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December 8, 2008

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From: Paul Gosselink

No. of Pages: 29 + 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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December 8, 2008

Via Facsimile

Judge William E. Newchurch
State Office of Administrative Hearings
300 W. 15th 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:

Enclosed for filing is an original and one copy of Applicant BFI Waste Systems Of North America, LLC's Responses to Objections To Pre-Filed Testimony And Exhibits in the above referenced matter.

Should you have any questions, please do not hesitate to contact me. Thank you for your attention to this matter.

Respectfully submitted,

Paul G. Gosselink /s/ per JEC
Paul Gosselink

Enclosures

**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 BFI WASTE SYSTEMS OF NORTH AMERICA, LLC'S
RESPONSES TO OBJECTIONS TO PRE-FILED TESTIMONY AND EXHIBITS**

Applicant BFI WASTE SYSTEMS OF NORTH AMERICA, LLC (BFI) files these Responses to the Objections to Pre-Filed Testimony made by TJFA pursuant to Interim Order Nos. 1 and 5, respectfully showing:

I. RESPONSES TO TJFA'S OBJECTIONS

Protestant TJFA, LP (TJFA) filed its objections to pre-filed testimony on November 21, 2008. BFI's responses to each of TJFA's objections are set forth in Exhibit "A" hereto.

II. CONCLUSION AND PRAYER

For the reasons set forth in Exhibit "A," BFI respectfully requests that the ALJ over-rule each of the objections. Alternatively, in the event the ALJ determines that any particular objection has merit, but that additional testimony or documentation that could substantiate an exception to hearsay challenge, provide authentication of satisfaction of hearsay exception, or otherwise cure a defect in the pre-filed testimony, that BFI be provided an opportunity to amend its pre-filed testimony or provide documentation so that justice may be served. BFI further requests such additional or alternative relief to which it might show itself justly entitled.

Respectfully submitted,

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OF COUNSEL:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Responses to TJFA's Objections to Pre-Filed Testimony were 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 December 8, 2008:

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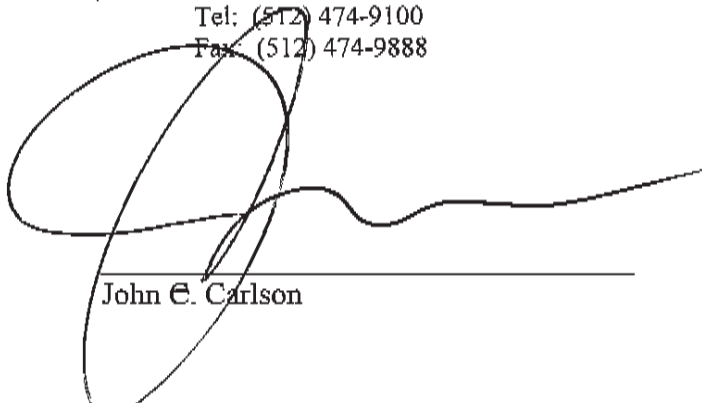
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John E. Carlson

EXHIBIT "A"

RESPONSES TO TJFA'S OBJECTIONS TO PRE-FILED TESTIMONY

Objection No.	Witness	Testimony Pages	Exhibit	Objection
1.a.	Ray Shull, P.E.	P. 24, ll. 19 - 21; P. 25, ll. 1 - 5	RS-11	Hearsay to the extent offered for the truth of the matters asserted.
Response				Ruling
<p>Exhibit RS-11 is the application that is the subject of this contested case hearing. It is a jurisdictional document in this proceeding. TJFA indicates that it does not object to the introduction of RS-11 into evidence for the limited purpose of establishing that it is a true and correct copy of BFI's application (the revised 5-12/08 version) upon which various qualified witnesses will provide supporting testimony. The application is admissible for all purposes, however.</p> <p>Through the cumulative testimony of Mr. Shull, who was the lead project engineer and who signed and sealed various parts of the application, and the other witnesses who worked on portions of the application and are sponsoring those portions that they signed and sealed, competent evidence exist to support all necessary facts, data and opinions which form the basis of the preparation of the application and the information contained therein as to all relevant issues referred to SOAH by the TCEQ. Mr. Shull and each of the other witnesses sponsoring the application or parts thereof – all of whom qualify as experts in their respective fields – have each testified that they personally participated in the preparation of the application and that they reviewed and relied upon various information and data in the course of their preparation of the application and the formation of their expert opinions and mental impressions. TJFA (whose witnesses have each reviewed and relied on various portions of the application in forming their own opinions) will have opportunity to cross-examine sponsoring witnesses and provide countervailing evidence as to the accuracy of the underlying facts and data contained in the application as well as the opinions upon which the application is based.</p> <p>The application, and individual portions of the application, are also admissible for the reasons discussed in BFI's response to TJFA's hearsay objections to Mike Snyder Exhibits JS-4, JS-5 and JS-6 below. That response is incorporated for all purposes into this response.</p> <p>TJFA's objection should be overruled, and Exhibit RS-11 should be admitted into evidence for all purposes.</p>				

Objection No.	Witness	Testimony Pages	Exhibit	Objection
1.b.	Ray Shull, P.E.	P. 102, ll. 16 – 23; p. 103, ll. 1 - 3		Not qualified to offer expert opinion.
Response				Ruling
<p>The question asked of Mr. Shull is "whether the Application considered impacts to endangered and threatened species." He responds in the affirmative. Earlier in his testimony, Mr. Shull testifies that he has prepared numerous applications for municipal solid waste (MSW) disposal facilities and is familiar with the agency rules concerning those applications. Later in his testimony Mr. Shull describes correspondence his firm had with the U.S. Fish & Wildlife Department and Texas Parks & Wildlife that have been included in the application - agencies which must be consulted under TCEQ's MSW rules.</p> <p>The relevant issue referred by TCEQ to SOAH for this hearing is "(P) Whether the Application contains adequate provisions to protect endangered and threatened species in compliance with agency rules including 30 TAC §§ 330.53(b)(13) and 330.129". Mr. Shull is an experienced MSW engineer who is plainly qualified to address this issue as regards the contents of the application and how it satisfies (or attempts to satisfy) the applicable rules. Allowing the objected-to testimony will not prevent TJFA from cross-examining Mr. Shull or from offering qualified countervailing testimony.</p> <p>BFI has offered other testimony regarding details of the threatened and endangered species study that was conducted in connection with the preparation of the application through another expert witness, Lee Sherrod. TJFA has not objected to any of Mr. Sherrod's testimony. In his pre-filed testimony, Mr. Shull testifies that he relied on many other experts, including Mr. Sherrod, in preparing the application. Because both the question and answer objected to by TJFA are limited to whether the application addressed impacts on threatened and endangered species, and does not extend beyond Mr. Shull's areas of expertise, the objection should be overruled.</p>				

