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November 21, 2008

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Client No.: 1635-03

From: Paul Gosselink

No. of Pages: 24 + 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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November 21, 2008

**Via Facsimile**

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

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

Dear Judge Newchurch:

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

Also enclosed please find a Proposed Order Ruling on the Objections to Pre-filed Testimony. BFI respectfully requests that the Administrative Law Judge adopt the Proposed Order Ruling on the Objections to Prefiled-Testimony. Please have your assistant let me know if an electronic copy of the proposed order would be helpful in preparing the final order

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

Respectfully submitted,

A handwritten signature in cursive script that reads "Paul Gosselink".

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  
OBJECTIONS TO PRE-FILED TESTIMONY AND EXHIBITS**

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


**I. OBJECTIONS**

Protestants TJFA, LP (TJFA) and Northeast Neighbors Coalition (NNC) filed their pre-filed direct case testimony and exhibits on November 5, 2008. BFI's objections to TJFA's pre-filed testimony and exhibits are attached hereto as Exhibit "A," and its objections to NNC's pre-filed testimony and exhibits are attached hereto as Exhibit "B." BFI has no objections to the pre-filed testimony or exhibits filed by any other parties.

**II. CONCLUSION AND PRAYER**

For the reasons set forth in Exhibits "A" and "B," BFI respectfully requests that the ALJ sustain the objections and strike and/or limit the objectionable testimony and exhibits. BFI further requests such additional or alternative relief to which it might show itself justly entitled.

Respectfully submitted,

By:   
Paul G. Gosselink  
Texas Bar No. 08222800

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BFI WASTE SYSTEMS OF NORTH  
AMERICA, LLC**

OF COUNSEL:

John E. Carlson  
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**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing Objections to Pre-Filed Testimony and Exhibits 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 November 21, 2008:

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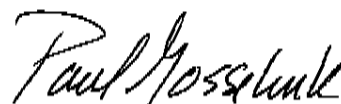
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Paul G. Gosselink

EXHIBIT "A"

OBJECTIONS TO TJFA PRE-FILED TESTIMONY AND EXHIBITS

Testimony		Exhibit	Objection	Basis for Objection	Ruling
From	To				
<b>PIERCE CHANDLER</b>					
Page 14, Line 6	Page 15, Line 6		Witness asked to state a conclusion of law.	Although Rule 704 of the Texas Rules of Evidence does not bar an opinion by an expert that goes to an ultimate issue or expresses a conclusion of law, an opinion must still be admissible under Rule 702 <sup>1</sup> , which requires that the opinion must be within the scope of the witness's expertise. <sup>2</sup> Here, the witness admits he is not an attorney and does not hold a law degree. He is thus not qualified to offer an opinion on the relationship and primacy of federal regulations and the state statutes and regulations that have been adopted by the State of Texas. This is instead a purely legal matter for briefing by the attorneys. Also, the opinion must assist the fact-finder. <sup>3</sup> While the ALJ sits as both fact-finder and legal arbiter in this proceeding, the expert opinions may only be offered to assist the ALJ in his capacity as fact-finder. Mr. Chandler's unqualified legal opinion does not assist the ALJ in this manner.	
		PC-5	Hearsay – not public record or report	The testimony proffering the exhibit identifies it as "U.S. EPA, Solid Waste Disposal Facility Criteria Technical Manual, EPA 530-R-93-017, 1993 (Revised April 1998)." A document by this name is cited as a reference in Exhibit PC-4 which was published in 2001. However, the document marked as Exhibit PC-5 indicates that it was	

<sup>1</sup> Greenberg Traurig of New York, P.C. v. Moody, 161 S.W.3d 56, 94 (Tex. App.—Houston [14th Dist.] 2004, no pet.)

<sup>2</sup> Schauer v. Memorial Care Sys., 856 S.W.2d 437, 451 (Tex. App.—Houston [1st Dist.] 1993, no writ).

<sup>3</sup> Mowbray v. State, 788 S.W.2d 658, 668 (Tex. App.—Corpus Christi 1990, pet. ref'd).

