

KENNEDY REPORTING SERVICE

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

TRANSCRIPT OF PROCEEDINGS BEFORE THE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AUSTIN, TEXAS

IN THE MATTER OF THE)	SOAH DOCKET NO.
APPLICATION OF BFI WASTE)	582-08-2178
SYSTEMS OF NORTH AMERICA, LLC)	
PROPOSED SOLID WASTE PERMIT)	TCEQ DOCKET NO.
AMENDMENT NO. 1447A)	2007-1774-MSW

HEARING ON THE MERITS
FRIDAY, JANUARY 30, 2009

BE IT REMEMBERED THAT AT 9:00 a.m., on Friday, the 30th day of January 2009, the above-entitled matter came on for hearing at the State Office of Administrative Hearings, 300 West 15th Street, Hearing Room 402, Austin, Texas, before WILLIAM NEWCHURCH, Administrative Law Judge; and the following proceedings were reported by Aloma J. Kennedy, a Certified Shorthand Reporter of:
Volume 9 Pages 2042 - 2294

FRIDAY, JANUARY 30, 2009
VOLUME 9

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1 PROCEEDINGS
 2 FRIDAY, JANUARY 30, 2009
 3 (9:00 a.m.)
 4 JUDGE NEWCHURCH: Okay. Let's go on the
 5 record. It's 9:00 a.m. It is January 30, 2009. This
 6 is a continuation of 582-08-2178 concerning BFI.
 7 And are there any preliminary matters
 8 this morning?
 9 MR. HEAD: Yes, Your Honor. For the
 10 record, J. D. Head.
 11 We just received from the TCEQ their
 12 latest and greatest draft permit, with some
 13 attachments. And we are engaged with -- keeping in
 14 mind that we oppose any issuance of the permit -- but
 15 TJFA is engaged with discussions with the staff and
 16 with BFI for some clarity on some of the special
 17 provisions. And we would request that after the
 18 City's case be put on, we could have a brief recess to
 19 try to finalize some language, prior to the ED staff
 20 going on, if that would meet your approval.
 21 JUDGE NEWCHURCH: Is everybody agreeable
 22 with that?
 23 MR. SHEPHERD: Yes.
 24 MR. GOSSELINK: That sounds like a good
 25 idea to us, too.

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1 JUDGE NEWCHURCH: Okay. So let's do
 2 that. Mr. Head, we can probably squeeze in Travis
 3 County, too, since I think their evidence is coming in
 4 without cross-examination.
 5 MR. HEAD: That would be fine.
 6 MS. TALLEY: And, Your Honor --
 7 JUDGE NEWCHURCH: Ms. Talley.
 8 MS. TALLEY: -- speaking to that, I
 9 wasn't here yesterday afternoon, but I understand that
 10 although that was discussed, it was never put on the
 11 record that that was going to be stipulated.
 12 JUDGE NEWCHURCH: We may have been off
 13 the record, but I think everyone agreed that they had
 14 no cross-examination for Travis County's witnesses.
 15 MS. TALLEY: I believe that's correct.
 16 JUDGE NEWCHURCH: Is that correct?
 17 Anybody disagree with that?
 18 MR. SHEPHERD: It's still correct here.
 19 MR. HEAD: That's correct.
 20 JUDGE NEWCHURCH: Okay. In fact, why
 21 don't we jump ahead and do that right now.
 22 MS. TALLEY: We would like to offer the
 23 prefiled testimony of Jon White, as stipulated.
 24 JUDGE NEWCHURCH: Has it been marked?
 25 MS. TALLEY: It has been marked as TC-1

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1 through 4. I think we have the order a little
 2 backwards. TC-4 is the testimony. One through 3 are
 3 the exhibits.
 4 JUDGE NEWCHURCH: And the witness' name
 5 again? I'm sorry.
 6 MS. TALLEY: Jon White.
 7 JUDGE NEWCHURCH: So Mr. White's direct
 8 testimony and attachments are offered. And there is
 9 no objection to their being admitted without his
 10 appearing to swear by them or be cross-examined.
 11 Correct?
 12 MR. HEAD: Correct.
 13 JUDGE NEWCHURCH: So without objection,
 14 Travis County-1 through 4 are all admitted.
 15 (Exhibit Travis County Nos. 1 through 4
 16 admitted)
 17 JUDGE NEWCHURCH: And, Ms. Talley, does
 18 Travis County have anything more as part of its direct
 19 case?
 20 MS. TALLEY: No, Your Honor.
 21 JUDGE NEWCHURCH: All right. So I think
 22 we're ready for the City of Austin's case.
 23 MS. NOELKE: Thank you. I'm going to
 24 make a brief opening statement.
 25 JUDGE NEWCHURCH: Very good.

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1 OPENING STATEMENT ON BEHALF OF THE CITY OF AUSTIN
 2 MS. NOELKE: The City of Austin, as a
 3 protestant in this proceeding is opposed to the
 4 granting of the landfill application permit as it was
 5 originally filed. The location of the proposed
 6 landfill expansion is in the City's Desired
 7 Development Zone and creates quality-of-life issues
 8 resulting in citizen complaints and city
 9 investigations for smell, litter, noise of traffic and
 10 the like.
 11 Landfill operations in close proximity
 12 to the residential areas call for special solutions to
 13 address the quality-of-life issues that impact current
 14 and future area residents. The City experts, in
 15 reviewing the application for the landfill expansion,
 16 have identified several specific operational
 17 improvements and conditions which would mitigate the
 18 concerns noted.
 19 BFI, Giles and the City have entered
 20 into an agreement that requires a cessation of
 21 acceptance of waste on or before November 1, 2015, as
 22 well as a prohibition on the use of the property as a
 23 transfer station. Our agreement also requires Giles
 24 and BFI to execute and deliver a restrictive covenant
 25 which restricts the properties from the acceptance of

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1 waste, the handling of waste for recycling, disposal
 2 and other purposes and from use of the property for a
 3 transfer station.
 4 In addition, the agreement reached
 5 includes specific operational improvements. And BFI
 6 is required under the agreement to request that the
 7 operational improvement be made special provisions to
 8 any permit granted under the permit application, to
 9 ensure TCEQ enforcement.
 10 The City will not be offering any
 11 testimony -- or our testimony will not go to any
 12 additional special provisions, although the City does
 13 not object to special provisions which may be added as
 14 a result of agreement with the rest of the parties or
 15 as proposed by the Administrative Law Judge,
 16 specifically alternative daily cover prohibition which
 17 has been discussed in the proceeding previously. Also
 18 I believe there was mention by Dr. Libicki of the
 19 Applicant's offer to accept a special provision
 20 related to requiring odor investigations daily and
 21 inclusion of those in the site operating permit report
 22 form.
 23 That's it.
 24 JUDGE NEWCHURCH: Okay. You may call
 25 your first witness, then.

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1 MS. NOELKE: Thank you. I call Greg
 2 Guernsey.
 3 JUDGE NEWCHURCH: And before we get
 4 started, are all the exhibits up there for him now?
 5 Mr. Guernsey, if you will take the oath.
 6 (Witness sworn)
 7 JUDGE NEWCHURCH: Thank you. Please
 8 have a seat.
 9 Ms. Noelke.
 10 PRESENTATION ON BEHALF OF THE CITY OF AUSTIN
 11 GREGORY INOUE GUERNSEY,
 12 having been first duly sworn, testified as follows:
 13 DIRECT EXAMINATION
 14 BY MS. NOELKE:
 15 Q And, Mr. Guernsey, would you state your full
 16 name, please.
 17 A Gregory Inoue Guernsey.
 18 Q Thank you. What is your occupation?
 19 A I'm the Director of Neighborhood Planning &
 20 Zoning for the City of Austin.
 21 Q I believe in front of you, you will find
 22 what's been marked City of Austin Exhibits 1, 2 and 3.
 23 A Yes.
 24 Q Do you have those?
 25 A Yes.

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1 Q Would you identify Exhibit 1, please.
 2 A Exhibit 1 is my prefiled testimony, Exhibit 2
 3 is my resume, and Exhibit 3 is the agreement regarding
 4 the property and City of Austin.
 5 Q Exhibit No. 3, just to clarify, is that the
 6 agreement between the City of Austin, BFI and Giles?
 7 A That's correct.
 8 Q Do you have any corrections to Exhibit No. 1,
 9 your testimony?
 10 A No.
 11 Q Any corrections to either of the other
 12 exhibits?
 13 A No.
 14 Q Do you adopt your prefiled testimony today as
 15 if you had given it here live?
 16 A Yes.
 17 MS. NOELKE: I move the admission of
 18 Exhibits 1, 2 and 3.
 19 JUDGE NEWCHURCH: Ms. Noelke, just for
 20 clarification, the agreement, Exhibit 3, is that the
 21 same as what we've generally referred to as the
 22 Rule 11 Agreement?
 23 MS. NOELKE: Yes, Your Honor. It is the
 24 agreement itself, which is an attachment to the Rule
 25 11 Agreement, and has been referred in this hearing.

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1 JUDGE NEWCHURCH: And the Rule 11
 2 Agreement also includes some procedural agreements
 3 between the parties, I think -- is that right? --
 4 beyond the specific conditions of this. You said it's
 5 an attachment to the Rule 11 Agreement. Is there
 6 more? I'm just trying to better understand.
 7 MS. NOELKE: My understanding is, the
 8 Rule 11 Agreement describes the limitation on offered
 9 testimony by the City of Austin and has the attached
 10 agreement. That limitation is also contained within
 11 the agreement.
 12 JUDGE NEWCHURCH: Okay. So this is the
 13 substance of what's been referred to often as the
 14 Rule 11 Agreement, including many conditions, but most
 15 specifically this specific date in 2015 by which the
 16 landfill and all other similar or related operations
 17 must discontinue?
 18 MS. NOELKE: Precisely.
 19 JUDGE NEWCHURCH: Okay.
 20 MS. NOELKE: And also I will say that
 21 the Rule 11 Agreement has a specific request. BFI,
 22 Giles and the City request that the proposal for a
 23 decision and any permit amendment issued by the TCEQ
 24 contained in provisions set out in the agreement as
 25 special conditions in the permit. So that request

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1 also is a part of the Rule 11.
 2 JUDGE NEWCHURCH: Okay. I don't recall
 3 any prefiled objections to these three exhibits. Am I
 4 overlooking something? Are there any additional
 5 objections that might be raised now for good cause?
 6 MR. RENBARGER: No.
 7 JUDGE NEWCHURCH: Then without
 8 objection, Austin-1, 2 and 3 are all admitted.
 9 (Exhibit City of Austin Nos. 1, 2 and 3
 10 admitted)
 11 MS. NOELKE: Thank you. Pass the
 12 witness.
 13 MR. GOSSELINK: Your Honor, before we
 14 begin cross-examination, I simply have a question.
 15 I've never experienced this before. Is it appropriate
 16 to be taking videotape of this proceeding? I looked
 17 over and saw that Mr. McAfee was taking a videotape of
 18 me.
 19 JUDGE NEWCHURCH: SOAH has recently
 20 adopted a rule, which admittedly I haven't dissected,
 21 that addresses recording of SOAH proceedings, and it
 22 specifically allows for that. It's usually
 23 contemplating, you know, broadcast media, television
 24 stations, but I don't know that there is any
 25 restriction on that.

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1 Also throughout the hearing, there's
 2 been a number of recorders around, audio recorders,
 3 and I haven't tried to closely watch that, but I've
 4 occasionally seen some. So, no, that is not
 5 objectionable. And, of course, this is an open
 6 hearing and it would fall within that.
 7 MR. GOSSELINK: I've got one of my best
 8 new ties on, so I'm all right with it.
 9 JUDGE NEWCHURCH: That's good. There is
 10 a specific provision in the SOAH rule -- and I haven't
 11 noticed anything that would make me want to invoke
 12 this -- but any recording must be non-disruptive.
 13 And I have to admit, I don't know where
 14 Mr. McAfee is this morning -- there he is. Hi,
 15 Mr. McAfee.
 16 And I don't see anything to indicate
 17 disruption. If somebody comes and plops in front of
 18 me and sticks a camera in my face and blocks my view
 19 of you, then we're going to have a different
 20 discussion.
 21 Okay. So 1 through 3 are admitted.
 22 Mr. Carlson?
 23 MR. CARLSON: I have a procedural
 24 question --
 25 JUDGE NEWCHURCH: Yes, sir.

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1 MR. CARLSON: -- about the order of
 2 examinations now with the City of Austin, a little
 3 unique situation.
 4 JUDGE NEWCHURCH: That's where I was
 5 going to next. Okay. In view of the agreement, it
 6 appears to me that the parties most closely aligned
 7 with Austin are BFI and Giles. And I would be
 8 inclined to move in an order that starts with the two
 9 of you -- and we'll figure out the other folks as we
 10 go along -- and ends up with TJFA and Mr. Blackburn
 11 for the Northeast Neighbors.
 12 MR. CARLSON: Okay.
 13 JUDGE NEWCHURCH: So why don't we start
 14 with that. Mr. Carlson, do you have cross-
 15 examination?
 16 MR. CARLSON: I do, Your Honor.
 17 CROSS-EXAMINATION
 18 BY MR. CARLSON:
 19 Q Mr. Guernsey, my name is John Carlson. I
 20 represent the Applicant. Do you understand that?
 21 A Yes.
 22 Q And you and I have never met before, have we?
 23 A Not that I know of.
 24 Q Not that I know of, at least, either. You're
 25 employed by the City of Austin. Is that correct?

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1 A That's correct.
 2 Q And I understand that you work in the
 3 Neighborhood Planning & Zoning Department. Is that
 4 correct?
 5 A That's correct.
 6 Q And you are the Director of that department?
 7 A That's correct.
 8 Q And you've been employed by the City for
 9 almost 23 and a half years now. Right?
 10 A That's correct.
 11 Q And you've been doing zoning and land use
 12 types of stuff, work during that time period. Is that
 13 correct?
 14 A That's correct.
 15 Q The Sunset Farms, I believe there is
 16 evidence, started operations in 1982. Is that
 17 consistent with your understanding?
 18 A Generally, yes.
 19 Q Okay. Then the Sunset Farms Landfill has
 20 been in existing use for that particular property for
 21 the entirety of your professional career at the City
 22 of Austin. Is that correct?
 23 A That's correct.
 24 Q Now, I understand from your prefiled
 25 testimony that you have read the testimony, the

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1 prefiled testimony, of Mr. Worrall, Mr. Heimsath and
 2 Ms. Carter. Is that correct?
 3 A That's correct.
 4 Q The factual information contained in that
 5 prefiled testimony, you don't have any reason to
 6 believe that, for example, the description, the site,
 7 the location, the proximity to neighborhoods or
 8 schools or anything like that is incorrect, do you?
 9 A No.
 10 Q Let's talk a little bit about the Smart
 11 Growth Initiative. You're very familiar with that, I
 12 assume, aren't you, sir?
 13 A I am familiar with that.
 14 Q Does that fall under the umbrella of your
 15 particular department?
 16 A It falls and covers several departments at
 17 the City of Austin.
 18 Q Okay. Could you briefly describe how that
 19 Smart Growth Initiative fits in with the different
 20 city departments.
 21 A The Smart Growth initiative really talks
 22 about generally growth and development in the City of
 23 Austin. And generally what it says is that we have
 24 two areas, basically Drinking Water Protection Zone
 25 and Desired Development Zone. And it's in the Desired

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1 Development Zone that we would categorize it, we would
 2 like to have development or promote development --
 3 Q All right.
 4 A -- where we would like to grow.
 5 Q And my question was a little different, but I
 6 appreciate the explanation. What city departments are
 7 involved in looking after working with the Smart
 8 Growth Initiative?
 9 A It would be my department, Neighborhood
 10 Planning & Zoning, Watershed Protection and
 11 Development Review Department. There may be also the
 12 utilities like Austin Water utility, Austin Energy.
 13 Those are the general departments that would have an
 14 interest.
 15 Q Now, the Smart Growth Initiative is a plan.
 16 Correct?
 17 A It was part of City-adopted policy. It's
 18 been incorporated in the interim update to the City's
 19 comprehensive plan.
 20 Q Okay. It's a policy or plan, though; it's
 21 not enforceable in the way, for example, that a zoning
 22 ordinance would be enforceable. Correct?
 23 A That's correct. It would be more of a guide.
 24 Q All right. And it's a guide toward the long-
 25 term development of the City of Austin. Is that

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1 correct?
 2 A That's correct.
 3 Q Okay. And I believe you testified in the
 4 context of this plan or with this plan, there are two
 5 basic areas that have been delineated, the Drinking
 6 Water Protection zone. Correct?
 7 A That's correct.
 8 Q And that tends to be or is exclusively west
 9 of Mopac. Is that correct?
 10 A Generally that's correct.
 11 Q Okay. Maybe some exceptions. But to the
 12 extent there are exceptions, they just go a little bit
 13 to the east of Mopac. Right?
 14 A That's correct.
 15 Q And then there is the Desired Development
 16 Zone, sometimes called the DDZ. Is that correct?
 17 A That's correct.
 18 Q And that tends to run through the downtown
 19 area and east of Austin. Right?
 20 A That's correct.
 21 Q Okay. Now, one of the focuses of this plan
 22 is to direct growth in certain areas. Is that right?
 23 A That's correct.
 24 Q Okay. And as I understand the plan, there
 25 are certain areas that the City hopes the growth will

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1 be particularly focused toward under the plan. Is
 2 that right?
 3 A In that Desired Development Zone.
 4 Q But within the Desired Development Zone,
 5 there are favored areas for development or
 6 redevelopment. Correct?
 7 A I don't believe that actually specifically
 8 addresses certain areas within the Desired Development
 9 Zone over others. It may give incentives through our
 10 watershed ordinances that may make it easier to
 11 develop on some of those tracts.
 12 Q Let me ask it a little different way. The
 13 City's position is that there is an hierarchy of
 14 zones, that it prefers development or redevelopment to
 15 occur within the DDZ. Right?
 16 A Generally.
 17 Q Right. Downtown area?
 18 A Downtown area.
 19 Q Okay. Areas with significant opportunities
 20 for redevelopment such as the former Mueller Airport.
 21 Right?
 22 A That would be correct.
 23 Q Okay. Corridors and transit centers that are
 24 identified within the plan?
 25 A That's correct.