Objection No.	Witness	Testimony Pages	Exhibit	Objection
2.a.	John Michael Snyder	P. 13, ll. 15 - 23	JS-4, JS-5, JS-6	Hearsay to the extent offered for the truth of the matters asserted.
Response				Ruling
<p>Exhibit JS-4 is Attachment 4 (Geology and Geotechnical Report) to Part III of the application. Exhibit JS-5 is Attachment 5 (Groundwater Characterization Report) to Part III, and Exhibit JS-6 is Attachment 11 (Groundwater Sampling and Analysis Plan or "GWSAP") to Part III. TJFA's blanket objection to these exhibits is off-base and should be overruled for a number of reasons.</p> <p>First, in his pre-filed testimony Mr. Snyder clearly states that he personally prepared, signed and sealed each of these documents (with contributions by other experts such as Greg Adams for certain parts). His "in court" testimony plainly adopts these "out of court" documents – and their content – as his own testimony. Simply put, Mr. Snyder is properly sponsoring these exhibits, each of which is admissible for all purposes.</p> <p>Second, the exhibits and their contents are admissible under the Rules of Evidence governing opinions and expert testimony. Rule 702 of the Texas Rules of Evidence states that a witness who is qualified as an expert by knowledge, skill, experience, training or experience may provide opinion testimony "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 701. Rule 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing." TEX. R. EVID. 703. Rule 705 allows experts to give the reasons for their opinions or inferences – including disclosing such on direct examination – and the balancing test for admitting otherwise inadmissible facts or data is simply not applicable here because there is no risk of prejudicing a jury. <i>See</i> TEX. R. EVID. 705 (a) & (d).</p> <p>As his pre-filed testimony and resumé show, Mr. Snyder is plainly qualified to offer expert opinions regarding (among other things) matters pertaining to geology, hydrogeology and groundwater monitoring, sampling and analysis. The lion's share of Exhibits JS-4 and JS-5 comprise the expert</p>				

¹ "To prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required except as otherwise provided by these rules." TEX. R. EVID. 1002. "A duplicate is admissible to the same extent as an original unless (1) a question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." TEX. R. EVID. 1003. TJFA has not raised any question as to the authenticity of the application or suggested any unfairness of the duplicates in lieu of the original, which is on file with the TCEQ.

opinions of Mr. Snyder and his explanations of the bases for those opinions. (Exhibit JS-6 – the GWSAP – is essentially a forward-looking document that simply says what BFI will do if and when the amended permit is granted. For this reason, TJFA's objection to the GWSAP is particularly unclear.) For example, the discussion of "Site Stratigraphy and Structure" on page 4-8 of Attachment 4 (*i.e.*, Exhibit JS-4) contains Mr. Snyder's opinion as to the types of soils underlying the site and describes the bases for his opinions and mental impressions (including the data he has personally reviewed and learned treatises he has relied upon). Similarly, Table 4-4, "Generalized Site Stratigraphy," on page 4-9 of Attachment 4 comprises Mr. Snyder's opinions regarding site stratigraphy and the bases for those opinions. The geologic cross-sections contained in Figures 4C.1 through 4C.10 in Attachment 4, Appendix 4C were prepared by Mr. Snyder and comprise additional opinions of Mr. Snyder based on his interpretation and interpolation of geologic data.

These exhibits and Mr. Snyder's testimony about them will plainly assist ALJ understand the scientific and technical evidence and determine any facts in issue. For example, if the thickness of the Cretaceous Taylor Group becomes for any reason a fact in issue, the ALJ can find that it is approximately 400 feet thick beneath the site based on the opinion provided by Mr. Snyder in the aforementioned text of Attachment 4. The exhibits and their contents are thus admissible under the rules governing experts and opinion testimony.

Third, Mr. Snyder's pre-filed testimony itself summarizes the information contained in Exhibits JS-4, JS-5 and JS-6. In his pre-filed testimony he could have answered in question-and-answer format questions pertaining to each and every statement contained in these three exhibits. Similarly, in his pre-filed testimony Mr. Snyder could have been asked to individually prove up each and every drawing or figure he created for the application. However, that would have led to an unwieldy volume of pre-filed testimony considering that BFI's application is three four-inch binders thick and Mr. Snyder's testimony is already fairly long. Notably, Mr. Snyder will be present to testify at the hearing, and TJFA and the other parties will have an opportunity to cross-examine him regarding his pre-filed testimony and the portions of the application he is sponsoring.

Fourth, virtually every issue referred to SOAH in this proceeding is a question about whether the application contains adequate information or proposes adequate safeguards as to some aspect of facility operations. For example, referred issue "C" asks whether the application proposes adequate protection of groundwater and surface water in compliance with agency rules; and referred issue "H" asks whether the application includes adequate provisions for groundwater monitoring, in compliance with agency rules.

These referred issues specifically pose questions as to the contents of the application, a written document. Offering the application and its attachments into evidence is consistent with, and indeed is required by, the best evidence rule.¹

Finally, to the extent that TJFA is making a blanket objection to three exhibits (totaling some 560 pages), the objection is overbroad. The raw data relied upon by Mr. Snyder in formulating his opinions is being disclosed along with his opinions pursuant to Rule 705 of the Texas Rules of Evidence, which specifically provides that "[t]he expert may in any event disclose on direct examination, . . . , the underlying facts or data." TEX. R. EVID. 705(a). If TJFA can point to specific portions of these exhibits which it believes are objectionable, BFI can provide additional bases for showing that such portions are admissible under the Texas Rules of Evidence – including, without limitation, rules pertaining to admissibility of business records, recorded recollections, public records and reports, statements in ancient documents, commercial publications or learned treatises. See TEX. R. EVID. 803.

Objection No.	Witness	Testimony Pages	Exhibit	Objection
2.b.	John Michael Snyder	P. 56, ll. 3 - 8	JS-4, JS-5, JS-6	Not qualified to offer opinion. Ambiguous and unintelligible. Hearsay. Could address issues not otherwise identified in testimony.

Response	Ruling
The question and answer which TJFA find objectionable go to an ultimate issue of fact and law which has been referred to SOAH: whether the application proposes sufficient provisions to protect the health of the requestors and their families. Testimony is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. TEX. R. EVID. 704. The applicant and its representatives have consistently taken the position in this proceeding that by designing and constructing a municipal solid waste disposal facility that complies with the regulations of the Texas Commission on Environmental Quality, it has proposed sufficient provisions to protect the health of the requestors and their families. Mr. Snyder has demonstrated expertise in preparing applications for MSW facilities and in developing groundwater monitoring systems and sampling plans that are designed to monitor and protect groundwater, and therefore is qualified to offer an opinion as to the sufficiency of these elements of the landfill <i>vis-a-vis</i> the protection of human health and the environment. Even	