Testimony		Exhibit	Objection	Basis for Objection	Ruling
From	To				
				<p>revised January 14, 2008. Thus, this version of the document could not have been a reference source for a document published in 2001. Rule 803(8) of the Texas Rules of Evidence allows admission of otherwise qualified public documents "unless the sources of information or other circumstances indicate lack of trustworthiness." Since it is unknown what revisions were made to the document since the 1998 revision cited by TFJA, nothing contained in Exhibit PC-5 can be deemed trustworthy.</p>	
		<p>PC-4, PC-6, PC-7, PC-8, PC-9, PC-10, PC-11, PC-12 &amp; PC-13</p>	<p>Hearsay</p>	<p>For each of these exhibits, the testimony appears to attempt to lay a foundation for admission of the exhibits as learned treatises. However, the exception in the hearsay rule specifically prohibits admission of the learned treatise itself as evidence; instead, the rule only authorizes <u>statements</u> to be read into evidence. TEX. R. EVID. 803(18). Similarly, Rule 705 allows the disclosure of the specific <u>facts or data underlying a qualified expert opinion</u>. TEX. R. EVID. 705. It does not authorize a wholesale adoption of a scientific treatise. TFJA is offering portions of Mr. Chandler's library totaling over 450 pages without ever identifying the <u>specific statements</u> from the documents relied upon by the witness or the <u>facts or data</u> relied upon in <u>formulating his opinions</u>.</p>	
<p>Page 27, Line 12</p>	<p>Page 28, Line 5</p>	<p>PC-15</p>	<p>Hearsay; Relevance</p>	<p>The exhibit is not what it is described to be by testimony, and no foundation or basis exists in the testimony to establish the relevance of the hearsay contained in Exhibit PC-15. The testimony (Page 27, Line 12 through Page 28, Line 5) describes Exhibit PC-15 as "excerpts from U.S. EPA, <u>Solid Waste Disposal Facility Criteria Technical Manual</u>, EPA 530-R-93-017, 1993 (Revised April 1998)," while actual document that has been marked as PC-15 is entitled "RCRA Ground-Water Monitoring Technical Enforcement Guidance Document TEBD" and is dated September, 1986. Moreover, the testimony does not indicate what statements might be relevant from the document, so it is impossible to further assess whether some</p>	

Testimony		Exhibit	Objection	Basis for Objection	Ruling
From	To				
Page 52, Line 3	Page 52, Line 12		Hearsay; Speculation	hearsay exception might be applicable. Regardless of what exception might be available, none has been identified to support the admissibility of Exhibit PC-15. The question asks Mr. Chandler for the opinion of the TCEQ staff. Without bothering to provide a citation or source of any statement he makes, the witness expounds on what the opinion is of some unidentified "TCEQ staff." This question and answer are rank hearsay and call for the witness to speculate about the staff's position.	
Page 62, Line 19	Page 63, Line 7	Exhibit 17, Photograph hs 17A through 17C	Authentication Relevance	The photographs in the exhibit have not been properly authenticated. A photograph may generally be authenticated by testimony that it is a fair and accurate representation of the actual scene or event. TEX. R. EVID. 901 <sup>4</sup> . Here, the testimony is merely that the photographs are illustrative of the Taylor Marl at the Skyline Landfill near Dallas. The photographs themselves show what appears to naturally exposed outcropping soils with vines growing down over those soils; photos of exposed soils at a site 200 miles north of Sunset Farms have very little or no relevance at all to the purely vertical expansion of the Sunset Farms Landfill.	
Page 62, Line 3	Page 62, Line 18	Exhibit 17, Photograph hs 17D through 17K	Authentication Relevance	The photographs in the exhibit have not been properly authenticated. A photograph may generally be authenticated by testimony that it is a fair and accurate representation of the actual scene or event. TEX. R. EVID. 901 <sup>5</sup> . The testimony is merely that the photographs are illustrative of "rotational" or circular arc failures. The witness failed to provide any meaningful testimony that the photographs are fair and accurate representations of the actual scenes or events.	
Page 64, Line 2	Page 64, Line 8	PC-4	Authentication Relevance	The photographs contained in the referenced exhibit have not been properly authenticated. A photograph may generally be authenticated	

<sup>4</sup> *Davidson v. Great National Life Ins. Co.*, 737 S.W.2d 312, 314-15 (Tex. 1987)

