



FRITZ, BYRNE, HEAD & HARRISON, PLLC

Attorneys at Law

November 24, 2008

VIA FACSIMILE NO. 239-3311

- and -

U. S. FIRST CLASS MAIL

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

Re: SOAH Docket No. 582-08-2178; TCEQ Docket No. 2007-1774-MSW; In re:
the Application of BFI Waste Systems of North America, Inc., for a Major
Amendment to Type I MSW Permit No. 1447A


Dear Ms. Castañuela:

Enclosed are an original and one copy of TJFA, L.P.'s Response to BFI Waste Systems of North America, LLC's Motion to Compel which we respectfully request be filed among the other papers in the above-referenced proceeding. Please return a file-stamped copy to me in the self-addressed, postage prepaid envelope provided for your convenience.

A copy of the enclosure is being forwarded to all parties of interest as set forth below. Thank you for your assistance in this matter.

Very truly yours,

FRITZ, BYRNE, HEAD & HARRISON, PLLC

By: 

Ann M. Devers
Assistant to J. D. Head

Enclosures

cc: See, Certificate of Service (w/encl)



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

APPLICATION OF BFI WASTE	§	BEFORE THE STATE OFFICE
SYSTEMS OF NORTH AMERICA,	§	
INC., FOR A MAJOR AMENDMENT	§	OF
TO TYPE I MSW PERMIT NO.	§	
1447A	§	ADMINISTRATIVE HEARINGS

**TJFA, L.P.’s RESPONSE TO BFI WASTE SYSTEMS
OF NORTH AMERICA, LLC’S MOTION TO COMPEL**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, TJFA, L.P. (“TJFA”), Protestant and files this Response to BFI Waste Systems of North America, LLC’s (“BFI”) Motion to Compel and would respectfully show the following:

1. In its Motion to Compel, BFI requests the Administrative Law Judge (“ALJ”) compel on or before 5:00 p.m. on November 25, 2008¹ production of identified documents for copying/reproduction by BFI. This production request would likely entail thousands of pages of documents. BFI seeks an ALJ order prior to the prescribed period for a response by TJFA to the Motion to Compel. BFI’s Motion to Compel was served by e-mail at 4:45 p.m. on Friday, November 21, 2008. Pursuant to State Office of Administrative Hearing (“SOAH”) Rule § 155.30(c), a response to a motion to compel is due five (5) days after receipt of the motion. Under SOAH Rule § 155.19(a), “Computation of Time,” in computing

¹ The Motion to Compel is unclear on whether BFI is proposing November 25, 2008 or November 26, 2008 for TJFA to produce the requested documents.

time periods prescribed by applicable statute, this chapter or by judge order, the day of the act, event or default on which the designated period of time begins to run is not included. Moreover, if the period specified is five (5) days or less, as is the case here, the intervening Saturdays, Sundays and legal holidays (such as Thanksgiving) are not counted. BFI's counsel has requested that the ALJ compel production six (6) days before a response from TJFA is even due on the Motion to Compel. This is harassment, pure and simple. Inasmuch as the Motion to Compel was filed late on Friday, November 21, 2008, pursuant to the SOAH rules, a response from TJFA would not be due until at least December 1, 2008 - after the Thanksgiving holidays. TJFA files this premature response only in an abundance of caution that the ALJ might rule by November 25, 2008. BFI's gamesmanship in this Motion to Compel should not be countenanced by the ALJ.

2. The Motion to Compel seeks documents not previously requested. Only one document was orally requested and the rest of the documents were never requested in any form. In its Motion to Compel, BFI seeks an ALJ order on or before 5:00 p.m. on November 25, 2008 compelling the production of the following documents before end of business on Wednesday, November 26, 2008:

- a. A complete copy of MSW Permit No. 2123 (TDSL landfill);
- b. A complete copy of the original permit application for MSW Permit No. 2123 (as well as any amendments and modifications thereto, including but not limited to any application pertaining to the implementation of the federal Subtitle D regulations);

- c. Copies of other permitting documents pertaining to the TDSL landfill in Creedmoor that includes any discussions, studies, reports or characterizations of the geology, hydrogeology or geotechnical properties of the soils at the TDSL landfill site;
- d. A complete copy of the current Groundwater Sampling and Analysis Plan (“GWSAP”) for the TDSL landfill;
- e. A complete copy of the current Site Operating Plan (“SOP”) for the TDSL landfill.

First and foremost, counsel for BFI misrepresents essential facts in its Motion to Compel. The only document requested from TJFA by BFI’s counsel was a copy of the original permit application of TDSL. This was requested in a telephone conversation on November 17, 2008. This is confirmed by Exhibit B to BFI’s Motion to Compel wherein the undersigned stated in an e-mail “TJFA objects to production of TDSL’s original application for a landfill permit.” At no time has BFI’s counsel requested, either in writing or orally, the following documents:

- a. A complete copy of MSW Permit No. 2123 (TDSL landfill);
- b. Any amendments or modifications to the original permit application for MSW Permit 2123, including but not limited to any application pertaining to the implementation of the federal Subtitle D regulations;
- c. Copies of other permitting documents pertaining to the TDSL landfill in Creedmoor that includes any discussions, studies, reports or characterizations of the geology, hydrogeology or geotechnical properties of the soils at the TDSL landfill site;
- d. A complete copy of the current GWSAP for the TDSL landfill;
- e. A complete copy of the current SOP for the TDSL landfill.

