



FRITZ, BYRNE, HEAD & HARRISON, PLLC

Attorneys at Law

December 8, 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

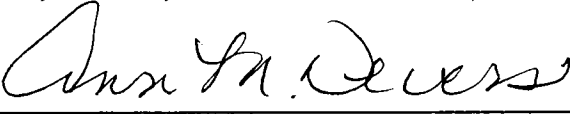
Dear Ms. Castañuela:

Enclosed are an original and one copy of TJFA, L.P.'s Responses to Objections to Pre-Filed Testimony and Exhibits 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 Bob Renbarger

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 RESPONSES TO OBJECTIONS
TO PRE-FILED TESTIMONY AND EXHIBITS**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, TJFA, L.P. (TJFA), and files its responses to the objections of BFI Waste Systems of North America, LLC's (BFI) to TJFA's pre-filed direct testimony and exhibits herein. TJFA shall identify and describe each of BFI's objections and provide a response for same. TJFA's responses are organized by the individual witness to whom the objections relate.

Pierce Chandler

Objection No. 1: BFI objects to p. 14, l. 6 through p. 15, l. 6 of the pre-filed testimony claiming that Mr. Chandler is stating a conclusion of law outside of the witness' expertise in violation of Texas Rules of Evidence (TRE) 702.

Response: Mr. Chandler is not offering or otherwise attempting to state a legal conclusion. Rather, the witness is stating his opinion as an imminently qualified expert on municipal solid waste permitting, under both state and federal regulations, on the relationships and interpretation of those similar bodies of regulations. His testimony clearly reflects that he is not offering a legal opinion nor is he qualified to do so. His many years of experience, training, education, knowledge and skills as a professional engineer engaged in numerous municipal solid waste permitting matters qualifies him to opine on his interpretation of those

regulations and how they have been historically interpreted and implemented. TJFA further asserts that his opinion is/should be of assistance to the Administrative Law Judge to fully understand his testimony as it relates to such topics, among others, as slope stability analyses, vertical expansions, design considerations for both pre-Subtitle D and post-Subtitle D landfill and groundwater monitoring issues. Moreover, if BFI disagrees with the opinions cited in this testimony, there is nothing to prevent its lawyers from providing any counter legal argument at the hearing or in the form of a motion. The testimony, as presented, is admissible to establish Mr. Chandler's views and reliance on his interpretation of the regulatory programs governing municipal solid waste permitting in support of his later testimony.

Objection No. 2: BFI objects to the admission of Exhibit PC-5, claiming the published document contradicts Exhibit PC-4 and thus rendering it inadmissible due to its claimed "untrustworthiness" in contravention of TRE 803(8).

Response: It is apparent that BFI has not reviewed Exhibit PC-5 or has simply ignored its content. The original version of the EPA's Solid Waste Disposal Facility Criteria Technical Manual was published November 15, 1993. The 1998 updated version of this manual was published in April 1998. Contrary to BFI's claims, the only change to the manual is that the 1998 version was updated with a new "Introduction" and to incorporate certain minor rule changes occurring after 1993. Otherwise, the 1998 manual is true to the text of the 1993 manual which is the authoritative source of EPA guidance on Subtitle D facilities. Mr. Chandler downloaded the 1998 version in February 2008 from the EPA's website. The third page of Exhibit PC-5 (entitled "Publication Detail") reflects in no uncertain terms that the 1998 version of the manual merely includes the new introductory comments. BFI only needs to read the new "Introduction" found on pages iv - viii to ascertain any new information or developments since the 1993 version. BFI's statement that "[s]ince it is unknown what revisions were made to the document since the 1998 revision cited by TJFA, nothing contained in Exhibit PC-5 can be deemed trustworthy" is patently incorrect. Minor comments and changes to an introduction to an authoritative resource document does not render it "untrustworthy" as contemplated by TRE 803(8). Exhibit PC-5 is trustworthy and admissible. A copy of the "Publication Detail" document taken from the 1998 version is attached for your convenience.

Objection No. 3: BFI objects to the admissibility of Exhibits PC-4 and to PC-6 through PC-14 alleging that the documents are inadmissible exhibits as “learned treatises” under TRE 803(18) and further urges that they do not identify specific statements from these documents as permitted by TRE 705.

