further notes that all of the drainage experts in this case understood this. PFD 17. The ALJ's analysis is correct.

TJFA's lawyers are alone in their interpretation of the phrase "natural drainage patterns." TJFA's exception should be denied.

Chain-of-Approval. The ALJ laid out what he referred to as the "chain of approvals" argument as the final evidentiary support of BFI's use of "existing permitted conditions" as the

baseline. *See* PFD at 17. This argument tracks BFI's initial drainage analysis back to 1982, when it received its original permit. It then notes that each subsequent permit amendment or modification was required to comply with the same regulatory requirement. He then logically concludes that "each subsequent amendment would not significantly alter those natural drainage conditions" and cites to Mehevec's testimony confirming that is what BFI did each time the drainage issue was reviewed. The argument is logical, correct, and confirms how the Commission has consistently approached this issue.

NNC's Apples-to-Oranges Comparison. On pages 2 through 11 of its exceptions, NNC argues that the peak flows at Outfalls 4 and 5 on the western side of the facility will be significantly altered. This argument is premised on a false apples-to-oranges comparison: NNC's lawyer is looking at the wrong document from which to make the drainage comparison. NNC's exceptions, which include several gratuitous attempts to impugn BFI and its drainage engineer, present nothing new. TJFA has joined in NNC's argument, even though its own expert testified that no significant alteration will occur as a result of the proposed expansion. Tr. 1896-97.

A brief explanation of the recent permitting history of the site is the best starting point for this analysis:

- **The 2002 MOD.** BFI obtained a drainage-related permit modification from the agency in October 2002 (the 2002 MOD). *See* BFI Exh. AM-32. With the exception of an 11-acre portion of the landfill footprint that was deleted in 2006 (see below), the 2002 MOD reflects what the site would look like (final contours, etc.) upon closure if BFI's expansion application is for any reason denied.
- **The 2006 MOD.** BFI submitted a MOD in very early January 2006 to delete 11 acres from the northeast corner of the landfill footprint (the 2006 MOD). Tr. 985-86. Because this deleted 11-acre area drains exclusively to Outfall 1 in the northeast corner, BFI's engineers did not recalculate the

drainage at Outfalls 2 through 6, which were not affected. That MOD was subsequently granted.

- **The Expansion Application.** BFI filed its application for the vertical expansion on January 2006. BFI Exh. RS-1 at 7. The Expansion Application was declared technically complete in March 2007. *Id.* at 28-29; BFI Exh. RS-13. This application obviously reflects what the site would look like (final contours, etc.) upon closure if it is granted.

Three other events occurred between 2002 and the time that the Expansion Application was filed that affected the preparation of the application:

- **TCEQ/TxDOT Methodology Change.** In 2004 there was a mandatory change in the applicable TxDOT methodology which MSW applicants are required to use. Tr. 1026.
- **More Accurate Survey Data.** As they were preparing the Expansion Application, BFI's engineers obtained more accurate survey (topographic) data for the site. *Id.* Due to the more accurate survey data, they learned that approximately 2½ acres in the northwest corner of the site (outside the footprint) has always flowed to the south toward Outfalls 4 and 5 and not to the east toward Outfall 1, as previously thought. *Id.*
- **Prior Exclusion of Buffer Zones.** As they were preparing the Expansion Application, BFI's engineers learned that some buffer zone areas had not been included in earlier permitting materials. *Id.*

Armed with this knowledge, BFI's engineers performed their drainage analyses and calculations for both the existing permitted condition (the 2002 MOD less the 11-acre footprint deletion reflected in the 2006 MOD) and the proposed final condition (the Expansion Application). They performed these analyses using both the updated TxDOT methodology and the City of Austin methodology. All of their analyses – the existing and proposed conditions for both the TxDOT and City methodologies – were done such that the more accurate survey data was reflected in each analysis, and the buffer zones were added to and treated consistently across in these analyses as well.

All of this work ensured that the existing and proposed drainage conditions could be properly analyzed and presented – that is, that the proper apples-to-apples comparison would be made. For the TCEQ methodology, the proper apples-to-apples comparison is made by comparing Exhibit AM-16 (existing permitted condition) to Exhibit AM-17 (proposed condition). For the City of Austin methodology, the proper apples-to-apples comparison is made by comparing Exhibit AM-34 (existing) to Exhibit AM-35 (proposed). Every drainage expert in this case – including the City’s and TJFA’s - was satisfied by these apples-to-apples comparisons. See PFD at 13-14.

NNC’s attorney embarked on a different course that was not an exercise in truth-seeking. He insisted on making his apples-to-oranges/oranges-to-apples comparison by comparing Exhibit NNC-3 (the 2002 MOD “Proposed Drainage Condition” that was prepared using the old TxDOT methodology and was not adjusted to reflect either the new survey data or the buffer zone areas) to Exhibit AM-17 (proposed). The change in methodology alone basically doubled the size of the flow numbers. NNC’s attorney’s argument is no more fair or valid than comparing Exhibit AM-16 (existing using TxDOT methodology) to Exhibit AM-35 (proposed using City methodology).

Notably, nothing has changed in the on-the-ground drainage at the site as a result of any of the foregoing. The change in methodology was simply that – a change in mathematical inputs and computations. The change in methodology has not changed the actual direction, volume or flow on the ground. Similarly, the improved survey data also has not changed the actual on-the-ground drainage: it turns out that water has always flowed from the 2½ acres to Outfalls 4 and 5.

The ALJ, after considering the arguments of NNC and TJFA and comparing them to the explanation offered via Mr. Mehevec's testimony, properly summarized the situation:

When all of the above is sorted through, it is sufficiently clear to the ALJ that NNC and TJFA are comparing existing and proposed peak flows at Outlets 4 and 5 that were calculated using different methodologies. Additionally, some of the "existing" peak flows that NNC and TJFA cite do not reflect the changes in inputs that Mr. Mehevec properly made when he recalculated "existing" peak flows for this case, such as the updated survey data that was more precise.

PFD at 22. BFI submits that the ALJ's conclusion is consistent with every expert's testimony, the discussion in the PFD is correct, and the related findings and conclusions are also correct. For additional discussions regarding drainage, see pages 27-36 of BFI's closing argument and pages 31-49 of BFI's reply to the other parties' closing arguments.

BFI's Alleged Failure to Construct the Landfill as Permitted. NNC continues to contend (on pages 4 through 6 of its exceptions) that BFI did not construct what it was permitted to construct and insinuates that this is all part of some "sleight of hand." It further insists that BFI should be ordered to construct the landfill "correctly." While it is not clear from NNC's exceptions what exactly it contends was not built as permitted – the landfill or the drainage system in the buffer zone – it is clear that NNC does not understand how a landfill is constructed. Its allegations are totally unfounded.

To be clear, to date BFI has constructed its landfill in complete compliance with the terms of its existing permit. If it does not receive this permit amendment, it will finish the construction exactly as set out in its existing permit. None of the drainage systems called for in the existing permit have been built yet because they are, by definition, to be built as part of the final cover drainage system. BFI is at least one year away from beginning that process. If NNC's accusations are directed at this alleged failure, they reflect a basic lack of understanding of when and how landfill final cover drainage systems are constructed.

If the "drainage system" NNC says BFI "did not construct" is the area in the buffer zone in and around the northwest corner, then it also misunderstands the facts of this application. This area has never had anything built on it, nor has anything ever been proposed to be built on it unless and until BFI's permit amendment is granted. If BFI's application is denied, nothing will ever be built in this area. As a result, there are not any examples of anything BFI "did not construct as they represented they would" nor has any "violation of a MOD been revealed."

BFI's Alleged Misrepresentation. One of NNC's more interesting criticisms in its exceptions (page 4) is that "BFI's engineers knew exactly what they were doing." Normally, this would not seem to be a matter of concern. NNC's criticism has been tempered in this round of briefing, but the insinuation that Mehevec somehow manipulated the flows for purposes of the present application remains. This accusation ignores or discredits Mehevec's testimony where he strongly rejected the suggestion that he misrepresented anything:

Q. [by Mr. Blackburn] One might suggest that you were misrepresenting the flow in your modification.

MR. GOSSELINK: Objection; argumentative.

JUDGE NEWCHURCH: Response?

A. [by Mr. Mehevec] And I would strongly disagree with that.

JUDGE NEWCHURCH: Just a second. Do you have a response?

A. [by Mr. Mehevec] I disagree with that statement.

JUDGE NEWCHURCH: No, not you.

Tr. 996. It also ignores the fact that it would have been vastly simpler for Mehevec, if he had wanted to manipulate anything, to have never pursued the more detailed topographic survey to ensure that the information he was working with was accurate. Instead, what Mehevec did was

seek out the most accurate data he could find and then do exactly what a good engineer is supposed to do when confronted with a newly-discovered condition: he designed drainage features to match the on-the-ground facts and accomplish the regulatory goal. Tr. 1087.

What this shows is that Mehevec had to deal with a previously unknown fact he had uncovered by going the extra step and checking out the topography more closely. Rather than this being some grand scheme designed to allegedly benefit BFI, it was really just an engineering problem that Mehevec had to solve. And he did.

Protection of Groundwater and Surface Water (Referred Issue C)

TJFA has excepted to various portions of the PFD that discuss protection of groundwater and surface water on pages 9 through 28 of its exceptions. The overarching themes of TJFA's exceptions in this arena are: (1) repackaged arguments TJFA has already made and lost, (2) one-sided renditions of TJFA-sponsored evidence that fails to acknowledge the totality of the evidence on this subject matter; and (3) attempts to rehabilitate the credibility of TJFA's experts and impugn the integrity of BFI's. As much as TJFA may not like it, the evidence does not start and stop with its experts' pre-filed testimony. They were cross-examined, and their opinions tended to fall apart on cross. Other experts also testified on these subject matters, and had different opinions that the ALJ found to be much more believable.

Exploration of Subsurface. TJFA offers three exceptions to the "Exploration of Subsurface" section of the PFD on pages 13 and 14 of its exceptions. The first exception is meaningless, particularly when the text of the last paragraph on page 26 of the PFD is read. Pages 25 and 26 of the PFD accurately summarize the process, sequence and scope of BFI's subsurface exploration. In the second exception, TJFA cites only the pre-filed testimony of its own expert witness to claim that the ALJ should not have concluded that BFI's boring plan was

conducted in accordance with established field exploration methods. This self-serving cite ignores all of the other evidence. Other witnesses – including the Executive Director’s staff – found that BFI’s boring plan was conducted in accordance with such methods. Regarding the third exception, BFI agrees that the word “vertical” should be changed to “lateral.”