<sup>5</sup> *Id.*



Testimony		Exhibit	Objection	Basis for Objection	Ruling
From	To				
beginning of "The GeoRG document (Exhibit PC-7) ..."			Hearsay	by testimony that it is a fair and accurate representation of the actual scene or event. TEX. R. EVID. 901 <sup>6</sup> . Mr. Chandler has not provided testimony that he was ever present to witness the scenes or events represented by the pictures, and therefore has not established a basis from which he could have observed the actual scene or event represented by the photographs he refers to. Other references to Exhibit PC-4 attempt to adopt provisions of the document wholesale without identification of the statements which form the basis of Mr. Chandler's opinions. The testimony attempts to lay a foundation for the hearsay exception as a learned treatise under Rule 803(18), which, as discussed above may authorize statements to be read into evidence but prohibits admission of the learned treatise as an exhibit. Similarly, Rule 705 allows the disclosure of the specific facts or data underlying a qualified expert opinion. It does not authorize a wholesale adoption of a scientific treatise.	
Page 67, Line 1	Page 69, Line 6	Exhibit PC-5	Hearsay	The exhibit which forms the basis of the testimony is inadmissible under the public records and reports exception to the prohibition on hearsay (Rule 803(6)).  The testimony should be stricken as the exhibit offered by the witness is not the same as the document cited in the testimony. These circumstances indicate a lack of trustworthiness of the exhibit and also the testimony derived from it.	
Page 72, Line 8	Page 73, Line 6	Exhibit PC-18	Speculation; Hearsay	The questions asks: "Do you think the applicant's consultants were aware of . . . ?" This calls for rank speculation from the witness in violation of Rules 702 and 705(c). The answer and following questions offering Exhibit PC-18 all concern hearsay statements of a third party without any attempt to identify any exception to the	

<sup>6</sup> *Id.*

Testimony		Exhibit	Objection	Basis for Objection	Ruling
From	To				
Page 86, Line 9 beginning	Page 86, Line 12, ending		Relevance; Authentication	<p>general prohibition on admissibility of hearsay evidence. TEX. R. EVID. 802.</p> <p>See objections to Exhibit PC-17 above. Again, the photographs shown in Exhibit PC-17 are of naturally exposed, weathered Taylor Marl some 200 miles distant from the Sunset Farms Landfill, which will be vertically expanded only. There is inadequate testimony that the referenced photographs depict the actual scene or event as required by Rule 901.</p>	
<b>ROBERT KIER</b>					
Page 18, Line 10	Page 19, Line 20	BK-8	Violation of SOAH Order No. 1; Hearsay	<p>SOAH Order No. 1 in this case requires that: "Prefiled testimony shall be written as if the questions were asked by the party's lawyer and answered by the witness." TJFA and Dr. Kier are attempting to bypass this requirement by offering memoranda previously written by Dr. Kier in the form of an exhibit, when the exhibit actually contains a series of opinions based on hearsay within hearsay. TJFA also falls short in its attempt to bootstrap these memoranda by referring to them as business records. The testimony does not demonstrate that the memoranda were kept in the course of a regularly conducted business activity and that it was the regular practice of that business activity to make the memoranda as required by Rule 803(6) of the Texas Rules of Evidence. Moreover, the proffered exhibit suggests the source of information and method and circumstances of preparation indicate a lack of trustworthiness, making the memoranda objectionable under Rule 803(6). Specifically, Dr. Kier offers testimony that: "At one point I was given the opportunity to review analytical data for groundwater samples taken by a consultant for Applied Materials;</p>	

Testimony		Exhibit	Objection	Basis for Objection	Ruling
From	To				
				<p>however, I was not given copies of those data." As such, Dr. Kier can't say <i>when</i> he got the information, <i>who</i> gave it to him, or even <i>what</i> the data was. This and other indications of lack of trustworthiness contained in Dr. Kier's testimony prevent his memoranda regarding an investigation some ten years ago from satisfying the spirit or letter of the business records exception to the hearsay rule. The Texas Rules of Evidence allow an expert to introduce statements from learned treatises that form the basis of qualified opinions (Rule 803(18)) and to introduce the facts and data upon which those opinions are based (Rule 705). Dr. Kier's memos are not learned treatises. Instead, they rely on scant facts or data and provide the illusion that there is a large body of facts, data and authority for his unsupported conjecture. For all of the foregoing reasons, Exhibit BK-8 and the testimony based on it should be stricken.</p>	
<b>JAMES NEYENS</b>					
Page 12, Line 10	Page 13, Line 4		Legal Conclusion; Best Evidence	<p>Mr. Neyens is interpreting the terms of conditions of a written contract. Best Evidence would be to allow the document to speak for itself. Mr. Neyens has not demonstrated any expertise in legal matters generally or in interpretation of contract and therefore has not been qualified to offer a legal opinion. Mr. Neyens's opinion will not assist the ALJ in his role as a fact finder.</p>	