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1 Q Okay. Infill and redevelopment opportunities
 2 within the urban core. Is that right?
 3 A That's correct.
 4 Q Okay. And then tradition neighborhood
 5 district zones near destination parks. Is that right?
 6 A We don't have many of those.
 7 Q All right.
 8 MR. CARLSON: May I approach, Judge?
 9 JUDGE NEWCHURCH: Yes, sir.
 10 Q (BY MR. CARLSON) Mr. Guernsey, does the
 11 information about the Smart Growth Initiative, is that
 12 actually published on the City of Austin's website?
 13 A It is.
 14 MR. CARLSON: Let me have the court
 15 reporter, who will hand you this document after it's
 16 marked . . .
 17 What's next in order, 31 or 32?
 18 JUDGE NEWCHURCH: I have it as 31.
 19 MR. CARLSON: If you would mark that as
 20 31 and that as 32, please.
 21 (Exhibit BFI Nos. 31 and 32 marked)
 22 MR. BLACKBURN: Smart Growth is 31?
 23 MR. CARLSON: Yes, sir.
 24 Q (BY MR. CARLSON) Mr. Guernsey, do you have
 25 BFI-31 and BFI-32 in front of you?

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1 A Yes.
 2 Q Does BFI-31 appear to be a true and correct
 3 printout of a web page from the City of Austin?
 4 A Yes.
 5 Q Are you familiar with this particular page?
 6 A Yes, I've seen it before.
 7 Q All right. And BFI-31 references some .pdf
 8 maps. Correct?
 9 A That's correct.
 10 Q Okay. If you'll look at BFI-32, it's
 11 entitled "Austin Smart Growth Zones." Do you see
 12 that?
 13 A Yes.
 14 Q Is that one of the .pdf -- to your knowledge,
 15 is that one of the .pdf maps referenced in BFI-31?
 16 A That's correct.
 17 Q Okay. Now, I look at the bottom of BFI-32.
 18 It says "Draft - August 2004." Do you see that?
 19 A Yes.
 20 Q I didn't see anything that said final on the
 21 City of Austin's website. Is there anything that's
 22 been actually published as a final version on the
 23 website?
 24 A I'm not sure if there is a final version
 25 published on the website.

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1 Q Okay. To the best of your knowledge, does
 2 this draft that I pulled from the website reflect the
 3 current Austin Smart Growth Zone delineations?
 4 A It does.
 5 Q Okay. Now, you're familiar with the general
 6 location of the Sunset Farms Landfill?
 7 A Yes.
 8 Q Okay. It's west of Giles and south of Blue
 9 Goose. Right?
 10 A That's correct.
 11 Q Now, all of the streets on BFI-32 are not
 12 labeled. Are you familiar enough with that vicinity
 13 to identify where the Sunset Farms Landfill is?
 14 A Yes.
 15 Q Could you put an "X" -- it's in the -- I'm
 16 not very good with colors. I don't know what you
 17 would call this lighter yellow or vanilla color, but
 18 it's within that color. Isn't that correct?
 19 A Yes, kind of like very light yellow.
 20 Q Okay. In the key at the bottom, it's in the
 21 color at the very bottom of that column that says
 22 "Desired Development Zone." Is that right?
 23 A Yes.
 24 Q Okay. "Outside Full Purpose Jurisdiction"?
 25 A Yes. And the map scale is very large, so

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1 there's probably a portion of it that may actually be
 2 in the zoning jurisdiction of the City of Austin, yes.
 3 Q All right. And just for the benefit of the
 4 ladies and gentlemen that are here that are looking at
 5 this map, the Sunset Farms location would be roughly
 6 maybe a third of an inch to the west of the Highway
 7 290 marker right there on the mid-right part of the
 8 page. Is that correct?
 9 A That's correct.
 10 Q Would you put the letters "SF" and circle it
 11 where the Sunset Farms is in that light yellow color.
 12 A My initials may actually be larger in width
 13 than the site.
 14 Q Somebody gave you a Sharpie instead of a fine
 15 pen. All right. Okay. But the entirety of the
 16 Sunset Farms site is actually in that vanilla color
 17 we're talking about -- right? -- designated as outside
 18 the full purpose jurisdiction?
 19 A Full purpose jurisdiction.
 20 Q Is that correct?
 21 A That's correct.
 22 Q Now, are you also generally familiar with the
 23 location of the Texas Disposal System Landfill, sir?
 24 A No.
 25 Q You're not. Okay.

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1 MR. CARLSON: May I approach again,
 2 Judge?
 3 JUDGE NEWCHURCH: Yes, sir.
 4 MR. CARLSON: And I apologize. I have a
 5 few copies of this for the folks out here. It's a
 6 printout with "Contact Us" section from the Texas
 7 Disposal System Website. Let me show it to you.
 8 (Exhibit BFI Nos. 33 and 34 marked)
 9 MR. CARLSON: I made a
 10 misrepresentation. I do have extra copies of BFI-33.
 11 JUDGE NEWCHURCH: Is the aerial 34?
 12 MR. CARLSON: Yes.
 13 Q (BY MR. CARLSON) Mr. Guernsey, do you have
 14 BFI-33 and 34 in front of you?
 15 A I do.
 16 Q All right. BFI-33 is a printout or appears
 17 to be a printout from the Texas Disposal Systems
 18 website. Is that correct?
 19 A Yes.
 20 Q It has contact information?
 21 A Yes.
 22 Q And lists the main office as 12200 Carl Road
 23 in Creedmoor at zip code 78610. Is that correct?
 24 A That's what it lists.
 25 Q And there's some other information right

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1 below there that says "Texas Disposal Systems
 2 Landfill, 3016 FM 1327, Buda, Texas 78610." Correct?
 3 A Correct.
 4 Q All right. If you look at BFI-34, that's a
 5 document I've printed off from Google Earth. Are you
 6 familiar with the Google Earth program?
 7 A Yes.
 8 Q Have you used it before?
 9 A Yes.
 10 Q Have you been able to type in addresses and
 11 find overviews or aerial views of particular tracts of
 12 land?
 13 A Yes.
 14 Q Does it appear to you that 12200 Carl Road in
 15 Buda, Texas 78610, is represented in BFI-34?
 16 A It appears so.
 17 Q Okay. And to the upper left-hand corner,
 18 does that appear to you to be a landfill operation?
 19 A Yes.
 20 Q All right. To the south of that landfill is
 21 FM 1327. Right?
 22 A That's what it lists, yes.
 23 Q Okay. And then to the east is a road called
 24 Carl Road. Right?
 25 A Correct.

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1 Q So the landfill, at least according to
 2 BFI-34, appears to be to the northwest of the
 3 intersection of Carl Road and FM 37. Is that correct?
 4 A Correct.
 5 Q 1327. I may have misspoken.
 6 A 1327.
 7 Q All right. Would you go back to BFI-32,
 8 please, sir, the Smart Growth zone map.
 9 A Yes.
 10 Q If you look at the bottom of the map, the
 11 roads aren't labeled. Are you familiar with the roads
 12 in Southeast Travis County?
 13 A Not as much as I am on the northeast side.
 14 Q Okay. I put a couple of maps there maybe
 15 that might provide some reference. And if you need
 16 something, I have an Austin key map if those don't
 17 work.
 18 MR. RENBARGER: Are these exhibits,
 19 counsel? I'm sorry.
 20 MR. CARLSON: They're not. They're just
 21 general maps.
 22 Q (BY MR. CARLSON) And if you want, we can go
 23 a little -- maybe, Mr. Guernsey, you can just say what
 24 the maps that I've asked you to look at reflect.
 25 A Exhibit 32, specifically Austin Smart Growth

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1 Zones, and I'm looking at a map that was of 12200 Carl
 2 Road labeled "Yahoo Local Maps" at the top. And it
 3 shows the intersection of FM 1625 at 1327 and shows
 4 that intersection and also shows generally the
 5 intersection of 1327 and Interstate Highway 35 and
 6 also shows the Village of Creedmoor's general
 7 location. And the tract, I believe, which is in
 8 Exhibit A, or labeled as A for 12200 Carl Road being
 9 west of Creedmoor.
 10 Q All right. Let me ask you this so we can go
 11 through a little bit more of a lengthy exercise, but I
 12 hope to cut it short. Are you able, based on the
 13 general maps of the area, to identify, looking at the
 14 Austin Smart Growth Zones, BFI-32 exhibit, the
 15 location of the TDS facility?
 16 MR. BLACKBURN: Your Honor, I'm going to
 17 interpose an objection here. I mean, among other
 18 things, I'm not sure what relevancy this has. I
 19 understand TDS has been an issue in this case. I
 20 don't dispute that it is an issue in some respects.
 21 I don't think that this witness is --
 22 for one, you know, the testimony about TDS clearly has
 23 not been prepared. And I think, more importantly,
 24 Creedmoor is outside of Austin. So it seems to me
 25 that the relevancy is in question. And if I need to

7 (Pages 2063 to 2066)

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1 take the witness on voir dire and ask about Creedmoor,
 2 I'll be happy to. But it just seems to me that this
 3 is just too far.
 4 MR. CARLSON: I don't think it is. I
 5 think I'll be able to show very quickly that the TDS
 6 Landfill is in the Desired Development Zone. And
 7 Dr. Kier testified yesterday that he is working on a
 8 QA/QC for an expansion of the TDS Landfill.
 9 MR. RENBARGER: May I respond, Judge?
 10 JUDGE NEWCHURCH: And why is that
 11 relevant?
 12 MR. CARLSON: Well, I think it goes to
 13 the whole notion of what the City will allow or won't
 14 allow in terms of expansions, the number of landfills
 15 in here, what the City's overall policy is with
 16 landfill expansion and long-term landfill expansions.
 17 MR. BLACKBURN: But if it's not in the
 18 City -- may I take the witness on voir dire?
 19 JUDGE NEWCHURCH: You might not need to.
 20 I'm still having trouble -- TDS is -- I think TDS
 21 testimony concerning it has some relevancy because, as
 22 I understand it, you've been trying to attack the
 23 credibility of some of the witnesses who have a
 24 relationship with TDS, and you allege that there is a
 25 relation between TJFA and TDS.

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1 MR. CARLSON: Let me put it this way,
 2 Judge: This is one reason I was asking you about the
 3 order of exams, friendly versus cross, is I don't know
 4 what TJFA is going to ask in terms of whether or not
 5 development or the expansion of the Sunset Farms
 6 Landfill is inappropriate because of the desired
 7 development zone. I'll be happy to reapproach this if
 8 they raise that issue or if Mr. Blackburn raises that
 9 issue.
 10 JUDGE NEWCHURCH: Well, at some point we
 11 drift into a dispute of BFI versus TDS and who has got
 12 the best location, and that's not part of this case.
 13 And I think we've reached that point, so I'm going to
 14 sustain the relevancy objection.
 15 MR. BLACKBURN: Thank you, Your Honor.
 16 MR. CARLSON: All right.
 17 Q (BY MR. CARLSON) Just a couple more
 18 questions, Mr. Guernsey. Let's say that you continue
 19 to work for the City of Austin in your capacity for
 20 another 20 years. Okay? Congratulations! With this
 21 economy, we all might be doing the same thing 20 years
 22 from now. If this permit amendment for the Sunset
 23 Farms facility is not granted and you went out to the
 24 Sunset Farms, you would find a closed landfill. Is
 25 that correct?

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1 A From the information that I've read, it would
 2 appear that it would be closed by 2016 or so.
 3 Q All right. And if this permit amendment is
 4 granted, with the special conditions, and you go out
 5 to the Sunset Farms 20 years from now, there will be a
 6 closed landfill there. Is that correct?
 7 A That's correct.
 8 MR. CARLSON: I'll pass the witness.
 9 JUDGE NEWCHURCH: Mr. Terrill?
 10 MR. TERRILL: No questions.
 11 JUDGE NEWCHURCH: Let's see. Probably
 12 after that, Ms. Talley?
 13 MS. TALLEY: No questions.
 14 JUDGE NEWCHURCH: Ms. Mann?
 15 CROSS-EXAMINATION
 16 BY MS. MANN:
 17 Q Good morning.
 18 A Good morning.
 19 Q I'm Christina Mann. I'm with the Public
 20 Interest Counsel at TCEQ, and I have questions about
 21 some of your testimony. On Page 4 of your testimony,
 22 Line 5, you state that the application does not
 23 address the continued negative effects, and then you
 24 go on, created by the current landfill operations on
 25 the existing property -- I'm sorry -- existing and

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1 proposed residential -- I didn't mean to read this
 2 whole line -- civic land uses in the adjacent area.
 3 Do you see that testimony?
 4 A Yes.
 5 Q Okay. Can you describe some of what you
 6 would consider continued negative effects that you're
 7 referring to?
 8 A With regards to the operation of the
 9 landfill?
 10 Q Yes.
 11 A Well, generally landfill operations, aside
 12 from truck traffic, odors, you may hear noise of
 13 vehicles coming in, of hydraulics or -- I think OSHA
 14 equipment makes rather high decibels that you can hear
 15 quite a ways -- lighting operations of headlights, of
 16 where the area might be filled, those are some of the
 17 things. Odors certainly, especially during the summer
 18 months.
 19 Q Okay. And how do the -- and then later you
 20 state that the special conditions contained -- well,
 21 you agree that the special conditions contained in
 22 Exhibit 3, which is by my understanding the Rule 11
 23 and its connected attached agreement, you state that
 24 they will mitigate your concerns regarding land use
 25 capability. You agree with that. Do you see that?

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1 A Yes.
 2 Q Line 21. How do the Rule 11 provisions
 3 address some of the continued negative effects that
 4 you just mentioned?
 5 A They provide cover which may dissipate some
 6 of the odor issues. Also there were limitations that
 7 were agreed to as far as the truck traffic where the
 8 vehicles would be coming and going to. And probably
 9 the largest thing is, it provides certainty of closure
 10 so that at some point in the future, this agreement
 11 that it would not be used as a landfill or a waste
 12 transfer station on this area.
 13 Q But is it fair to say that the Rule 11
 14 Agreement and its attached provisions don't address
 15 all of the continued negative effects that you just
 16 described?
 17 A No. You would still hear probably the noise
 18 that may operate from some of the equipment, but I
 19 feel overall it would mitigate the issues.
 20 Q You also testify that it's anticipated -- at
 21 Line 9 through 11 -- that basically more houses are
 22 going to be built in the area surrounding the
 23 landfill. Do you see that testimony?
 24 A Yes.
 25 Q Okay. Do you have an opinion on whether or

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1 not increased residential -- because residential
 2 development has thrived around the landfill, whether
 3 or not that is indicative of compatibility with the
 4 surrounding land use?
 5 A Generally I would say that landfills --
 6 operating landfill and single-family residential or
 7 any residential would not be compatible.
 8 Q Okay. You stated that a date certain -- and
 9 the date we're talking about is November 1, 2015.
 10 Correct?
 11 A Yes.
 12 Q -- that that date certain is one of the
 13 biggest and one of the most important provisions that
 14 helps mitigate the land use compatibility issues. Is
 15 that fair?
 16 A Yes.
 17 Q Would any date certain do or is it because
 18 it's in the relative near future?
 19 A I think it's because it's in the relative
 20 near future. You know, there are tracts of land that
 21 might be developed nearby, that if the date was pushed
 22 out further, that the properties to be developed may
 23 be pushed off as well.
 24 MS. MANN: I have no further questions.
 25 I pass the witness. Thank you.

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1 JUDGE NEWCHURCH: Mr. Shepherd?
 2 MR. SHEPHERD: No questions.
 3 JUDGE NEWCHURCH: Before we proceed,
 4 Ms. Noelke, I have a question for you. Am I correct
 5 in understanding that at this point, the City of
 6 Austin does not support the issuance of the permit in
 7 accord- -- the amended permit in accordance with the
 8 Rule 11 Agreement but, instead, does not oppose the
 9 issuance of the amended permit in accordance with the
 10 Rule 11 Agreement? In other words, you're not for it,
 11 you're just not necessarily against it?
 12 MS. NOELKE: I think that from a
 13 practical standpoint, your understanding is correct.
 14 The City of Austin is not taking a position.
 15 JUDGE NEWCHURCH: Right. You're not
 16 opposing it?
 17 MS. NOELKE: Is not taking a position --
 18 JUDGE NEWCHURCH: So you're not for it
 19 or against it?
 20 MS. NOELKE: We are not taking a
 21 position for it and we are limiting our participation
 22 to testimony and evidence in support of the agreement.
 23 JUDGE NEWCHURCH: Okay. The reason I
 24 bring this up is, it might -- I've tried to, as I've
 25 explained several times, set up an order of cross-

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1 examination which does not put someone in the position
 2 where they go early, someone else brings something
 3 else up and they're not having an opportunity to
 4 respond to that. And I think that's worked pretty
 5 well so far.
 6 And usually the fix for that is, if the
 7 party who has called the witness thinks that something
 8 needs to be followed up on, the party who calls the
 9 witness has an interest in making sure that that point
 10 is addressed, which reopens another round of
 11 cross-examination.
 12 And I bring all this up because I want
 13 to make sure that every party, through their cross-
 14 examination, gets to thoroughly explore the issues
 15 that are raised, which might mean that I will give BFI
 16 an opportunity to conduct additional cross. If I do,
 17 we'll go back again to TJFA and Northeast, and we'll
 18 go round and round till we make sure that everybody
 19 has got a chance to put on the evidence that they need
 20 to put on.
 21 MR. BLACKBURN: I have no opposition to
 22 that.
 23 JUDGE NEWCHURCH: Okay. What counts is
 24 that the evidence gets in, not creating procedural
 25 roadblocks that are artificial. And those of you that

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1 have been stung by those in the past --
 2 MR. BLACKBURN: That's why I'm
 3 supportive.
 4 JUDGE NEWCHURCH: Right. Okay. So
 5 given that, Mr. Renbarger, I think you're next.
 6 MR. RENBARGER: Yes, sir.
 7 CROSS-EXAMINATION
 8 BY MR. RENBARGER:
 9 Q Good morning, Mr. Guernsey.
 10 A Good morning.
 11 Q I'm going to expose my lack of social life,
 12 but I think I've seen you on TV quite a few times on
 13 City of Austin's access, channel, haven't I?
 14 A That's correct.
 15 Q Okay. Well, welcome aboard.
 16 JUDGE NEWCHURCH: Did you want his
 17 autograph?
 18 (Laughter)
 19 MR. RENBARGER: It depends on how he
 20 testifies.
 21 Q (BY MR. RENBARGER) Mr. Guernsey, I believe
 22 you testified a few moments ago that you had reviewed
 23 the prefiled testimony from BFI's expert witnesses,
 24 John Worrall, Charles Heimsath and Donna Carter.
 25 Correct?