Liner Leakage from Representations in the Application. On pages 14 and 15 of its exceptions, TJFA “strongly excepts” to pages 30 and 31 of the PFD that comment on TJFA’s expert witnesses. This exception attempts to rehabilitate the credibility of witnesses who deserved to have their credibility questioned. The ALJ accurately and succinctly explained the basis for his conclusion that Kier and Chandler were not credible on their very serious allegation that the Sunset Farms landfill is leaking. In a nutshell, they concocted a flimsy leakage theory that was based on a dotted-and-dashed line in the application that everybody else knew did not represent, and was not intended to represent, groundwater (leachate) *inside* the landfill. Kier and Chandler didn’t even bother to look at groundwater monitoring data to “confirm” their theory. Nobody bought the argument – including the Executive Director’s professional geologist and, ultimately, the ALJ. Nobody should. For further discussion on this issue, see pages 22-23 of BFI’s closing argument and pages 5-8 of BFI’s reply to the other parties’ closing arguments.

Water Level Drawings. On pages 15-18 of its exceptions, TJFA excepts to portions of the PFD that were included under the subheading “Potentiometric Water Level Drawings.” The first exception (on page 15) excepts to statements in the PFD that TJFA concedes are “factually correct”! That exception makes no sense. The ensuing two-paragraph discussion on pages 16 and 17 does not appear to except to anything in particular, but instead is a re-hash of the discredited dotted-and-dashed line argument. In these paragraphs, TJFA also chides BFI’s geologist, Mike Snyder, for his “after-the-fact explanations” of the dotted-and-dashed lines

when, in fact, these “after-the-fact explanations” were simply responses to questions he was asked during cross-examination. TJFA also chides BFI’s attorneys for their “imprecise use” of the words “groundwater” and “leachate” during the hearing (without citing any specific example). BFI’s attorneys would point TJFA to pages 7 through 11 of Dr. Kier’s pre-filed testimony, in which he and the questioner use the words “groundwater” and “leachate” interchangeably, as a possible source of any alleged imprecision. *See* TJFA Exh. BK-1 at 7-11. TJFA’s exception (on pages 17 and 18) to the conclusions the ALJ reached regarding Kier’s response to questions regarding the TDSL application is meritless. The ALJ got the issue exactly right: Kier applied a different standard when he was shown a geologic cross-section from the application for the TDS Landfill, which is owned and operated by one of TJFA’s affiliates, than he did when he was criticizing the cross-sections in BFI’s application. It was an exercise in hypocrisy that eroded the witness’ credibility.

Applied Materials Site. On pages 18 to 24 of its exceptions, TJFA wants the entire section of the PFD that discusses the Applied Materials site deleted. This exception, which raises nothing new, appears to be an attempt to rehabilitate Dr. Kier’s credibility coupled with an effort to minimize any adverse collateral effect that this PFD may have in the ACL permit proceeding (in which TJFA is a party-protestant and Kier testified for TJFA).

TJFA’s request to delete the entire section is interesting in light of the fact that it was TJFA, and not BFI, that raised the Applied Materials site as a potential issue in this case. More specifically, in his pre-filed testimony Kier attached and briefly discussed a portion of a report that had been prepared by a consulting firm called PBS&J that referred to a groundwater investigation that had been performed in 2002. *See* TJFA Exhs. BK-7 & BK-8. That report indicated that some “tentatively identified compounds” (TICs) – including a chemical called

caprolactam – had been found in four of the eight groundwater monitor wells on the Applied Materials site. The Applied Materials site is located across the road from Sunset Farms, and portions of that site are hydrogeologically downgradient from Sunset Farms.

Faced with an attempt to tar-and-feather Sunset Farms with allegations or insinuations of groundwater contamination on a downgradient property, at the hearing BFI cross-examined Dr. Kier about the Applied Materials site, the partial PBS&J report, and his testimony regarding those matters. Two of BFI's experts also gave some testimony about Dr. Kier's pre-filed testimony and the partial PBS&J report that Kier had attached and discussed. *See* Tr. 407-410 & 784-787.

The PBS&J report stated that all eight wells at Applied Materials were non-detect for both Appendix I and Appendix II constituents – the very constituents that EPA and TCEQ have specifically selected for groundwater sampling and analysis at MSW sites because they are potentially indicative of releases from landfills. TJFA Exh. BK-7 at 5-6; Tr. 785 & 1747-51. The TIC that was identified in the report was found in three wells on the Applied Materials site that Kier agreed are not downgradient from Sunset Farms but are (in two instances) located near a former body shop and a former gas station. Tr. 1751-53. The TIC was also located in a fourth well that is located in the center of the Applied Materials site (an industrial complex), over 1,350 feet from the property boundary and 2,000 feet from the Sunset Farms landfill. *Id.* Groundwater would take over 130 years to travel such distances assuming it traveled ten feet per year. *Id.* Sunset Farms has only been open since 1982. *Id.* Finally, the TIC that was identified in the PBS&J report is identified with nylon and is suggesting of nothing more than a sampling error since nylon rope was used in the sampling procedure. Tr. 321; *See* TJFA Exh. BK-7 at APP019766.

There was no hard science or facts to back up any of Kier's Applied Materials claims. The provenance of the PBS&J report and study was and is unknown. (Its authors were never deposed or called to testify to determine the purpose of the study, the methodology they used, or their conclusions.) The report itself was incomplete. The portion Kier did attach to his testimony specifically notes the possibility of a sampling error. *See* Tr. 321. Kier never performed any studies or took any samples himself. He never contoured groundwater under the Applied Materials site. He couldn't point to any soil test results or groundwater chemistry data that would support his theory that groundwater in the area travels over 100 feet per year due to changes in the subsurface clays caused by the impact of acids and solvents. He apparently never even tried to find any. The ALJ's conclusion that Kier was engaging in junk science may sound harsh but was most certainly correct in this instance. PFD at 36.

Given all this, the ALJ's findings and conclusions regarding the Applied Materials site and the PBS&J report are reasonable and should not be changed. Nor should they be removed from the PFD. They are essential analysis, findings and conclusions regarding an issue that was in dispute – an issue that TJFA raised. All of TJFA's exceptions to the "Applied Materials Site" section of the PFD should be denied.

Extraction Wells and Leachate Levels. On pages 24 through 27 of its exceptions, TJFA discusses portions of the "Extraction Wells and Leachate Levels" subsection of the PFD. TJFA does not expressly except to any part of this subsection of the PFD other than a sentence that straddles pages 37 and 38 of the PFD which states that TJFA ignored some of Mike Snyder's testimony. The rest of TJFA's discussion simply recycles arguments and evidence from its post-hearing briefing.

By way of background, TJFA did not file any pre-filed testimony supporting its “high leachate level” argument. No party did. Instead, during the hearing TJFA’s attorneys attempted to advance a theory through their cross-examination of BFI’s witnesses that higher leachate levels in a few of the 180 LFG extraction wells are somehow indicative of high leachate levels throughout the mass of the landfill. TJFA’s closing argument included very selected segments of the transcript that did not fully or fairly represent the testimony on this subject matter. Indeed, it relied primarily on a discussion of Mike Snyder’s testimony that conveniently omitted Snyder’s primary observation: liquid or condensate levels in individual LFG extraction wells are not indicative of leachate levels within the landfill itself. Specifically, Snyder testified (on cross-examination):

Q. Okay. Mr. Snyder, based on the elevations of groundwater that appear from the exhibit [TJFA-9], would you think that it would be fair to conclude that there are areas within the landfill that are experiencing high water levels?

A. **That's not what I would interpret from this data. What I would interpret from this data is that there is liquid in a leachate extraction well and that they found it at a certain level in that well, and it may or may not be reflective of any level that is anywhere around.**

I might point out that there are multiple wells around those that don't apparently have liquid levels. And so what I would guess and what my experience has been is that you end up – when you drill a hole into waste, there are pockets of moisture of leachate, and when you drill a hole through there, that provides an avenue for all that leachate to escape its normal condition where it's perched on waste levels or soil levels. And this is an accumulation of either leachate or possible gas condensate in a well, and its reflective of a – either vertical or lateral connected level.

Tr. at 309-10 (emphasis added). Later Snyder testified (on re-direct):

Q. With respect to liquid in the [LFG extraction] pipes, in your opinion is liquid inside the pipe reflective of the level of leachate inside the landfill that's above the bottom liner?

A. No. I believe it's reflective of leachate in the pipe that has collected in the pipe.

Tr. at 448; *see also* Tr. 450.

Matt Stutz, BFI's landfill gas expert and the engineer who designed the gas collection system for the facility, clearly and fully explained that water in gas extraction wells is commonplace (indeed, expected) and is not indicative of leachate levels within the landfill mass itself. Tr. 915-17. Indeed, Stutz testified that he specifically designs gas extraction wells in anticipation of collection of some liquids within the gas piping. Tr. 921. And he testified that liquid in the wells is not suggestive of "mounding" of leachate within the landfill, as TJFA's attorneys were trying to suggest. Tr. 922 & 925-26. TFJA never presented any evidence to the contrary.

The ALJ plainly got this issue right. TJFA's exception(s) should be denied. For additional discussion regarding this subject, see pages 8-12 of BFI's reply to the other parties' closing arguments.

Detection Monitoring. TJFA discusses the "Detection Monitoring" subsection of the PFD on page 27 of its exceptions. Its discussion, however, does not include any specific exception. Instead, TJFA simply "re-asserts" (its own word) arguments it made in the post-hearing briefing. This discussion adds nothing new. The ALJ's analysis of MW-30, which the evidence showed is presently in assessment monitoring, is correct. (BFI notes parenthetically that *its* witnesses were the only ones who ever discussed MW-30 in their pre-filed testimony.

BFI prepared and filed its pre-filed testimony first. MW-30 was apparently insignificant enough to Kier and Chandler that neither gentleman ever even mentioned it in his pre-filed testimony.)

Groundwater Monitoring System. On pages 27 and 28 of its exceptions, TJFA excepts to the ALJ's characterization of its downgradient/background well/point of compliance argument as a "word game" and then "re-asserts" (again, its own word) arguments it has already made before. BFI will address this exception in the Groundwater Monitoring section below.