**EXHIBIT "B"**

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

Testimony		Exhibit	Objection	Basis for Objection	Ruling
From	To				
<b>JEREMIAH BENTLEY</b>					
		JB-2	Hearsay; Violation of SOAH Order No. 1	Mr. Bentley offers his affidavit (an out of court statement) solely on the basis that he filled it out and signed it. It is purportedly regarding his experiences regarding the Sunset Farms landfill. Mr. Bentley suggests no exception to the hearsay rule on which the affidavit could be admitted into evidence, and none exists.  Order No. 1 in this case requires that: "Prefiled testimony shall be written as if the questions were asked by the party's lawyer and answered by the witness." Mr. Bentley is offering his affidavit in lieu of testimony in violation of the order.	
		JB-3	Hearsay	Mr. Bentley refers to only one letter in his testimony but offers two letters he previously wrote to the TCEQ regarding the Sunset Farms landfill. He offers this hearsay evidence solely on the basis that they [it?] are true and correct and that he wrote them [it?]. Mr. Bentley suggests no exception to the hearsay rule on which the letter(s) could be admitted into evidence, and none exists.	
Page 6, Line 4	Page 6, Line 9		Hearsay	The testimony offered by Mr. Bentley is entirely based on hearsay from other individuals and he admits he has no personal knowledge of the allegations.	
Page 6, Line 16	Page 6, Line 23		Hearsay	The testimony offered by Mr. Bentley is entirely based on hearsay from other individuals and newspaper articles. Mr. Bentley has no personal knowledge of the allegations.	
		JB-4	Hearsay; Violation of SOAH Order No. 1	Mr. Bentley offers over 80 pages of affidavits from numerous individuals which contain wide-ranging allegations against the Sunset Farms landfill. These affidavits of persons for whom no pre-filed testimony has been offered are rank hearsay. TEX. R. EVID. 802.	

Testimony		Exhibit	Objection	Basis for Objection	Ruling
From	To				
				As discussed above, NNC's attempt to offer "testimony" via affidavit also violates Order No. 1.	
<b>JOYCE BEST</b>					
Page 3, Line 11	Page 3, Line 19	BEST-2	Hearsay; Violation of SOAH Order No. 1	Ms. Best offers her affidavit (an out of court statement) solely on the basis that she filled it out and signed it. It is purportedly regarding her experiences regarding the Sunset Farms landfill. Ms. Best suggests no exception to the hearsay rule on which the affidavit could be admitted into evidence, and none exists.  Order No. 1 in this case requires that: "Prefiled testimony shall be written as if the questions were asked by the party's lawyer and answered by the witness." Ms. Best is offering his affidavit in lieu of testimony in violation of the order.	
Page 8, Line 5	Page 8, Line 18	BEST-4	Hearsay within Hearsay; Lack of Trustworthin ess	Ms. Best offers BEST-4 as "a copy of an odor report form that [she] created." The form was filled in by Joy Mitchell. The document contains hearsay within hearsay. Although NNC moves for admission of the document, not for the truth of the matter but as exemplary of the type of information that was gathered and submitted by Joyce Best" that does not change the character of the proffered information as hearsay within hearsay. Ms. Best could offer the blank form she created in order to inform the ALJ of the type of information she gathered. She would not be allowed to testify about the statements of Ms. Mitchell from the stand and must not be allowed to submit Ms. Mitchell's statements through a hearsay within hearsay exhibit. TEX. R. EVID. 802.	
Page 8, Line 21	Page 8, Line 30	BEST-5	Hearsay	Ms. Best offers BEST-5 as "odor complaint forms that [she] gathered from the neighborhood." The proffer of evidence demonstrates that	