<p>if the testimony goes beyond the narrow interpretation of Mr. Snyder's expertise suggested by TJFA, opinion testimony of a lay witness as to a conclusion of law is permissible if the witness is familiar with the legal standard.² Given the vague positions taken by protestants in this proceeding as to the meaning of being protective of the health of the requestors and their families, the trier of fact should welcome opinions such as those offered by Mr. Snyder.</p>				
Objection No.	Witness	Testimony Pages	Exhibit	Objection
3.a.	Gregory Adams	P. 9, ll. 8 - 1656, ll. 3 - 8	GA-4, GA-5 and GA-6	Hearsay to the extent offered for the truth of the matters asserted.
Response				Ruling
<p>Exhibit GA-4 is Attachment 4 (Geology and Geotechnical Report) to Part III of the Application. Exhibit GA-5 is Attachment 10 (Soil and Liner Quality Control Plan) to Part III of the Application. Exhibit GA-6 is Appendix 12-A (Final Cover Quality Control Plan) of Attachment 12 (Final Closure Plan) to Part III of the Application. Again, TJFA's blanket objection to these exhibits is off-base and should be overruled for a number of reasons.</p> <p>First, in testimony not objected to by TJFA, Mr. Adams states that he prepared and sealed portions of each of Attachment 4, all of Attachment 10, and all of Appendix 12-A of Attachment 12. His "in court" testimony plainly adopts these "out of court" documents – and their content – as his own testimony. Simply put, Mr. Adams is properly sponsoring these exhibits, each of which is admissible for all purposes.</p> <p>Second, the exhibits and their contents are admissible under the Rules of Evidence governing opinions and expert testimony. Rule 702 of the Texas Rules of Evidence states that a witness who is qualified as an expert by knowledge, skill, experience, training or experience may provide opinion testimony "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 701. Rule 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing." TEX. R. EVID. 703. Rule 705 allows experts to give the reasons for their opinions or inferences – including disclosing such on direct examination – and the balancing test for admitting otherwise inadmissible facts or data is simply not applicable here because there is no</p>				

² *East v. State*, 702 S.W.2d 606, 611-13 (Tex. Crim. App. 1985), cert denied, 474 U.S. 1000, 106 S. Ct. 418, 88 L.Ed.2d 368 (1985).

³ TEX. R. EVID. 1002; TEX. R. EVID. 1003. TJFA has not raised any question as to the authenticity of the Application or suggested any unfairness of the duplicates in lieu of the original, which is on file with the TCEQ.

risk of prejudicing a jury. *See* TEX. R. EVID. 705 (a) & (d).

As his pre-filed testimony and résumé show, Mr. Adams is plainly qualified to offer expert opinions regarding the matters addressed in his exhibits. Those portions of the exhibits sponsored by Mr. Adams comprise the expert opinions of Mr. Adams and his explanations of the bases for those opinions. The features of the landfill designed by Mr. Adams as described in his testimony and the exhibits he sponsors are essentially forward-looking documents that simply say what BFI will do if and when the amended permit is granted. These exhibits and Mr. Adams' testimony about them will plainly assist the ALJ in understanding the scientific and technical evidence and determining any facts in issue.

Third, Mr. Adams' pre-filed testimony itself summarizes the information contained in Exhibits GA-4, GA-5, and GA-6. In his pre-filed testimony he could have answered in question-and-answer format questions pertaining to each and every statement contained in these three exhibits. Similarly, in his pre-filed testimony Mr. Adams could have been asked to individually prove up each and every drawing or figure he created for the application. However, that would have led to an unwieldy volume of pre-filed testimony considering that BFI's application is three four-inch binders long. Notably, Mr. Adams will be present to testify at the hearing, and TJFA and the other parties will have an opportunity to cross-examine him regarding his pre-filed testimony and the portions of the application he is sponsoring.

Fourth, virtually every issue referred to SOAH in this proceeding is a question about whether the application contains adequate information or proposes adequate safeguards as to some aspect of facility operations. For example, referred issue "C" asks whether the application proposes adequate protection of groundwater and surface water in compliance with agency rules; and referred issue "H" asks whether the application includes adequate provisions for groundwater monitoring, in compliance with agency rules. These referred issues specifically pose questions as to the contents of the application, a written document. Offering the application and its attachments into evidence is consistent with, and indeed is required by, the best evidence rule.³

Finally, to the extent that TJFA is making a blanket objection to the three exhibits, the objection is overbroad. The raw data relied upon by Mr. Adams in formulating his opinions is being disclosed along with his opinions pursuant to Rule 705 of the Texas Rules of Evidence, which specifically provides that "[t]he expert may in any event disclose on direct examination, . . . , the underlying facts or data." TEX. R. EVID. 705(a). If TJFA can point to specific portions of these exhibits which it believes are objectionable, BFI can provide additional bases for showing that such portions are admissible under the Texas Rules of Evidence – including,

without limitation, rules pertaining to admissibility of business records, recorded recollections, public records and reports, statements in ancient documents, commercial publications or learned treatises. <i>See</i> TEX. R. EVID. 803.				
Objection No.	Witness	Testimony Pages	Exhibit	Objection
4.a.	Matt Stutz	P. 11, ll. 7 - 12	MS-3	Hearsay to the extent offered for the truth of the matters asserted.
Response				Ruling
<p>Exhibit MS-3 is Attachment 14 (Landfill Gas Management Plan) Part III of the application. In other testimony (not objected to by TJFA) Mr. Stutz states that he prepared and sealed Attachment 14. TJFA's blanket objection to this exhibit is off-base and should be overruled for a number of reasons.</p> <p>First, in testimony not objected to by TJFA, Mr. Stutz states that he prepared and sealed Attachment 14. His "in court" testimony plainly adopts this "out of court" document – and its content – as his own testimony. Simply put, Mr. Stutz is properly sponsoring this exhibit, which is admissible for all purposes.</p> <p>Second, the exhibit and its contents are admissible under the Rules of Evidence governing opinions and expert testimony. Rule 702 of the Texas Rules of Evidence states that a witness who is qualified as an expert by knowledge, skill, experience, training or experience may provide opinion testimony "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 701. Rule 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing." TEX. R. EVID. 703. Rule 705 allows experts to give the reasons for their opinions or inferences – including disclosing such on direct examination – and the balancing test for admitting otherwise inadmissible facts or data is simply not applicable here because there is no risk of prejudicing a jury. <i>See</i> TEX. R. EVID. 705 (a) & (d).</p> <p>As his pre-filed testimony and résumé show, Mr. Stutz is plainly qualified to offer expert opinions regarding the matters addressed in his exhibit. Those portions of the exhibit sponsored by Mr. Stutz comprise the expert opinions of Mr. Stutz and his explanations of the bases for those opinions. The features of the landfill designed by Mr. Stutz as described in his testimony and the exhibit he sponsors, are set forth in an essentially forward-looking document that simply says what BFI will do if and when</p>				

⁴ TEX. R. EVID. 1002; TEX. R. EVID. 1003. TJFA has not raised any question as to the authenticity of the Application or suggested any unfairness of the duplicates in lieu of the original, which is on file with the TCEQ.

the amended permit is granted. This exhibit and Mr. Stutz's testimony about it will plainly assist the ALJ in understanding the scientific and technical evidence and determining any facts in issue and are thus admissible under the rules governing experts and opinion testimony.

Third, Mr. Stutz's pre-filed testimony itself summarizes the information contained in Exhibit MS-3. In his pre-filed testimony he could have answered in question-and-answer format questions pertaining to each and every statement contained in the exhibit. Similarly, in his pre-filed testimony Mr. Stutz could have been asked to individually prove up each and every drawing or figure he created for the application. However, that would have led to an unwieldy volume of pre-filed testimony considering that BFI's application is three four-inch binders long. Notably, Mr. Stutz will be present to testify at the hearing, and TJFA and the other parties will have an opportunity to cross-examine him regarding his pre-filed testimony and the portions of the application he is sponsoring.