Response: While it is true that TRE 803(18) establishes that learned treatises are not admissible as exhibits, TJFA was not intending these documents and excerpts from them to be admitted for the truth of the matters asserted. Rather, the exhibits were intended to be admitted for the limited purpose as evidence of the authorities relied upon and to provide support for the witness’ direct testimony. In essence, these exhibits represent the authorities identified in PC-3 and are being offered to simplify any discussions, direct examinations and/or cross-examinations of any expert witness at the hearings (including TJFA’s). They are not intended to be admitted for the truth of the matters asserted or as learned treatises. Instead, TJFA asserts their admissibility under TRE 703 as the bases for the witness’ expert opinions later offered in his direct testimony.

Objection No. 4: BFI objects to the admission of PC-15 on the basis of the document described in the testimony on p. 27, l. 12 through p. 28, l. 5 does not match the physical document identified as Exhibit PC-15 in corresponding copies of the exhibits.

Response: BFI is correct that there is a disconnect between the identity of the document described in the referenced testimony and the actual Exhibit PC-15. This was an editing error on behalf of TJFA. Exhibit PC-15 was intended to be identified as the RCRA Ground-Water Monitoring Technical Enforcement Guidance Document (TEGD), OSWER-9950.1, U.S. EPA, 1986. Exhibit PC-3 identifies the excerpts relied upon by the witness in support of his groundwater testimony contained in the direct examination. TJFA asserts the same basis for its admission as that set forth in its response to Objection No. 3 above. TJFA would further note that BFI has no problem with seeking admission of RS-37 (TCEQ Regulatory Guidance RG-420, April 2005) and GL-3 (TCEQ Regulatory Guidance Document RG-417, June 2006) in their entirety while seeking to hold TJFA to a different standard. TJFA regrets the editing error contained in the referenced testimony and seeks leave to correct this oversight prior to the offering of Mr. Chandler’s pre-filed testimony and exhibits at the evidentiary hearing. Changes to

Mr. Chandler's pre-filed testimony, starting on p. 27, l. 14, are as follows:

A. This exhibit contains excerpts from the RCRA Ground-Water Monitoring Technical Enforcement Guidance Document (TEGD), OSWER-9950.1, U.S. EPA, 1986.

Q. What does this EPA reference document cover with respect to landfill permitting?

A. The EPA publication addresses proper groundwater monitoring regimens and the design considerations for groundwater monitoring systems at solid waste landfills.

Then, at p. 28, beginning at l. 3:

Q. Does Exhibit PC-15 provide a basis of support for your later testimony with respect to groundwater and groundwater monitoring?

A. Yes. Exhibit PC-15 is recognized as EPA's official position with respect to proper groundwater monitoring at both hazardous waste and Subtitle D municipal solid waste landfills.

Objection No. 5: BFI objects to the testimony appearing at p. 52, l. 3 through p 52, l. 12 as hearsay due to Mr. Chandler's statement regarding the Texas Commission on Environmental Quality's (TCEQ) staff's position taken on the topic of stability analyses for municipal solid waste.

Response: If necessary, TJFA asserts that Mr. Chandler's testimony can be amended to provide Q. and A. regarding the basis for his statements regarding TCEQ staff positions on stability analyses:

Q. Mr. Chandler, you indicated that the TCEQ staff have taken the position that comprehensive stability analyses are not required demonstrations for municipal solid waste landfill permits. What is the basis for that statement?

- A. I was personally present during the contested case hearing for the Williamson County and Comal County municipal solid waste landfills. At each of these hearings, the TCEQ staff opined that comprehensive stability analyses were not required as a part of the permitting process. These statements were made on the record and should be included in the hearing transcripts for each of these municipal solid waste landfill proceedings.

Objection No. 6: BFI objects to the testimony appearing at p. 62, l. 19 through p. 63, l. 7 and photographs 17A through 17C on the basis that the proffered exhibits were not properly authenticated and are irrelevant to Sunset Farms Landfill.