Groundwater Protection. TJFA asserts an omnibus exception to the ALJ's groundwater protection findings and conclusions on page 28 of its exceptions. This exception is generic and no specific basis is provided for the exception. See above and pages 18-27 of BFI's closing argument and pages 5-20 of BFI's replies to other parties' closing arguments for additional discussions regarding groundwater protection.

Slope Stability (Referred Issue F)

TJFA excepts to various slope stability discussions, findings and conclusions on pages 28 through 41 of its exceptions. These exceptions include a number of novel interpretations of the MSW rules. Many are based on phantom standards of care that Chandler, and Chandler alone, advocates. Another recurring theme in these slope stability exceptions is TJFA's repeated attempts to rehabilitate Chandler's credibility. Finally, as elsewhere, nothing in these exceptions is new.

Applicable Rules. On pages 28 through 30 of its exceptions, TJFA excepts to the ALJ's recitation of rules applicable to slope stability and then asserts that §330.305 (the unstable areas rule) should have been included in the ALJ's recitation. Procedurally, TJFA's request is too late. Substantively, TJFA's request is wrong. BFI will address the procedural aspects of TJFA's exception here, and the substantive aspects of the exception in the next subsection.

As a threshold matter, BFI notes that every witness in this proceeding – including Mr. Chandler – agreed that there are no rules in Chapter 330 that specifically address slope stability. BFI Exh. GA-1 at 27; Tr. 597, 658-59 & 1492. The agency has not published any technical guidance manuals regarding slope stability. BFI Exh. GA-1 at 31. There is no regulatory "laundry list" of information that an applicant must include regarding slope stability or performance standards that an applicant must meet. Tr. 1492.

For slope stability, the PFD cites the same rules (§§330.55(b)(8) and 330.56(l)) that the Commissioners cited when they referred this case to SOAH. TJFA did not object to the order of referral, nor did it request that §330.305 be listed as a rule applicable to the slope stability issue at the jurisdictional hearing or at any time prior to the hearing on the merits. TJFA failed to make a timely motion or request to include §330.305 as a rule that is applicable to the slope stability issue.

Unstable Area Rule. Starting on page 29 and going through page 34 of its exceptions, TJFA makes an argument that falls squarely in the “made-up interpretation of the rules” category. The argument is rooted in an interpretation of §330.305 that the record makes clear is unique to Mr. Chandler. The gist of this argument is that, for vertical expansions, the existing waste mass and conditions associated with it constitute “man-induced” or “human-induced” events that give rise to an unspecified duty to conduct a “comprehensive stability analysis.” In Chandler’s world, no other engineer ever satisfies this heightened – and undefined – duty.

Nobody shares Chandler’s (and now TJFA’s) interpretation of §330.305. The Executive Director certainly does not. Matthew Udenenwu specifically testified that Chandler's interpretation of the §330.305 unstable areas regulation is not consistent with the agency's interpretation of its own rule. ED Exh. ED-MU-1 at 41-42. The Executive Director confirmed

this in his post-hearing briefings. See ED Closing Argument at 13-15. Chandler admitted on cross that his interpretation differs from the Executive Director's historical interpretation and application of the rule. Tr. 1481-82. He could not identify anybody else who shared his interpretation.

The ALJ properly concluded that BFI and Adams complied with the standard interpretation of §330.305. Adams confirmed that there are no "unstable areas" such as Karst terrains and areas susceptible to mass movement (*e.g.*, landslides, avalanches, etc.) at and around the site. BFI Exh. GA-1 at 22-23. When asked on cross about "man-induced" or "human-induced" events that might fall within ambit of §330.305, Adams sensibly explained that a mine shaft located below an MSW facility might be such an example. Tr. 580. BFI and Adams otherwise demonstrated that the landfill and its slopes will be stable. (See pages 25-27 of BFI's closing argument and pages 20-29 of its reply to the other parties' closing arguments for additional discussions of BFI's slope stability submissions.) The Executive Director reviewed and approved BFI's slope stability submissions. ED Exh. ED-MU-1 at 17-21.

TJFA's exceptions regarding the PFD and its discussion of the unstable areas rule lack any merit and should be denied.

Slope Stability Analysis and Conclusions. On pages 34 and 35 of its exceptions, TJFA excepts to a statement in the PFD where the ALJ found that Chandler deviated from generally accepted standards and practices in Texas concerning landfill slope stability. This is another TJFA exception aimed at restoring the credibility of one of its witnesses. It also includes an attack or two on the integrity of one of BFI's witnesses (Adams).

There is ample evidence in the record that supports the ALJ's statement. Among other things:

- Chandler advocated an interpretation of §330.305 that no one else – including the Executive Director – shares (see above).
- Chandler advocated use of a factor of safety of 2.0 that nobody else in the profession uses – even though he himself uses 1.5 (or less) on other projects. *E.g.*, TJFA Exh. PC-1 at 61-69; Tr. 1505-07.
- Chandler ignored the much steeper (1H:1V) excavation slopes, higher (170-foot) waste column, and identical side slopes (4H:1V) at the TDSL facility (which has similar geology and soils) and much the higher waste columns at other 4H:1V-sloped facilities he has worked on when he contended that the slope stability at Sunset Farms is somehow problematical. *See* Tr. 1458-59, 1487-90, 1508 & 1514-17.
- Although he admitted that site-specific data is the "Cadillac" for performing slope stability analyses, Chandler proceeded to ignore the Cadillac data in favor of generic – and inapplicable – "lowest published values" that were transparently selected to yield an unrealistically low calculated factor of safety. *See* Tr. 1497; BFI-6. In so doing, he "proved" that every modern lined landfill in Texas with slopes greater than 11:43H:1V will fail.
- Although he billed TJFA tens of thousands of dollars for his work and admitted that he had access to a slope stability computer program, Chandler never ran any such models or analyses of his own to credibly demonstrate that Adams had identified the wrong worst-case scenarios, used incorrect inputs, or made incorrect calculations. Tr. 1500-02.

Finally, in this section TJFA claims that it “is not suggesting that [BFI witness Gregg] Adams is dishonest” and then proceeds to suggest that Adams and BFI are dishonest. The ALJ, who had an opportunity to assess the character and veracity of the witnesses, properly found that there was absolutely no merit to the unfounded and unwarranted accusation that Adams/BFI destroyed evidence because Adams did not save every run of the many hundreds of slope stability iterations he ran on his computer. There was and is no requirement that he do so.

Industry Standards for Side Slopes and Excavation Slopes. On pages 35 and 36 of its exceptions, TJFA excepts to the ALJ’s conclusion that Mr. Chandler “contradictorily claimed that each of BFI’s slope stability analyses were problematic and did not meet the standard of

practice for slope stability analyses.” This exception, which is another attempt to rehabilitate Chandler’s credibility, is meritless for all the reasons set forth above and in BFI’s post-hearing briefings.

Factors of Safety and Soil Strength. On pages 36 and 37 of its exceptions, TJFA rehashes its argument that a non-standard factor of safety of 2.0 was appropriate in this case and then attempts to clarify Chandler’s testimony regarding soil strength parameters.

The paragraph discussing factors of safety doesn’t contain a specific exception. It presents nothing new. For additional discussions regarding factors of safety and how they played out in this case, see page 25 of BFI’s closing argument and pages 25-26 of BFI’s reply to other parties’ closing arguments. The ALJ got this issue right.

The soil strength paragraph contains an exception to a sentence on page 65 of the PFD that summarizes Chandler’s testimony by stating that “according to Mr. Chandler, the application lacks any high quality soil strength data, thus its strength is uncertain and the lowest possible strength values should be used.” TJFA’s exception is befuddling, as the ALJ’s summary might as well have come right from Mr. Chandler’s mouth. In the hearing, Chandler testified that the application "does not really contain what we would consider any high quality strength data." Tr. 1571. In his pre-filed testimony, Chandler repeatedly advocated using strength parameters that are “low,” “very low” or are on the “lower end of the published ranges,” to-wit:

- “It is readily apparent that using the lower end of the published interface strengths ...”;
- “... components have low to very low interface strengths.”;
- “... the lower end of the published ranges of interface strength angles ...”;
- “... using the lower end of typical published interface strengths ...”.

TJFA Exh. PC-1 at 62 (first two bullet points) & 79 (second two).

The ALJ's statement is a valid summary of Chandler's testimony. TJFA's exception should be denied.

Slope Failures Elsewhere. The paragraph at the top of page 36 of TFJA's exceptions contains no exception and warrants no response.

Geosynthetic Interface Review. TJFA regurgitates several arguments it made in its post-hearing briefings on pages 38 and 39 of its exceptions. The section does not make or contain any actual exceptions, much less offer anything new. Instead, it is another naked attempt to cast aspersions on the veracity of Mr. Adams after professing that TJFA is "not casting [sic] dispersions on the veracity of Mr. Adams."

The record is very clear: nobody destroyed anything or did anything wrong pertaining to keeping or discarding slope stability analyses and data. Adams testified that he used an industry-recognized computer program, PCSTABL6, to analyze potential rotational and block failures. Tr. 666-69 & 671. He looked for and identified critical case scenarios in the proposed design. Tr. 671-73. He testified that he ran many hundreds of iterations of calculations using conservative inputs based on site-specific information and his substantial professional experience actually working in and with the Taylor clays. Tr. 670. He ultimately included detailed information regarding the critical case scenarios in the application, including computer inputs and outputs, and described his work in detail in his pre-filed testimony and at the hearing on the merits. *See* APP000449-55, APP000512-624 & APP000725-853. He did not keep data from runs that were not critical because (1) there is no need to keep the non-critical runs, (2) there is no requirement that non-critical runs be discussed in the application, and (3) there is no TCEQ

rule or other requirement that he or anyone else keep such runs. TJFA has not pointed to any requirement that any such data be kept. This charge is baseless.

For additional discussions regarding geosynthetic interface review and, more generally, slope stability analyses, see pages 20-29 of BFI's reply to the other parties' closing arguments.