At no time did TJFA's counsel refuse production of the foregoing documents. These documents simply were not requested by BFI.

BFI's counsel has presented the ALJ a Motion to Compel documents never requested from TJFA, with the exception of the original application for MSW Permit 2123. BFI's Motion to Compel exhibits a lack of candor to the tribunal. Moreover, TEX. R. CIV. P. § 191.3 requires a discovery request to be in writing and signed by an attorney. A party is not required to take any action with respect to a request or notice that is not signed. TEX. R. CIV. P. § 191(3)(d). There is simply no provision under the rules for an oral request for production that is binding on a party. Counsel for BFI should be required to follow the rules of discovery and his action of filing a Motion to Compel for documents never properly requested is frivolous.

3. TJFA does not accept as factual BFI's statement that the solid waste permit and related documents for the TDSL facility at Creedmoor are not available for inspection and copying at the Texas Commission on Environmental Quality ("TCEQ"). On November 24, 2008, a representative of Fritz, Byrne, Head & Harrison, PLLC made an inquiry at the TCEQ of available records relating to BFI's Motion to Compel. While it is true that the TCEQ's records do not contain a complete copy of the original TDSL landfill permit application, records found at Central Records and the MSW permitting offices substantially provide this information. Microfiche records contain significant amounts of information relating to the original TDSL application including, but not limited to, information on groundwater, soils,

soil liner evaluation reports (“SLERs”) and local geology. The microfiche records also contain voluminous information concerning discovery, public notices, witness statements (both fact and expert), records related to the evidentiary hearing, proposed and adopted findings of fact and conclusions of law, exceptions, objections, and extensive post-hearing briefing. Records available at the MSW permitting office includes documents related to the Subtitle D permit amendments and modifications from 1993 forward to the present. The Subtitle D permit modification application contains copies of former permits and re-publishes significant portions of the original application and its attachments within the body of such document. Had BFI made a more diligent inquiry, it would have found that the TCEQ records contain more than ample information for use in the depositions of TJFA’s experts. Simply put, BFI has not made an adequate showing of “good cause” to warrant the extraordinary relief requested in its Motion to Compel nor has it undertaken sufficient inquiry to even know what information is available through existing public records.

4. Counsel for BFI represented TDSL in its original MSW permit hearing and successfully obtained MSW Permit No. 2123 for TDSL. TJFA finds it hard to accept that competent counsel such as that currently representing BFI would not have retained for his files copies of the TDSL application which he himself prosecuted. Retaining copies of the client’s files is prudent practice and TJFA submits that BFI’s counsel likely has a copy of the original permit application for MSW Permit 2123.

5. TJFA submits this Motion to Compel is premature inasmuch as the majority of documents have never been requested in any form from TJFA. None of the documents referenced in BFI's Motion to Compel have been properly requested under the rules. The notion that BFI cannot obtain a copy of MSW Permit 2123 at the TCEQ is patently absurd. It defies logic for BFI to contend that the TCEQ has no copies of the GWSAP or the current SOP. TJFA contends that the Motion to Compel, and its outlandish requested date for an ALJ ruling, is purely for the sake of harassment.

6. The documents requested by BFI were never sought in the discovery phase of this case, despite BFI's long-held position that certain experts for TJFA have in the past conducted work for TDSL. As stated previously, the requested documents have never been requested of TJFA in a signed motion by BFI. BFI had the opportunity during the course of the written discovery phase of this case to request these documents and neglected to do so. The time for filing written discovery requests has long since past. After failing to avail itself of these opportunities, BFI now files a specious Motion to Compel requesting the ALJ to order production of thousands of pages of documents, the vast majority of which were never requested by BFI in any way, shape, manner or form from TJFA. TJFA submits that BFI's Motion to Compel is groundless, brought in bad faith, unduly burdensome, filed for the purpose of harassment and is sanctionable under 30 T.A.C. § 80.107.

7. BFI's Motion to Compel production of TDSL documents was served on TJFA. TDSL is not a party to these proceedings and any discovery from non-parties should be

conducted pursuant to TEX. R. CIV. P. § 205. TJFA's attorneys, contrary to representations by BFI's counsel, have never indicated that TDS or TDSL would not produce copies of documents. TJFA's attorneys do not represent TDS or TDSL. The proper method for BFI to obtain the documents sought is through a subpoena to TDSL, not a motion to compel directed to TJFA.

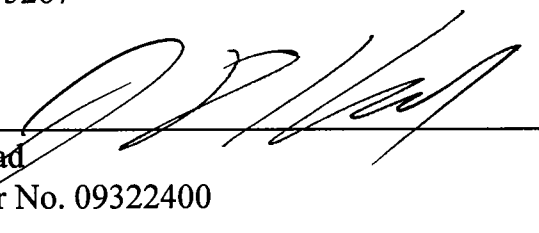
Conclusion and Prayer

For the foregoing reasons, TJFA respectfully requests the ALJ deny BFI's Motion to Compel.

Respectfully submitted,

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ATTORNEYS FOR TJFA, L.P.

CERTIFICATE OF SERVICE

By my signature above, I hereby certify that a true and correct copy of the foregoing document has been served this 24th day of November, 2008, via e-mail, facsimile transmission or U.S. First Class mail, to the following:

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