Fourth, virtually every issue referred to SOAH in this proceeding is a question about whether the application contains adequate information or proposes adequate safeguards as to some aspect of facility operations. For example, referred issue "D" asks whether the application includes adequate provisions to control odors, in compliance with agency rules; and referred issue "E" asks whether the application includes adequate provisions to manage landfill gas, in compliance with agency rules. These referred issues specifically pose questions as to the contents of the application, a written document. Offering the application and its attachments into evidence is consistent with, and indeed is required by, the best evidence rule.⁴

Finally, to the extent that TJFA is making a blanket objection to the exhibit, the objection is overbroad. The raw data relied upon by Mr. Stutz in formulating his opinions is being disclosed along with his opinions pursuant to Rule 705 of the Texas Rules of Evidence, which specifically provides that "[t]he expert may in any event disclose on direct examination, . . . , the underlying facts or data." TEX. R. EVID. 705(a). If TJFA can point to specific portions of the exhibit which it believes are objectionable, BFI can provide additional bases for showing that such portions are admissible under the Texas Rules of Evidence – including, without limitation, rules pertaining to admissibility of business records, recorded recollections, public records and reports, statements in ancient documents, commercial publications or learned treatises. See TEX. R. EVID. 803.

Objection No.	Witness	Testimony Pages	Exhibit	Objection
5.a.	Gregory Lewis	P. 11, ll. 6 - 20	GL-3	Hearsay to the extent offered for the truth of the matters asserted.
Response				Ruling
<p>Exhibit GL-3 is a publication of the Texas Commission on Environmental Quality titled: "Guidelines for Preparing a Surface Water Drainage Plan for a Municipal Solid Waste Facility" dated June 2006. As a public record it is subject to an exception to the hearsay rule pursuant to Rule 802(8) of the Texas Rules of Evidence. TEX. R. EVID. 802(8). It is also self-authenticating pursuant to Rule 902(5) of the Texas Rules of Evidence. TEX. R. EVID. 902(5). BFI further submits that the ALJ may take judicial notice of this guideline and other TCEQ publications.</p>				
Objection No.	Witness	Testimony Pages	Exhibit	Objection
5.b.	Gregory Lewis	P. 15, ll. 15 - 21; p. 16, ll. 1 - 20; p. 17, ll. 1 - 9	GL-4	Relevance.
Response				Ruling
<p>In testimony preceding that found objectionable by TJFA, Mr. Lewis had stated that it is his opinion that, when analyzing the impact of a landfill expansion on drainage patterns, the post-development condition of expanded landfill should be compared to predevelopment conditions and not to the undeveloped conditions. TJFA does not object to the relevance of this testimony. The testimony and exhibit objected to by TJFA is an elaboration of the basis for Mr. Lewis's opinion. TJFA objects because the matters addressed are commentary on proposed rules that were adopted to be effective after BFI's application was declared administratively complete. However, the provisions of the Texas Register are cited for the proposition that the interpretation of the rules regarding drainage confirms Mr. Lewis' interpretation of the rules and policy <u>before</u> the rule change. Mr. Lewis is not interpreting what the new rules mean to new applications. He is explaining what the rules applicable to the application at issue in this proceeding mean in the context of this application. The testimony and exhibit are relevant to this application and are therefore relevant to this proceeding.</p> <p>Exhibit GL-4 is also a publication of the Texas Commission on Environmental Quality; as a public record it is subject to an exception to the hearsay rule pursuant to Rule 802(8) of the Texas Rules of Evidence. TEX. R. EVID. 802(8). It is also self-authenticating pursuant to Rule 902(5) of the Texas Rules of Evidence. TEX. R. EVID. 902(5).</p>				

Objection No.	Witness	Testimony Pages	Exhibit	Objection
6.a.	Adam Mehevec	P. 8, ll. 1 – 21; p. 9, ll. 1 - 19	AM-3, AM-4, AM-5, AM-6, AM-7, AM-8, AM-9, AM-10, AM-11, AM-12, AM-13, AM-14	Hearsay to the extent offered for the truth of the matters asserted.
Response				Ruling
<p>Exhibits AM-3 through AM-14 are: AM-3 - Part III – Site Development Plan (Including all Attachments) AM-4 - Part III – Appendix III-A AM-5 - Part III – Appendix III-B AM-6 - Part III – Appendix III-C AM-7 - Part III – Attachment 1, Site Layout Plan AM-8 - Part III – Attachment 3, Existing Contour Map AM-9 - Part III – Attachment 6, Groundwater and Surface Water Protection AM-10 - Part III – Attachment 7, Final Contour Map AM-11 - Part III – Attachment 8, Closure and Post-Closure Cost Estimate AM-12 - Part III – Attachment 12, Closure Plan AM-13 - Part III – Attachment 13, Post Closure Care Plan AM-14 - Part III – Attachment 15, Leachate and Contaminated Water Management Plan</p> <p>TJFA's blanket objection to these exhibits is off-base and should be overruled for a number of reasons.</p> <p>First, in testimony not objected to by TJFA, Mr. Mehevec states that he prepared and sealed portions of each of the exhibits he is sponsoring.⁵ His "in court" testimony plainly adopts these "out of court" documents – and their content – as his own testimony. Simply put, Mr. Mehevec is properly sponsoring these exhibits, each of which is admissible for all purposes.</p> <p>Second, the exhibits and their contents are admissible under the Rules of Evidence governing opinions and expert testimony. Rule 702 of the Texas Rules of Evidence states that a witness who is qualified as an expert by knowledge, skill, experience, training or experience may provide opinion testimony "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 701. Rule 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before</p>				

⁵ Mr. Mehevec testified that he supervised the preparation of Exhibit AM-10.

⁶ TEX. R. EVID. 1002; TEX. R. EVID. 1003. TJFA has not raised any question as to the authenticity of the Application or suggested any unfairness of the duplicates in lieu of the original, which is on file with the TCEQ.

the hearing.” TEX. R. EVID. 703. Rule 705 allows experts to give the reasons for their opinions or inferences – including disclosing such on direct examination – and the balancing test for admitting otherwise inadmissible facts or data is simply not applicable here because there is no risk of prejudicing a jury. *See* TEX. R. EVID. 705 (a) & (d).

As his pre-filed testimony and résumé show, Mr. Mehevec is plainly qualified to offer expert opinions regarding the matters addressed in his exhibits. Those portions of the exhibits sponsored by Mehevec comprise the expert opinions of Mr. Mehevec and his explanations of the bases for those opinions. The features of the landfill designed by Mehevec, as described in his testimony and the exhibits he sponsors, are set forth in essentially forward-looking documents that simply say what BFI will do if and when the amended permit is granted. These exhibits and Mr. Mehevec's testimony about them will plainly assist the ALJ in understanding the scientific and technical evidence and determining any facts in issue and are thus admissible under the rules governing experts and opinion testimony.

Third, Mr. Mehevec's pre-filed testimony itself summarizes the information contained in Exhibits AM-3 through AM-14. In his pre-filed testimony he could have answered in question-and-answer format questions pertaining to each and every statement contained in these exhibits. Similarly, in his pre-filed testimony Mr. Mehevec could have been asked to individually prove up each and every drawing or figure he created for the application. However, that would have led to an unwieldy volume of pre-filed testimony considering that BFI's application is three four-inch binders long. Notably, Mr. Mehevec will be present to testify at the hearing, and TJFA and the other parties will have an opportunity to cross-examine him regarding his pre-filed testimony and the portions of the application he is sponsoring.