Testimony		Exhibit	Objection	Basis for Objection	Ruling
From	To				
				<p>Ms. Best has no personal knowledge of the facts contained in the over 40 pages of forms competed by non-witness third parties. The exhibit (actually, multiple exhibits) contains hearsay within hearsay, including multiple page narratives making allegations against landfills. NNC moves for admission of the document, "as a compilation of the odor complaints that were submitted by Joyce Best to the TCEQ." NNC fails to identify any exception to the prohibition on hearsay evidence (or hearsay within hearsay) that applies to the documents. Ms. Best's limited offer does not change the character of the exhibit which is replete with out-of-court statements. She is not an expert witness and would not be allowed to testify about the statements of the numerous people that filed out the forms and provided narratives from the stand and must not be allowed to submit these statements through a hearsay within hearsay exhibit. TEX. R. EVID. 802.</p>	
<b>DELMER ROGERS</b>					
Page 1, Line 9	Page 1, Line 15	DR-2	Hearsay; Violation of SOAH Order No. 1	<p>Mr. Rogers offers his affidavit (an out of court statement) solely on the basis that he filled it out and signed it. It is purportedly regarding his experiences regarding the Sunset Farms landfill. Mr. Rogers suggests no exception to the hearsay rule on which the affidavit could be admitted into evidence, and none exists.</p> <p>Order No. 1 in this case requires that: "Prefiled testimony shall be written as if the questions were asked by the party's lawyer and answered by the witness." Mr. Rogers is offering his affidavit in lieu of testimony in violation of the order.</p>	

Testimony		Exhibit	Objection	Basis for Objection	Ruling
From	To				
<b>EVELYN REMMERT</b>					
Page 1, Line 22	Page 2, Line 1	ER-2	Hearsay; Violation of SOAH Order No. 1	Ms. Remmert offers her affidavit (an out of court statement) solely on the basis that she filled it out and signed it. It is purportedly regarding her experiences regarding the Sunset Farms landfill. Ms. Remmert suggests no exception to the hearsay rule on which the affidavit could be admitted into evidence, and none exists.	
Page 3, Line 15	Page 3, Line 20	ER-3	Hearsay	Order No. 1 in this case requires that: "Prefiled testimony shall be written as if the questions were asked by the party's lawyer and answered by the witness." Ms. Remmert is offering her affidavit in lieu of testimony in violation of the order.	
Page 7, Line 28	Page 8, Line 4	ER-7	Hearsay; Violation of Order No. 1	Ms. Remmert offers an email complaint she filed with the TCEQ on the sole basis that it is true and correct. This document is hearsay. Ms. Remmert suggests no exception to the hearsay rule on which the affidavit could be admitted into evidence, and none exists.	
				Ms. Remmert offers a series of handwritten pages purporting to be a log of observations. It is offered on the basis that it was written in her own handwriting and that the observations are true and correct. Ms. Remmert suggests no exception to the hearsay rule on which the log could be admitted into evidence, and none exists.	
				SOAH Order No. 1 in this case requires that: "Prefiled testimony shall be written as if the questions were asked by the party's lawyer and answered by the witness." Ms. Remmert is offering her log in lieu of testimony in violation of the order.	
Page 8, Line 13	Page 8, Line 18	ER-8	Hearsay	Ms. Remmert offers affidavits of six individuals "on behalf of my neighbors." She claims the affidavits are signed by a notary and "therefore contain truthful information." Ms. Remmert suggests no	

Testimony		Exhibit	Objection	Basis for Objection	Ruling
From	To				
				<p>exception to the hearsay rule on which the affidavits could be admitted into evidence, and none exists.</p> <p>SOAH Order No. 1 in this case requires that: "Prefiled testimony shall be written as if the questions were asked by the party's lawyer and answered by the witness." Ms. Remmert is offering six affidavits in lieu of testimony in violation of the order, and denying other parties the right to cross-examine the sponsors of the statements contained in the affidavits.</p>	
<b>EVAN WILLIAMS</b>					
Page 1, Line 9	Page 1, Line 14	EW-2	Hearsay Violation of SOAH Order No. 1	<p>Mr. Williams offers his affidavit (an out of court statement) solely on the basis that he filled it out and signed it. It is purportedly regarding his experiences regarding the Sunset Farms landfill. Mr. Williams suggests no exception to the hearsay rule on which the affidavit could be admitted into evidence, and none exists.</p> <p>Order No. 1 in this case requires that: "Prefiled testimony shall be written as if the questions were asked by the party's lawyer and answered by the witness." Mr. Williams is offering his affidavit in lieu of testimony in violation of the order.</p>	
Page 1, Line 18	Page 1, Line 21				
Page 4, Line 22	Page 5, Line 11		Witness not qualified as expert	<p>The witness's testimony makes clear that he has nothing but a general understanding of land use regulation and understands them only in a general sense. Despite his admitted lack of relevant expertise, the testimony provides expert opinions regarding a complex regulatory scheme. TEX. R. EVID. 702. Moreover, the witness was not identified as a testifying expert in discovery and as required by order of the ALJ.</p>	