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1 A That's correct.
 2 Q When did you do that?
 3 A I reviewed it about three or four -- well,
 4 three or four months ago. And then last night council
 5 ended early, so I had an opportunity to just kind of
 6 look back over the documents again.
 7 Q Okay. You have not been present during any
 8 of this contested case hearing up until today. Is
 9 that right?
 10 A I was here briefly for about an hour, I think
 11 it was Wednesday just before noon. I think it was the
 12 Giles property owner.
 13 Q Okay. But you weren't present during any of
 14 the live testimony of the witnesses Worrall, Heimsath
 15 or Carter, were you?
 16 A No.
 17 Q And are you aware that there may have been
 18 some changes to the prefiled testimony that was
 19 originally filed on behalf of Mr. Worrall and
 20 Mr. Heimsath?
 21 A No, I guess not.
 22 Q You don't recall the last dates that
 23 information has been provided you which may have
 24 included any amendments or changes to that testimony?
 25 A I guess not.

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1 Q If you could look at City of Austin Exhibit
 2 1, I believe, which is your prefiled testimony,
 3 hopefully in front of you.
 4 A Yes.
 5 Q On Page 3 of your testimony, if I could
 6 direct you down to about Line 17, please.
 7 A Yes.
 8 Q And I believe in response to a question about
 9 stating your remaining concerns, I believe your answer
 10 begins at Line 17. If you would not mind, please,
 11 just reading that aloud for the record.
 12 A "To lessen the impact of the existing and
 13 proposed residential uses and adjacent civic uses, I
 14 would suggest that the operation be limited to day
 15 light hours, truck traffic be limited to Giles Road,
 16 and the closure date for the land fill be moved up or
 17 at least be limited to a specific date in the near
 18 future to provide certainty to the adjacent property
 19 owners."
 20 Q Is that still your recommendation today?
 21 A Yes.
 22 Q Are you aware of anything in the Rule 11
 23 Agreement or the agreement between the City, BFI and
 24 Giles that restricts in any way the operations of the
 25 landfill to daylight hours?

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1 A No.
 2 Q Well, I believe there were some traffic
 3 provisions included in that agreement, based on your
 4 previous testimony. Correct?
 5 A Yes.
 6 Q Could you outline those very briefly for us?
 7 A It would primarily keep the truck traffic off
 8 of Blue Goose. Primarily access would be along Giles
 9 Road, unless there was certain deliveries that were
 10 necessary to pick up and use Blue Goose for access to
 11 the immediate area.
 12 Q And I believe your recommendation also
 13 included a closure date for the landfill to be moved
 14 up or at least be limited to a specific date in the
 15 near future. Is it your testimony that you think the
 16 agreement between the City, BFI and Giles accomplishes
 17 that recommendation?
 18 A I think the date of 2015 would mitigate that
 19 certainly if it was moved up, I think it would be
 20 better.
 21 Q By saying "better," you're saying it may not
 22 necessarily completely eliminate that concern but if
 23 just mitigates it. Is that a fair characterization of
 24 your testimony?
 25 A That's correct.

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1 Q Beginning at the top of Page 4 of your
2 testimony, I believe you make reference to additional
3 changes suggested by the City in a proposed
4 restrictive covenant. Do you see that testimony?
5 A Yes.
6 Q When you're talking about a proposed
7 restrictive covenant, what are you referring to there
8 in your testimony?
9 A There was an agreement, which is the Exhibit
10 3, I think, that would take the form of a restrictive
11 covenant later. It talked about covering use of
12 grasses, discussions along that manner.
13 Q So if I understand your testimony, you
14 consider basically the agreement that is identified as
15 City of Austin Exhibit 3 as a restrictive covenant.
16 Is that your testimony?
17 A That's right. It would evolve into a
18 restrictive covenant that would be offered to the
19 City.
20 Q Okay. Have you seen any document that is
21 identified or titled "restrictive covenant" with
22 respect to the agreement reached between the City of
23 Austin, BFI and Giles Holdings?
24 A I have not seen a restrictive covenant
25 exhibit. I'm only seen this --

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1 Q Agreement?
2 A -- agreement.
3 Q Okay. You testified a little bit ago about
4 the Desired Development Zone --
5 A Yes.
6 Q -- as being a component of the Smart Growth
7 Initiative?
8 A Yes.
9 Q When did the City of Austin adopt the Desired
10 Development Zone goal or guidance, if you will, as a
11 part of the Smart Growth Initiative?
12 A I believe it was back in the 1990s.
13 Q And is it your understanding that it is still
14 in place as of this date?
15 A Yes.
16 Q Are you aware, Mr. Guernsey, that CAPCOG
17 issued a conditional letter of approval of its
18 compliance with its solid waste plan, regional solid
19 waste plan?
20 A I recall seeing some letter from CAPCOG. I
21 don't know the specifics of it.
22 Q You don't recall the specifics?
23 A That's correct.
24 Q Are you aware that the Travis County
25 government also has weighed in on this particular

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1 application?
2 A I believe they do have a concern regarding
3 this, yes.
4 Q And are you aware that Travis County, in
5 providing some written comments, has even indicated
6 that it believes that the landfill is incompatible
7 land use?
8 A Yes, that's my understanding.
9 Q What is your understanding, Mr. Guernsey, on
10 how the City of Austin may be able to enforce the
11 agreement as between the City, BFI and Giles Holdings?
12 A Partly through the TCEQ, that these items
13 would be put into an application, and that would be
14 enforceable by the TCEQ.
15 Q Do you consider the agreement enforceable by
16 the City of Austin?
17 A The restrictive covenant and those lines
18 would be enforceable by the City as a party to that
19 restricted covenant.
20 Q Would anyone, for example, in Code
21 Enforcement or in the Watershed Protection Division,
22 the Solid Waste Division, be able to enforce the terms
23 of the agreement, in your judgment?
24 A I believe --
25 MR. CARLSON: Objection. Calls for a

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1 legal conclusion.
2 JUDGE NEWCHURCH: Mr. Renbarger?
3 Q (BY MR. RENBARGER) Mr. Guernsey, I'm not
4 asking you that question as a lawyer. You're not a
5 lawyer, are you?
6 A I am not.
7 Q Okay. I'm asking you as an official of the
8 City of Austin and familiar with the planning and
9 zoning issues and land development issues, how those
10 things may be enforced, if you know?
11 A It's typical for a public restrictive
12 covenant, the City as a party, to have the ability of
13 enforcement.
14 Q And if it is a restrictive covenant that is
15 being enforced, is that being enforced through one of
16 the departments of the City of Austin or would it be
17 through the Legal Department, if you know?
18 A It may be a combination of those.
19 Q Is it your understanding that should BFI be
20 granted this permit amendment, that it will still be
21 required to obtain additional permits from the City of
22 Austin?
23 A That's my understanding, yes.
24 Q Will your offices or department weigh in on
25 any of those reviews?

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1 A Usually they take the form of what's called a
2 site development permit. My office does not do
3 reviews of site development permit applications.
4 We'll handle zoning if an issue comes up along that
5 line, but it's usually done by our Watershed
6 Protection Development department, with input from
7 other departments.
8 MR. RENBARGER: Pass the witness.
9 JUDGE NEWCHURCH: Mr. Blackburn.
10 CROSS-EXAMINATION
11 BY MR. BLACKBURN:
12 Q Good morning, Mr. Guernsey. I'm Jim
13 Blackburn, and I represent the Northeast Neighbors
14 Coalition. I would like you to pick up BFI-32,
15 please. It's the Austin Smart Growth zone map. Do
16 you see that?
17 A Yes.
18 Q Now, I believe you have marked "SF" for
19 Sunset Farms on that map. Is that correct?
20 A That's correct.
21 Q And is there a green circle immediately to
22 the west of the "SF" designation?
23 A Yes, there is a green circle.
24 Q What does that green circle stand for?
25 A It's a designation of park or traditional

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1 neighborhood district area.
2 Q And what exactly does that mean in the
3 context of this location?
4 A It would be seen as an area that might be
5 desirable in the future to have as a destination in
6 the City of Austin for recreational activities, also
7 to have housing, mixed businesses to be located in
8 that area.
9 Q So this is an area that has been identified
10 on your growth zone map as one of the highlighted
11 areas. Correct?
12 A Yes.
13 Q Now, in the right-hand side of the green
14 circle, you can see a road coming up from 290, and
15 then it sort of goes back to the right and then
16 continues further to the right. Could you identify
17 those roads?
18 A One is Giles, and that would be the road to
19 the right of the SF. And then Harris Branch, I
20 believe, goes through from the pumpkin-colored area, I
21 guess goes further to the north.
22 Q And then is that Blue Goose that cuts across
23 right on top of the SF?
24 A Going east/west or left to right, yes, that
25 would be Blue Goose.

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1 Q Right. And then moving into the green zone,
2 is that still Blue Goose?
3 A I think it turns into Cameron when you get
4 far enough over. In some maps it may also show this
5 road as Braker as a designation.
6 Q And then there is a blue line coming south
7 from Cameron. Is that Springdale?
8 A I believe it is, yes.
9 Q Now, are you aware if any of the portions of
10 this green circle are within one mile of the landfill?
11 A It's difficult to tell from this map. I know
12 the general depth of the BFI site is about a mile, so
13 this may be within the mile, yes.
14 Q And are you familiar, for example, with the
15 location of the Barr Mansion?
16 A Yes. It looks like this property is located
17 within the boundaries of -- the Barr Mansion is
18 located within the boundaries of that circle.
19 Q Are you familiar with a piece of property
20 owned by a citizen named John Wilkins or that he is
21 the trustee of?
22 A The name is not familiar to me.
23 Q Okay. Now, my understanding is, you're in
24 charge of sort of the larger scale land use issues in
25 the City of Austin. Is that correct?

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1 A That would be correct.
2 Q And so by "larger scale," what I'm referring
3 to at least is sort of in the long-term where the
4 City's growth will be directed or not and sort of what
5 the City tries to do in term of directing land use and
6 development patterns. Would that be fair?
7 A That would be fair.
8 Q And is it fair to say that in the past, say
9 over the last 20 years or so, the development of the
10 City of Austin has been more toward the west, whether
11 it be the northwest or the southwest or the pure west?
12 A I think generally the growth in Austin has
13 been towards the suburb areas. It would be northeast,
14 southwest, Oak Hill, northwest, more recently probably
15 southeast.
16 Q Okay. Now, is it fair to say that the City
17 of Austin would like to discourage development in the
18 green area on BFI-32 and toward the east?
19 A That would be correct.
20 Q Why is that?
21 A Generally the area that's in green, which is
22 our Drinking Water Protection Zone, are characterized
23 by steep slopes. The flood plains are more narrow.
24 It's more difficult to provide utility service because
25 of the grades. The areas to the east are flatter;

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1 they're easier to develop. Lands are typically more
2 compatible for putting in utility lines. It's easier
3 to provide water, emergency services, because of the
4 flatter terrain.
5 Q And so would it be fair to say within the
6 area to the east that you are generally trying to
7 encourage growth toward, the green circles are
8 specific target areas for truth to the east?
9 A Yes.
10 Q And one of those specific target areas is
11 within approximately one mile of the Sunset Farms
12 Landfill. Correct?
13 A Yes. As depicted, yes.
14 Q Right. And if I represent to you there is
15 testimony, for example, the Barr Mansion is about a
16 mile away, would you disagree with that?
17 A It appears, from the scale of this map, that
18 would be correct.
19 Q And what is the time frame that you're hoping
20 for development within the green circles?
21 A There is not a specific time because this was
22 only looked at as a guide. A lot would depend on
23 whether utilities are available in this area. Most
24 likely they would be the main driver of whether or not
25 these tracts would be developed.

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1 Q Well, would these green areas be preferential
2 areas for utility development by the City of Austin?
3 A They may or they may not, depending on what
4 infrastructure is nearby and what the property owner
5 may be willing to invest to bring the utilities to
6 their property.
7 Q But if the owner were willing to work with
8 you, this is an area the City would prioritize. Would
9 that be fair?
10 A Yes.
11 Q Now, is it your testimony that as a general
12 proposition, a landfill is not compatible with single-
13 family residential development?
14 A An operating landfill is not compatible with
15 single-family residential.
16 Q Now I'm going to show you a -- well, let me
17 ask you this: What are the aspects of an operating
18 landfill that you feel are not compatible with
19 residential development?
20 A Truck traffic, noise, lighting, odors.
21 Q Okay. Now, I'm going to show you an
22 exhibit -- and for everyone else, this is from -- this
23 is Exhibit ER-4, Ms. Remmert's Exhibit 4, and I'm
24 going to show NNC3247 as the Bates number on the
25 photograph. And I'm going to ask you to take a look

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1 at the photograph that you have in front of you that I
2 have identified for purposes of the record. And is
3 that NNC -- is it 3247 down in the bottom right hand?
4 A 3247 are the last four digits on the
5 photograph.
6 Q Okay. And I will represent to you that that
7 is a photograph that has been entered into evidence in
8 this proceeding by Evelyn Remmert who is one of the
9 citizen witnesses. Did you have the opportunity to
10 review Ms. Remmert's testimony?
11 A No.
12 Q So this is the first time that you've seen
13 that photograph?
14 A Yes.
15 Q Now, is a landfill that appears as that
16 landfill in that photograph appears compatible with
17 residential development?
18 A I would not want to live next door to it.
19 Q And from a land use standpoint, how do you
20 assess whether a land use is compatible or not? Is it
21 sort of that test that if you don't want to live next
22 to it, it's not an acceptable land use?
23 A Well, you're looking at distances from the
24 actual operation. And where the residential property
25 is, it may take in the consideration of screening, it

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1 may take in the hours of operation. These are all
2 different things that could be looked at. How the
3 landfills operate would probably have an impact on how
4 compatible that use may be.
5 Q And is it your testimony that if it's not
6 screened, if it is apparently -- and I'll make the
7 representation to you that's from a road that is used
8 in the neighborhood; you know, to transit to and from
9 the neighborhood. The screening is what you see. Is
10 that compatible?
11 A Well, the photograph appears to be taken at a
12 time when the trees are not in leaf form.
13 Q That would be winter?
14 A That would be winter. You could probably
15 provide more landscaping along the frontage that would
16 somewhat dissipate that view.
17 Q Is landscaping along the frontage included in
18 the Rule 11 Agreement?
19 A As far as I know, that there is some
20 landscaping that is provided within that agreement.
21 Q Do you know if it is on the frontage of
22 roads?
23 A I believe that it is along the area that is
24 furthest to the north and I guess be northeast, in the
25 corner, there would be landscaping, and then there

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1 would be use of native grasses along the slopes.
 2 Q I'm going to show you what has been
 3 identified as Best Exhibit No. 7. And if there is an
 4 NNC number on it, I can't see it. But it's the first
 5 of a set of three photographs that I'm going to ask
 6 you to look at and ask you if you have seen that
 7 photograph previously?
 8 A No, I have not.
 9 Q And again, this is evidence that has been put
 10 into the record in this proceeding of the -- at least
 11 a photograph that was taken by the residents at a
 12 particular point in time. And my question again to
 13 you is, are the scenes depicted in that photograph a
 14 compatible land use with single-family residential?
 15 A And I guess I need clarification. Are you
 16 saying the residences next door to this?
 17 Q I'm saying the residences in the vicinity.
 18 I'm not going to represent to you it's next door.
 19 A Okay. Well, if --
 20 MR. TERRILL: Objection. Vague.
 21 JUDGE NEWCHURCH: He objects that the
 22 question is vague.
 23 MR. BLACKBURN: I'm sorry?
 24 JUDGE NEWCHURCH: Mr. -- sorry. Drew a
 25 blank.

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1 MR. TERRILL: Terrill.
 2 JUDGE NEWCHURCH: Terrill. Sorry.
 3 Excuse me. We've only been here nine days.
 4 He objects that it's vague, that
 5 question is vague.
 6 MR. TERRILL: I'll elaborate. How can
 7 the City witness testify about whether something does
 8 or doesn't conform, without knowing exactly where it
 9 is, and saying that something is in the vicinity is
 10 just not specific enough to get the type of answer
 11 that's requested.
 12 MR. BLACKBURN: Well, I think that's up
 13 to the witness.
 14 JUDGE NEWCHURCH: I'm going to sustain
 15 the objection. You can be more specific in your
 16 Question if you would like.
 17 Q (BY MR. BLACKBURN) If you lived in the
 18 Harris Branch subdivision and drove by the scene
 19 depicted in the Best exhibit, for the Best-7, I
 20 believe, is that a factor that would enter into your
 21 concerns about land use compatibility?
 22 A Driving by it or living by it?
 23 Q Both.
 24 A Certainly if this was next door to a property
 25 that was used for residential use, it would not be

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1 compatible. If it is I guess a matter of driving to
 2 it, I guess it would depend on how far away it is from
 3 the actual residences we're talking about.
 4 Q Now, would you have any problem with adding a
 5 condition to this permit that required the landfill to
 6 be closed at night?
 7 A Well, as I understand our agreement that
 8 we've entered into would not specify it being closed
 9 at night.
 10 Q And I'm just saying, would you have any
 11 objection?
 12 A I personally would not have an objection, no.
 13 Q And, in fact, would you recommend such a
 14 closure requirement?
 15 A In my testimony I said it would be better if
 16 it was closed in the evening.
 17 Q It would make it more compatible, would it
 18 not, with adjacent residential in Harris Branch?
 19 A Yes.
 20 Q Now, you say in your testimony that you
 21 conducted field trips to the site. Is that correct?
 22 A I went out to go -- drive around the area,
 23 yes. I drove around Giles and down Blue Goose, down
 24 Harris Branch, last year.
 25 Q Did you see the undeveloped area that was,

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1 say, south of Blue Goose, to the west of the landfill,
 2 back toward the Barr Mansion?
 3 A Yes.
 4 Q Would it be fair to say that that would be
 5 areas that would be prime for development but for the
 6 presence of the landfill?
 7 A I'm not sure what the utility infrastructure
 8 there is, and there may be some concerns that some
 9 flood plains -- the roadway network is probably not as
 10 well developed as it is in Harris Branch.
 11 Q If the landowner were willing to participate
 12 on utilities, however, would that then put this into a
 13 fairly developable category, based on kind of your
 14 understanding of growth patterns?
 15 MR. CARLSON: Objection. Calls for
 16 speculation.
 17 JUDGE NEWCHURCH: Mr. Blackburn?
 18 MR. BLACKBURN: Well, I mean, land use
 19 in the future of this area is a speculative type of
 20 issue. He just happens to be an expert in what the
 21 future development potential of areas is. I mean, I
 22 think it's an expertise that involves future
 23 projections. So there is certainly an element of
 24 speculation in it but not in a legal sense, and that's
 25 his expertise.

14 (Pages 2091 to 2094)

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1 JUDGE NEWCHURCH: I agree. It's an area
 2 that he might have an expert opinion in, so objection
 3 overruled.
 4 A The area that I recall that's south of Blue
 5 Goose, west of the BFI property, is probably not as
 6 desirable as the northern side. But, yes, it's an
 7 area that if we could get utilities to it and roadway
 8 network was improved, it could be developed for some
 9 future use, yes.
 10 Q (BY MR. BLACKBURN) And, in fact, even
 11 portions of that area are within your green circle.
 12 Right?
 13 A Further to the west.
 14 Q Now, did you write your testimony -- did you
 15 write any part of your testimony before the Rule 11
 16 Agreement was put together?
 17 A Everyone keeps referring to the Rule 11
 18 Agreement. I'll just referring to the agreement. I
 19 was handed a copy of the agreement by my attorney.
 20 And so I had that when I was -- yes, when I was
 21 writing my prefiled testimony, I did have that.
 22 Q Did you participate in the negotiation of the
 23 agreement?
 24 A No.
 25 Q Was your input solicited to the agreement?

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1 A I was asked general questions about
 2 compatibility, but I did not participate in the
 3 agreement.
 4 Q Were you directed as to what your testimony
 5 would be after the agreement was signed?
 6 A No. I was merely asked to testify regarding
 7 these issues of land use and the landfill.
 8 Q And were you asked to testify that the
 9 Rule 11 Agreement took care of it?
 10 A I was asked would these mitigate the
 11 conditions, and I think that's what I stated in my
 12 prefiled testimony.
 13 Q Now, does "mitigate" mean that it is
 14 compatible?
 15 A Not necessarily.
 16 Q It means it just has less impact than it
 17 would have had otherwise. Correct?
 18 A That's correct.
 19 Q So it is not your testimony that it is
 20 compatible. Correct?
 21 A I would say that the landfill is not
 22 compatible with residential, correct.
 23 MR. BLACKBURN: Thank you.
 24 Pass the witness.
 25 JUDGE NEWCHURCH: Mr. Renbarger?

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1 MR. RENBARGER: I preceded
 2 Mr. Blackburn.
 3 JUDGE NEWCHURCH: Oh, you did. I'm
 4 sorry. Excuse me.
 5 Is there further cross-examination
 6 before we go to redirect? Anybody?
 7 MR. CARLSON: There is.
 8 JUDGE NEWCHURCH: Mr. Carlson, go ahead.
 9 FURTHER CROSS-EXAMINATION
 10 BY MR. CARLSON:
 11 Q Mr. Guernsey, you're not here to testify
 12 about compliance of the landfill or the application
 13 with the land use compatibility criteria of the TCEQ,
 14 are you?
 15 A No.
 16 Q You would defer to TCEQ and its consideration
 17 of the land use compatibility issues?
 18 A With regards to their permitting powers
 19 procedures and state laws, that would be correct.
 20 Q All right. The City of Austin has
 21 comprehensive zoning. Correct?
 22 A That's correct.
 23 Q Okay. The landfill, the Sunset Farms
 24 Landfill, with the exception of a very small strip on
 25 the Giles Lane side, is not zoned. Is that correct?

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1 A That's correct.
 2 Q And, in fact, it's not even located within
 3 the City of Austin city limits. Right?
 4 A That's correct.
 5 Q Okay. And the part that is zoned is just a
 6 few acres right along Giles Lane. Right?
 7 A That's correct.
 8 Q And it's zoned as a DM?
 9 A DR.
 10 Q DR.
 11 A Development reserve.
 12 Q The DR zoning designation, that would not
 13 restrict the development, the vertical expansion of
 14 the landfill. Is that correct?
 15 A Well, the vertical expansion of the landfill
 16 I believe is outside of the City of Austin city
 17 limits.
 18 Q That's what I was asking. So that
 19 designation has no bearing or effect on the proposed
 20 vertical expansion of the landfill. Correct?
 21 A You know, the City of Austin does not have a
 22 land use zoning authority.
 23 Q Okay. In fact, the City of Austin doesn't
 24 have any sort of, per se, prohibition on the existence
 25 of landfills either within the city limits or within

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1 its extraterritorial jurisdiction. Is that correct?
 2 A Inside the City of Austin's zoning
 3 jurisdiction?
 4 Q Is there a, per se, prohibition?
 5 A I don't believe there is a, per se,
 6 prohibition throughout the City of Austin.
 7 Q And that would include the ETJ. Right?
 8 A The ETJ is an area that we do not have zoning
 9 jurisdiction, and so there would be no zoning
 10 prohibition outside of our city limit line.
 11 Q Okay. So it's fair to say that there is no,
 12 per se, prohibition with respect to the City of Austin
 13 for the proposed expansion of this vertical --
 14 A Under our zoning regulations, that would be
 15 correct.
 16 Q There is no, per se, prohibition by the City
 17 of Austin for the proposed vertical expansion. Is
 18 that correct?
 19 A In the context of zoning?
 20 Q Yes, sir.
 21 A That's correct.
 22 Q Now, let's go back through the timeline here
 23 a little bit. I asked you a question a little bit
 24 earlier about your understanding of when the Sunset
 25 Farms Landfill was first permitted. Do you recall

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1 that?
 2 A Yes.
 3 Q Are you familiar with the old Travis County
 4 Landfill?
 5 A I believe it's further to the south.
 6 Q Right. And that's an historical landfill
 7 that was developed in the fifties and sixties. Is
 8 that correct?
 9 A I'm not familiar enough to know. I just know
 10 it's not open right now.
 11 Q Substantially predates Sunset Farms. Is that
 12 fair to say?
 13 A That's my understanding.
 14 Q Okay. And then the Austin Community
 15 Landfill, are you familiar with the location of that
 16 landfill?
 17 A Is that the Waste Management?
 18 Q Yes, sir.
 19 A It's my understanding that's next door.
 20 Q Right. And that landfill predates Sunset
 21 Farms as well. Correct?
 22 A I believe so.
 23 Q Okay. And then do you have any reason to
 24 dispute that Sunset Farms was first permitted and
 25 opened for operations in 1982?

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1 A No. I believe I've actually read that in
 2 some of the prefiled testimony.
 3 Q Okay. So, in fact, those landfills are
 4 situated side-by-side-by-side. Is that correct?
 5 A That's correct.
 6 Q Okay. And so is it fair to say that there
 7 have been landfill operations occurring in that area
 8 just slightly to the west of Giles Lane for over 50
 9 years?
 10 A Yes, a substantial amount of time. I'm not
 11 sure it goes back 50 years.
 12 Q Almost -- 50 years is a fair estimate.
 13 Correct?
 14 A Yes.
 15 Q Okay. So is it fair to say that's an
 16 historical use of that particular area of Travis
 17 County?
 18 A Yes.
 19 Q Okay. Now, are you aware that BFI filed
 20 what's called a modification, a Subtitle D
 21 modification in the 1990s?
 22 A I believe there was something that was filed.
 23 I didn't read the specifics about that in the prefiled
 24 testimony.
 25 Q Okay. You're generally aware that BFI filed

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1 a modification to comply with the new Subtitle D
 2 regulations in the nineties. Right?
 3 A Very generally, yes.
 4 Q Okay. Are you also aware that BFI estimated
 5 an additional site life that would take it to 2016?
 6 A I know if it was 2016 or 2018 or something,
 7 yes.
 8 Q All right. But BFI, to your knowledge, was
 9 on record saying that this site, at least in its best
 10 estimate, was going to be in and around -- actually
 11 where it was at through 2018. Correct?
 12 A Yes, based on the prefiled testimony.
 13 Q That's your understanding. Right?
 14 A That's my understanding.
 15 Q And BFI -- it's your understanding, based on
 16 the agreement that BFI has entered into with and Giles
 17 and the City of Austin that, in fact, it's agreeing to
 18 cease accepting waste on or before November 1, 2015.
 19 Right?
 20 A That's correct.
 21 Q So that's three years earlier than the
 22 estimate from the mid-1990s. Isn't that correct?
 23 A Yes.
 24 Q Okay. Anybody that was generally familiar
 25 with the landfill and city development, would it have

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1 been a surprise to them that the landfill was
2 estimated to be in existence through the mid-20 teens?
3 A I can't speak for everyone. I mean, I think
4 it was general knowledge that it was there.
5 Q Okay. First of all, it was no surprise that
6 the landfills are there. Right?
7 A That's correct.
8 Q Okay. You've driven around that site now for
9 20 years in the capacity of your job. Right?
10 A On and off, yes.
11 Q Okay. No secret that there are some
12 landfills there. Right?
13 A Correct.
14 Q Okay. And for folks who do development, the
15 folks that you know that do development in Travis
16 County and the City of Austin, the existence of those
17 landfills really wouldn't be a surprise to them.
18 Correct?
19 A I don't believe so.
20 Q Okay. Mr. Renbarger asked you some questions
21 about some changes to Mr. Worrall's and Mr. Heimsath's
22 testimony. Do you recall those questions?
23 A Yes.
24 Q Did you get the sense from that question that
25 there were some sort of substantially changes to that

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1 prefiled testimony?
2 A I'm not sure from his questions.
3 Q Okay.
4 A I'm sure, you know, what I saw of the
5 prefiled testimony, there were some updates of
6 information. That was all.
7 Q Okay. Did you take it that there were
8 substantially, they were substantively changing their
9 testimony as a result of any modifications or
10 revisions or clarifications that have been made here?
11 A No.
12 Q Okay. You did read Mr. Heimsath's testimony?
13 A Charles Heimsath?
14 Q Yes.
15 A Yes.
16 Q You're familiar with Mr. Heimsath?
17 A Yes.
18 Q He's a pretty prominent figure in the real
19 estate industry business in Austin?
20 A I would say so, yes.
21 Q Okay. He's well-recognized. Right?
22 A Yes.
23 Q And he's considered an expert in matters
24 pertaining to real estate evaluations. Is that fair
25 to say?

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1 A Yes.
2 Q He's in the know in the City of Austin as far
3 as development?
4 A The City of Austin has employed his services
5 in the past.
6 Q All right. He knows what's going on, doesn't
7 he, based on your experience?
8 A Based on my experience, yes.
9 Q Okay. So I guess you weren't here when
10 Mr. Heimsath -- do you remember the questions about
11 potential development of properties to the west of the
12 landfill, between the landfill and the Barr Mansion,
13 do you remember that general series of questions?
14 A Just a moment ago, yes.
15 Q Yes, sir. And I think you said some
16 reservations about the developability, if that's a
17 word, because of the potential lack of access of city
18 utilities, the road infrastructure and that sort of
19 thing?
20 A Yes.
21 Q Is that a fair characterization?
22 A Yes.
23 Q Okay. If Mr. Heimsath had testified that he
24 did not believe that those properties in that area
25 could be developed for any sort of large scale

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1 residential purposes, due to the lack of
2 infrastructure, would you have any reason to disagree
3 with that opinion?
4 A No.
5 Q And you've actually seen those properties
6 before. Right?
7 A When I went out and drove down Blue Goose,
8 yes.
9 Q Those are pretty textured properties.
10 There's a lot of topographical changes going on with
11 those properties. Right?
12 A Yes, elevation changes.
13 Q And some ruts due to dry creeks and that sort
14 of thing?
15 A Yes.
16 Q And in your experience, does that make
17 attractive land less desirable for developers to try
18 to develop for residential purposes?
19 A It would be more difficult to develop those
20 tracts of land, because the city has certain
21 requirements for setbacks from steep slopes and
22 creeks.
23 Q All right. And there are potentially some
24 flood plains in there as well. Right?
25 A Yes.

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1 Q Okay. Are you familiar with the utility, the
 2 electric line that runs north/south there along Walnut
 3 Creek?
 4 A I have only observed that there was a utility
 5 line.
 6 Q Okay. You have seen a relatively large
 7 utility line that runs parallel to Springdale?
 8 A I believe there was one out there. I
 9 couldn't tell you exactly where it is.
 10 Q In your experience, would the existence of a
 11 large electrical transmission line, would that also
 12 dissuade developers from putting in large residential
 13 developments?
 14 A I don't believe so. It would be more of
 15 other utilities being available than simply having a
 16 large utility line cross a property.
 17 Q Okay. Now, with respect to how the City of
 18 Austin works, do you speak officially for the City of
 19 Austin?
 20 A That's why I'm here today.
 21 Q Well, let me ask you this: In the hierarchy,
 22 the City of Austin has a mayor. Right?
 23 A Correct.
 24 Q Okay. Has a city council. Right?
 25 A Yes.

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1 Q Has a city manager. Correct?
 2 A Yes.
 3 Q And then has various departments and
 4 department heads. Correct?
 5 A Correct.
 6 Q And you report to all of the above, don't
 7 you?
 8 A I report to Sue Edwards, who reports to Marc
 9 Ott, who reports to the city council.
 10 Q All right. And you've seen what's been
 11 called the Rule 11 Agreement, the settlement
 12 agreement. Right?
 13 A Yes, what I understand is the agreement,
 14 but --
 15 Q Okay. That agreement was signed by Mr. Ott.
 16 Is that correct?
 17 A I don't know if I've actually seen the
 18 signature on the documents.
 19 Q Why don't we pull that one up. Could you
 20 look at RS-42, please, sir.
 21 A RS?
 22 Q And I'm working off of memory, and my memory
 23 might be incorrect. I'm looking for the --
 24 A Is there a particular page?
 25 Q Yes, sir. This is a document that you

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1 actually looked at or have reviewed in the past.
 2 Correct?
 3 A Well, it looks like it's attached to the same
 4 agreement. It's our Exhibit 3.
 5 Q All right. Now, if you'll turn to Page 8 of
 6 the document -- it's kind of embedded in there -- it's
 7 called "Agreement Regarding Operations and Closure of
 8 the Sunset Farms Landfill," please.
 9 A You said on Page 8 of the document?
 10 Q Yes, sir.
 11 A It's a witness page?
 12 Q Signature page. Is that correct?
 13 A Signature page?
 14 Q For the document we've been talking about.
 15 Right?
 16 A Yes.
 17 Q And that document has been signed by the -- I
 18 guess it's the Assistant City Manager. Correct?
 19 A Yes.
 20 Q Okay. And that's the person who you would
 21 report to in the absence of Mr. Ott?
 22 A I don't believe it's my Assistant City
 23 Manager. There are several Assistant City Managers.
 24 Q Okay.
 25 A It's probably one of the other ones that's

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1 over Solid Waste Services Department.
 2 Q All right. Nevertheless, this document has
 3 been signed, at least for what you can see, by a
 4 representative of the City of Austin. Right?
 5 A That's correct.
 6 Q Are you aware of the general discussions that
 7 occurred at the city council level regarding the BFI/
 8 City of Austin settlement?
 9 A I have not sat in a lot of those meetings.
 10 If there is an opportunity for me to leave the
 11 chambers, outside of zoning and land uses, I take that
 12 opportunity.
 13 Q You are aware that there were a lot of
 14 discussions. Correct?
 15 A Yes. I understand there was a lot of
 16 discussion.
 17 Q Culminating in this agreement. Right?
 18 A And culminating in the signatures of this
 19 agreement.
 20 Q Okay. Thanks. Could you pull BFI-32. It's
 21 the Austin Smart Growth Zones map.
 22 A Yes.
 23 Q Okay. Now, you were asked a few questions by
 24 Mr. Renbarger, by my recollection. Do you recall
 25 that?

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1 A Yes.
2 Q About the DDZ?
3 A Yes.
4 Q Okay. And you were asked some questions by
5 Mr. Blackburn as well. Correct?
6 A Yes.
7 Q And I asked you some questions earlier. This
8 is a plan -- correct? -- or a policy. It's not
9 enforceable like a city ordinance would be. Is that
10 correct?
11 A That's correct. It's used as a guide.
12 JUDGE NEWCHURCH: May I interrupt?
13 MR. CARLSON: Yes, sir.
14 JUDGE NEWCHURCH: And I don't know if
15 this is deliberate or an oversight. But Exhibits 31
16 through 34 were not offered.
17 MR. CARLSON: I'm going to offer 31 and
18 32. Based on our prior discussion, I may go back
19 there, Judge. I don't know if you're going to let me
20 go back there or not, but --
21 JUDGE NEWCHURCH: You're offering 31 and
22 32?
23 MR. CARLSON: I'll offer 31 and 32 at
24 this point in time.
25 JUDGE NEWCHURCH: Any objection?

