

**SOAH Docket No. 582-08-2178
TCEQ Docket No. 2007-1774-MSW**

**IN RE THE APPLICATION OF
BFI WASTE SYSTEMS OF NORTH
AMERICA, LLC
PERMIT NO MSW-1447-A**

**§ BEFORE THE STATE OFFICE
§ OF ADMINISTRATIVE HEARINGS
§**

**TEXAS DISPOSAL SYSTEMS LANDFILL, INC.'S MOTION TO QUASH THE
SUBPOENA FOR DEPOSITION ON WRITTEN QUESTION OF BOB E. GREGORY,
REQUEST FOR PRODCUTION OF DOCUMENTS AND
MOTION FOR PROTECTIVE ORDER**

Texas Disposal Systems Landfill, Inc. ("TDSL"), a non-party to the above-referenced proceeding, files this *Motion to Quash the Subpoena for the Production of Documents and the Deposition on Written Questions of Mr. Bob E. Gregory* which has been noticed by BFI Waste Systems of North America, Inc. ("BFI") for January 9, 2009, and in support of this Motion would respectfully show the Court as follows:

I.

On December 18, 2008, Mr. Bob Gregory received a subpoena as President of TDSL. TDSL is not a party to this proceeding. The subpoena commands Mr. Gregory, as President of TDSL, to appear for a deposition on January 9, 2009. The subpoena also included a demand for production of documents from TDSL. The document demanded is a copy of TDSL's original multi-volume landfill permit.

In its subpoena request for a non-party, TDSL, BFI merely makes the self-serving, conclusory, and unsubstantiated statement that it made a diligent effort to obtain a copy of TDSL's original landfill permit from the state agency charged with maintaining an official public record copy of that permit. TDSL's original landfill permit was filed for record with the Texas Commission on Environmental Quality's ("TCEQ") predecessor agency in the late 1980's. A

copy of the original official permit can only be obtained from the TCEQ. The TCEQ is the state agency charged with enforcing the terms of the landfill permit and is the state agency charged with maintaining the official public record copy of the landfill permit. TDSL does not have the official copy of the permit. It merely has its own copy of the permit. TDSL's copy of the landfill permit cannot be certified as a complete, official copy and, therefore, has no evidentiary value in this proceeding.

It should be clear that BFI served this subpoena in an attempt to harass and unduly burden TDSL and its President. At a minimum, BFI should be required to produce evidence to the Court of the steps, if any, that it actually took to secure an official copy of the landfill permit from the TCEQ. BFI has not presented the Court with a letter or certification from the TCEQ that the official copy of the landfill permit either in hard copy or microfiche form does not exist or cannot be found by TCEQ staff at the TCEQ's central office, field office, program staff office, or some other agency location. Without this statement from the TCEQ, BFI cannot show good cause for this extraordinary request.

BFI's subpoena merely serves to abuse the discovery process by causing great expense to TDSL in the time it must take to retrieve every page of a multi volume landfill permit. TDSL's President must then review every page of the permit and answer a deposition on written questions regarding TDSL's copy of the permit.

II.

The document BFI seeks has not been shown to be unavailable from the public agency responsible for maintaining the official public record copy of the document. BFI has not even identified specifically the information it thinks it needs from the TCEQ in order to verify that the

information is not available. My own inquiry with a TCEQ representative reveals there are volumes of documents on TDSL's permit with a large amount of information available at TCEQ. BFI counsel should not be able to use a verbal statement from a TCEQ employee that TCEQ may not be able to find every single page as justification to harass TDSL's President. Further, because BFI is asking for every single page of the permit when it may only be seeking a small portion of the permit, the subpoena serves only as backdoor harassment of TDSL's President. Taking the time to (1) review the document, (2) deliver the document to BFI, and (3) sit for a deposition regarding the validity of the document produced is unduly burdensome and expensive on a non-party when the document is a public record required by statute to be on file with a state agency.

Furthermore, counsel for BFI represented TDSL in obtaining the original landfill permit for TDSL and should have retained a copy in his files. Counsel for BFI should, therefore, be concerned if he is now suggesting there is a problem with TDSL's landfill permit.

You Honor should quash the subpoena for the request for the production of documents and the deposition on written questions because the request is unduly burdensome, expensive, obtainable from an alternate source, and is simply harassment, all specifically prohibited by the Texas Rules of Civil Procedure. Further, Your Honor should issue a protective order preventing such spurious, harassing, unduly burdensome, and expensive requests for information from an entity that is not even a party to this proceeding. This behavior should be sanctioned to prevent recurrence in the future.

III.

The Texas Government Code explicitly provides Your Honor with the authority to impose sanctions against a party for "filing a motion or pleading that is groundless and brought in bad faith, for the purpose of harassment, for any other improper purpose, such as to cause unnecessary delay or needless increase in the cost of the proceeding."¹ Sanctions may also be imposed when a party abuses the discovery process or fails to obey an order of the Court

Appropriate sanctions for discovery misconduct include:

- charging all or any part of the expenses of discovery against the offending party or its representatives;
- refusing to allow the offending party to support or oppose a designated claim or defense or prohibiting the party from introducing designated matters in evidence;
- disallowing in whole or in part requests for relief by the offending party; and
- excluding evidence in support of those requests, and striking pleadings or testimony, or both, in whole or in part.²

The Texas Rules of Civil Procedure and the Texas Administrative Code provide that discovery requests that are unduly burdensome, expensive, cumulative, duplicative, obtainable from an alternate source, harassing, or irrelevant may also be limited and/or sanctioned by the ALJ.³ TDSL thus requests that its costs to seek this Motion to Quash and Protective Order be reimbursed to TDSL.

¹ TEX. GOV'T CODE § 2003.047(j) (Vernon 2005).

² *Id.* at § 2003.047(k).

³ *See* TEX. R. CIV. P. 192; 215 (2005); 30 TEX. ADMIN. CODE § 80.107.

IV. Prayer

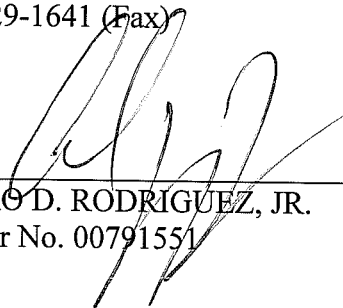
For the above reasons, TDSL asks the Court, on final hearing, Order that BFI's request for production of documents and subpoena for deposition on written questions be quashed. TDSL further prays for any such further relief to which it is justly entitled.

WHEREFORE PREMISES CONSIDERED Plaintiff TDSL prays that the Court issue an order consistent with the relief requested herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature above, I hereby certify that a true and correct copy of the foregoing document has been served this 7th day of January, 2009, via e-mail, facsimile transmission or U.S. First Class mail, to the following:

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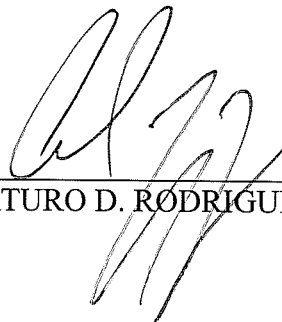
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