Testimony		Exhibit	Objection	Basis for Objection	Ruling
From	To				
<b>JOHN WILKINS</b>					
Page 1, Line 13	Page 1, Line 19	JAW-2	Hearsay; Violation of SOAH Order No. 1	Mr. Wilkins offers his affidavit (an out of court statement) solely on the basis that he filled it out and signed it. It is purportedly regarding his experiences regarding the Sunset Farms landfill. Mr. Wilkins suggests no exception to the hearsay rule on which the affidavit could be admitted into evidence, and none exists.  Order No. 1 in this case requires that: "Prefiled testimony shall be written as if the questions were asked by the party's lawyer and answered by the witness." Mr. Wilkins is offering his affidavit in lieu of testimony in violation of the order.	
<b>MARK MCAFEE</b>					
Page 3, Line 16 beginning "I asked Barry . . ."	Page 3, Line 18		Hearsay	This line of testimony is about an out-of-court conversation between the witness and another party. It is classic hearsay. TEX. R. EVID. 802. No exception to the hearsay rule is applicable.	
Page 4, Line 7	Page 4, Line 18		Hearsay	This line of testimony is about an out-of-court conversation between the witness and another party. It is classic hearsay. TEX. R. EVID. 802. No exception to the hearsay rule is applicable.	
<b>ROBERT ANDREWS</b>					
		RGA-1	Failure to Identify Witness	Mr. Andrews was never identified as a person with knowledge of relevant facts in disclosures provided pursuant to BFI's request under TRCP 194.1. Mr. Andrews was never identified as a witness in response to specific interrogatories.	

Testimony		Exhibit	Objection	Basis for Objection	Ruling
From	To				
Page 1, Line 14	Page 1, Line 20	RG-2	Hearsay; Violation of SOAH Order No. 1	<p>Mr. Andrews offers his affidavit (an out of court statement) solely on the basis that he filled it out and signed it. It is purportedly regarding his experiences regarding the Sunset Farms landfill. Mr. Andrews suggests no exception to the hearsay rule on which the affidavit could be admitted into evidence, and none exists.</p> <p>Order No. 1 in this case requires that: "Prefiled testimony shall be written as if the questions were asked by the party's lawyer and answered by the witness." Mr. Andrews is offering his affidavit in lieu of testimony in violation of the order.</p>	
<b>MARION CHILDRESS-USHER</b>					
		MCU-1	Failure to Identify Witness	<p>Ms. Childress-Usher was never identified as a person with knowledge of relevant facts in disclosures provided pursuant to BFI's request under TRCP 194.1. Ms. Childress-Usher was never identified as a witness in response to specific interrogatories.</p>	
Page 1, Line 14	Page 1, Line 20	MCU-2	Hearsay; Violation of Order No. 1	<p>Ms. Childress-Usher offers her affidavit (an out of court statement) solely on the basis that she filled it out and signed it. It is purportedly regarding her experiences regarding the Sunset Farms landfill. Ms. Childress-Usher suggests no exception to the hearsay rule on which the affidavit could be admitted into evidence, and none exists.</p> <p>Order No. 1 in this case requires that: "Prefiled testimony shall be written as if the questions were asked by the party's lawyer and answered by the witness." Ms. Childress-Usher is offering her affidavit in lieu of testimony in violation of the order.</p>	