Fourth, virtually every issue referred to SOAH in this proceeding is a question about whether the Application contains adequate information or proposes adequate safeguards as to some aspect of facility operations. For example, referred issue "A" asks whether the application demonstrates that natural drainage patterns will not be significantly altered by the expansion, in compliance with agency rules; and referred issue "Q" asks whether the application includes adequate provisions for cover, in compliance with agency rules. These referred issues specifically pose questions as to the contents of the application, a written document. Offering the application and its attachments into evidence is consistent with, and indeed is required by, the best evidence rule.⁶

Finally, to the extent that TJFA is making a blanket objection to the exhibits, the objection is overbroad. The raw data relied upon by Mr. Mehevec in formulating his opinions is being disclosed along with his

<p>opinions pursuant to Rule 705 of the Texas Rules of Evidence, which specifically provides that "[t]he expert may in any event disclose on direct examination, . . . , the underlying facts or data." TEX. R. EVID. 705(a). If TJFA can point to specific portions of these exhibits which it believes are objectionable, BFI can provide additional bases for showing that such portions are admissible under the Texas Rules of Evidence – including, without limitation, rules pertaining to admissibility of business records, recorded recollections, public records and reports, statements in ancient documents, commercial publications or learned treatises. <i>See</i> TEX. R. EVID. 803.</p>				
Objection No.	Witness	Testimony Pages	Exhibit	Objection
6.b.	Adam Mehevec	P. 19, ll. 3 – 21; p. 20, ll. 1 - 3	AM-15, AM-16, AM-17	Hearsay to the extent offered for the truth of the matters asserted.
Response				Ruling
<p>Exhibits AM-3 through AM-14 are: AM-15 - Part III – Attachment 6, Groundwater and Surface Water Protection, Figure 6-2. AM-16 - Part III – Attachment 6, Groundwater and Surface Water Protection, Figure 6-3. AM-17 - Part III – Attachment 6, Groundwater and Surface Water Protection, Figure 6-4. TJFA's blanket objection to these exhibits is off-base and should be overruled for a number of reasons.</p> <p>First, in testimony not objected to by TJFA, Mr. Mehevec states that he supervised the preparation of each of the exhibits he is sponsoring. His "in court" testimony plainly adopts these "out of court" documents – and their content – as his own testimony. Simply put, Mr. Mehevec is properly sponsoring these exhibits, each of which is admissible for all purposes.</p> <p>Second, the exhibits and their contents are admissible under the Rules of Evidence governing opinions and expert testimony. Rule 702 of the Texas Rules of Evidence states that a witness who is qualified as an expert by knowledge, skill, experience, training or experience may provide opinion testimony "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 701. Rule 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing." TEX. R. EVID. 703. Rule 705 allows experts to give the reasons for their opinions or inferences – including disclosing such on</p>				

⁷ TEX. R. EVID. 1002; TEX. R. EVID. 1003. TJFA has not raised any question as to the authenticity of the Application or suggested any unfairness of the duplicates in lieu of the original, which is on file with the TCEQ.

direct examination – and the balancing test for admitting otherwise inadmissible facts or data is simply not applicable here because there is no risk of prejudicing a jury. *See* TEX. R. EVID. 705 (a) & (d).

As his pre-filed testimony and résumé show, Mr. McHevec is plainly qualified to offer expert opinions regarding the matters addressed in his exhibits. Those portions of the exhibits sponsored by Mehevec comprise the expert opinions of Mr. Mehevec and his explanations of the bases for those opinions. The features of the landfill designed by Mehevec, as described in his testimony and the exhibits he sponsors, are set forth in essentially forward-looking documents that simply say what BFI will do if and when the amended permit is granted. These exhibits and Mr. Mehevec's testimony about them will plainly assist the ALJ in understanding the scientific and technical evidence and determining any facts in issue.

Third, Mr. Mehevec's pre-filed testimony itself summarizes the information contained in Exhibits AM-15, AM-16 and AM-17. In his pre-filed testimony he could have answered in question-and-answer format questions pertaining to each and every statement contained in these three exhibits. Similarly, in his pre-filed testimony Mr. Mehevec could have been asked to individually prove up each and every drawing or figure he created or supervised the creation of for the application. However, that would have led to an unwieldy volume of pre-filed testimony considering that BFI's application is three four-inch binders long. Notably, Mr. Mehevec will be present to testify at the hearing, and TJFA and the other parties will have an opportunity to cross-examine him regarding his pre-filed testimony and the portions of the application he is sponsoring.

Fourth, virtually every issue referred to SOAH in this proceeding is a question about whether the application contains adequate information or proposes adequate safeguards as to some aspect of facility operations. For example, referred issue "A" asks whether the application demonstrates that natural drainage patterns will not be significantly altered by the expansion, in compliance with agency rules; and referred issue "Q" asks whether the application includes adequate provisions for cover, in compliance with agency rules. These referred issues specifically pose questions as to the contents of the Application, a written document. Offering the Application and its Attachments into evidence is consistent with, and indeed is required by, the best evidence rule.⁷

Finally, to the extent that TJFA is making a blanket objection to the exhibits, the objection is overbroad. The raw data relied upon by Mr. Mehevec in formulating his opinions is being disclosed along with his opinions pursuant to Rule 705 of the Texas Rules of Evidence, which specifically provides that "[t]he expert may in any event disclose on direct

<p>examination, . . . , the underlying facts or data." TEX. R. EVID. 705(a). If TJFA can point to specific portions of these exhibits which it believes are objectionable, BFI can provide additional bases for showing that such portions are admissible under the Texas Rules of Evidence – including, without limitation, rules pertaining to admissibility of business records, recorded recollections, public records and reports, statements in ancient documents, commercial publications or learned treatises. <i>See</i> TEX. R. EVID. 803.</p>				
Objection No.	Witness	Testimony Pages	Exhibit	Objection
7.a.	John Michael McInturff, P.E.	P. 11, ll. 17 - 22; p. 12, l. 1.	MM-3	Hearsay to the extent offered for the truth of the matters asserted.
Response				Ruling
<p>Exhibit MM-3 is the Transportation Study which is contained in the application as Part II.E of the application. In other testimony (not objected to by TJFA) Mr. McInturff states that he prepared and sealed Part II.E. TJFA's blanket objection to this exhibit is off-base and should be overruled for a number of reasons.</p> <p>First, in testimony not objected to by TJFA, Mr. McInturff states that he prepared and sealed Part II.E. His "in court" testimony plainly adopts this "out of court" document – and its content – as his own testimony. Simply put, Mr. McInturff is properly sponsoring this exhibit, which is admissible for all purposes.</p> <p>Second, the exhibit and its contents are admissible under the Rules of Evidence governing opinions and expert testimony. Rule 702 of the Texas Rules of Evidence states that a witness who is qualified as an expert by knowledge, skill, experience, training or experience may provide opinion testimony "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 701. Rule 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing." TEX. R. EVID. 703. Rule 705 allows experts to give the reasons for their opinions or inferences – including disclosing such on direct examination – and the balancing test for admitting otherwise inadmissible facts or data is simply not applicable here because there is no risk of prejudicing a jury. <i>See</i> TEX. R. EVID. 705 (a) & (d).</p> <p>As his pre-filed testimony and résumé show, Mr. McInturff is plainly qualified to offer expert opinions regarding the matters addressed in his</p>				