Infinite Slope Analysis. On pages 39 through 41 of its exceptions, TJFA excepts to the ALJ's description of a short exercise BFI had asked Chandler to perform during his deposition (and later discussed with him during his cross-examination). In the exercise, Chandler had been asked to perform some simple infinite slope calculations based on conservative shear strength parameters he was advocating. Using his ultra-low input parameters, Chandler calculated that a lined slope any steeper than 11:43V:1H (5 degrees) would not satisfy the applicable factor of safety and is unstable. This simple exercise was done to demonstrate the hyper-conservative nature of some of the input parameters Chandler was advocating as part of his criticism of the application's slope stability demonstration. And that's exactly what it showed. The ALJ's description of the exercise is correct and should not be changed.

Chandler and TJFA have repeatedly insisted that that Abramson's lowest published strength values should have been used in lieu of values based on site-specific data. *E.g.*, TJFA Closing Argument at 45-46. They have argued that BFI and Adams should have ignored the "Cadillac" site-specific data and Adams' substantial hands-on experience with on-site soils and geosynthetics, and instead used the generic, one-size-fits-all published inputs favored by Chandler. *See* Tr. 1497. And, predictably, when Chandler performed his own calculations he selected absolutely the lowest published shear strength data he could find in Abramson (generic interfaces with no cohesion whatsoever and a low-ball friction angle) to "prove" that the slopes at Sunset Farms will fail. *See* TJFA Exh. PC-1 at 75-76; Tr. 687-90; BFI-6. All he actually

proved, however, was that any lined slope steeper than 11:43H:1V – that is, every lined slope at every modern landfill in Texas – will fail on paper if low-ball, unrealistic inputs are used. *See* BFI-6; Tr. 687-92. That’s what the ALJ saw and heard. That’s the basis for the ALJ’s statement.

Ultimately, Chandler's selection of hyper-conservative shear strength parameters from Abramson highlighted the important distinction Adams pointed out in the hearing between what is "conservative" and what is "reasonable" from an engineering standpoint. *See* Tr. 608 & 617. The two terms are important engineering concepts, but they are not synonymous. A good engineer like Adams uses inputs that are both conservative (*i.e.*, the engineer uses engineering judgment to select input parameters are not aggressive and have a factor of conservatism built in) and reasonable (*i.e.*, the selected input values are reasonably reflective of what is actually observed on-the-ground) to ensure that the proposed design has an acceptable measure of safety built in. *See* Tr. 679-84 & 686. At some point, however, an engineer can use such overly conservative parameters that his calculations bear no resemblance to the materials that are going to be used and what's actually going to be constructed – leading to absurdities such as Chandler’s 11:43H:1V maximum design slopes. *See* Tr. 686-92.

Slope Stability Summary. The paragraph on the bottom half of page 41 of TJFA’s exceptions simply re-asserts TJFA’s “unstable areas” argument, and does not need to be addressed again.

Groundwater Monitoring (Referred Issue H)

Pages 42 through 55 of TJFA’s exceptions address groundwater monitoring issues. All of TJFA’s arguments in this arena have already been made before. They present nothing new at all. Several of its exceptions are based on novel interpretations of the MSW rules. Several also

dwelling on Waste Management and the ACL site to the south of Sunset Farms – a site that has its own groundwater monitoring system.

TJFA grudgingly concedes that BFI's proposed Groundwater Sampling and Analysis Plan (GWSAP) "meets the minimal requirements" of the MSW rules. Its groundwater monitoring arguments instead focus on BFI's proposed 32-well perimeter monitoring system. BFI is proposing 32 wells that have a maximum spacing of 600 feet between any two wells and an average distance of slightly less than 500 feet. BFI Exh. JS-1 at 41-42; Tr. 413 & 1755-56. All of the wells will be screened to sample groundwater at the interface of the weathered and unweathered Taylor marls. BFI Exh. JS-1 at 41. The entire perimeter of the site will serve as the "point of compliance" for regulatory purposes. *Id.* at 42; Tr. 777.

TJFA's criticism of BFI's proposed 32-well system needs to be put into context before its exceptions are individually addressed. TJFA is affiliated with TDSL, which operates the TDS Landfill in southeastern Travis County. Tr. 1446-47; PFD at 81. The TDS Landfill is situated in virtually identical soils as Sunset Farm (the Taylor clays) and have the same uppermost regulatory aquifer (the weathered Taylor). Tr. 1762-66; BFI Exh.18. The TDS Landfill and Sunset Farms are similar in size. The TDS Landfill perimeter monitoring system, which was designed by Dr. Kier, consists of six wells which are screened to sample groundwater at the interface of the weathered and unweathered Taylor marls. Tr. 1762-66; Exh. BFI-18. TJFA is criticizing a proposed system at Sunset Farms that will have more than five times the number of monitor wells than TJFA's sister company's site has.

Applicable Rules. On page 43 of its exceptions, TJFA excepts to the exclusion of §330.51(b)(1) as a rule that is applicable to groundwater monitoring. This exception should be denied for at least three distinct reasons. First, TJFA failed to move or request inclusion of this

rule in a timely manner, and its present request is late. Second, §330.51(b)(1) applies *generally* to all applications and all parts of an application. Specifically including the regulation with this referred issue makes no more sense than including it with other referred issues such as adequacy of cover, dust control or endangered species. Including the rule adds nothing. Third, the Executive Director found that BFI's entire application (including the groundwater monitoring provisions) was both administratively and technically complete – and thus satisfies the provisions of §330.51(b)(1).

Existing and Proposed Groundwater Monitoring Systems. Pages 43 through 45 of TJFA's exceptions contain two exceptions. First, TJFA excepts to the statement on page 77 of the PFD that BFI chose to designate all 32 wells as point of compliance wells because that designation provides an “enhanced layer of environmental protection.” Next, it excepts to the conclusion on page 77 that states that the agency’s new (2006) monitor well spacing rule does not apply to BFI’s application because it was filed in January 2006 before the new rule was adopted. Both exceptions should be denied.

There is more than ample evidence in the record that demonstrates that BFI's proposed groundwater monitoring system not only meets the applicable rules – *i.e.*, the pre-March 27, 2006 rules that govern this application – but also meets or exceeds the current rules. For example, the applicable rules do not have a maximum spacing requirement between wells. Tr. 357; *see* 30 TAC §330.231 (2006). The current rules have a 600-foot maximum spacing requirement. Tr. 358 & 760; *see* 30 TAC §330.402(a)(2) (2008). As configured, the maximum spacing between any two wells in BFI's proposed 32-well system does not exceed 600 feet, and the average spacing between wells is less than 500 feet. Tr. 359-62 & 760-61; *see* APP000874. Several of the wells on the southern border of the landfill (the border that TJFA seems fixated

on) are even closer. Tr. 361-62; *see* APP000874. And, BFI has proposed – with the Executive Director's approval – to designate the entire perimeter of the landfill as the point of compliance for groundwater monitoring purposes. BFI Exh. JS-1 at 42; *see* APP000874. Kevin Carel, one of BFI's groundwater experts, testified that such a designation is both a more "aggressive" (in terms of the scope of monitoring and reporting and, if necessary, initiation of assessment monitoring and corrective actions²) and a more "conservative" (in terms of groundwater protection) way to monitor groundwater at the site. *See* Tr. 762, 777 & 788.

With respect to the second exception regarding the future applicability of rules, BFI's response is: so what? The ALJ's short statement regarding the applicability of the pre-March 27, 2006 rules to this application is in all respects correct. The future applicability of the post-March 27, 2006 rule has no bearing on *this* application.

Justification for GWSAP and Site Specific Conditions. TJFA does not specifically except to anything in a one-paragraph argument that straddles pages 45 and 46 of its exceptions. TJFA raises nothing new in this no-exception paragraph – it's strictly re-hash. Nor does it cite any record evidence in support of its argument. For a detailed discussion of groundwater monitoring issues, see pages 19-21 & 24-25 of BFI's closing argument and pages 12-20 of BFI's reply to the other parties' closing arguments.

Proximity of Austin Community Landfill. On pages 46 to 49 of its exceptions, TJFA excepts to comments in the PFD about the relevance and reliability of TJFA's ACL evidence. The ALJ's comments regarding ACL are correct and should remain in the PFD..

Throughout this proceeding TJFA has repeatedly thrown out insinuations regarding the ACL facility that have nothing to do with Sunset Farms. Kier's pre-filed testimony included materials from an investigation of the ACL facility that he performed for Bob Gregory in the late

² *See generally* 30 TAC §§330.235-238.

1990s as well as his review of the PBS&J sampling event at Applied Materials in July 2002. *See* TJFA Exh. BK-1 at 16-24; *see also* TJFA Exhs. BK-7 and BK-8, pp 16-24. The clear intent of TJFA's effort has been to try to tar and feather BFI with innuendo about an unrelated facility. There is no basis, regulatory or otherwise, for Kier's and TJFA's suggestion that BFI is under some sort of heightened regulatory monitoring obligation due to the existence of the ACL facility. ACL is responsible for monitoring its own site. (BFI notes parenthetically that the Sunset Farms/ACL common boundary will be monitored by two separate perimeter monitoring systems. It will, in effect, be "double monitored.")

The ALJ correctly noted that this contested case does not concern ACL. PFD at 80. Waste Management, which operates ACL, has an application pending to expand that facility. That application is in contested case hearing, and TJFA is a party-protestant in that case. TJFA has had an opportunity to make its case against ACL's expansion and its groundwater monitoring system in that proceeding; Waste Management has had an opportunity to defend its application and the proposed groundwater monitoring system. That's a whole different fight.

Assessment Monitoring in MW-30. TJFA's two-paragraph argument on pages 49 and 50 of its exceptions does not include any specific exception. Instead, TJFA claims that the ALJ misunderstood TJFA's position about MW-30, which is presently in assessment monitoring. TJFA appears to take offense at the first sentence in the second paragraph on page 82 of the PFD, which states that "TJFA does not explain how the current assessment monitoring shows that BFI's proposed groundwater monitoring plan fails to meet the standards in the Commission's rules." But this sentence doesn't purport to restate TJFA's position. Instead, it simply notes that TJFA had failed to explain how the current assessment monitoring shows how

BFI's proposed monitoring system fails to meet the standards set forth in the MSW rules. That is a correct statement.

Contamination of Applied Materials' Facility. TJFA excepts to the ALJ's conclusions regarding contamination at Applied Materials in a two-paragraph argument on pages 50 and 51 of its exceptions. Most of TJFA's argument is a discussion of groundwater velocity that has no cites to the evidentiary record and, BFI submits, no basis at all in the record.