Testimony		Exhibit	Objection	Basis for Objection	Ruling
From	To				
<b>MARCELINA COOK</b>					
		MCO-1	Failure to Identify Witness	Ms. Cook was never identified as a person with knowledge of relevant facts in disclosures provided pursuant to BFI's request under TRCP 194.1. Ms. Cook was never identified as a witness in response to specific interrogatories.	
Page 1, Line 20	Page 2, Line 2	MCO-2	Hearsay Violation of Order No. 1	Ms. Cook offers her affidavit (an out of court statement) solely on the basis that she filled it out and signed it. It is purportedly regarding her experiences regarding the Sunset Farms landfill. Ms. Cook suggests no exception to the hearsay rule on which the affidavit could be admitted into evidence, and none exists.  Order No. 1 in this case requires that: "Prefiled testimony shall be written as if the questions were asked by the party's lawyer and answered by the witness." Ms. Cook is offering his affidavit in lieu of testimony in violation of the order.	
Page 2, Line 10 beginning with "We have experienced ..."	Page 2, Line 12		Witness not qualified as expert; Violation of SOAH Order No. 3 (Ruling No. 9).	Only a medical doctor is qualified to offer expert testimony regarding medical causation. TEX. R. EVID. 701-702. Ms. Cook is not a medical doctor. The ALJ ordered that any party desiring to present evidence of health effects arising from landfill activities would be required to present a HIPAA form to BFI. Ms. Cook has not provided any such form and BFI has therefore been denied an opportunity to conduct discovery regarding this issue.	
<b>JENNIFER WELLS</b>					
		JWE-1	Failure to Identify Witness	Ms. Wells was never identified as a person with knowledge of relevant facts in disclosures provided pursuant to BFI's request under TRCP 194.1. Ms. Wells was never identified as a witness in response to specific interrogatories.	

Testimony		Exhibit	Objection	Basis for Objection	Ruling
From	To				
Page 1, Line 14	Page 1, Line 19	JWE-2	Hearsay; Violation of Order No. 1	<p>Ms. Wells offers her affidavit (an out of court statement) solely on the basis that she filled it out and signed it. It is purportedly regarding her experiences regarding the Sunset Farms landfill. Ms. Wells suggests no exception to the hearsay rule on which the affidavit could be admitted into evidence, and none exists.</p> <p>Order No. 1 in this case requires that: "Prefiled testimony shall be written as if the questions were asked by the party's lawyer and answered by the witness." Ms. Wells is offering her affidavit in lieu of testimony in violation of the order.</p>	
<b>BARBARA WINCHELL</b>					
		BWI-1	Failure to Identify Witness	<p>Ms. Winchell was never identified as a person with knowledge of relevant facts in disclosures provided pursuant to BFI's request under TRCP 194.1. Ms. Winchell was never identified as a witness in response to specific interrogatories.</p>	
Page 1, Line 14	Page 1, Line 20	BWI-2	Hearsay; Violation of Order No. 1	<p>Ms. Winchell offers her affidavit (an out of court statement) solely on the basis that she filled it out and signed it. It is purportedly regarding her experiences regarding the Sunset Farms landfill. Ms. Winchell suggests no exception to the hearsay rule on which the affidavit could be admitted into evidence, and none exists.</p> <p>Order No. 1 in this case requires that: "Prefiled testimony shall be written as if the questions were asked by the party's lawyer and answered by the witness." Ms. Winchell is offering her affidavit in lieu of testimony in violation of the order.</p>	

**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**

**ORDER NO. \_\_\_\_\_**  
**RULING ON BFI WASTE SYSTEMS OF NORTH AMERICA, L.L.C.'S**  
**OBJECTIONS TO PREFILED TESTIMONY AND EXHIBITS**

On November 21, 2008, BFI Waste Systems of North America, L.L.C. ("BFI") filed objections to testimony and exhibits of various witnesses appearing on behalf of Protestants. On \_\_\_\_\_, the Parties appeared and presented argument regarding the objections. Having heard the argument of counsel and reviewed the relevant pleadings and proffered testimony and exhibits, the Administrative Law Judge rules as follows on each specific objection made by BFI:

Testimony		Exhibit	Objection	Ruling
From	To			
<b>PIERCE CHANDLER</b>				
Page 14, Line 6	Page 15, Line 6		Witness asked to state a conclusion of law.	
		PC-5	Hearsay – not public record or report	
		PC-4, PC-6, PC-7, PC-8, PC-9, PC-10, PC-11, PC-12 & PC-13	Hearsay	
Page 27, Line 12	Page 28, Line 5	PC-15	Hearsay; Relevance	
Page 52, Line 3	Page 52, Line 12		Hearsay; Speculation	
Page 62, Line 19	Page 63, Line 7	Exhibit 17, Photographs 17A through 17C	Authentication Relevance	