⁸ TEX. R. EVID. 1002; TEX. R. EVID. 1003. TJFA has not raised any question as to the authenticity of the Application or suggested any unfairness of the duplicates in lieu of the original, which is on file with the TCEQ.

exhibit. Those portions of the exhibit sponsored by Mr. McInturff comprise the expert opinions of Mr. McInturff and his explanations of the bases for those opinions. The lion's share of Exhibit MM-3 comprise the expert opinions of Mr. McInturff as to the traffic conditions in the area of the landfill at the time of the application and his explanations of the bases for those opinions. This exhibit and Mr. McInturff's testimony about it will plainly assist the ALJ in understanding the scientific and technical evidence and determining any facts in issue.

Third, Mr. McInturff's pre-filed testimony itself summarizes the information contained in Exhibit MM-3. In his pre-filed testimony he could have answered in question-and-answer format questions pertaining to each and every statement contained in the exhibit. Similarly, in his pre-filed testimony Mr. McInturff could have been asked to individually prove up each and every drawing or figure he created for the application. However, that would have led to an unwieldy volume of pre-filed testimony considering that BFI's application is three four-inch binders long. Notably, Mr. McInturff will be present to testify at the hearing, and TJFA and the other parties will have an opportunity to cross-examine him regarding his pre-filed testimony and the portions of the application he is sponsoring.

Fourth, virtually every issue referred to SOAH in this proceeding is a question about whether the application contains adequate information or proposes adequate safeguards as to some aspect of facility operations. For example, referred issue "N" asks whether the application provides adequate information related to transportation, in as required by agency rules. This referred issue specifically poses a question as to the contents of the Application, a written document. The portion regarding transportation is the exhibit authored by and now offered by Mr. McInturff. Offering the application and its attachment into evidence is consistent with, and indeed is required by, the best evidence rule.⁸

Finally, to the extent that TJFA is making a blanket objection to the exhibit, the objection is overbroad. The raw data relied upon by Mr. McInturff in formulating his opinions is being disclosed along with his opinions pursuant to Rule 705 of the Texas Rules of Evidence, which specifically provides that "[t]he expert may in any event disclose on direct examination, . . . , the underlying facts or data." TEX. R. EVID. 705(a). If TJFA can point to specific portions of the exhibit which it believes are objectionable, BFI can provide additional bases for showing that such portions are admissible under the Texas Rules of Evidence – including, without limitation, rules pertaining to admissibility of business records, recorded recollections, public records and reports, statements in ancient documents, commercial publications or learned treatises. See TEX. R. EVID. 803.

Objection No.	Witness	Testimony Pages	Exhibit	Objection
7.b.	John Michael McInturff, P.E.	P. 13, ll. 10 - 22; p. 14, ll. 1 - 23.	MM-4	Improper attempt to amend the application.
Response				Ruling
<p>Exhibit MM-4 is a series of tables which provide updated information regarding traffic in the area of the landfill obtained after the Transportation Study (Exhibit MM-3, which is contained in the Application as Part II.E) was submitted with the Application. The original Transportation Study (Exhibit MM-3) made projections as to future changes in traffic on area roads. The updated study (Exhibit MM-4) was a real-time investigation to confirm the accuracy of the projections made in the application. In other testimony (not objected to by TJFA) Mr. McInturff states that he prepared and sealed Exhibit MM-4. TJFA objects as the information "is untimely and has not undergone technical review."</p> <p>It is unclear to BFI what evidentiary or procedural rule TJFA is relying upon for this objection. Contrary to TJFA's assertion, the exhibit is not being offered to amend the application, but instead has been offered to present evidence of current post-technical review conditions and to demonstrate the accuracy and conservative nature of the information contained in the application. This evidence will help the trier of fact in his consideration of such matters.</p> <p>Referred issue "N" asks whether the application provides adequate information related to transportation, in as required by agency rules. This referred issue specifically poses a question as to the contents of the application, a written document. Had existing conditions changed in a manner that demonstrated, in hind-sight, that the information contained in the application was inaccurate or not conservative, TJFA would certainly be attempting to introduce evidence of current conditions to make that point. The ALJ should not be expected to put on blinders as to current conditions that demonstrate the adequacy of the information that was contained in the application.</p>				
Objection No.	Witness	Testimony Pages	Exhibit	Objection
7.c.	John Michael McInturff, P.E.	P. 25, ll. 13 - 23; p. 26, ll. 1 - 6.	MM-5	Improper attempt to amend the application.
Response				Ruling
<p>Exhibit MM-5 is a series of tables which provide updated projections regarding traffic in the area of the landfill obtained after the Transportation Study (Exhibit MM-3, which is contained in the application as Part II.E) was submitted with the application. The original Transportation Study (Exhibit MM-3) made projections as to future changes in traffic on area</p>				

roads. The updated study (Exhibit MM-5) makes projections for future traffic impacts (through 2015) based on traffic information from current conditions. In other testimony (not objected to by TJFA) Mr. McInturff states that he prepared and sealed Exhibit MM-5. TJFA objects as the information "is untimely and has not undergone technical review."

It is unclear to BFI what evidentiary or procedural rule TJFA is relying upon for this objection. Contrary to TJFA's assertion, the exhibit is not being offered to amend the application, but instead has been offered to present evidence of current post-technical review conditions and to demonstrate the accuracy and conservative nature of the information contained in the application. This evidence will help the trier of fact in his consideration of such matters.

Referred issue "N" asks whether the application provides adequate information related to transportation, as required by agency rules. This referred issue specifically poses a question as to the contents of the application, a written document. Had existing conditions changed in a manner that demonstrated, in hind-sight, that the information contained in the application was inaccurate or not conservative, TJFA would certainly be attempting to introduce evidence of current conditions to make that point. The ALJ should not be expected to put on blinders as to current conditions that demonstrate the adequacy of the information that was contained in the application.

Objection No.	Witness	Testimony Pages	Exhibit	Objection
8.a.	Shari B. Libicki, Ph.D	P. 32, ll. 17-22		Hearsay.

Response	Ruling
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The question and answer to which TJFA objects are the following:

Q. Do you know if BFI has committed to continue conducting daily inspections if the permit amendment application is granted?

A. Yes, I have been informed that Brad Dugas of BFI has committed to acceptance of a special provision in any permit issued for the expansion of the landfill that requires the daily inspections on days the landfill is accepting waste through its close by November 1, 2015.

In other testimony by Dr. Libicki, to which TJFA has not objected, Dr. Libicki states that the bases for her expert opinion that "[t]he application, and the special conditions that have been accepted by Mr. Brad Dugas, contains specific requirements for odor control." The statement objected to by TJFA is therefore the basis of an expert opinion.