Response: Photographs 17A through 17C are duplicates of original photographs taken by the witness in 1999 at the Skyline Landfill near Dallas, Texas. The Skyline Landfill is situated in a geologic setting known as the Taylor Formation and has excavations within the weathered Taylor Marl. As set forth in his testimony as well as BFI's experts' testimony, the BFI Sunset Farms Landfill is situated in the same geologic formation and includes both weathered and unweathered Taylor Marl. The limited purpose of Exhibits 17A through C is to provide a visual representation of what has been discussed verbally by all of these witnesses and to assist the trier of fact. The photographs are relevant for this limited purpose and do not purport to be offered for any other purpose than to show a representative example of weathered Taylor Marl. The photographs fall within the scope of TRE 1003 and should be admissible for their limited purpose. If necessary, TJFA can amend Mr. Chandler's testimony by the following additional Q. and A.:

- Q. Mr. Chandler, are the photographs reflected in Exhibits 17A through 17C fair and accurate representations of the weathered Taylor Marl at the Skyline Landfill you viewed in 1999?
- A. Yes, these photos are duplicates of the original photographs taken at Skyline and fairly and accurately represent the conditions they purport to represent.

Objection No. 7: BFI objects to the testimony found at p. 62, l. 3 through p. 62, l. 18 and Exhibits 17D through 17K on the basis that the proffered exhibits were not properly authenticated.

Response: Photographs 17D through 17K are true and accurate duplicates of photographs taken in 1999 at the Skyline Landfill and the City of Irving Landfill. They are offered for the limited purpose of providing illustrative examples of “rotational” or “circular arc” failures in Texas landfills situated in the Taylor Marl. As previously discussed in Mr. Chandler’s testimony (see, Response to BFI’s Objection No. 5, above), TCEQ staff has taken the position that comprehensive stability analyses are not required in MSW permitting and that they are unaware of any slope failures at any Texas landfill. Photographs 17D through 17K contradict the TCEQ staff’s prior statements as well as provide the trier of fact with illustrative examples of “rotational” or “circular arc” failures, topics discussed by both Mr. Chandler and BFI’s experts. If necessary, TJFA will supplement Mr. Chandler’s testimony as follows:

Q. Mr. Chandler, are the photographs reflected in Exhibits 17D through 17K fair and accurate representations of the “rotational” or “circular arc” failures you observed at the Skyline Landfill and the City of Irving Landfill in 1999?

A. Yes.

Objection No. 8: BFI objects to the testimony found at p. 64, l. 2 through p. 64, l. 8 and Exhibit PC-4 on the basis of authentication and its previous objection to PC-4 as a learned treatise, apparently on the same basis as its Objection No. 3.

Response: Exhibit PC-3 identifies the specific pages of PC-4 and PC-7 relied upon by the witness in support of his opinions regarding landfill stability. (See, Items No. 4 and 7 in PC-3). The photographs and figures discussed in the challenged testimony are contained in PC-4 and PC-7 and are for the limited purpose of providing visual representations and drawings to assist the trier of fact in understanding what a “translational” slope failure consists of and why they are problematic. Again, both Mr. Chandler and BFI’s experts provide testimony on this type of slope failure. As such, the testimony and referenced exhibits provide illustrative examples of this phenomenon and clarity. Even if

BFI's objections are, in part, well founded based on the rules of evidence cited, the documents, referenced photographs and illustrations are offered under TRE 703 as authorities that provide the bases for the expert's opinion testimony. In addition, they are sufficiently reliable for admission pursuant to TEX. GOV'T CODE § 2001.081(3) if not TRE 703.

Objection No. 9: BFI objects to the witness testimony found at p. 67, l. 1 through p. 69, l. 6 and Exhibit PC-5 based on its arguments contained in Objection No. 2 and the exception to the hearsay rule for public documents (cited in the objection as TRE 803(6)).

Response: Please refer to TJFA's Response to BFI's Objection No. 2. As pointed out in TJFA's Response to Objection No. 2, BFI is mistaken that the 1993 version and 1998 version of EPA's Solid Waste Disposal Facility Criteria - Technical Manual are sufficiently different to make PC-5 inadmissible. Moreover, PC-3 specifically identifies the excerpts from PC-5 (see, PC-3, Item No. 11) to support admission of this testimony and the corresponding Table 2-4 taken from p. 55 of this well known authoritative reference document.

Objection No. 10: BFI objects to the witness testimony found at p. 72, l. 8 through p. 73, l. 6 and Exhibit PC-18 based on claims of speculation (contrary to TRE 702 and TRE 705(c)) and hearsay (TRE 802) with respect to the proffered exhibit.

Response: With respect to the objection based on speculation, TJFA will amend the Q. and A. beginning on p. 72, l. 8 as follows:

Q. Do you have personal knowledge of whether BFI's expert Greg Adams was aware of the slope failures at the Skyline and City of Irving landfills? (replaces p. 72, l. 8).

A. I do not have personal knowledge of his awareness or lack of awareness of these landfill slope failures.

Q. Do you have any evidence of whether Mr. Adams employer, Biggs and Mathews Environmental, Inc. is

familiar with stability problems associated with the Taylor Marl?

A. Yes. (Delete l. 9 and start again at l. 10). [A] Biggs and Mathews' letter (Exhibit PC-18, APP 028454 - 028455) indicates . . . (beginning p. 73, l. 6).

Q. May an engineer reasonably rely on an engineering document which bears the seal of a registered, professional engineer?

A. Yes. It would be proper to rely on such a document.

Q. Did you rely on the representations made in Exhibit PC-18 to form your opinion that Mr. Adams' firm was aware of stability issues associated with the Taylor Marl?

A. Yes.

Q. Did you also rely on Exhibit PC-18 to form your opinion that Mr. Adams' firm was aware of stability issues associated with the Taylor Marl at BFI's Sunset Farms Landfill?

A. Yes.

TJFA asserts that PC-18 is reliable, even if hearsay, based on the above testimony. TRE 703 provides that experts may rely on documents, even if hearsay, in the formation of their opinions. *See, In re: CHRISTUS Spohn Hospital*, 222 S.W.3d 434, 440 (Tex. 2007). It is Mr. Chandler's opinion that incidents such as a slope failures at Skyline and the City of Irving landfills are well enough known that engineers engaged in landfill design in Texas should be aware of them, particularly when designing a landfill expansion in the Taylor Marl. PC-18 is probative of the imputed awareness of Taylor Marl issues to BFI's expert as it was created and sealed by one of his colleagues working at the Sunset Farms Landfill at the same time his firm was engaged to prosecute the subject application. Both the testimony and Exhibit PC-18 are admissible under TRE 703 as well as TEX. GOV'T CODE § 2001.081(3).

Objection No. 11: BFI objects to the witness testimony found at p. 86, l. 9 through p. 86, l. 12 and reiterates its objections to Exhibit PC-17.

Response: Please refer to TJFA's Response to BFI's Objection No. 6.

Robert S. Kier

Objection No. 1: BFI objects to the witness' testimony found at p. 18, l. 10 through p. 19, l. 20 and Exhibit BK-8 based on claims of hearsay and failure to establish the documents contained in BK-8 as business records. BFI further complains that BK-8 lacks trustworthiness as some of the data relied upon in the documents is not properly identified as to source or time.

Response: TRE 703 and case law permit experts to rely on hearsay in the formation of their opinions. (See, *CHRISTUS Spohn Hospital* case cited above). In the case of BK-18, Dr. Kier relied on a number of items identified in the body of the memoranda comprising this exhibit. He relied upon available public records found at the Texas Department of Health, the Texas Water Commission, the TNRCC, the Texas Department of Water Resources, the Texas Water Quality Board and the EPA to develop information about releases from the Austin Community Landfill (ACL) that is immediately adjacent to BFI's Sunset Farms Landfill facility. Dr. Kier further relied on data provided to him by an employee of Allied Materials (a facility immediately across the street from BFI) to bolster his opinion that contamination emanating from ACL migrated under BFI's property and ultimately progressed onto the Applied Materials' property. TJFA asserts that public records and reports by ACL filed at those public agencies are sufficiently reliable that an expert may incorporate them into his work-product and maintain such reports in his business records. (See, TRE 703 and TRE 803(6)). TJFA asserts that the documents comprising BK-8 are of sufficient reliability to be admitted under TRE 703, TRE 803(6) and TEX. GOV'T CODE § 2001.081. If necessary, TJFA will amend Dr. Kier's testimony beginning at p. 19, l. 4 as follows:

Q. Dr. Kier, do you recall who provided you with the Applied Materials' data you just referenced?

A. Yes.

- Q. Who was it?
- A. The groundwater data was provided to me on two separate occasions. Initially, the environmental compliance officer for Applied Materials shared it with me. After I prepared a report on my analysis of the data, I was again provided the information by a consultant who worked for Applied Materials. I do not recall that person's name but he worked for Bill Espey's environmental consulting firm.
- Q. When did the Applied Materials' employee and the Espey consultant provide you this data?
- A. It was sometime in 1998.
- Q. What did the data consist of?
- A. The data consisted of laboratory analyses of groundwater samples taken from monitoring wells situated on the Applied Materials' property across Giles Road from the BFI Sunset Farms Landfill.
- Q. Did you rely upon this data in addition to the public records in developing the memoranda contained in Exhibit BK-8?
- A. Yes, I did.
- Q. Is it reasonable for a professional geologist to rely on public records and groundwater data of the type you just described in the formation of your opinions?
- A. Yes, it is.
- Q. Were the documents comprising BK-8 created by you at or near the time reflected on each of them?
- A. Yes.

Q. Is it a regularly conducted business activity of yours to prepare groundwater investigation reports for your clients?

A. Yes, it is.

Q. Do you maintain the documents comprising Exhibit BK-8 as a part of your regular business activities?

A. Yes.

TJFA submits that BK-8 and the testimony objected to by BFI is admissible for the reasons stated in this response.

James Neyens

Objection No. 1: BFI objects to the witness testimony on p. 12, l. 10 through p. 13, l. 4 based on its view that the witness is offering a legal opinion on the interpretation of a contract.

Response: BFI misconstrues Mr. Neyens' testimony. Mr. Neyens is not a lawyer nor is he qualified to offer a legal opinion on the proper legal interpretation of a contract. His testimony is not in the form of a legal opinion. It is that of an engineer's view on what the contract says and how that relates to the soil deficiency acknowledged by BFI in its permit amendment application. Certainly, Mr. Neyens may opine on what he believes the document means albeit without the force or effect of a legal opinion. BFI's sponsoring witnesses for the referenced contract styled "First Amended Sale and Purchase Agreement" (BD-5) is Brad Dugas, BFI's Regional Market Vice President. Mr. Dugas, a non-lawyer, considers the contract to provide evidence of BFI's efforts to acquire up to 1.5 million cubic yards of soil from its neighboring landfill facility. Surely, Mr. Dugas' interpretation of the contract to provide this amount of soil is no more of a legal opinion than Mr. Neyens' views on whether the contract will sufficiently address this soil deficit. (See, Brad Dugas' testimony at p. 45, l. 13 through l. 16). Accordingly, Mr. Neyens testimony reflects his lay opinion on whether the contract provides a sufficient answer to address a known soil deficit at the site and is admissible to reflect his opinion as an engineer familiar with the soil needs of a landfill for its proper operation, closure

and post-closure care. Mr. Neyens' opinions are admissible for such stated purposes.

TJFA respectfully requests that BFI's objections be overruled and the challenged testimony and exhibits admitted for the purposes identified in the respective witnesses' pre-filed testimony. Should the Administrative Law Judge find any of the objections to have merit, TJFA respectfully requests it be given an opportunity to supplement or amend the pre-filed testimony as forth in this response or as otherwise requested to correct any perceived and curable deficiencies. In the alternative, TJFA respectfully requests the challenged testimony and exhibits be admitted subject to the weight ascribed by the Administrative Law Judge.

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 8th day of December, 2008, via e-mail, facsimile transmission or U.S. First Class mail, to the following:

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Internet Location:

<http://www.epa.gov/epaoswer/non-hw/muncpl/landfill/techman/index.htm>

RCRA Online Number:

50369

Title:

Solid Waste Disposal Facility Criteria: Technical Manual

Document Date:

11/15/1993

Description:

This document was updated in April 1998 with a new introduction. Addresses general applicability of the Part 258 criteria, location restrictions, operating requirements, design standards, groundwater monitoring and corrective action, and closure and postclosure care for landfills. Includes the regulatory language, a general explanation of the regulations and who must comply with them, key technical issues that may need to be addressed to ensure compliance with a particular requirement, and information sources. Written for municipal solid waste landfill owners and operators.

Topics:

Municipal Solid Waste, Disposal, Groundwater Monitoring, Corrective Action (RCRA), Closure (hazardous waste), Post-closure (hazardous waste), Landfills, Compliance, Municipal Solid Waste

Policy Directive Number:

EPA Publication Number:

530-R-93-017

NTIS Number:

PB94-100 450

GPO Number:

Non-Regulatory Guidance:

No