Testimony		Exhibit	Objection	Ruling
From	To			
Page 62, Line 3	Page 62, Line 18	Exhibit 17, Photogra phs 17D through 17K	Authentication Relevance	
Page 64, Line 2 beginnin g: "The GeoRG docume nt (Exhibit PC-7) ...."	Page 64, Line 8	PC-4	Authentication Relevance Hearsay	
Page 67, Line 1	Page 69, Line 6	Exhibit PC-5	Hearsay	
Page 72, Line 8	Page 73, Line 6	Exhibit PC-18	Speculation; Hearsay	
Page 86, Line 9 beginnin g: "The distribut ion of these seconda ry . . ."	Page 86, Line 12, ending ". . . Skyline Landfill in 1991 (Exhibit PC-17)."		Relevance; Authentication	
<b>ROBERT KIER</b>				
Page 18, Line 10	Page 19 Line 20	BK-8	Violation of SOAH Order No. 1; Hearsay	
<b>JAMES NEYENS</b>				
Page 12, Line 10	Page 13, Line 4		Legal Conclusion; Best Evidence	
<b>JEREMIAH BENTLEY</b>				
		JB-2	Hearsay; Violation of SOAH Order No. 1	
		JB-3	Hearsay	

Testimony		Exhibit	Objection	Ruling
From	To			
Page 6, Line 4	Page 6, Line 9		Hearsay	
Page 6, Line 16	Page 6, Line 23		Hearsay	
		JB-4	Hearsay; Violation of SOAH Order No. 1	
<b>JOYCE BEST</b>				
Page 3, Line 11	Page 3, Line 19	BEST-2	Hearsay; Violation of SOAH Order No. 1	
Page 8, Line 5	Page 8, Line 18	BEST-4	Hearsay within Hearsay; Lack of Trustworthines s	
Page 8, Line 21	Page 8, Line 30	BEST-5	Hearsay	
<b>DELMER ROGERS</b>				
Page 1, Line 9	Page 1, Line 15	DR-2	Hearsay; Violation of SOAH Order No. 1	
<b>EVELYN REMMERT</b>				
Page 1, Line 22	Page 2, Line 1	ER-2	Hearsay; Violation of SOAH Order No. 1	
Page 3, Line 15	Page 3, Line 20	ER-3	Hearsay	
Page 7, Line 28	Page 8, Line 4	ER-7	Hearsay; Violation of Order No. 1	
Page 8, Line 13	Page 8, Line 18	ER-8	Hearsay	
<b>EVAN WILLIAMS</b>				
Page 1, Line 9	Page 1, Line 14	EW-2	Hearsay Violation of SOAH Order No. 1	
Page 1, Line 18	Page 1, Line 21			

Testimony		Exhibit	Objection	Ruling
From	To			
Page 4, Line 22	Page 5, Line 11		Witness not qualified as expert	
<b>JOHN WILKINS</b>				
Page 1, Line 13	Page 1, Line 19	JAW-2	Hearsay; Violation of SOAH Order No. 1	
<b>MARK MCAFEE</b>				
Page 3, Line 16 beginnin g "I asked Barry . . .."	Page 3, Line 18		Hearsay	
Page 4, Line 7	Page 4, Line 18		Hearsay	
<b>ROBERT ANDREWS</b>				
		RGA-1	Failure to Identify Witness	
Page 1, Line 14	Page 1, Line 20	RGA-2	Hearsay; Violation of SOAH Order No. 1	
<b>MARION CHILDRESS-USHER</b>				
		MCU-1	Failure to Identify Witness	
Page 1, Line 14	Page 1, Line 20	MCU-2	Hearsay; Violation of Order No. 1	
<b>MARCELINA COOK</b>				
		MCO-1	Failure to Identify Witness	
Page 1, Line 20	Page 2, Line 2	MCO-2	Hearsay Violation of Order No. 1	
Page 2, Line 10 beginnin g with "We	Page 2, Line 12		Witness not qualified as expert; Violation of SOAH Order	



Testimony		Exhibit	Objection	Ruling
From	To			
have experien ced ...."			No. 3 (Ruling No. 9).	
<b>JENNIFER WELLS</b>				
		JWE-1	Failure to Identify Witness	
Page 1, Line 14	Page 1, Line 19	JWE-2	Hearsay; Violation of Order No. 1	
<b>BARBARA WINCHELL</b>				
		BWI-1	Failure to Identify Witness	
Page 1, Line 14	Page 1, Line 20	BWI-2	Hearsay; Violation of Order No. 1	

SIGNED ON \_\_\_\_\_

\_\_\_\_\_  
WILLIAM NEWCHURCH,  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS