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January 8, 2009

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Client No.: 1635-03

From: Paul Gosselink

No. of Pages: 3 + cover sheet

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

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January 8, 2009

Judge William E. Newchurch  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> Street, Suite 504  
Austin, Texas 78701

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

Dear Judge Newchurch:

At the December 19th prehearing conference, I neglected to raise three evidentiary/procedural issues that are somewhat unique to cases involving pre-filed testimony and that I believe warrant clarification prior to the hearing.

First, as you are well aware, the parties' pre-filed direct testimony and exhibits were prepared and filed in stages: BFI's pre-filed testimony and exhibits were filed first, followed by the protestants' pre-filed testimony and exhibits, which were in turn followed by the Executive Director's pre-filed testimony. As such, BFI's expert witnesses prepared their pre-filed testimony before seeing anybody else's testimony or exhibits – including the pre-filed testimony of the protestants' experts. And, because the dynamics of cases like this in which the parties pre-file their testimony militates against deposing an opposing party's experts prior to receiving copies of those experts' pre-filed testimony, BFI's expert witnesses also prepared their pre-filed testimony before they were able to review the transcripts of the depositions of the opposing parties' experts.

We now have or are in the process of obtaining copies of deposition transcripts of the opposing parties' experts in addition to having received those witnesses' pre-filed testimony. BFI's testifying experts obviously have developed opinions regarding the opinions and mental impressions that have been expressed by the protestants' expert witnesses in their pre-filed testimony. While some of the opinions of BFI's testifying expert witnesses may fall within the realm of rebuttal-type testimony, a number of these witnesses are from out-of-town (and, in some cases, from out-of-state). In an effort to streamline the evidentiary hearing, minimize duplicative trips by witnesses, and ultimately keep costs under control, I would like to have some latitude during the direct examinations of BFI's testifying experts to ask those witnesses questions regarding matters that were raised in the subsequently-prepared pre-filed testimony of other

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parties' expert witnesses. Any such questioning during the direct examination would be limited to testimony regarding matters that are actually addressed in other witnesses' pre-filed testimony, and would not be used as a back-door effort to supplement or amend existing pre-filed testimony regarding matters outside the scope of any prefiled testimony. These experts would also be subject to cross-examination on their opinions regarding the other experts' opinions and mental impressions. I do not believe that following such a procedure will add much time to the witnesses' time on the stand – whether individually or collectively – but do believe that such a procedure would save time and costs associated with the rebuttal phase of the hearing.

Second, it has been my practice in contested case hearings such as this to ask certain witnesses who I am presenting on direct – typically witnesses who played major roles in the preparation of the permit application – to describe who they are, what role they played on the permitting project, and to briefly summarize the observations, opinions and mental impressions contained in their pre-filed testimony and in certain instances use demonstrative exhibits (which we would be willing to prefile). I would like to do that here because I feel that it helps the ALJ to better understand the “big picture” before the witness' testimony invariably moves toward the minutiae. Is it your practice to allow a short overview session on the front end of the direct exams of such witnesses?

Third, I would also like to know whether the parties will be provided an opportunity to present a brief opening statement prior to presenting their direct case. BFI would like such opportunity.

For planning purposes, would you please provide some guidance regarding how much latitude we might have with respect to any such direct testimony and whether the parties will be permitted to make brief opening statements? Alternatively, to the extent that I am somehow requesting some form of affirmative relief, please consider this letter to be a motion by BFI for leave to (a) ask its retained testifying experts questions during their direct examination regarding matters that have been raised in the pre-filed testimony of other parties' expert witnesses; (b) ask its witnesses a series of brief overview questions prior to proving up the pre-filed testimony and turning the witness over for cross and (c) present a brief opening statement.

Thank you for your consideration of this matter.

Respectfully submitted,



Paul Gosselink

PGG/mpj

cc: (see certificate)

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I hereby certify that a true and correct copy of this letter filing was served on the following counsel/parties of record by certified mail (return receipt requested), regular U.S. mail, facsimile transmission and/or hand delivery and via e-mail on January 8, 2009:

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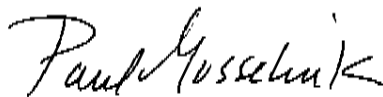
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