The Applied Materials evidence is discussed elsewhere in this reply and will not be repeated again. BFI does note, however, that even Dr. Kier repeatedly admitted that he has no evidence that BFI has anything to do with anything at the ACL and Applied Materials sites. His 1998 reports to Gregory specifically stated that "no evidence has been found that the BFI Sunset Farms Landfill has contributed in any detectable way to the contamination of ground water in the weathered Taylor clays." TJFA Exh. BK-8. With respect to the TICs (tentatively identified compounds) noted in the (partial) PBS&J report, he testified at the hearing that "I'm not saying it came from BFI." Tr. 1591. Ultimately, Applied Materials, like ACL, was not relevant to BFI's application. Instead, it was a transparent attempt to try to tar and feather BFI with groundwater data from another site – in this case data the ALJ properly concluded was neither relevant nor reliable.

Establishing Background Groundwater Quality. On pages 51 to 55 of its exceptions, TJFA re-hashes the "upgradient background well" argument that it raised in its closing argument. This is a nonsensical argument that is based in the flawed premise that BFI has not already established background groundwater quality for this site. It has. BFI has operated (under agency review) groundwater monitor wells at the site since it opened in 1982, and has extensive background groundwater quality data for wells (whether existing or planned) around and across

the entire site. How on earth could MW-30 have been placed in assessment monitoring (see above) if there was not any background water quality data by which to make a comparison?

This argument is also flawed because TJFA is misreading the rules governing background wells. The purpose of background monitoring, and thus background wells, is to establish background groundwater quality, *i.e.*, a baseline upon which future sampling data can be compared for statistically significant changes of constituent levels. The rules relevant to background wells include subsections 330.231(a)(1) and 330.233(c) of the MSW regulations. Subsection 330.231(a)(1) states in full:

Background wells shall be installed to allow determination of the quality of background groundwater that has not been affected by leakage from a unit. **A determination of background quality may include sampling of wells that are not hydraulically upgradient of the waste management area if hydrogeologic conditions do not allow the owner or operator to determine which wells are hydraulically upgradient or if sampling at other wells will provide a better indication of background groundwater quality than is possible from upgradient wells.**

30 TAC §330.231(a)(1) (emphasis added). Background groundwater quality data may thus be established from a downgradient well to be used for future comparison purposes if the site conditions do not allow the operator to identify upgradient wells or if sampling will be better from downgradient wells. Subsection 330.233(c) states in relevant part:

The owner or operator shall establish background groundwater quality in hydraulically upgradient wells **or in background wells** for each of the monitoring parameters or constituents required in the groundwater monitoring program for [an MSW landfill unit] Downgradient groundwater data shall not be adjusted by subtracting background groundwater data.

30 TAC §330.233(c) (emphasis added).

Under the rules, then, background wells can be either upgradient or downgradient. No agency rule, guidance or policy mandates or even suggests that at least one upgradient background well must be included in a facility's groundwater monitoring system. No agency rule, guidance or policy precludes the use of downgradient wells as background wells for future comparison purposes. The rules do not state how many wells, or what percentage or ratio of wells, must be background wells. And no rule, guidance or policy precludes an owner or operator from designating its entire system as downgradient or as its regulatory point of compliance.

Here, BFI's proposed enhanced groundwater monitoring system is eminently reasonable, well within both the letter and spirit of the rules pertaining to background monitoring, and has been approved by the Executive Director. BFI's proposed plan falls well within the relevant rules for three separate reasons. First, as discussed above, BFI has already established background groundwater quality data for the site. A baseline for any and all wells, whether they exist now or are installed at some point in the future, already exists. Second, BFI's plan qualifies under the first exception set forth in §330.231(a)(1). Sunset Farms sits on a topographic high, and groundwater in the regulatory aquifer (the weathered Taylor) flows in all directions from the site. BFI Exh. JS-1 at 33-34 & 42. The MSW rules specifically allow BFI and others to use downgradient wells as background wells where, as here, "conditions do not allow the owner or operator to determine which wells are hydraulically upgradient." 30 TAC §330.231(a)(1). Third, BFI's plan also qualifies under the second exception set forth in §330.231(a)(1). Because the landfill sits on a topographic high, any upgradient well would, by definition, be located in the middle of the landfill's footprint. Under such conditions, "sampling at other wells will provide a better indication of background groundwater quality than is possible from upgradient wells." *Id.*

The ALJ correctly concluded that BFI has proposed an aggressive 32-well monitoring system that defines the entire perimeter of the landfill site as its regulatory point of compliance. PFD at 83. BFI has already established background groundwater quality at the site. It will develop background data over two years for each of the 17 new wells it is planning to install. BFI Exh. KC-1 at 12. BFI will use intra-well comparisons and other statistical methods allowed by TCEQ to ensure that any potential releases from the landfill are detected. *Id.* at 13-15; *see* APP001341-1401.

Cover (Referred Issue Q)

TJFA includes a short section on cover on page 56 of its exceptions. The exception is really about soil balance, which was not referred as an issue. Nor is there any rule in Chapter 330 that requires an MSW applicant or permittee to show that soil “will balance.” *See* Tr. 1357; *see generally* 30 TAC §§330.1 *et seq.* TJFA has not cited any such rule or relevant provision in any rule in its exception. The rule pertaining to cover that TJFA has cited does not address soil balance, *see* 30 TAC §330.133, nor do the rules pertaining to closure, post-closure and cost estimates for closure and post-closure. *See* 30 TAC §§330.250-256 & 280-284.

Regulatory requirements aside (or, more accurately, putting aside the absence of any rule that provides any support whatsoever for TJFA’s argument), there is absolutely no evidence in the evidentiary record that supports any conclusion other than that BFI has adequate soil and/or access to soil for both its current and future needs. Brad Dugas testified about the contract BFI has with Waste Management for 1.5 million cubic yards of soil at \$1.50 per yard. BFI Exh. BD-1 at 45-46; BFI Exh. BD-5. He also testified that soil is periodically brought in for free from construction contracts. Tr. 1310; BFI Exh. BD-1 at 44-45. And he testified that the site has always had enough soil, and that soil can readily be purchased on the open market. Tr. 1311 &

1358; BFI Exh. BD-1 at 46. The only evidence pertaining to closure, post-closure and cost estimates for closure and post-closure was presented by BFI and the Executive Director. *See* BFI Exh. AM-1 at 61-66; ED Exh. ED-AA-1 at 22-25; *see also* APP001139-51.

TJFA did not present any evidence at all pertaining to soil balance or how any alleged imbalance factors in any way into matters pertaining to closure, post-closure or cost estimates pertaining to closure or post-closure. Nothing. This exception has no merit whatsoever.

Land Use Compatibility (Referred Issue U)

Both TJFA and NNC have excepted to the ALJ's land use compatibility findings and conclusions in the PFD. None of these exceptions are based on anything new except for NNC's assertion that the decision in the Spring-Cypress Landfill case somehow mandates denial of this permit amendment. BFI will summarize the record evidence regarding land use compatibility first, and then address the exceptions lodged by TJFA and NNC afterward.

The Record Evidence. No protestant raised any challenge to the accuracy or completeness of the land use information that was contained in the application. Nobody disputes that the application satisfies the requirements of TCEQ's land use rules. Everybody agrees that zoning does not prohibit this expansion. It was uncontested that the City's "Smart Growth Initiative," from which the Desired Development Zone (DDZ) designation comes, is a "guide" only and is not enforceable in the manner of an ordinance. There is no evidence that indicates that landfills are excluded from the DDZ (they aren't).

Neither NNC nor TJFA presented any expert testimony regarding land use or land use compatibility in the hearing. Nobody has cited any instance where the testimony (whether pre-filed or live testimony) given by BFI's land use experts – John Worrall, Charles Heimsath and Donna Carter – was factually inaccurate, or that any exhibit that these witnesses sponsored was

inaccurate, incomplete or invalid. The growth trends studies conducted by Worrall and Heimsath have never been challenged. Those studies showed that growth in the areas located within one and five miles of the facility, respectively, has been vigorous for the past 20 years even though landfill operations have been occurring along Giles Road for fifty years or more – demonstrating that the facilities are, in any objective sense, compatible with the land uses in that area of the county. BFI Exh. JW-1 at 19-24; BFI Exh. CH-1 at 8-46; *see* BFI Exhs. JW-3, JW-4 and CH-3 through CH-6.

No governmental body opposes issuance of the permit amendment. The Executive Director reviewed the application – including the land use report – and concluded that it satisfied the agency's land use regulations. ED Exh. ED-AA-1 at 36-37. CAPCOG reviewed BFI's application in the context of the COG's regional solid waste plan, corresponded with BFI, and issued its "conditional conformance" letter when BFI promised to cease accepting waste at the site on or before November 1, 2015 and agreed to five other conditions. BFI Exh. RS-1 at 21 & 36-37; BFI Exhs. RS-31, RS-32 & RS-33. In so doing, CAPCOG has deemed that BFI's application – and thus the draft permit with the special provisions that have since been included – conforms with the regional plan. Travis County does not oppose issuance of the permit as long as the special conditions that BFI has requested are included in the permit. TC Exh. 1 at 10. And the City of Austin, which entered into the settlement agreement with BFI, does not oppose issuance of the permit. *See* Tr. 2046-47 & 2073; BFI Exh. RS-42. The settlement agreement includes the November 1, 2015 cessation-of-waste-acceptance date, an agreement not to use the site as a transfer station, enhanced erosion controls, limits on truck traffic on Blue Goose Road, and other measures. *See id.*

CAPCOG's conditional conformance letter and the County and City's non-opposition are all predicated on the unique – indeed, previously unheard of – commitment BFI has made to cease accepting waste by November 1, 2015. In so doing, BFI has effectively committed itself to closing the landfill after only four (and perhaps less) additional years of operation, and has committed to closing the landfill one year earlier than the 2016 closure date it had estimated as part of its 1994 Subtitle D MOD. BFI Exh. BD-1 at 34; *see* Tr. 2069, 2101 & 2133-34.

The tracts of land adjacent to Sunset Farms are all large, and no tract is used for residential purposes. ACL borders the entirety of Sunset Farms' southern boundary. BFI Exh. JW-1 at 11. An industrial facility (Applied Materials) is located immediately to the east across Giles Lane. *Id.* The property to the west is primarily open, though part of it has been leased by Williams, Ltd. for communications towers. *Id.*; *see* Tr. 1186 & 2025 and APP000156. The properties to the north are agricultural. Tr. 1978 & 1984-85; *see* APP000156. The closest residential area is the Harris Branch subdivision, which is located to the northeast of Sunset Farms. *See* APP000156. The closest residence in Harris Branch is located 1045 feet (almost one-quarter mile) from the Sunset Farms permit boundary, and, because of the 50-plus acre effective buffer area in the northeast corner of the facility, is located 1830 feet (over one-third of a mile) from the landfill itself. BFI Exh. JW-1 at 24. With the vertical expansion, landfilling operations will be even further from this residence. *See id.* Many of the houses in Harris Branch are over one-half mile away from the landfill. *See* APP000154 & 56.

Almost ninety percent (89%) of the residential properties within one mile of the landfill were built after Sunset Farms was permitted. BFI Exh. JW-1 at 18, 21 & 33. The Harris Branch subdivision was platted and first developed in the late 1980s – several years after Sunset Farms was permitted. Tr. 2126-27. Notably, the landfill operated without complaint for its first 20

years – proving that landfills in the area can reasonably co-exist with the surrounding properties and land uses, including single-family residences. Tr. 2147-48.

Because no protestant could point to or has pointed to any regulatory flaw in the land use analysis portion of BFI's application (such as a zoning ordinance that prohibits the proposed expansion, a negative effect on growth trends, or the existence of drinking water wells that could be affected by the facility), the protestants have resorted to a fuzzy NIMBY-type argument: the landfill is incompatible with surrounding land uses just because it is. That isn't the regulatory standard or an appropriate framework for a compatibility analysis. The ALJ understood all of this when he analyzed the land use compatibility evidence and reached his conclusion that the expansion will be compatible with surrounding land uses.

For additional discussions regarding land use compatibility, see pages 55-61 of BFI's closing argument and pages 62-68 of BFI's reply to the other parties' closing arguments.

TJFA Exceptions. TJFA's exceptions regarding land use compatibility are found at pages 56 to 58 of its exceptions. These exceptions are rich in irony coming from a company that serially purchases property adjacent to landfills. The irony is even richer here since TJFA bought its tract across from Sunset Farms in late 2004 after BFI's plans to expand the landfill were public. If irony is a ground for denying an exception, then surely TJFA's exception must be denied.

TJFA has generally excepted to the ALJ's land use compatibility conclusions and incorporates NNC's closing argument by reference. BFI will respond to TJFA's general exception in the NNC section below since TJFA raises nothing unique.

On page 57 of its exceptions, TJFA specifically excepts to the ALJ's purported conclusion that §361.062 of the Texas Health and Safety Code "prohibits consideration of Travis

County's comments [to CAPCOG]" (which are marked as TJFA Exhibit 24). TJFA is misconstruing what the ALJ stated. His discussion regarding the Travis County comments TFJA had offered as an exhibit was more nuanced. The ALJ *did* consider the exhibit and its contents. He just didn't find them particularly persuasive because: (1) the DDZ and other land uses discussed in Travis County's comments had been addressed in this hearing and did not lead to a conclusion that the expansion was not compatible; (2) Travis County's position had plainly changed since the letter was written (due to BFI's subsequent commitments regarding closure, etc.); and (3) there was no evidence that Travis County had ever had a local solid waste plan approved by the Commission, as the law requires, and public comments shouldn't be given much weight when the law states that the Commission can only consider an approved plan. *See* PFD at 104-106.

NNC Exceptions. NNC's land use compatibility exception(s) is found on pages 11 through 19 of its exceptions. In this section, NNC never expressly says what portions of the PFD, findings or conclusions it is excepting to – though presumably it is excepting to the ALJ's ultimate conclusion that the facility is compatible with surrounding land uses. The miscellaneous exceptions contained on pages 19 to 21 of NNC's exceptions under the "Nuisance" subheading are discussed later in this reply.

On page 14 of its exceptions, NNC asserts that urban landfills must be held to higher standards than other landfills. There is no statutory or regulatory basis for this assertion, whether in terms of land use compatibility or more generally in terms of site operations. All landfills – whether urban, suburban or rural – must meet the standards and performance criteria set forth in the MSW rules.

On page 15, NNC argues that the Commission's decision in the Spring-Cypress Landfill case precedent that must be followed in this case – but provides little if any meaningful analysis of the Spring-Cypress case to show why a different landfill in a different setting with a different evidentiary record provides a basis for denial of this permit amendment on land use compatibility grounds. Spring-Cypress is not a “similar landfill case.” It involved a proposed Type IV facility in a greenfield site, whereas Sunset Farms involves a facility that has been around for 27 years in an area historically used for landfilling. Sunset Farms predates 89% of the residences located within one mile of the facility, whereas a greenfield site predates nothing. If other any case should serve as precedent, BFI submits that the expansion of the DFW Landfill (TCEQ Permit No. MSW-1025B), a Type I facility located in a rapidly growing area that had approximately 2,250 residences within one mile when approved, is much more similar to this case than Spring-Cypress in terms of land use issues.

On page 15 of its exceptions, NNC asserts that several of its members believed that the landfill would be closed by 2010. Aside from being factually incorrect, any such beliefs can hardly be considered as a factor explaining growth in the area.

NNC discusses Greg Guernsey's testimony on pages 15 through 19 of its exceptions. Guernsey is the City's Director of Neighborhood Planning and Zoning Development Department. Tr. 2048. He did not testify about the compliance of BFI's application with the TCEQ's land use compatibility criteria, and testified that he would defer to the agency and its consideration of the land use compatibility considerations "with regard to [its] permitting powers [sic] procedures and state laws." Tr. 2097.

Among other things, Guernsey testified that he did not identify any factual errors in the application or in the testimony of BFI's expert witnesses. Tr. 2055. He also agreed that the

landfill proper is outside the City's jurisdiction and not subject to any zoning ordinance that would prohibit the proposed expansion. Tr. 2098-99. He testified that the City's Smart Growth Initiative, with its embedded DDZ designation, is "more of a guide" than a plan and is not enforceable in the way that a zoning ordinance is. Tr. 2055. He did not testify that development of new landfills or expansions of existing MSW facilities are excluded from the DDZ.

At the hearing, Guernsey stated his personal opinion that operating landfills are not generally compatible with single-family residential. *See* Tr. 2088. NNC highlights this general proposition in its exceptions, but ignores the totality of Guernsey's testimony. Guernsey's testimony, taken in its entirety, does not support NNC's conclusion – for any number of reasons. First, Guernsey by his own admission did not look at the application in terms of the TCEQ regulations or regulatory compliance. Tr. 2097. Second, his observation was a *general* observation and was not specific to Sunset Farms. Indeed, throughout his testimony he only offered a "general" opinion regarding a landfill's compatibility with surrounding land uses. *E.g.*, Tr. 2070, 2072, 2085, 2086, 2088, 2096 & 2125. Guernsey did not conduct a specific analysis and offered no specific opinion here. Indeed, there was nothing at all analytical about Guernsey's opinion. Nothing he said was based on any particular regulation, study, analysis or treatise, and he did not base his general opinion on any objective land use criterion such a zoning ordinance or anything quantifiable such as housing starts or growth trends. Third, his general opinion was given solely in the context of "single-family residences." *See* Tr. 2088 & 2125. He offered no such opinion regarding compatibility with other MSW facilities (ACL), industrial sites (Applied Materials), open space (Williams, Ltd.'s property), communications towers (again, Williams, Ltd.'s property), agricultural land (the Remmert and TJFA properties) or any other uses. Fourth, his observations were repeatedly couched in terms of single-family residences that

are "next door" or "adjacent to" a generic operating landfill. *E.g.*, Tr. 2089 & 2092. Sunset Farms is not "next door" or "adjacent to" any single-family residence – including any Harris Branch residence. The closest residence is 1830 feet from the landfill itself. Guernsey specifically testified that any single-family residential compatibility concerns he has lessen when, as here, such residences are further away from a facility. Tr. 2121-22. And, finally, Guernsey testified that the City/BFI settlement agreement had been executed by the City Manager by authorization of the city council and had "sufficiently mitigated" any land use compatibility concerns he might have had:

- Q. ... It's your testimony that the city council has supported this [settlement] agreement. Right?
- A. The agreement has been signed by the City Manager by authorization of the city council.
- Q. All right. And that's because the landfill, the operators agreed to cease accepting waste before November 1, 2015. Right?
- A. Among other things, yes.
- Q. Okay. And has agreed not to use the property as a transfer station going forward. Correct?
- A. Yes.
- Q. And that there's a number of additions to the operations of the facility, including matters pertaining to seeding and sodding and erosion control. Is that correct?
- A. Yes.
- Q. **Okay. So all those thing taken together add up to your – those things taken together sufficiently mitigate your concerns that the landfill may be incompatible with land uses. Is that correct?**
- A. **Yes.**

Tr. 2122-23 (emphasis added).

Erosion Control (Referred Issues C and Y)

Pages 58 through 62 of TJFA's exceptions address erosion and sedimentation control issues. This is one topic where TJFA has not repeated virtually all of its prior arguments. No doubt this is because TJFA's own experts (Stecher and Chandler) acknowledged that the Rule 11 Agreement (*i.e.*, the City/BFI settlement agreement) resolved most of their concerns regarding erosion control. Tr. 1529-30 & 1855-56. Nonetheless, they have persisted with three issues: (1) the alleged inadequacies of the sedimentation ponds at Outfalls 2 through 5; (2) Ditch K; and (3) Ditch L. All of TJFA's arguments on these three features have been made before and are shopworn. Its exceptions present nothing new at all. Several of its exceptions are nothing more than a complaint that the ALJ didn't agree with its expert witness.

TJFA's erosion/sedimentation control arguments must be viewed quite skeptically – for at least six reasons. First, to repeat, the Rule 11 Agreement reached with the City of Austin was focused upon and successfully resolved every erosion control concern the City could think up. The City assigned its best and most respected erosion control experts (as acknowledged by Mr. Stecher) in establishing the standards and controls BFI will have to follow – all of which go above and beyond the TCEQ requirements. Second, there is no TCEQ requirement that an MSW facility even have sedimentation ponds. Tr. 2282. Third, the City of Austin, which does have sedimentation pond performance criteria, has reviewed and approved BFI's application. Tr. 2203-04. Fourth, neither of the experts TJFA offered in this arena could identify a single instance where sediment has flowed off-site or where there has been any sediment in the outfalls. Fifth, both Stecher and Chandler made a lot of their typical kitchen sink opinions that fell apart on cross-examination. Finally, despite all of the criticisms that Stecher and Chandler made in

their pre-filed testimony about the alleged inadequacy of the erosion and sedimentation control features presently at, and proposed for, the landfill, neither witness ever took the time or initiative to conduct a site visit. They have no personal knowledge of any of the features and practices they criticized.

For detailed discussions of erosion and sedimentation control, see pages 36-49 of BFI's closing argument and pages 51-62 of its reply to the other parties' closing arguments.

Sedimentation Ponds. TJFA's and Stecher's complaint that the sedimentation ponds are undersized has neither regulatory nor factual support. On the regulatory side, it is worth repeating that there is no TCEQ requirement that any sedimentation pond be constructed. Tr. 2282. Many erosion and sedimentation control practices other than sedimentation ponds can be employed and in this case many of these additional practices have been and will be employed as set out in the application and in the Rule 11 agreement.

If such a pond is used, the TCEQ has no criterion that prescribes the minimum size for a sedimentation pond. The City of Austin does have a performance-based standard when sedimentation ponds are used: they must be designed to capture the first half-inch of runoff. Tr. 964. The ponds by Outfalls 4 and 5 were designed to this standard, and the application requires that the ponds (or traps) by Outfalls 2 and 3 also be maintained to the same standard. Tr. 1052.

The City reviewed BFI's application for the sedimentation ponds at Outfalls 4 and 5 and issued a City permit. Tr. 2203-04. While TJFA attempts to discredit the City's approval by noting that Kelly did not personally cross-check these calculations, Tr. 2203-04, the application was formally reviewed and approved by other City personnel. Tr. 2200. TJFA has not provided any evidence that the calculations were incorrect.

On page 59 of its exceptions, TJFA re-hashes Stecher's testimony that the City's half-inch performance standard is not applicable to above-grade landfills. Stecher provided no support for this bald statement, and his statement was not consistent with the testimony that Mike Kelly of the City gave at the hearing. Kelly testified that the half-inch standard applies to *any* land development project, including landfills. Tr. 2204. The City's code does not single out landfills because Austin, like most cities, does not have a drainage code just for landfills. If the City believed that landfills require more stringent criteria, presumably it would have developed criteria specific to landfills.

In sum, TJFA's criticism that the application should be denied because BFI has designed and constructed sedimentation ponds that are not required by the TCEQ, but nonetheless comply with the design standards of the City of Austin, seems nonsensical.

Ditches K and L. On pages 61 and 62, TJFA claims that the ALJ erred in finding that Ditch K and L control erosion in the two drainage areas, Areas 1 and 3, which drain to Outfall 1. It re-asserts Stecher's testimony that the ALJ has already considered, and then complains that the ALJ has discounted Stecher's opinions. The exception has no merit.

The ALJ correctly noted that Stecher's opinion that Ditch K does not have enough erosion controls is an opinion that was not shared by any other expert. BFI's expert testified that the erosion controls were adequate. BFI Exh. AM-1 at 45-46. The Executive Director's expert, Matthew Udenenwu, testified that he considered Stecher's criticisms but disagrees with Stecher. Tr. 2281. Instead, he concurs with BFI that the erosion control features of Ditch K are effective. *Id.* Also, the City's expert, Mike Kelly, understandably had no criticism of Ditch K since the City authorized it. Tr. 2200.

Despite its name, Ditch K is not just a ditch. The channel was constructed up to over 100 feet wide to help keep velocities low during the first half-inch of runoff. *See* APP000974. Further, there are multiple sediment traps and rock berms across the channel to remove sediment. Exh. BFI-7 at 13. Ditch K was fully authorized by the TCEQ in the 2002 MOD, by Travis County, and by the City in the related channel project permits. Tr. 1942; *see* BFI Exh. AM-33. Moreover, it is actually constructed and presently operating as an erosion control feature. Tr. 2282. And it is doing the job it is designed to do, notwithstanding Stecher's opinion. *See* Exh. BFI-29 (TCEQ investigation report responding to Joyce Best's complaints).

The general same factual situation exists with regard to Ditch L; Stecher disagrees with the other experts and the ALJ that Ditch L effectively controls erosion prior to discharge at Outfall 1. The City clearly disagrees with Stecher's opinions on the value of the silt fences, because silt fencing was a specific requirement of the Rule 11 Agreement. *See* BFI Exh. RS-42 at 4. The fact that neither Stecher nor any NNC witness can identify an instance when sediment has been discharged at Outfall 1 again undermines TJFA's contention. Tr. 1860. (BFI uses the word "contention" because it does not appear there is a specific exception, even in the broad method employed by TJFA, directed at Ditch L.)

Finally - and to state the obvious - the ALJ did not find Stecher's criticisms persuasive. So he did not agree with Stecher. On pages 61 and 62 of its exceptions, TJFA complains that the ALJ should not have "negated" or "discounted" Stecher's testimony. BFI submits that weighing and balancing the evidence is precisely what the ALJ is supposed to do. This process inevitably and appropriately results in some testimony being comparatively discounted.

NNC's "Nuisance Issues" (Referred Issues D, G, O & W)

On pages 19 to 21 of its exceptions, NNC lumps four unrelated issues under the subheading "Nuisance." BFI notes that the first three items in this section – pertaining to the Williams property, visual impact, and buzzards – do not fall under the regulatory definition of "nuisance." See 30 TAC §330.2(86) (pre-March 2006 rules). For lengthy discussions of matters pertaining to nuisance, site operations, birds, landfill gas management and odor controls, and visual impacts, see generally BFI's closing argument and its reply to the other parties' closing arguments.

Williams, Ltd. Property. On page 20, NNC asserts that the ALJ did not address/discuss the "developability" of the Wilkins tract. It is unclear exactly what NNC is excepting to here. In any event, there was nothing for the ALJ to discuss or address in the PFD regarding the Wilkins tract because NNC never presented any meaningful evidence to even raise this as an issue. Any lack of discussion on the ALJ's part resulted solely from NNC's failure to put on any evidence to discuss. BFI further notes that the existence of infrastructure "at least ... for water" doesn't show that there is also infrastructure for wastewater or that the roadways could support development. The testimony at the hearing made clear that good access and the availability of water and (not or) wastewater are what developers are looking for in a property. Tr. 1204.

Visual Impact. NNC's discussion of Donna Carter's testimony regarding the visual impacts of the two-tiered design of the landfill and BFI's plan to "paint" the landfill is not an exception to anything in the PFD, findings or conclusions.

Buzzards. On pages 20 and 21 of its exceptions, NNC complains that the ALJ dismissed the testimony of NNC's lay witnesses in favor of BFI's bird expert, Bill Southern. Dr. Southern, BFI's bird expert and the gentleman who developed its bird control plan (BCP), was the only

witness who provided expert testimony regarding buzzards or any other kind of bird. He described the success of BFI's BCP. BFI Exh. WS-1 at 20. Gulls have been reduced to almost zero at the site, and other birds have been reduced to ambient levels (the number that would be expected even if the landfill were not there). Tr. 1251; BFI Exh. WS-1 at 18-19. The BCP has prevented vultures from feeding at and frequenting the landfill. *Id.* at 26. Southern testified that vultures eat carrion; that they are drawn to the area primarily because of the power lines to the west of the facility, upon which they roost, and not the landfill; that vultures roam forty or more miles per day in search of food; and that they are very unlikely to spread disease. BFI Exh. WS-1 at 10 & 21; Tr. 1251-52 & 1260. No party presented any evidence to rebut Southern's findings or opinions.

Gas and Odors. NNC briefly discusses gas and odors on page 21 of its exceptions. This section does not explicitly except to any discussion, finding or conclusion, but instead seems to be directed at BFI's position in this case regarding landfill gas management and odor controls. In it, NNC complains that the ALJ gave undue weight to the testimony of BFI's odor expert, Dr. Shari Libicki.

Landfill gas management and odor controls are discussed in detail on pages 49-55 of BFI's closing argument and pages 71-72 of BFI's reply to the other parties' closing arguments. As discussed in BFI's post-hearing briefings and elsewhere in this reply, the landfill has been cited only once (in 2002) for nuisance-level odors. When odors became an issue, BFI immediately implemented an aggressive plan that included expanding its gas collection system to 180 extraction wells, not recirculating leachate, not using alternate daily cover, using misters, etc. That plan has worked.

Assessment of Transcript Costs

TJFA excepts to the ALJ's conclusion that it was just and reasonable for TJFA to pay one-half of the court reporting and transcript costs. It specifically excepts to the statement that "TJFA's participation in this case was a transparent attempt by Mr. Gregory to delay, complicate, increase the cost of, and with luck defeat BFI's Application so as to gain a business edge on BFI" – claiming that there is no evidence in the record to support this statement.

BFI submits that the *entire record* in this proceeding – from the first time TJFA faxed its public comments to the TCEQ to the hundreds of pages of pre-filed testimony of four testifying experts TJFA filed to the 64 pages of exceptions TJFA has recently filed – fully supports the ALJ's conclusion. TJFA's exceptions are but the latest example of what BFI has had to deal with throughout this multi-year process: a number of mostly kitchen-sink arguments (including a land use compatibility argument from a company that specifically bought property next to the landfill in late 2004) that unnecessarily complicate and increase the cost of this proceeding.

TJFA's multi-year, many-hundred-thousand dollar opposition to this permit application to "protect" a \$90,000 piece of property makes absolutely no sense unless one comes to the same conclusion as this ALJ. Its similar efforts in three other recent permitting proceedings involving Waste Management cement that conclusion.

At a very minimum, TJFA has certainly shown that it has the financial ability to pay half the reporting and transcript costs and that it has not been shy about fully participating in this proceeding. *See* 80 TAC §80(d)(1)(B) & (C).

The ALJ's recommendation regarding assessments costs is just and reasonable and should be followed.