The testimony is admissible under the Rules of Evidence governing opinions and expert testimony. Rule 702 of the Texas Rules of Evidence

states that a witness who is qualified as an expert by knowledge, skill, experience, training or experience may provide opinion testimony “[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” TEX. R. EVID. 701. Rule 703 provides that “[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing.” TEX. R. EVID. 703 (emphasis added). Rule 705 allows experts to give the reasons for their opinions or inferences – including disclosing such on direct examination – and the balancing test for admitting otherwise inadmissible facts or data is simply not applicable here because there is no risk of prejudicing a jury. See TEX. R. EVID. 705 (a) & (d).

As her pre-filed testimony and resume show, Dr. Libicki is plainly qualified to offer expert opinions on the matters addressed in his exhibit. Those portions of the exhibit sponsored by Dr. Libicki comprise the expert opinions of Dr. Libicki and her explanations of the bases for those opinions. Dr. Libicki's testimony will plainly assist the ALJ in understanding the scientific and technical evidence and determining facts in issue related to odor controls at the landfill.

Objection No.	Witness	Testimony Pages	Exhibit	Objection
9.a.	John A. Worrall	P. 8, ll. 5 - 14	JW-3	Hearsay to the extent offered for the truth of the matters asserted.

Response	Ruling
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Exhibit JW-3 is the Land Use Analysis Report that is included as Part II.D of the application. In other testimony (not objected to by TJFA), Mr. Worrall states that he personally prepared the document. TJFA's blanket objection to this exhibit is off-base and should be overruled for a number of reasons.

First, in testimony not objected to by TJFA, Mr. Worrall states that he prepared Part II.D. His “in court” testimony plainly adopts this “out of court” document – and its content – as his own testimony. Simply put, Mr. Worrall is properly sponsoring this exhibit, which is admissible for all purposes.

Second, the exhibit and its contents are admissible under the Rules of Evidence governing opinions and expert testimony. Rule 702 of the Texas Rules of Evidence states that a witness who is qualified as an expert by knowledge, skill, experience, training or experience may provide opinion testimony “[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” TEX. R. EVID. 701. Rule 703 provides that “[t]he facts or data in the

particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing." TEX. R. EVID. 703. Rule 705 allows experts to give the reasons for their opinions or inferences – including disclosing such on direct examination – and the balancing test for admitting otherwise inadmissible facts or data is simply not applicable here because there is no risk of prejudicing a jury. *See* TEX. R. EVID. 705 (a) & (d).

As his pre-filed testimony and résumé show, Mr. Worrall is plainly qualified to offer expert opinions regarding the matters addressed in his exhibit. The exhibit sponsored by Mr. Worrall comprises the expert opinions of Mr. Worrall and his explanations of the bases for those opinions. The lion's share of Exhibit JW-3 comprise the expert opinions of Mr. Worrall as to the land use in the area of the landfill at the time of the application and his explanations of the bases for those opinions. This exhibit and Mr. Worrall's testimony about it will plainly assist the ALJ in understanding the scientific and technical evidence and determining any facts in issue and are thus admissible under the rules governing experts and opinion testimony.

Third, Mr. Worrall's pre-filed testimony itself summarizes the information contained in Exhibit JW-3. In his pre-filed testimony he could have answered in question-and-answer format questions pertaining to each and every statement contained in the exhibit. Similarly, in his pre-filed testimony Mr. Worrall could have been asked to individually prove up each and every drawing or figure he created for the application. However, that would have led to an unwieldy volume of pre-filed testimony considering that BFI's application is three four-inch binders long. Notably, Mr. Worrall will be present to testify at the hearing, and TJFA and the other parties will have an opportunity to cross-examine him regarding his pre-filed testimony and the portions of the application he is sponsoring.

Finally, to the extent that TJFA is making a blanket objection to the exhibit, the objection is overbroad. The raw data relied upon by Mr. Worrall in formulating his opinions is being disclosed along with his opinions pursuant to Rule 705 of the Texas Rules of Evidence, which specifically provides that "[t]he expert may in any event disclose on direct examination, . . . , the underlying facts or data." TEX. R. EVID. 705(a). If TJFA can point to specific portions of the exhibit which it believes are objectionable, BFI can provide additional bases for showing that such portions are admissible under the Rules of Evidence – including, without limitation, rules pertaining to admissibility of business records, recorded recollections, public records and reports, statements in ancient documents, commercial publications or learned treatises. *See* TEX. R. EVID. 803.

Objection No.	Witness	Testimony Pages	Exhibit	Objection
9.b.	John A. Worrall	P. 8, ll. 20 – 23; p. 3[sic], ll. 1 – 4. (BFI presumes this is a typographical error and the objection is to page 9.)	JW-4	Hearsay to the extent offered for the truth of the matters asserted. Improper attempt to amend the application.
Response			Ruling	
<p>Exhibit JW-4 is an updated version of the Land Use Analysis Report discussed above. Mr. Worrall states that he prepared the document.</p> <p>TJFA's objection that the exhibit and related testimony are an impermissible attempt to amend the application is without merit. Unlike most of the other issues referred to SOAH by the TCEQ, referred issue "U" asks a question about current conditions, <i>i.e.</i>, whether the proposed expansion is compatible with land use in the surrounding area. Mr. Worrall makes no attempt to amend the Land Use Analysis Report that is included in the application (indeed, he fully discusses that report), but instead is simply providing relevant current information in the form of opinion testimony with proper support in underlying data through Exhibit JW-4.</p> <p>As to TJFA's blanket hearsay objections, TJFA is off-base and should be overruled for a number of reasons. First, in testimony not objected to by TJFA, Mr. Worrall states that he prepared Exhibit JW-4. His "in court" testimony plainly adopts this "out of court" document – and its content – as his own testimony. Simply put, Mr. Worrall is properly sponsoring this exhibit, which is admissible for all purposes.</p> <p>Second, the exhibit and its contents are admissible under the Rules of Evidence governing opinions and expert testimony. Rule 702 of the Texas Rules of Evidence states that a witness who is qualified as an expert by knowledge, skill, experience, training or experience may provide opinion testimony "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 701. Rule 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing." TEX. R. EVID. 703. Rule 705 allows experts to give the reasons for their opinions or inferences – including disclosing such on direct examination – and the balancing test for admitting otherwise inadmissible facts or data is simply not applicable here because there is no risk of prejudicing a jury. <i>See</i> TEX. R. EVID. 705 (a) & (d).</p> <p>As his pre-filed testimony and resume show, Mr. Worrall is plainly</p>				

qualified to offer expert opinions on the matters addressed in his exhibit. The exhibit sponsored by Mr. Worrall comprises the expert opinions of Mr. Worrall and his explanations of the bases for those opinions. The lion's share of Exhibit JW-4 comprise the expert opinions of Mr. Worrall as to the current land use in the area of the landfill and his explanations of the bases for those opinions. This exhibit and Mr. Worrall's testimony about it will plainly assist the ALJ in understanding the scientific and technical evidence and determining any facts in issue and are thus admissible under the rules governing experts and opinion testimony.

Third, Mr. Worrall's pre-filed testimony itself summarizes the information contained in Exhibit JW-4. In his pre-filed testimony he could have answered in question-and-answer format questions pertaining to each and every statement contained in the exhibit. Similarly, in his pre-filed testimony Mr. Worrall could have been asked to individually prove up each and every drawing or figure he created. However, that would have led to an unwieldy volume of pre-filed testimony considering that BFI's application is three four-inch binders thick. Notably, Mr. Worrall will be present to testify at the hearing, and TJFA and the other parties will have an opportunity to cross-examine him regarding his pre-filed testimony and the portions of the application he is sponsoring.

Finally, to the extent that TJFA is making a blanket objection to the exhibit, the objection is overbroad. The raw data relied upon by Mr. Worrall in formulating his opinions is being disclosed along with his opinions pursuant to Rule 705 of the Texas Rules of Evidence, which specifically provides that "[t]he expert may in any event disclose on direct examination, . . . , the underlying facts or data." TEX. R. EVID. 705(a). If TJFA can point to specific portions of the exhibit which it believes are objectionable, BFI can provide additional bases for showing that such portions are admissible under the Texas Rules of Evidence – including, without limitation, rules pertaining to admissibility of business records, recorded recollections, public records and reports, statements in ancient documents, commercial publications or learned treatises. *See* TEX. R. EVID. 803.

Objection No.	Witness	Testimony Pages	Exhibit	Objection
9.c.	John A. Worrall	P. 9, ll. 11 - 14	JW-5	Hearsay to the extent offered for the truth of the matters asserted.
Response				Ruling
Exhibit JW-5 is a series of documents constituting a landscape enhancement plan proposed for the landfill. Again, Mr. Worrall testifies that he personally prepared the documents.				

<p>Unlike most of the other issues referred to SOAH by the TCEQ, referred issue "U" asks a question about current conditions: whether the proposed expansion is compatible with land use in the surrounding area. Mr. Worrall is providing very relevant current information in the form of opinion testimony with proper support in underlying data through Exhibit JW-5.</p> <p>As to TJFA's blanket hearsay objections, TJFA is off-base and should be overruled for each of the reasons discussed in BFI's response to TJFA's objection No, 9.b. to Exhibit JW-4 above.</p>				
Objection No.	Witness	Testimony Pages	Exhibit	Objection
9.d.	John A. Worrall	P. 31, ll. 1-11		Not qualified to offer expert opinion.
Response				Ruling
<p>TJFA objects to this question and answer on the basis that Mr. Worrall is "not qualified to offer the testimony and that he has not demonstrated that he is an expert in soil science, agronomy, agriculture or any other field to support this opinion on vegetative cover.</p> <p>Mr. Worrall has sufficient expertise to offer the opinions complained of by TJFA. Mr. Worrall is experienced in landscape architecture, which requires him to know what plants will survive in what climates under what circumstances. As his testimony shows, he has vast experience in such matters as they pertain to MSW landfills. Moreover, TJFA is over-stating the technical expertise required to offer the opinion contained in the testimony. In fact, most of the testimony objected to is personal observation. Mr. Worrall is a resident of Central Texas. Mr. Worrall states, from personal experience that "[a]bundant evidence exists in that Sunset Farms has already established vegetative cover with similar slopes and soils and that Central Texas is not, in fact, a desert. We receive sufficient rainfalls to allow vegetative cover of the types proposed to thrive, once established.</p>				
Objection No.	Witness	Testimony Pages	Exhibit	Objection
10.a.	Charles Heimsath	P. 21, ll. 20 – 22; p. 22, ll. 1 – 23; p. 23, ll. 1 – 15; p. 24, ll. 1 - 16	CH-5	Improper attempt to amend the application.
Response				Ruling
<p>Exhibit CH-5 is a current growth trend analysis for the area surrounding the landfill. Mr. Heimsath states that he personally prepared the document.</p> <p>TJFA objects on the basis that the exhibit and related testimony are an impermissible attempt to amend the application, TJFA is off-base. Unlike</p>				

<p>most of the other issues referred to SOAH by the TCEQ, referred issue "U" asks a question about current conditions: whether the proposed expansion is compatible with land use in the surrounding area. Growth trends are one element of an analysis of land use compatibility under the TCEQ's rules. Mr. Heimsath makes no attempt to amend the Land Use Report or any other aspect of the application, but is providing very relevant current information in the form of opinion testimony with proper support in underlying data through Exhibit CH-5.</p>				
Objection No.	Witness	Testimony Pages	Exhibit	Objection
11.a.	Donna Carter	P. 18, ll.16 - 22; p. 19, ll. 1 - 17		Not qualified to offer expert opinion.
Response				Ruling
<p>TJFA objects to this testimony on the basis that Ms. Carter is "not qualified to offer an opinion on whether the proposed expansion is compatible with land use in the surrounding area in the context of the MSW rules." All of the opinions offered by Ms. Carter are squarely within her areas of expertise as set forth in her testimony.</p> <p>The principal factor in TJFA's challenge to Ms. Carter's qualifications is her admission that this is her first municipal solid waste landfill project. Every expert testifying in this proceeding had a first time to offer expert opinion testimony. Under TJFA's logic, if a witness cannot testify regarding a particular subject matter for a first time, there would be no qualified expert witnesses.</p> <p>Ms. Carter proved her qualifications to offer the opinions in her testimony. She is regularly involved in land planning and feasibility studies that are presented to local planning and zoning boards to obtain approval of major construction projects. That is essentially what is occurring in this proceeding. She also has substantial experience in matters pertaining to visual aesthetics, and has offered both factual and opinion testimony in this area.</p>				
Objection No.	Witness	Testimony Pages	Exhibit	Objection
12.a.	Brad Dugas	P. 16, ll. 14 - 16		Not qualified to offer expert opinion to extent offered for engineering opinions.
Response				Ruling
<p>TJFA objects to this testimony to the extent that Mr. Dugas is offering an opinion as to the adequacy of any engineering issue contained in the</p>				

<p>application.</p> <p>BFI understands that Mr. Dugas is not a licensed engineer. He does not need to be a licensed engineer to offer the expert opinions he is offering. His testimony is offered based on his extensive experience, skill and training in operational aspects of MSW landfills in general and the Sunset Farms Landfill in particular.</p>				
Objection No.	Witness	Testimony Pages	Exhibit	Objection
12.b.	Brad Dugas	P. 35, ll. 22 – 23; p. 36, ll. 1 – 3; p. 37, ll. 16 – 19, p. 39, ll. 4 – 6; p. 42, ll. 15 – 17; p. 43, ll. 10 – 12; p. 44, ll. 16 - 18		Not qualified to offer expert opinion to extent offered for engineering opinions.
Response				Ruling
<p>TJFA objects to this testimony to the extent that Mr. Dugas is adopting the testimony and opinions expressed by various engineering experts and thereby offering an opinion as to the adequacy of any engineering issue contained in the application.</p> <p>Again, BFI understands that Mr. Dugas is not a licensed engineer. He does not need to be a licensed engineer to offer the expert opinions he is offering. His testimony is offered based on his extensive experience, skill and training in operational aspects of MSW landfills in general and the Sunset Farms Landfill in particular. Each of the items of adopted testimony are related to facility operations. Mr. Dugas is responsible for implementing the Site Operating Plan at the facility – both the current plan and the proposed plan. The testimony adopted by Mr. Dugas all relates to facility operations that are governed by the current and future plans.</p>				