V. INCORPORATION OF BFI'S CLOSING ARGUMENT AND REPLY BRIEF

As noted above, neither TJFA nor NNC has raised anything new in their exceptions. These items were all addressed in detail in BFI's closing argument (dated March 12, 2009) and in its reply to TJFA and NNC's closing argument (dated March 30, 2009). BFI incorporates both of these documents into this reply brief for all purposes.

VI. CONCLUSION AND PRAYER

TJFA's and NNC's exceptions are without merit and should be denied in their entirety. BFI met its burden of proof with respect to every referred issue. As such BFI requests that the draft permit (with the special provisions that have been requested, but without the 7:00 a.m. to 7:00 p.m. weekday only operating hours recommendation of the ALJ) be issued as a final permit, and that findings of fact and conclusions of law be entered in support of the issuance of the permit as proposed by BFI in the proposed findings of fact and conclusions of law that BFI previously filed in this proceeding on March 30, 2009. Specifically, BFI request that the following findings of fact and conclusions of law made by the ALJ (first column) be replaced by the findings of fact and conclusions of law previously proposed by BFI (second column):

Proposed Finding or Conclusion (ALJ)	BFI's Proposed Finding or Conclusion
FOF 286	FOF 301
COL 7	COL 55
COL 55	COL 42
COL 68	COL 68

Excerpts from BFI's proposed findings of fact and conclusions of law are attached as Exhibit "A." BFI also requests that the Commissioners strike the portion of ordering Provision No. 1 where the ALJ proposes waste acceptance hours between 7:00 a.m. and 7:00 p.m. on weekdays only in lieu of 24/7 operating hours. BFI prays for any and all other relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

2009 JUN -9 AM 8:14

I hereby certify that a true and correct copy of Applicant's Reply to Exceptions was served on the following counsel/parties of record via U.S. mail, hand delivery and/or electronic transmission on June 9, 2009:

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Exhibit A

**Excerpts of Applicant's Proposed Findings of Fact
and Conclusions of Law
(filed March 30, 2009)**

**SOAH DOCKET NO. 582-08-2178
TCEQ DOCKET NO. 2007-1774-MSW**

**IN RE THE APPLICATION OF BFI WASTE § BEFORE THE
SYSTEMS OF NORTH AMERICA, LLC § STATE OFFICE OF
PERMIT NO. MSW-1447A § ADMINISTRATIVE HEARINGS**

**APPLICANT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Applicant BFI WASTE SYSTEMS OF NORTH AMERICA, LLC (BFI) files its Proposed Findings of Fact and Conclusions of Law, respectfully showing:

I. PROPOSED FINDINGS OF FACT

Background

General Findings

1. The applicant is BFI Waste Systems of North America, LLC ("BFI"). Its business address is 4542 Southeast Loop 410, San Antonio, Texas 78222.
2. The facility is the Sunset Farms Landfill ("Sunset Farms," the "Landfill" or the "Facility"). The street and mailing address for the Facility is 9912 Giles Lane, Austin, Texas 78754.
3. Sunset Farms is located in Travis County at the intersection of Giles Lane and Blue Goose Road, approximately 5 miles east of the intersection of U.S. 290 and I.H. 35. The facility is bounded by Blue Goose Road to the north, Giles Lane to the east, the Austin Community Landfill to the south and southwest, and open land to the west.
4. A portion of the permitted boundary is located within the city limits of Austin, Texas, and the remainder of the site is within the extra-territorial jurisdiction (ETJ) of Austin.
5. Sunset Farms is an existing Type I Municipal Solid Waste (MSW) Landfill operating under TCEQ Permit No. MSW-1447. The original permit for the Facility was issued by the Texas Department of Health in 1981.
6. The Facility is currently authorized to accept municipal solid waste, Class 2 and Class 3 industrial nonhazardous solid waste, Class 1 industrial waste that is Class 1 only because of asbestos content, and certain special wastes.

300. The current operating and waste acceptance hours, as posted at the site entrance, are 24 hours per day Monday through Friday and from 12:00 am to 3:00 pm on Saturdays. No waste is currently accepted on Sundays.

301. The Landfill's operational hours are appropriate.

Other Issues

Issue L (Part 1 of 2: owner and operator) - Whether the application includes adequate provisions designating the owner, operator, responsible parties, and qualified personnel, in compliance with agency rules, including 30 TAC §§ 330.52(a)(1), 330.52(b)(7-10), and 330.114(1);

302. The Application designates both BFI and Giles as Owners of the Facility.

303. The land on which the Facility is located is owned by BFI and Giles. BFI owns an approximately 55-acre tract within the permit boundaries; Giles owns three other tracts that together comprise the remaining acreage of the Facility.

304. BFI and Giles are co-owners of the Facility.

305. The Application includes a legal description of each piece of property that makes up the Facility.

306. The Application includes a properly executed property owner affidavit.

307. The Application designates BFI as the Operator of the Facility.

308. The Application includes a verification of BFI's legal status.

309. BFI is the sole operator of the Facility, and has operated it (either in the corporation's present corporate form or as a predecessor-in-interest) continuously since the landfill was first permitted in 1981.

310. With respect to the tracts owned by Giles, BFI operates the facility under a landlord-tenant relationship.

311. BFI is the sole "Site Operator."

312. BFI is the sole party responsible for the operation of the Facility.

313. The Application designates BFI as the sole Applicant.

314. The Application includes adequate provisions designating the owner and operator.

Issue L (Part 2 of 2: responsible parties, qualified personnel) - Whether the application includes adequate provisions designating the owner, operator, responsible parties,

42. As required by TEX. HEALTH & SAFETY CODE § 361.069, Sunset Farms Landfill is compatible with surrounding land uses.
43. Operation of an MSW Landfill in accordance with the applicable law and regulations is a proper land use of the property described in the Application.
44. The buffer zones established by BFI between the edge of fill and the site boundary are compliant with the MSW rules, including 30 TEX. ADMIN. CODE §§ 330.121(b) and 330.138. The Application satisfies all applicable screening requirements.
45. The vertical expansion of the Landfill, if constructed and operated in accordance with the TEX. HEALTH & SAFETY CODE ANN. Chapter 361, 30 TEX. ADMIN. CODE Chapter 330, the Application and the Draft Permit, will not adversely affect the health of the requestors or their families.
46. The vertical expansion of the Landfill, if constructed and operated in accordance with the TEX. HEALTH & SAFETY CODE ANN. Chapter 361, 30 TEX. ADMIN. CODE Chapter 330, the Application and the Draft Permit, will not cause the creation or maintenance of a nuisance in violation of Commission rules, including 30 TAC § 330.5(a)(2).
47. The operating hours proposed in the Application are appropriate.
48. The erosion control methods identified in the Application and Draft Permit are sufficient.
49. The parties have stipulated that referred Issue Z, pertaining to whether the storage, treatment and disposal of contaminated water is adequately addressed in the Application and Draft Permit and is not in dispute and may be resolved as if BFI had obtained summary disposition in its favor with respect to this issue.
50. The Commission has jurisdiction over the disposal of municipal solid waste and the authority to issue this permit under TEX. HEALTH & SAFETY CODE ANN. § 361.061.
51. Notice was provided in accordance with TEX. HEALTH & SAFETY CODE ANN. § 361.0665, 30 TEX. ADMIN. CODE §§ 39.5 and 39.101, and TEX. GOV. CODE §§ 2003.051 and 2003.052.
52. SOAH has jurisdiction to conduct a hearing and to prepare a Proposal for Decision on contested cases referred by TCEQ under TEX. GOV. CODE § 2003.47.
53. BFI submitted an administratively and technically complete permit amendment application, as required by TEX. HEALTH & SAFETY CODE ANN. §§ 361.066 and 361.068, that demonstrates that it will comply with all relevant aspects of the Application and design requirements as provided in 30 TEX. ADMIN. CODE §§ 330.4(m) and 330.51(b)(1).
54. The Application was processed and the proceedings described in this Order were conducted in accordance with applicable law and rules of the TCEQ, specifically 30

TEX. ADMIN. CODE § 80.1 *et seq.*, and the State Office of Administrative Hearings, specifically 1 TEX. ADMIN. CODE § 155.1 *et seq.*, and Subchapter C of TEX. HEALTH & SAFETY CODE ANN. Chapter 361.

55. The burden of proof was on the Applicant, in accordance with 30 TEX. ADMIN. CODE § 80.17(a). BFI met its burden with respect to all referral issues.
56. The evidence in the record is sufficient to meet the requirements of applicable law for issuance of the Draft Permit, including TEX. HEALTH & SAFETY CODE ANN. Chapter 361 and 30 TEX. ADMIN. CODE Chapter 330.
57. The provisions of 30 TEX. ADMIN. CH. 330 apply specifically to "all aspects of municipal solid waste management," and are based primarily on the stated purpose of TEX. HEALTH & SAFETY CODE ANN. Chapter 361.
58. The provisions of 30 TEX. ADMIN. CH. 330 in effect prior to March 22, 2006 amendments apply to the Application.
59. No site-specific conditions exist at the site that will require special consideration as provided in 30 TEX. ADMIN. CODE §§ 330.51(b)(3) and 330.53(b)(4).
60. The contents of the permit to be issued to the Facility meet the requirements of TEX. HEALTH & SAFETY CODE ANN. §§ 361.086(b) and 361.087.
61. The TCEQ is not prohibited by TEX. HEALTH & SAFETY CODE ANN. § 361.122 from issuing Permit No. MSW-1447A.
62. BFI has submitted documentation of compliance with the National Pollutant Discharge Elimination System (NPDES) program under the federal Clean Water Act Section 402, as amended, as required by 30 TEX. ADMIN. CODE § 330.51(b)(5).
63. Part I of the Application meets the technical requirements of 30 TEX. ADMIN. CODE §§ 305.45 and 330.52.
64. Part II of the Application meets the technical requirements of 30 TEX. ADMIN. CODE § 330.53.
65. The Site Development Plan, which supports Parts I and II of the Application, meets the requirements of 30 TEX. ADMIN. CODE §§ 330.54, 330.55, and 330.56.
66. Part IV of the Application, (the Site Operating Plan) meets the requirements of 30 TEX. ADMIN. CODE §§ 330.57 and 330.114.
67. BFI has shown that it will comply with the operational prohibitions and requirements in 30 TEX. ADMIN. CODE §§ 330.5, 330.11 and 330.139.
68. Pursuant to the authority of, and in accordance with applicable laws and regulations, the requested permit should be granted.