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1 MR. RENBARGER: None.
2 JUDGE NEWCHURCH: 31 and 32 are
3 admitted.
4 (Exhibit BFI Nos. 31 and 32 admitted)
5 MR. CARLSON: And just for your
6 information, I do intend to go back a little bit,
7 based on part on TJFA's questions about the DDZ and
8 Mr. Blackburn's discussions about the destination park
9 area around the Barr Mansion.
10 JUDGE NEWCHURCH: Okay. I think that's
11 okay. We'll find out.
12 MR. CARLSON: We'll try it again.
13 Q (BY MR. CARLSON) Just a few background
14 questions. The Drinking Water Protection Zone areas,
15 the green area to the west of MoPac. We established
16 that. Correct?
17 A Yes.
18 Q Okay. And the Desired Development Area is
19 this area that's generally in shades of red to pink to
20 yellow to this -- I still can't figure out what color
21 that is. I've heard the word "ecru" before. I don't
22 know what that is, but maybe this is ecru. Let's call
23 it ecru. Okay?
24 A Okay.
25 Q All right. Now, I believe you had an

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1 opportunity to mark the location of Sunset Farms with
2 the letters "SF." Right?
3 A That's correct.
4 Q Okay. And that was in this ecru area.
5 Right?
6 A Yes.
7 Q And I believe we talked a little earlier
8 about what I think we agreed ultimately was kind of an
9 hierarchy for projected or desired growth within the
10 DDZ. Do you remember that discussion?
11 A Yes.
12 Q Okay. Sunset Farms where you've designated
13 that, that's not in the downtown area, is it?
14 A No.
15 Q All right. And it's not in an area with
16 significant opportunities for redevelopment, such as
17 the Robert Mueller airport?
18 A No.
19 Q All right. Now, there's some different
20 corridors that are marked in there in little dotted
21 black lines and little dotted red lines. Right?
22 A Yes.
23 Q And that's not located next to any of those,
24 is it?
25 A No.

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1 Q All right. And this is not an infill or
2 redevelopment opportunity within the urban core
3 established in the neighborhood planning process, is
4 it?
5 A No.
6 Q Okay. And it's not located within a
7 traditional neighborhood district zone near
8 destination parks. Right?
9 A It's not in those areas, no.
10 Q All right. Now, if you'll go back and look
11 at BFI-33 and 34.
12 MR. BLACKBURN: Your Honor, if we're
13 going to go into 33 and 34, could I take the witness
14 on voir dire?
15 JUDGE NEWCHURCH: For what purpose?
16 MR. BLACKBURN: To establish that
17 Creedmoor is outside of the City of Austin. It's a
18 separate jurisdiction.
19 JUDGE NEWCHURCH: Is that in dispute?
20 MR. CARLSON: Well, I don't dispute
21 that. Sunset Farms is outside the City of Austin.
22 MR. BLACKBURN: It's in a separate
23 jurisdiction.
24 JUDGE NEWCHURCH: Well, so one at a
25 time. You wanted to establish that Creedmoor is

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1 outside the jurisdiction of the City of Austin?
 2 MR. BLACKBURN: Correct.
 3 JUDGE NEWCHURCH: And is that it
 4 dispute?
 5 MR. CARLSON: Excuse me?
 6 JUDGE NEWCHURCH: Is it in dispute that
 7 Creedmore is outside the City?
 8 And when you say "jurisdiction," are you
 9 including limited purpose jurisdiction?
 10 MR. BLACKBURN: Yes.
 11 MR. CARLSON: I don't dispute that
 12 Creedmore is, but this landfill is actually located
 13 within the ETJ of Austin, the TDS Landfill.
 14 JUDGE NEWCHURCH: Well, is that in
 15 dispute?
 16 MR. BLACKBURN: Maybe.
 17 JUDGE NEWCHURCH: Okay.
 18 MR. BLACKBURN: Maybe I don't know what
 19 I'm talking about, but --
 20 JUDGE NEWCHURCH: Creedmore is not, and
 21 that's not in dispute. That's stipulated, so you
 22 don't need voir dire on that.
 23 MR. BLACKBURN: Okay.
 24 JUDGE NEWCHURCH: I think you're ready
 25 to go.

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1 MR. CARLSON: Okay. I thought there
 2 might be a voir dire.
 3 Q (BY MR. CARLSON) All right. Looking at
 4 BFI-33 and 34, are you able to locate where the 12200
 5 Carl -- or the TDS Landfill located around the 12200
 6 Carl Road address is?
 7 A On the --
 8 Q On BFI-32.
 9 A Yes, I believe so.
 10 Q All right. Could you go ahead and write the
 11 letters "TDS" and circle that. Is that within the
 12 ecru area?
 13 A Yes.
 14 Q All right. I'm just happy I can use the word
 15 "ecru."
 16 (Brief pause)
 17 Q You've had an opportunity, Mr. Guernsey, to
 18 mark "TDS" on BFI-32?
 19 A Yes, sir.
 20 Q Okay. And it's located within the desired
 21 development zone depicted on this in the outside Full
 22 Purpose Jurisdiction area. Is that correct?
 23 A Yes.
 24 Q And it's located to the south of a large,
 25 somewhat large green circle that's hash marked.

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1 Right?
 2 A Yes.
 3 Q And that means the destination park/TND area?
 4 A Yes.
 5 Q And that would be the same sort of area that
 6 is reflected in the circle that Mr. Blackburn was
 7 talking to you earlier pertaining to the Barr Mansion
 8 area. Right?
 9 A Yes.
 10 Q Okay. Now, let's just say hypothetically, if
 11 TDS sought to expand its facility within the desired
 12 development zone, its proximity to the destination
 13 park -- first of all, there would not be any zoning
 14 restriction or, per se, restriction related to zoning
 15 that would prohibit that. Is that correct?
 16 A That's correct.
 17 Q Just like Sunset Farms. Right?
 18 A Correct.
 19 Q And the location of this destination park/TND
 20 area to the north of the TDS site, that necessarily
 21 would not restrict TDS from expanding its landfill
 22 either. Right?
 23 A That's correct.
 24 Q It's a situational type of thing. Right?
 25 A Yes.

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1 Q And it's part of an overall frame of looking
 2 at things from a policy standpoint. Right?
 3 A Yes.
 4 MR. CARLSON: Judge, I'll offer BFI-33
 5 and 34 at this time.
 6 JUDGE NEWCHURCH: Any objection?
 7 MR. RENBARGER: Objection. I'm going to
 8 go back to relevance objection from the standpoint, if
 9 you look at Exhibits 33 and 34, they're basically
 10 documents or a Google photograph of the landfill and a
 11 website description of contact information. Certainly
 12 the witness has made a marking on BFI Exhibit 32, and
 13 he has testimony about the marking on 32. So, I mean,
 14 I see 33 and 34 as superfluous and irrelevant to any
 15 issue in this case.
 16 JUDGE NEWCHURCH: Superfluous is
 17 different from irrelevant.
 18 MR. RENBARGER: It is indeed.
 19 JUDGE NEWCHURCH: So superfluous -- tell
 20 me why it's irrelevant.
 21 MR. RENBARGER: It is irrelevant from
 22 the standpoint that we have live testimony from the
 23 witness regarding the location of the TDS facility.
 24 Neither Exhibit 33 or 34 do anything to help us there
 25 with respect to BFI's Exhibit 32 where the witness has

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1 marked, as I understand it, his perceived location of
 2 the TDS Landfill.
 3 And counsel has elicited testimony from
 4 the witness regarding the location of the TDS Landfill
 5 on Exhibit 32 as being within -- I believe he calls it
 6 the ecru area on that map, which I might say, as a
 7 sidebar, I'm quite impressed that a boy from Elgin
 8 knows what ecru is.
 9 But, nonetheless, that's where we're
 10 going with it. I guess what I'm saying is that 33 and
 11 34 are not relevant, given that the witness has
 12 already made a marking on Exhibit 32 and has already
 13 elicited testimony along that line.
 14 JUDGE NEWCHURCH: Do you have a
 15 response?
 16 MR. CARLSON: Well, first of all, I
 17 think there is no doubt about the authenticity. It
 18 could be easily established by going to Google Earth
 19 and clicking in "12200 Carl Road." I don't think
 20 there is any dispute about that.
 21 JUDGE NEWCHURCH: All right. I never
 22 heard an objection to authenticity.
 23 MR. CARLSON: And as far as the
 24 relevance, it's a building block towards establishing
 25 the location of another landfill which I think we've

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1 discussed as very closely affiliated with TJFA within
 2 the DDZ.
 3 MR. RENBARGER: And I'm not sure what
 4 this witness has to do with any of those relationships
 5 between those parties, if any. Certainly it was fair
 6 game when we were talking about TJFA experts who may
 7 or may not have worked for other landfill facilities,
 8 but we're talking about land use here.
 9 And with respect to BFI Exhibit 32, I
 10 think, again, the witness has testified to the
 11 location of the TDS facility and has identified it on
 12 that map, which is a land use issue.
 13 JUDGE NEWCHURCH: Well, all the
 14 objections I heard pertained to it being superfluous.
 15 I heard a statement of it being irrelevant, and I
 16 asked for more details, and then I heard more about
 17 why it was superfluous. Why it is irrelevant?
 18 MR. RENBARGER: It's irrelevant
 19 because --
 20 JUDGE NEWCHURCH: Why are they
 21 irrelevant, is a better way to say it.
 22 MR. RENBARGER: Thank you.
 23 JUDGE NEWCHURCH: Yes.
 24 MR. RENBARGER: They are irrelevant
 25 because they have absolutely nothing to do with land

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1 use. All they are, are documents that have to do with
 2 identification of a website and a Google map, so
 3 they're not relevant to any of the testimony that this
 4 witness has provided.
 5 JUDGE NEWCHURCH: Okay. I cannot agree
 6 with that. Are they superfluous? We've got so many
 7 documents in this room to look at that. That
 8 objection is overruled.
 9 MR. RENBARGER: Thank you.
 10 MR. CARLSON: All right. Just a few
 11 more questions, Judge.
 12 Q (BY MR. CARLSON) Mr. Guernsey, you were
 13 asked some questions about proximity to the landfill
 14 and housing near the landfill. Do you know how far
 15 away, for example, a protestant named Ms. Evelyn
 16 Remmert is from the landfill?
 17 A I'm not familiar with the individual.
 18 Q As a general rule, would you say that the
 19 further away somebody is, the lesser your concern
 20 about compatibility?
 21 A Yes.
 22 Q So if Ms. Remmert lived -- if the record
 23 showed that she lived perhaps a half mile or so away
 24 from the landfill, that would not be as much a concern
 25 from a capability standpoint as somebody who might

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1 live 600 feet?
 2 A That's correct.
 3 Q All right. And I believe there were some
 4 questions and answers. Is it your understanding that
 5 the Barr Mansion is approximately a mile away from
 6 Sunset Farms?
 7 A Well, the scale eludes me on Exhibit 32, even
 8 with my bifocals. But I believe the Barr Mansion is
 9 located within the green circle to the left of the SF
 10 that I drew on the map.
 11 Q All right. A couple more questions. It's
 12 your testimony that the city council has supported
 13 this Rule 11 Agreement. Right?
 14 A The agreement has been signed by the City
 15 Manager by authorization of the city council.
 16 Q All right. And that's because the landfill,
 17 the operators agreed to cease accepting waste by on or
 18 before November 1, 2015. Right?
 19 A Among other things, yes.
 20 Q Okay. And has agreed not to use the property
 21 as a transfer station going forward. Correct?
 22 A Yes.
 23 Q And that there's a number of additions to the
 24 operations of the facility, including matters
 25 pertaining to seeding and sodding and erosion control.

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1 Is that correct?
 2 A Yes.
 3 Q Okay. So all those things taken together add
 4 up to your -- those things taken together sufficiently
 5 mitigate your concerns that the landfill may be
 6 incompatible with land uses. Is that correct?
 7 A Yes.
 8 MR. CARLSON: I'll pass the witness.
 9 JUDGE NEWCHURCH: Is there further cross
 10 before we go to redirect?
 11 MR. RENBARGER: Just a couple of quick
 12 questions, Judge. Thank you.
 13 FURTHER CROSS-EXAMINATION
 14 BY MR. RENBARGER:
 15 Q Help me with something if you can,
 16 Mr. Guernsey. I believe there was testimony elicited
 17 to you that the Austin City Council has approved the
 18 agreement which I guess is represented there by City
 19 of Austin Exhibit 3. Did I hear that correctly?
 20 A Well, it's been executed or signed by an
 21 Assistant City Manager. And I was understanding that
 22 the city council does not have any objection to the
 23 signature of this document.
 24 Q Well, that's a bit different, isn't it, than
 25 the city council has approved the agreement itself?

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1 A Well --
 2 MR. CARLSON: Objection. Calls for a
 3 legal conclusion.
 4 MR. RENBARGER: It does not call for a
 5 legal conclusion.
 6 Q (BY MR. RENBARGER) Are you aware that the
 7 city council in a duly called public meeting was ever
 8 voted to approve the agreement that is represented by
 9 City of Austin Exhibit 3?
 10 A I am not aware of an actual vote of the city
 11 council to approve the agreement.
 12 Q Are you aware that the agreement has been
 13 presented on more than one agenda of the Austin City
 14 Council?
 15 A I know that it has appeared on more than one
 16 agenda of the city council.
 17 Q And they took no action. Isn't that correct?
 18 A That I do not know.
 19 MR. RENBARGER: Thank you.
 20 Pass the witness?
 21 JUDGE NEWCHURCH: Mr. Blackburn?
 22 MR. BLACKBURN: Yes, just a couple.
 23 FURTHER CROSS-EXAMINATION
 24 BY MR. BLACKBURN:
 25 Q With regard to adjacent land developments to

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1 Sunset Farms, are you aware of the Harris Branch
 2 subdivision?
 3 A I am.
 4 Q And in terms of land use compatibility, is
 5 Harris Branch a single-family development?
 6 A It has single family, has some commercial,
 7 industrial land uses, yes.
 8 Q But in your testimony when you were
 9 discussing compatibility of single-family with
 10 landfill, would it be fair to say that Harris Branch
 11 was within ambit of that testimony?
 12 A Yes.
 13 Q And so there is a concern on your part about
 14 the compatibility of the landfill with Harris Branch,
 15 in a broad general sense?
 16 A Yes.
 17 Q And I understood your testimony to be that
 18 you felt that the Rule 11 or the settlement agreement
 19 mitigated your concern?
 20 A Yes.
 21 Q But I understood your testimony to be that
 22 you still believe that there was an incompatible land
 23 use situation between single-family residential and
 24 the landfill. Is that correct?
 25 A That's correct.

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1 MR. BLACKBURN: Thank you. No further
 2 questions.
 3 JUDGE NEWCHURCH: Any more cross?
 4 MR. CARLSON: About three more, Judge.
 5 JUDGE NEWCHURCH: Three more. We're
 6 going to keep going until everybody is done.
 7 FURTHER CROSS-EXAMINATION
 8 BY MR. CARLSON:
 9 Q We've established that the landfill, I
 10 believe, was permitted and started operating in the
 11 early 1980s. Is that correct?
 12 A Yes.
 13 Q The Harris Branch subdivision, that was
 14 actually platted later in the eighties. Is that
 15 correct?
 16 A I believe Harris Branch was like 1990, around
 17 that time.
 18 Q All right. It was platted --
 19 A Around that time is when the --
 20 Q Several years after the landfill came in
 21 existence. Correct?
 22 A Yes.
 23 Q And it has been developed since that point in
 24 time. Right?
 25 A Yes.

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1 Q And that landfill has been there throughout
2 the development of Harris Branch?
3 A Yes.
4 MR. CARLSON: Thank you.
5 Pass the witness.
6 JUDGE NEWCHURCH: Anything more?
7 Ms. Noelke, is there redirect? We
8 finally got back to you.
9 REDIRECT EXAMINATION
10 BY MS. NOELKE:
11 Q Just two quick questions, to continue beating
12 a dead horse. Mr. Guernsey, you're not saying that
13 the Rule 11 or the agreement between BFI and Giles and
14 the City of Austin will solve all problems that you
15 identify, are you?
16 A That's correct.
17 Q Is the major mitigating factor the date
18 certain to stop accepting waste by November 1st?
19 A That, and not having a transfer station
20 occurring in the future.
21 MS. NOELKE: Thank you. No further
22 questions.
23 JUDGE NEWCHURCH: Anything more, based
24 on that?
25 Thank you, Mr. Guernsey. You're

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1 excused.
2 WITNESS GUERNSEY: Thank you.
3 JUDGE NEWCHURCH: We appreciate your
4 service.
5 And we're going to take a break now for
6 10 minutes.
7 (Recess: 10:42 a.m. to 10:56 a.m.)
8 JUDGE NEWCHURCH: So let's come back on
9 the record.
10 And, Ms. Noelke, you may call your next
11 witness.
12 MS. NOELKE: Thank you. I call Joe
13 Word.
14 (Witness sworn)
15 JOE DAVID WORD,
16 having been first duly sworn, testified as follows:
17 DIRECT EXAMINATION
18 BY MS. NOELKE:
19 Q Mr. Word, would you state your full name,
20 please.
21 A Joe David Word.
22 Q And who is your employer?
23 A The City of Austin.
24 Q And what are you here to testify concerning?
25 A Regarding the City's agreement with BFI to

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1 basically improve the operations and establish a date
2 certainty for closure.
3 Q Would you look at what's been marked as City
4 of Austin Exhibits 4 and 5.
5 A Yes.
6 Q What is Exhibit 4?
7 A Exhibit 4 is my prefiled testimony.
8 Q Do you have any corrections or changes you
9 would like to make to the exhibit? And I'm going to
10 call your attention to Page 4 of 9 at Line 10. Is
11 there a typographical error you wish to correct?
12 A Yes, there is.
13 JUDGE NEWCHURCH: Which page is this
14 again, please?
15 MS. NOELKE: Page 4 of 9 of Exhibit 4.
16 A If you're reading that sentence, it says,
17 ". . . in order to minimize the impact so extended
18 landfill . . ." That should be "the impact of
19 extended landfill life."
20 Q (BY MS. NOELKE) Changing that word at the
21 end of Line 9, instead of saying "so," it should be
22 "of"?
23 A That's correct. Should I make those changes
24 here?
25 Q Yes, please.

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1 A (Witness changes document)
2 Q Are there any other changes?
3 A No, there are not.
4 Q Okay. Would you please identify Exhibit 5.
5 A Exhibit 5 is the summary of my
6 qualifications, resume.
7 Q Okay. Mr. Word, do you adopt your prefiled
8 testimony today as if you have been giving it here
9 live?
10 A Yes, I do.
11 MS. NOELKE: I'll offer Exhibits 4 and
12 5.
13 JUDGE NEWCHURCH: Is there objection?
14 MR. RENBARGER: No objection.
15 MR. CARLSON: No, Your Honor.
16 JUDGE NEWCHURCH: Four and 5 are both
17 admitted.
18 (Exhibit City of Austin Nos. 4 and 5
19 admitted)
20 MS. NOELKE: Pass the witness.
21 JUDGE NEWCHURCH: Mr. Carlson?
22 MR. CARLSON: Will we have the same
23 understanding with this witness?
24 JUDGE NEWCHURCH: Yes, sir.
25 MR. CARLSON: All right. Thank you,

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1 Judge.
2 CROSS-EXAMINATION
3 BY MR. CARLSON:
4 Q Mr. Word, my name is John Carlson. I
5 represent BFI in this proceeding. I have hopefully
6 just a few questions here for you. I understand that
7 you have worked in and for the City of Austin Solid
8 Waste Department for a number of years. Is that
9 correct?
10 A Yes, sir, that's correct.
11 Q You're retired or semi-retired right now?
12 A I retired in 2001, and then I came back and
13 took essentially part-time employment with the Solid
14 Waste Services department of the City.
15 Q All right. As of your retirement, how many
16 years had you worked with the Solid Waste Department?
17 A I believe I had about -- well, with the Solid
18 Waste, I was employed there since about 1983.
19 Q Okay. You were here for Mr. Guernsey's
20 testimony?
21 A Yes, I was.
22 Q As far as the questions and answers regarding
23 the history of landfilling operations along Giles
24 Road, do you recall those questions?
25 A Yes, I do.

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1 Q Is it your understanding that between the
2 combination of the Travis County Landfill, the Austin
3 Community Landfill and Sunset Farms, that that
4 particular area of Travis County has been used for
5 landfilling operations for upwards of 50 years or
6 more?
7 A That's correct.
8 Q All right. Now, if I understand your
9 testimony, you had a couple of concerns that were
10 addressed by virtue of the Rule 11 Agreement that's
11 been discussed between the City of Austin and BFI and
12 Giles. Is that correct?
13 A Yes.
14 Q Okay. Would you turn to Page 4 of your
15 prefiled, sir.
16 A Okay.
17 Q Okay. At the very bottom, you were asked a
18 question about whether you had concerns, whether the
19 application that prompted the request for part --
20 well, excuse me -- concerns, and you said that, in
21 your answer starting on Line 21 of Page 4, "The City
22 and nearby property owners, businesses, and residents
23 had an expectation that the landfill would close upon
24 reaching its currently permitted capacity" --
25 A I'm sorry. Which page of mine are you on?

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1 JUDGE NEWCHURCH: Which page are you on?
2 Q (BY MR. CARLSON) Oh, I'm sorry. This is my
3 math reading maybe this time working against me. It's
4 Page 3 of 9.
5 A Okay.
6 Q I'm referring specifically to your answer to
7 the last question on Page 3.
8 A Yes, sir.
9 Q And you have -- in your answer, it says, "The
10 City and nearby property owners, businesses, and
11 residents had an expectation that the landfill would
12 close upon reaching its currently permitted capacity."
13 Right?
14 A That's correct.
15 Q Okay. Now, I asked Mr. Guernsey some
16 questions about the Subtitle D modification that BFI
17 filed in the 1990s. Do you recall those questions?
18 A Yes.
19 Q Based on your experience in the Solid Waste
20 Department and your understanding just generally of
21 things that have happened pertaining to matters of
22 solid waste in Travis County, were you aware that BFI
23 had filed that modification?
24 A I was not at the time, but I'm aware of it
25 now, yes.

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1 Q And is it your understanding as well that BFI
2 at that point in time had estimated the life -- the
3 estimated life of the facility would take it through
4 somewhere in the 2018 time frame?
5 A That's my understanding.
6 Q All right. And so if, in fact, this permit
7 is issued and the special condition pertaining to the
8 November 1, 2015 cessation of acceptance of waste
9 provision is in there, the landfill will actually
10 close two or three years earlier than had been
11 projected as late as the 1990s. Correct?
12 A That would be correct.
13 Q Now, I understand that you also believe that
14 the operational requirements that are -- you're
15 reviewed the -- strike that. You've reviewed Rule 11
16 Agreement. Right?
17 A Yes.
18 Q You understand its terms and conditions?
19 A Yes, I do.
20 Q You understand that it's been executed by an
21 authorized representative of the City of Austin?
22 A That's my understanding.
23 Q All right. You're not testifying that the
24 permit application that was submitted did not meet the
25 TCEQ operational design requirements, are you?

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1 A I have not testified to that, no.
2 Q Okay. In fact, I read something in your
3 testimony that suggested to me that you thought that
4 they may actually meet the TCEQ requirements at least.
5 Is that fair to say?
6 A I don't recall exactly, but that would
7 probably be correct, yes.
8 Q Okay. Now, the Rule 11 Agreement imposes
9 some additional requirements on BFI. Correct?
10 A That's correct.
11 Q And that would be of a contractual nature
12 and, if they're incorporated in the permit, of a
13 regulatory nature. Is that correct?
14 A That would be correct.
15 Q So in theory, I guess they could be enforced
16 either by a regulatory agency or through a contractual
17 action. Is that correct?
18 A That would be my assumption, yes.
19 Q All right. Now, if you turn to Page 8 of
20 your prefiled testimony and look at the bottom, based
21 on that agreement and your review of that agreement
22 and its incorporation in the permit, you believe that
23 it will significantly mitigate the impacts of the
24 landfill and surrounding areas, don't you?
25 A It will mitigate some of the impacts, yes.

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1 Q Now, your testimony is, it will significantly
2 mitigate impacts of the landfill, on Line 21 of Page
3 8. Is that correct?
4 A Yes.
5 MR. CARLSON: All right. I'll pass the
6 witness.
7 JUDGE NEWCHURCH: Mr. Terrill?
8 MR. TERRILL: No questions, Your Honor.
9 JUDGE NEWCHURCH: Ms. Talley?
10 MS. TALLEY: No questions, Your Honor.
11 JUDGE NEWCHURCH: Ms. Mann?
12 MS. MANN: I have no questions.
13 JUDGE NEWCHURCH: Mr. Shepherd?
14 MR. SHEPHERD: No questions.
15 JUDGE NEWCHURCH: Mr. Renbarger?
16 Mr. Head?
17 CROSS-EXAMINATION
18 BY MR. HEAD:
19 Q Mr. Word, how would you doing this morning?
20 A Just fine.
21 Q You have been designated the City of Austin
22 representative for this proceeding. Correct?
23 A That's correct.
24 Q As I read your testimony, on Page 3 there is
25 a question, "Did you have concerns about the BFI

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1 permit application that prompted a request for party
2 status in the matter referred for hearing?" And you
3 answered "Yes"?
4 A Yes.
5 Q How long in your service with you City have
6 you been involved or had any involvement with the BFI
7 Landfill?
8 A Probably since at least 1983.
9 Q And at any time, did you reach the conclusion
10 that the BFI Landfill was having adverse effects on
11 the neighbors in that vicinity?
12 A I would say that that became evident in about
13 the 2001-2003 time frame when the odor issues came up,
14 yes.
15 Q Right; right. And from your answer about
16 your concerns that prompted the request for party
17 status, were you the driving force with City staff in
18 seeking -- in the City of Austin seeking party status
19 to oppose this application?
20 A No, I don't think I was.
21 Q Well, who to your knowledge recommended that
22 the City take a position adverse to this expansion?
23 A I think that was associated with a city
24 council resolution directing the staff to do so.
25 Q What concerns did you have that prompted a

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1 request for party status against this application?
2 A Well, there was an expectation, as I've said,
3 that the landfill would close in a fairly near future
4 time frame, I would call it.
5 Q Okay. Did BFI ever represent to the City
6 that it was going to close in a time frame prior to
7 2018?
8 A Under the existing permit, it was our
9 understanding they would run out of capacity and,
10 therefore, they likely would be closing.
11 Q So it was your impression that they would be
12 closing around the 2010 time frame. Is that correct?
13 A Yes, assuming -- and we understood that they
14 may be attempting to get an amendment. But
15 assuming -- with the existing permit, that would have
16 been our understanding.
17 Q And were you surprised when they applied for
18 an amendment to expand the landfill?
19 A Not really.
20 Q No. Now, you indicate in your testimony
21 that the -- and you understand when I talk about with
22 the Rule 11 Agreement?
23 A Yes, sir.
24 Q You indicate that that would mitigate to some
25 degree the impacts of the landfill?

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1 A That's correct.
 2 Q Which impacts will it not address?
 3 A It would not necessarily address things such
 4 as litter, either from the landfill or from truck
 5 traffic. It would not necessarily address issues of
 6 noise. It would not necessarily address issues of
 7 lighting at night, may or may not have impact on
 8 odors.
 9 Q All right. So even with the erosion controls
 10 that you have suggested and the other provisions of
 11 the Rule 11, your testimony will still be or could be
 12 adverse impacts to the neighborhood from this
 13 landfill. Is that correct?
 14 A That's correct.
 15 Q All right. And do you believe excess truck
 16 traffic to the landfill to be a potential adverse
 17 impact?
 18 A To some degree. It depends on where that
 19 truck traffic travels, I think.
 20 Q And the Rule 11 Agreement only addresses
 21 traffic on Blue Goose Road. Is that not correct?
 22 A That's correct.
 23 Q All right. Now, are you aware that in the
 24 permit application itself, that BFI agreed to a
 25 November 1, 2015 cessation of receipt of waste?

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1 A That's correct.
 2 Q And are you aware that the CAPCOG -- you know
 3 what CAPCOG is?
 4 A Yes, sir.
 5 Q -- that in their conformance letter, they had
 6 a cessation of receipt of waste of November 1, 2015?
 7 A That's correct.
 8 Q So the City of Austin in their Rule 11 did
 9 not take any steps to have waste receipts stopped
 10 prior to dates already agreed to by BFI, did it?
 11 A I think we reinforced that to a great degree.
 12 Q But the 2015 date was already established in
 13 the draft permit in the application and in the CAPCOG
 14 conformance letter?
 15 A That date is in those documents. That's
 16 correct.
 17 Q All right. Were you involved with the nuts
 18 and bolts of putting together the Rule 11 Agreement?
 19 A I was in the group, yes, that discussed it
 20 and negotiated it, yes.
 21 Q All right. Now, under Provision 8 -- I think
 22 it was D(8) in the Rule 11. Do you have that in front
 23 of you?
 24 A I'm not sure where it is exactly.
 25 Q Let's see. RS- --

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1 A RS-42.
 2 Q RS-42.
 3 MS. NOELKE: Exhibit 3 of the City of
 4 Austin.
 5 A I've got RS-42 in front of me.
 6 Q (BY MR. HEAD) Okay. And I would ask you to
 7 go to the Rule 11 of the agreements with the City with
 8 regard to -- I think it was D(1) through (9).
 9 A Yes.
 10 Q Okay. And I'm curious about the provision
 11 agreed to between BFI and the City and Giles regarding
 12 Drainage Area 2. This provides that Drainage Area 2
 13 shall be routed through the existing detention pond,
 14 or the proposed water quality pond when it's
 15 constructed, when the waste fill in Drainage Area 2
 16 has reached final grades. And my question is, why
 17 wait until final grade to have that water routed to
 18 the detention pond?
 19 A I did not necessarily look at the drainage
 20 calculations in detail. That was done more by, I
 21 think, Mike Kelly and perhaps Chuck Lesniak.
 22 Q So that would be a question for those two
 23 gentlemen?
 24 A Yes, sir.
 25 Q Okay. And your testimony addresses what you

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1 believe how the Rule 11 will decrease sedimentation
 2 from the facility?
 3 A Yes.
 4 Q Have you independently looked at the size of
 5 the existing sedimentation ponds?
 6 A No.
 7 Q Okay. Do you have an opinion one way or the
 8 other as to whether those sedimentation ponds are
 9 adequately sized?
 10 A No, I do not.
 11 Q Does the Rule 11 Agreement impact in any way,
 12 shape or form the size of the existing sedimentation
 13 ponds?
 14 A I don't believe it does.
 15 Q Was there any analysis --
 16 A Let me -- can I back up on that question? To
 17 the extent that a site development permit will be
 18 required, there may be requirements that come up from
 19 the City as a consequence of that review.
 20 Q Okay.
 21 A But the agreement itself does not address it.
 22 Q And you've sat through the testimony here
 23 through these proceedings. Correct?
 24 A Virtually all of it, yes.
 25 Q And you were here yesterday for the testimony

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1 Mr. Stecher?
 2 A Yes.
 3 Q And Mr. Stecher, you'll recall, testified he
 4 did not believe the sediment ponds to be large enough,
 5 did he not?
 6 A I heard that testimony.
 7 Q And as I understand, BFI has already
 8 submitted a site plan application to the City of
 9 Austin?
 10 A I understand that to be so, yes.
 11 Q Have you reviewed that?
 12 A No, I have not.
 13 Q Is it possible that in the course of that
 14 review -- no, let me strike that. Does the City have
 15 authorization in the course of that review to require
 16 BFI to enlarge the sediment ponds?
 17 A I don't specifically know, because that's not
 18 the area that I --
 19 Q Is that a Mr. Lesniak --
 20 A I believe it is, yes.
 21 Q All right. The Rule 11 Agreement requires
 22 that a revised Stormwater Pollution Prevention Plan be
 23 submitted to the City, and that deadline is tomorrow.
 24 To your knowledge, has that been filed?
 25 A I don't know.

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1 Q Okay. To your knowledge, has a restrictive
 2 covenant been filed in the deed records?
 3 A I don't know.
 4 Q Do you know who is responsible for the filing
 5 of the restrictive covenant at the City of Austin?
 6 A I would assume that would be our Law
 7 Department.
 8 Q All right. You indicate in your testimony
 9 that the Rule 11 will improve the quality of life of
 10 neighbors. Tell me how it will improve the quality of
 11 life of the neighbors.
 12 A Where do I state that?
 13 Q Page 3.
 14 A Okay.
 15 Q Well, what you stated, will mitigate to some
 16 degree. And I'm sorry. That's on Line 1.
 17 A Yes, sir.
 18 Q How will the Rule 11 mitigate the impacts on
 19 neighboring properties, residences and businesses?
 20 A Well, I believe it will principally, by
 21 accelerating the application of intermediate cover and
 22 the consequence seeding and growth of vegetation, by
 23 requirements in -- I think it's in the attachments
 24 that these things actually be irrigated, which I don't
 25 think the TCEQ rules actually require. So that just

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1 because you seed it, you actually might have a chance
 2 of getting some grass to grow.
 3 Q Let me stop and ask a question -- and I
 4 didn't mean to interrupt. In the course of your work
 5 with the City for 25 years, have you visited the BFI
 6 Landfill?
 7 A Yes, I have.
 8 Q On how many occasions?
 9 A Probably dozens.
 10 Q And on those visits, have you had the
 11 occasion to witness whether there's native grasses on
 12 the side slopes?
 13 A Yes.
 14 Q And what have you seen when you've been out
 15 there?
 16 A Frequently takes a very long time to get
 17 grass established.
 18 Q Okay. And that could cause erosion.
 19 Correct?
 20 A It could allow erosion, yes.
 21 Q Have you seen significant erosion ever on a
 22 visit to the Sunset Farms Landfill?
 23 A I don't know if I would term it
 24 "significant." I've seen rivulets and things of that
 25 nature, indicating that rainfall has eroded somewhat

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1 into the cover.
 2 Q So what you've seen at the Sunset Farms
 3 Landfill in the past, is it fair to say that you
 4 believe there has not been sufficient irrigation?
 5 A I think that's probably true.
 6 Q Okay. As a matter of fact, you state on Page
 7 8 of 9 that irrigation is virtually non-existent.
 8 Correct?
 9 A I believe that's correct, yes.
 10 Q Now, did you sit through -- did you hear the
 11 testimony of Mr. Dugas that there is more than
 12 abundant water to perform irrigation at that facility?
 13 A I heard that, yes.
 14 Q But your testimony is, from what you've seen,
 15 irrigation has been virtually non-existent. Right?
 16 A Well, that's not the same thing. Saying
 17 water is available and saying you're actually doing
 18 it, I guess, are two different things.
 19 Q But the testimony you heard from Mr. Dugas
 20 was, water was available for irrigation?
 21 A I heard that, yes.
 22 Q All right. And what your testimony is, from
 23 what you've seen, they weren't using that water for
 24 irrigation?
 25 A For the most part. There may have been some

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1 landscaping. But as far as the landfill itself, I
2 didn't see much evidence of it.
3 Q You said you had input on the Rule 11?
4 Correct?
5 A Yes.
6 Q Were there additional provisions that you
7 would have liked to have in the Rule 11 that didn't
8 end up in that Rule 11 regarding erosion control?
9 A I don't recall any.
10 MR. HEAD: I pass the witness.
11 JUDGE NEWCHURCH: Mr. Blackburn?
12 MR. BLACKBURN: I have no questions.
13 JUDGE NEWCHURCH: Is there further
14 cross?
15 MR. CARLSON: Just a few, Judge.
16 FURTHER CROSS-EXAMINATION
17 BY MR. CARLSON:
18 Q You started with the Waste Department in
19 1983. Is that correct?
20 A That's correct.
21 Q And you testified about some odor issues in
22 the 2001-2003 time frame. Right?
23 A I believe those were the years, yes.
24 Q Okay. Between 1982 and 2001, this landfill
25 operated pretty cleanly, didn't it?

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1 A It operated like a landfill, and I don't
2 recall hearing a lot of complaints about it.
3 Q There weren't a lot of complaints, were
4 there?
5 A Not to my knowledge.
6 Q Okay. And, in fact, can you recall a single
7 violation that was issued or cited by TCEQ against the
8 operator from this 1982 to 2001 time frame?
9 A I'm not aware of any.
10 Q And what about the City of Austin, same
11 thing?
12 A I am not aware of any.
13 Q All right. Now, there were some odor issues
14 in this general vicinity in 2001-2003. Right?
15 A That's correct.
16 Q And you were familiar with that?
17 A In passing, yes.
18 Q Did BFI, to your knowledge, BFI ever say that
19 its landfill was not at least partially involved in
20 the odors?
21 A I'm not aware of them having said that.
22 Q All right. TCEQ ultimately sent out a strike
23 force to investigate the odors. Is that right?
24 A That's my understanding.
25 Q Okay. And the county started doing some

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1 investigations of its own. Right?
2 A That's my understanding.
3 Q And ultimately BFI was issued one violation
4 for odors. Is that correct?
5 A That's correct.
6 Q Okay. Haven't been cited since, have they?
7 A That's my understanding.
8 Q Okay. Now, in this time frame, 2001-03, are
9 you aware of some changes in practices and design of
10 the landfill that BFI implemented in connection with
11 the odors?
12 A Yes.
13 Q All right. BFI build out, extended its
14 landfill gas collection system, didn't it?
15 A That's correct.
16 Q It agreed to stop using alternate daily cover
17 and started using dirt again. Is that correct?
18 A That's my understanding.
19 Q Okay. It limited the types of waste that it
20 was accepting at the landfill. Is that correct?
21 A Again, my understanding, yes.
22 Q All right. And it agreed not to recirculate
23 leachate in the landfill. Is that correct?
24 A That's what I understand.
25 Q And to your knowledge, BFI has done all of

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1 that. Correct?
2 A I don't have personal knowledge of that, but
3 that's my understanding.
4 Q All right. And those are all the sorts of
5 things that one would expect to at least reduce odors.
6 Right?
7 A Yes.
8 Q Okay. You were asked a couple of questions
9 about truck traffic. Could you turn to Page
10 APP 000179 of the application, sir.
11 A Do you know which volume that is?
12 Q It should be in Volume 1.
13 A Give me the reference again.
14 Q APP-179. It's called the area location map.
15 A Yes, I have it.
16 Q All right. It shows the landfill in the
17 middle of a diagram. Do you see that?
18 A Yes, sir.
19 Q And it has a number of the area roadways.
20 Right?
21 A Yes.
22 Q And it identifies, if you look at the "T"
23 there, a number of roads that have truck prohibition
24 signs. Right? Do you see that in the bottom
25 right-hand side?

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1 A Oh, yes, I do.
2 Q All right. If you look back at the map, that
3 would include Springdale and a portion of Yager
4 between Cameron and Parmer?
5 A Yes.
6 Q Harris Branch Parkway. Right?
7 A Yes.
8 Q Okay. And the Rule 11 Agreement that we've
9 been looking at, that includes some prohibitions or
10 agreements by BFI to prohibit its own trucks and
11 vendors who are using the facility, from using Blue
12 Goose Road. Is that correct?
13 A That's correct.
14 Q Do you have any understanding of BFI policy
15 of reprimanding and ultimately perhaps firing any
16 drivers who violate various restrictions on roads that
17 they may use?
18 A It's my understanding that they pledged to do
19 that.
20 Q All right. The Rule 11 Agreement does
21 include some provisions for irrigating when new seed
22 or sod is placed. Is that correct?
23 A That's correct.
24 Q And one last thing. I believe you referred
25 early on to a city council resolution early on that

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1 led to the City's involvement in this proceeding. Do
2 you recall that?
3 A Yes.
4 Q That resolution, you're personally familiar
5 with that resolution?
6 A I've seen it, yes.
7 Q You've read it. Right?
8 A Yes.
9 Q And that resolution didn't say anything,
10 didn't have any mention of a date certain for closure
11 or a requirement, did it?
12 A Actually, my recollection was that it did,
13 but I'm not totally clear on that.
14 Q Let me put it -- why don't you pull it up
15 real quick. Do we have the . . .
16 MR. CARLSON: You know what? I'll speed
17 things up. I'll pass the witness.
18 JUDGE NEWCHURCH: Okay. Other cross-
19 examination?
20 Thank you, Mr. Word. You're excused --
21 I'm sorry. Excuse me. Ms. Noelke, is there redirect?
22 MS. NOELKE: Yes, one question.
23 (Laughter)
24 JUDGE NEWCHURCH: You may have started
25 it all over again.

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1 REDIRECT EXAMINATION
2 BY MS. NOELKE:
3 Q If you'll look at Page 4 of your Exhibit 4 of
4 your testimony, please.
5 A Yes.
6 Q You were asked on cross-examination whether
7 it was true that the CAPCOG limitation of November 1,
8 2015, if that was the same date, November 1, 2015,
9 that was put in the agreement. Do you remember that
10 testimony?
11 A I believe I do, yes.
12 Q Okay. Was there a concern listed at Line 7
13 of your testimony --
14 A Yes.
15 Q -- on Page 4? And what is that concern?
16 What was that concern?
17 A Well, essentially that just by putting
18 something in an application and that application being
19 approved does not necessarily preclude someone from
20 going back and seeking any amendment.
21 Q All right. And does the agreement with the
22 City provide for a restrictive covenant to be executed
23 and provided to the City which restricts the use of
24 the land for receipt, processing, recycling or
25 disposal of any waste after November 1, 2015?

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1 A That's correct.
2 Q Does it, in addition, provide that no
3 transfer station shall ever be constructed or operated
4 on the property?
5 A That's correct.
6 MS. NOELKE: I have no further
7 questions.
8 JUDGE NEWCHURCH: Is there any cross,
9 limited to the scope of the redirect?
10 Okay. Now, Mr. Word --
11 WITNESS WORD: Thank you.
12 JUDGE NEWCHURCH: -- thank you for your
13 testimony and your service. You're excused.
14 Ms. Noelke, you can call your next
15 witness.
16 MS. NOELKE: I call Charles Lesniak.
17 (Witness sworn)
18 CHARLES LESNIAK III,
19 having been first duly sworn, testified as follows:
20 DIRECT EXAMINATION
21 BY MS. NOELKE:
22 Q Would you state your full name, please.
23 A Charles Lesniak III.
24 Q What is your occupation?
25 A I work for the City of Austin Watershed

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1 Protection and Development Review Department. I'm an
 2 environmental policy program manager.
 3 Q Would you please turn to what's been marked
 4 as City of Austin Exhibits 6 and 7.
 5 A Okay. I have those.
 6 Q Would you please identify them.
 7 A Exhibit 6 is my prefiled testimony, and
 8 Exhibit 7 is my qualifications, my resume.
 9 Q Do you have any changes or corrections to
 10 make to those?
 11 A No, ma'am.
 12 Q Do you adopt your prefiled testimony today as
 13 if you had given it here live?
 14 A Yes.
 15 MS. NOELKE: I would offer Exhibits 6
 16 and 7.
 17 JUDGE NEWCHURCH: Is there objection?
 18 MR. RENBARGER: None.
 19 MR. CARLSON: No, sir.
 20 JUDGE NEWCHURCH: Then 6 and 7 are both
 21 admitted.
 22 (Exhibit City of Austin Nos. 6 and 7
 23 admitted)
 24 MS. NOELKE: Thank you. I have no
 25 further questions.

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1 JUDGE NEWCHURCH: Mr. Carlson, the same
 2 understanding.
 3 MR. CARLSON: It's Mr. Gosselink.
 4 JUDGE NEWCHURCH: Mr. Gosselink. Sorry.
 5 CROSS-EXAMINATION
 6 BY MR. GOSSELINK:
 7 Q Good morning, Mr. Lesniak.
 8 A Good morning.
 9 Q Good morning. Are you familiar with the
 10 Rule 11 Agreement?
 11 A Yes.
 12 Q Are you familiar with the proposed special
 13 proceedings to implement the Rule 11 Agreement that
 14 are contained in the draft permit from the TCEQ?
 15 A Yes, I've read them.
 16 Q Okay. And did you, in fact, participate in
 17 the negotiations which resulted in the Rule 11
 18 Agreement?
 19 A Yes, I did.
 20 Q Is it fair to characterize your testimony as,
 21 in the first half of your testimony, setting out your
 22 concerns about the application's failure to adequately
 23 address issues relating to stormwater management,
 24 drainage and erosion and sedimentation control?
 25 A Yes.

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1 Q And then is it fair to say that in the last
 2 part of your testimony reflects your conclusion that
 3 the Rule 11 Agreement, quote, satisfies your concerns?
 4 A Yes, it does, to a great extent.
 5 Q Well, did your testimony at the time say
 6 those precise words, that at that time your opinion
 7 was that it satisfied your concerns? I'll read it to
 8 you.
 9 A Okay.
 10 Q And if you can find it on Page 5 of 5.
 11 "Question: Is it your opinion that the
 12 special conditions contained in COA Exhibit 3 will
 13 satisfy your concerns regarding erosion and
 14 sedimentation controls?"
 15 And "Answer: Yes, these conditions do
 16 address my concerns regarding erosion and
 17 sedimentation control, particularly those regarding
 18 erosion."
 19 So I thought the agreement you
 20 negotiated satisfied your concerns on the items that
 21 you negotiated. Is that no longer correct?
 22 A No. That is correct. It does -- I stand by
 23 my testimony. It does address the concerns regarding
 24 erosion and sedimentation control.
 25 Q Okay. Do you have any doubt whether BFI

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1 would be able to satisfy all the conditions set forth
 2 in the Rule 11 Agreement and in special provisions?
 3 A They've represented that they will.
 4 Q Okay. And do you have any reason to doubt
 5 their representation, based either upon your concern
 6 that they're physically not capable of doing it or
 7 that they are not committed to the getting it done?
 8 A Based on past performance at the facility, I
 9 think that it will require monitoring by the City and
 10 the state to ensure that they're done.
 11 Q Okay. You're expecting them to perform.
 12 Correct? They've reached an agreement with you, said
 13 they'll perform. Right?
 14 A Yes.
 15 Q Okay. And from your side of that agreement,
 16 you're expecting them to perform.
 17 A Yes.
 18 Q And that's what you expect from anybody on
 19 the opposite side of an agreement they reach.
 20 Correct?
 21 A Certainly.
 22 Q Okay. And is there anything in BFI's conduct
 23 in the course of these negotiations with the City that
 24 would give you any reason to think that they don't
 25 intend to do that?

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1 A No.
 2 Q Okay. I'm going to ask you one specific
 3 question. You have been out to the site?
 4 A Yes, many times.
 5 Q Okay. And you're aware that in the past
 6 there have been areas of the site that have had
 7 difficulty growing vegetation. Correct?
 8 A Yes.
 9 Q Okay. Is it your opinion now that there are
 10 portions of the site on the south side of the site
 11 that have, in fact, an adequate stand of vegetation?
 12 A Yes.
 13 Q Okay. And on the west side?
 14 A Generally, yes, that's my memory from the
 15 site visit.
 16 Q From that, can we conclude that reaching an
 17 85 percent vegetative cover is very plausible with
 18 irrigation as well?
 19 A Certainly. And with enhanced soil
 20 specifications included in the agreement, yes.
 21 MR. GOSSELINK: Pass the witness.
 22 JUDGE NEWCHURCH: Mr. Terrill?
 23 MR. TERRILL: No questions.
 24 JUDGE NEWCHURCH: Ms. Talley?
 25 MS. TALLEY: No questions, Your Honor.

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1 JUDGE NEWCHURCH: Ms. Mann?
 2 MS. MANN: I have no questions.
 3 JUDGE NEWCHURCH: Mr. Shepherd?
 4 MR. SHEPHERD: No questions.
 5 JUDGE NEWCHURCH: Mr. Renbarger?
 6 MR. RENBARGER: Thank you.
 7 CROSS-EXAMINATION
 8 BY MR. RENBARGER:
 9 Q Good morning, Mr. Lesniak.
 10 A Morning.
 11 Q I understand from your testimony that in your
 12 role with the City of Austin, that you don't just do
 13 stormwater, you actually look into a number of
 14 different environmental issues on behalf of the City.
 15 Is that right?
 16 A Yes, that's correct.
 17 Q And, in fact, I believe you testified that
 18 with respect to the BFI facility, you've also assisted
 19 in complaint investigations, among other things.
 20 Right?
 21 A Yes.
 22 Q Could you please describe your role in
 23 investigating complaints at the BFI facility?
 24 A In the past, in my early career with the
 25 City, I worked with the Spills and Complaints Response

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1 Program and was an investigator with that program.
 2 And I believe that I responded in the 1990s to
 3 investigate complaints regarding this facility and
 4 other facilities.
 5 Since that time, after I changed
 6 positions and moved really into my current position,
 7 and one of my responsibilities became working with
 8 landfills. When there are complaints about landfills
 9 in the City of Austin, generally the investigators,
 10 it's common for them to call me out or to consult with
 11 me when they do -- when they investigate complaints
 12 regarding this landfill and others in the City.
 13 Q Okay. So back in the 1990s when you were
 14 working with respect to spills, do you recall any
 15 specific spills that you investigated at BFI?
 16 A No spills I don't believe, just probably
 17 mostly stormwater complaints.
 18 Q What kind of stormwater complaints do you
 19 recall from back in the nineties?
 20 A I can't remember the dates. But I know over
 21 the course of my career, the last 10 years or so, I've
 22 been out on complaints and been consulted on
 23 complaints regarding sedimentation runoff.
 24 Q Were those complaints generally originated by
 25 a citizen complaint process?

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1 A Generally, yes.
 2 Q Do you know about on how many occasions in
 3 the last 10 years that you have been either consulted
 4 or participated in investigation of a complaint based
 5 on sedimentation runoff?
 6 A No. I would say less than a dozen, probably
 7 more than six or eight. I'm not sure.
 8 Q You also indicated in your prefiled testimony
 9 that you have on occasion performed site inspections
 10 at the facility. Is that right?
 11 A Yes. We did an area-wide survey of active
 12 landfills I believe in the 2004, early 2005 time
 13 frame, where we looked at -- where we visited all the
 14 landfills within our jurisdiction, the active
 15 landfills within our jurisdictions. And I have been
 16 out to this landfill from time to time, and other
 17 landfills -- the WMI Landfill -- in response to either
 18 odor complaints or stormwater complaints.
 19 Q There has been much testimony in this hearing
 20 about odor complaints in a time period from, say, 2001
 21 through 2003. Is that consistent with your connection
 22 on odor complaints?
 23 A Yes, yes. I was getting lots of e-mails in
 24 those days.
 25 Q Was the City of Austin ever able to verify

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1 any of these odor complaints?
 2 A I wasn't personally. I don't know -- I can't
 3 speak for the other investigators, so I wasn't able to
 4 personally verify any of them. But in this time
 5 frame, I also was not doing -- I was not part of the
 6 Spills and Complaints investigation team.
 7 And so generally I was getting these via
 8 e-mail or the investigator was checking in with me.
 9 And so I was really -- my role at that time was to
 10 make sure that our investigation staff were in contact
 11 with the right folks at BFI or in contact with TCEQ
 12 and that the follow-up with the citizens was occurring
 13 appropriately.
 14 Q Do you recall, with respect to the odor
 15 complaints, whether or not the City of Austin actually
 16 ever engaged in any enforcement activities against
 17 BFI?
 18 A No, I don't believe so, because regard to
 19 odor complaints, I don't believe we would be the
 20 primary jurisdiction. I think the jurisdictions for
 21 odor violations would be much more clearly with the
 22 TCEQ.
 23 Q Would it be fair to say, then, that you would
 24 defer to the TCEQ with respect to those kinds of
 25 enforcement activities?

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1 A Regarding odor complaints generally, yes.
 2 Q In your prefiled testimony, you indicate that
 3 the site has historically had poor erosion and
 4 sedimentation control. Could you expound on that a
 5 little bit for us?
 6 A Yes. An active landfill is a lot like a very
 7 large construction site that never stops. And erosion
 8 control -- like any construction site, erosion and
 9 sedimentation control is always an issue and difficult
 10 to control.
 11 And with a landfill, you have very large
 12 areas -- you often have very large areas of disturbed
 13 soil that needs to have significant temporary erosion
 14 and sedimentation controls and needs to be
 15 revegetated. Source control methodology is generally
 16 the most effective way to prevent erosion and
 17 sedimentation, as opposed to end-of-pipe treatment
 18 techniques.
 19 Q I believe your testimony says historically
 20 that you have knowledge of poor erosion and
 21 sedimentation controls. Is that based on your
 22 personal observation?
 23 A Yes. Historically there would be large areas
 24 of intermediate cover that were bare and poorly
 25 vegetated and which, based on my observations and

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1 discussions with the facility staff, was a result of
 2 poor revegetation practices.
 3 Q If I could direct your attention to your
 4 prefiled testimony on Page 3, please.
 5 A Okay.
 6 Q If you'll go down to Lines 16 and 17, if you
 7 could, just please read that last sentence into the
 8 record where it says, "I have also witnessed,"
 9 beginning on Line 16, and through the completion of
 10 that sentence on Line 18.
 11 A Okay. "I have also witnessed intermediate
 12 cover slope failures that I believe were related to
 13 poor revegetation practices."
 14 Q Do you recall approximately when you
 15 witnessed these intermediate cover slope failures?
 16 A Not specifically, but I would say it was
 17 probably 2002 to 2004 time frame, early two thousands.
 18 Q And if you would just briefly describe what
 19 you observed that you characterized as intermediate
 20 cover slope failure.
 21 A On the south slope of the facility, there was
 22 at least one and maybe -- actually, I remember several
 23 areas, one area where soil had slipped, had slumped
 24 down the slope for a certain distance, and then some
 25 areas of freshly disturbed soil that when I inquired

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1 about those, the landfill manager told me that those
 2 were areas where they had had some bad erosion and
 3 other areas where the soil had slipped.
 4 Q When you say "slipped," are you saying that
 5 the soil actually went downgrade from where it
 6 apparently had been placed? Is that --
 7 A Yes. Not very far, but a few feet.
 8 Q Did you notice any exposed waste or trash as
 9 a result of those slope failures?
 10 A No, I did not.
 11 Q I believe in your testimony that one of your
 12 recommendations was that there would be a clear
 13 written maintenance schedule for all permanent
 14 sedimentation basins. Isn't that correct?
 15 A Yes.
 16 Q On what facts did you base that
 17 recommendation?
 18 A Based on my experience at this facility and
 19 others, that I've seen those sedimentation basins
 20 quite full of sediment, temporary controls that had
 21 been washed out underneath or overtopped or crushed
 22 and generally in need of maintenance. And in general
 23 for a facility like this or a construction site, one
 24 of the things that is a good operating practice is, in
 25 my opinion, a standard operating practice, is have a

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1 clearly defined maintenance schedule, inspection and
 2 maintenance schedule.
 3 Q Okay. And if I could direct your attention
 4 to the agreement that's been, I think, commonly
 5 referred to as the Rule 11 Agreement in this
 6 proceeding.
 7 A RS-42?
 8 Q It would be RS-42 or City of Austin-3, I
 9 believe.
 10 A Do we have that handy, RS-42?
 11 Oh, thank you. It was hidden under the
 12 application, I guess. Okay.
 13 Q Do you have that in front of you?
 14 A Yes, I have RS-42 in front of me.
 15 Q Okay. Under Section D(9), if you could find
 16 that, please.
 17 A Yes, I have that.
 18 Q Is Section D(9) a representation of a
 19 sedimentation maintenance schedule that you were
 20 referring to in your recommendation in your prefiled
 21 testimony?
 22 A Yes. The last sentence of that item
 23 regarding inspection and maintenance of the
 24 sedimentation basins.
 25 Q Are you satisfied that your recommendation

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1 has been fully addressed in that passage?
 2 A For the sedimentation basins, yes.
 3 Q Okay. Have you examined the sizing of the
 4 sedimentation basins at the BFI facility?
 5 A No. I'm not a drainage engineer or a
 6 hydrologist, and so it's really outside of the scope
 7 of my job or my expertise.
 8 Q Are you aware, just from your personal
 9 knowledge, if anyone at the City of Austin with those
 10 qualifications or expertise examined the sizing of the
 11 sed basins for purposes of the Rule 11 Agreement?
 12 A For purposes of the Rule 11 Agreement, I
 13 don't know if those were specifically looked at.
 14 Mr. Kelly would probably be able to tell you that.
 15 Q Thank you. I believe when Mr. Word was on
 16 the stand, he indicated something about the site plan
 17 permit?
 18 A Yes.
 19 Q You are familiar with that process. Correct?
 20 A Yes.
 21 Q Would you be one of the persons that would be
 22 either reviewing or supervising someone reviewing the
 23 site plan permit for this facility?
 24 A Yes. In this particular case and in other
 25 cases involving landfills, it's not unusual for the

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1 land use review staff to consult with me and ask me to
 2 look at some or all of a site plan for a landfill.
 3 Q And again, since Mr. Word deferred to you
 4 kindly, in the site plan review process, would it be
 5 within the City of Austin's jurisdiction to request
 6 increases of sizing of detention or sedimentation
 7 ponds?
 8 A On occasion, yes.
 9 Q Okay. So are you looking at RS-42? Is that
 10 your copy of the agreement?
 11 A Yes.
 12 Q Okay. Again, back to Paragraph (8), which I
 13 guess at least -- it talks about the designated
 14 Drainage Area 2. Do you see that?
 15 A Yes.
 16 Q Okay. And that the water from Drainage Area
 17 2 will be diverted into either an existing detention
 18 pond or the proposed water quality detention pond,
 19 once the waste fill in Drainage Area 2 has reached the
 20 final grades. Do you see that?
 21 A Yes.
 22 Q Was that a recommendation that was your
 23 recommendation or did that come from somewhere else
 24 within the City of Austin staff?
 25 A It wasn't my recommendation. I believe

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1 Mr. Kelly was involved with that. I'm not certain
 2 that was his direct recommendation or if he was just
 3 involved in the discussion.
 4 Q Okay. It sounds like Mr. Kelly is going to
 5 get a few questions, too.
 6 A Yes.
 7 Q In Paragraph (10) of RS-42, I believe there's
 8 some information in there regarding the Stormwater
 9 Pollution Prevention Plan. Correct?
 10 A Yes.
 11 Q Is your office going to be reviewing any
 12 amendments or proposed changes to the Stormwater
 13 Pollution Prevention Plan as identified in Paragraph
 14 (10)?
 15 A Yes.
 16 Q So that is something that would come before
 17 you. Correct?
 18 A Yes. I will be one of the people to take a
 19 look at it.
 20 Q Okay. And I note that the plan is supposed
 21 to be submitted to the City for review and
 22 concurrence. Is it your understanding that the City
 23 must concur with any proposed changes to the
 24 Stormwater Pollution Prevention Plan before it is
 25 submitted for review or approval by the TCEQ?

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1 A I don't really know one way or another on
2 that. I know this describes concurrence, but that
3 wasn't my language, so I'm not certain about that.
4 Q Okay. Does the City of Austin actually
5 enforce stormwater pollution prevention plans?
6 A No, we don't. Generally if there is a
7 complaint regarding a TPS violation, that those are
8 referred to the TCEQ. We do have our own stormwater
9 permit and have obligations under that, but
10 enforcement of TPS permits is not one of those.
11 Q So wouldn't it make sense procedurally for
12 the City of Austin to approve any changes before that
13 went to the TCEQ, since the TCEQ is the ultimate
14 enforcement body?
15 A Yes, that would make sense. And I think that
16 would -- you know, it's not explicit in the document,
17 but I think that would be my expectation, is that we
18 would review it prior to submittal to the state.
19 Q Mr. Lesniak, you have attended most if not
20 all of the contested case hearings on the BFI
21 application, have you not?
22 A Yes.
23 Q Okay. And you've heard the testimony of
24 Steve Stecher, the expert witness on behalf of TJFA.
25 Correct?

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1 A Yes.
2 Q Have you read also his prefiled testimony?
3 A Most of it.
4 Q Okay. Based on anything that you've heard or
5 witnessed during the course of these hearing, are
6 there any additional recommendations you would make to
7 address the concerns that you expressed in your
8 prefiled testimony?
9 A No, not specifically. I think I stand by my
10 statement in my prefiled testimony. You know, on a
11 facility like this, similar to a large construction
12 site, you can always do things better, you can always
13 do more. But I think that what is in the agreement
14 addresses most of my concerns.
15 Q And did you review any drainage provisions
16 with regard to ultimately the adoption of the Rule 11
17 Agreement?
18 A I reviewed the stormwater drainage
19 characteristics of the site. As I said, I'm not an
20 engineer, so I didn't really review drainage
21 calculations, sizing of channels or structures and
22 those sorts of things. But I did look at how
23 stormwater was going to be managed on the site with an
24 eye towards prevention of erosion and sediment flowing
25 off site beyond their outfalls.

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1 Q Okay. So then it would be fair to say your
2 testimony was much more specifically looking at
3 erosion and effects of erosion and sediments, as
4 opposed to any drainage type issues with respect to
5 capacity or sufficiency of drainage?
6 A Yes. I'm kind of a where-the-rubber-hits-
7 the-road sort of guy as opposed to the people that can
8 actually crunch the numbers.
9 MR. RENBARGER: I appreciate that fully.
10 Thank you.
11 Pass the witness.
12 JUDGE NEWCHURCH: Mr. Blackburn?
13 MR. BLACKBURN: Yes. Let me ask the
14 Court Reporter to provide Exhibit Best-6, Best Exhibit
15 6. And the reason why, I've marked on mine, and so I
16 want to use an unmarked copy.
17 It will be NNC. It will be in the green
18 folder, I think. And it should be Witness Best. I
19 don't know where you've put those.
20 (Brief pause)
21 CROSS-EXAMINATION
22 BY MR. BLACKBURN:
23 Q Well, then, let me try this: It is a picture
24 of water coming off the site, Joyce Best, and it would
25 be Best Exhibit 6. And with the representation that I

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1 have added in blue ink, the 2002 date here -- well,
2 that's at least one set of them. That's Evelyn's.
3 Well, I think we can use this. I have put in -- you
4 see in blue ink the date 2002?
5 A Yes.
6 Q Now, I'll make the representation that I
7 added that to my copy. Besides that, that is the
8 exhibit that has been introduced as Best-6. It is
9 Bates stamped NNC97. Do you see that?
10 A Yes.
11 Q All right. Have you ever seen that
12 photograph previously?
13 A Yes, I have. I believe Ms. Best e-mailed a
14 copy of that shortly after this occurred.
15 Q Now, in the context of the City of Austin's
16 jurisdiction, is there anything in that photograph
17 that at least potentially would trigger the City of
18 Austin's jurisdiction?
19 A Possibly. If the area was subject to an
20 approved site plan, there could be possible land
21 development code violations occurring here regarding
22 erosion and sedimentation control. If this water left
23 the site, it would potentially be a violation of the
24 City's water quality code.
25 Q Now, what I'm trying to do is, I'm not asking

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1 you specifically, but I'm trying to understand the
 2 context of your regulatory structure.
 3 A Okay.
 4 Q Because people call the City of Austin and
 5 complain to you about Sunset Farms. Correct?
 6 A Yes.
 7 Q And what I'm really trying to understand is
 8 what you have jurisdiction over and what's the context
 9 of that. Now, you said, I believe, if they have a
 10 site development plan that were approved, there might
 11 be violations here?
 12 A Yes.
 13 Q Do you know if Sunset Farms currently has a
 14 site development plan that is approved?
 15 A For portions of the property, I believe they
 16 do.
 17 Q Okay. And so there's portions they do and
 18 portions they don't?
 19 A I believe that's true, yes.
 20 Q Now, can you explain how that came about? I
 21 mean, why wouldn't it be for the whole site?
 22 A Well, not being familiar with the history of
 23 regulation of landfills, I really couldn't tell you
 24 why there are certain portions that do, certain
 25 portions that don't. I don't know, when they first

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1 began activity out there, whether or not we had either
 2 the same rules that are in place today or if we had
 3 jurisdiction at the time, so I don't really know.
 4 Q So you really don't know?
 5 A No.
 6 Q Okay. Now, is it my understanding that as
 7 part of the so-called Rule 11 Agreement, that BFI has
 8 agreed to submit a site development plan for approval
 9 to the City?
 10 A Yes.
 11 Q Now, was that in doubt prior to the Rule 11
 12 Agreement?
 13 A Not in my mind.
 14 Q Now, in general, what does the site
 15 development plan cover?
 16 A Activities related to construction and
 17 development of a site. And on, you know, a typical
 18 site, a lot of our rules have to do with impervious
 19 cover and drainage infrastructure, parking lots, how
 20 you build buildings, really how they're constructed
 21 overall.
 22 One of the things that's fairly unique
 23 about a landfill facility is, they have very little
 24 impervious cover, and so many of our water quality
 25 regulations that are in our development code are not

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1 triggered because those are really centered on
 2 impervious cover.
 3 Q Now, do you have, as part of the site
 4 development plan process, concerns about flow, for
 5 example, leaving the site?
 6 A Absolutely. Yes.
 7 Q And is there a regulatory structure or rule
 8 that directly addresses that?
 9 A Yes. There's really two regulatory
 10 structures that apply here. One is the land
 11 development code, and the land development code
 12 doesn't, for the most part, have -- regarding water
 13 leaving the site, it doesn't have numerical rules,
 14 discharge limits like you have in TPES or in other
 15 parts of the city code. It's really about proper
 16 placement of erosion controls, proper stormwater
 17 management on site, proper source control of erosion
 18 and sedimentation, placement of temporary or permanent
 19 water quality controls.
 20 And then there is an inspection process
 21 that's associated with the site plan, once
 22 construction starts, to ensure that everything is
 23 being done according to the site plan. And if there
 24 are problems found during those inspections that maybe
 25 weren't anticipated during the site plan review, which

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1 is common on a construction site, they can made -- the
 2 inspector can direct modifications to that site plan
 3 for those controls.
 4 Then the City has a water quality code,
 5 that we have an obligation under state law to protect
 6 water quality within our jurisdiction. And so we have
 7 numerical criteria and discharge limitations that are
 8 in that water quality code that apply directly to
 9 discharges. Any discharge from this facility or any
 10 other property within the City of Austin that
 11 discharges to stormsewers or watercourses is subject
 12 to those numerical limitations and a general
 13 prohibition against polluting surface water.
 14 Q And is there a prohibition associated with
 15 increasing the flow coming off of the piece of
 16 property being developed?
 17 A In our land development code, there is. And
 18 in our water quality code, there is not a provision
 19 that applies to that directly, but there is a
 20 provision that indirectly applies, that if a discharge
 21 creates unusual maintenance requirements or causes
 22 congestion of a stormsewer or waterway, that that
 23 would be generally prohibited.
 24 Q And if I had questions about specific aspects
 25 of drainage and particularly flows and calculations of

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1 flows, would those be better directed to Mr. Kelly?
 2 A Yes, sir.
 3 MR. BLACKBURN: Pass the witness.
 4 JUDGE NEWCHURCH: Any further cross?
 5 MR. GOSSELINK: I do, and I have perhaps
 6 more than I expected. Would you like me to go on or
 7 would you like to break?
 8 JUDGE NEWCHURCH: Maybe we should take
 9 our lunch break --
 10 MR. GOSSELINK: Okay.
 11 JUDGE NEWCHURCH: -- until 1:30. So
 12 let's talk a little bit about -- when we come back,
 13 you have 20 minutes? How much?
 14 MR. GOSSELINK: Yes, I may winnow it
 15 down over lunch, but 20 minutes.
 16 JUDGE NEWCHURCH: Okay. I was just
 17 trying to get a sense of the rest of the day. And
 18 there's been several references to Mr. Kelly, so I'm
 19 assuming Mr. Kelly is going to be with us for a while.
 20 Thank you, Mr. Kelly.
 21 MR. RENBARGER: Run, Mike, run!
 22 JUDGE NEWCHURCH: I'm just trying to
 23 figure out the rest of the day, because the parties
 24 want to break to negotiate, and then we have the
 25 Executive Director's witnesses. I'm wondering if

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1 we're actually going to be done by 5 o'clock or so.
 2 MR. GOSSELINK: It would be, in the big
 3 picture, consistent with sort of the game plan we laid
 4 out yesterday. You know, I would be willing to stay
 5 late. I know it's Friday, and I've had, like
 6 everybody else, two long weeks. But it would be very
 7 helpful to get to the end of the State's case in order
 8 to evaluate what rebuttal is required. Otherwise, we
 9 don't get to the end until Monday, and then we have --
 10 you know, then we don't have the weekend to deliberate
 11 about it.
 12 JUDGE NEWCHURCH: Yes. Well, I'm seeing
 13 some grimaces, and we could listen, pre-weekend and
 14 weekend plans. The weekend starts at 5 o'clock on
 15 Friday.
 16 MR. CARLSON: We were talking about
 17 meeting on Monday, I believe, anyhow for a little bit.
 18 So if there's a little mop-up on Monday morning --
 19 JUDGE NEWCHURCH: We might be able to do
 20 just a little bit more on Monday morning without
 21 seriously jeopardizing your plans to analyze your
 22 rebuttal.
 23 MR. TERRILL: Judge, this might make me
 24 unpopular, but I'll also suggest taking less than an
 25 hour and a half for lunch also.

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1 JUDGE NEWCHURCH: Works for me. But,
 2 you know, I've got the easiest job. I've just got to
 3 go downstairs. We could reconvene at 1:00.
 4 MR. BLACKBURN: I think that works for
 5 me.
 6 MR. GOSSELINK: I've always found, you
 7 know, we have to go off-site and it takes -- 50
 8 minutes will not make it. How about 1:30?
 9 JUDGE NEWCHURCH: If we say 1:00, we're
 10 not going to get back by 1:00.
 11 MR. GOSSELINK: Yes.
 12 JUDGE NEWCHURCH: Why don't we just say
 13 1:30. We may have to work a little bit on Monday.
 14 And I know that compromises your rebuttal proposal a
 15 little bit. But it seems like, even if we do go on
 16 Monday, we'll probably be done mid-morning Monday.
 17 MR. RENBARGER: Judge, we may want to
 18 discuss this at a later time. But at least from our
 19 perspective, I believe counsel has identified that at
 20 least one witness, Mr. Sherrod, may be coming back to
 21 talk about some things.
 22 And again, just in the interest of
 23 keeping the hearing moving itself, we certainly would
 24 have no objections and, in fact, encourage, if we're
 25 going to be meeting on Monday, to go ahead and knock

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1 out Mr. Sherrod while we can get that done.
 2 JUDGE NEWCHURCH: Meeting Monday?
 3 MR. RENBARGER: On Monday, yes, sir, as
 4 a rebuttal witness.
 5 JUDGE NEWCHURCH: I have to admit I'm
 6 drawing a blank. Mr. Sherrod was --
 7 MR. RENBARGER: Well, excuse me. I
 8 believe Mr. Gosselink indicated, when we were talking
 9 about rebuttal cases --
 10 JUDGE NEWCHURCH: Yes.
 11 MR. RENBARGER: -- that one witness he
 12 has, he knows already Mr. Sherrod is very likely going
 13 to be a part of that rebuttal case.
 14 JUDGE NEWCHURCH: Well, yes. But he
 15 also --
 16 MR. RENBARGER: And there were some
 17 others he was considering.
 18 JUDGE NEWCHURCH: -- asked for an
 19 opportunity to evaluate his overall needs for
 20 rebuttal. So to ask him to jump ahead on that, I'm
 21 not quite sure I'm ready to do that.
 22 MR. RENBARGER: Okay.
 23 JUDGE NEWCHURCH: So why don't we break
 24 until 1:30, and we'll go from there.
 25 (Recess: 12:07 p.m. to 1:30 p.m.)

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1 AFTERNOON SESSION
2 FRIDAY, JANUARY 30, 2009
3 (1:30 p.m.)
4 JUDGE NEWCHURCH: Okay. I think we're
5 ready. Back on the record.
6 Are there any preliminary matters this
7 afternoon?
8 Mr. Lesniak has returned to the stand.
9 And, Mr. Gosselink, I think you had
10 additional cross?
11 MR. GOSSELINK: Yes, sir. Thank you.
12 PRESENTATION ON BEHALF OF THE CITY OF AUSTIN
13 (continued)
14 CHARLES LESNIAK III,
15 having been previously sworn, testified as follows:
16 FURTHER CROSS-EXAMINATION
17 BY MR. GOSSELINK:
18 Q Hi again.
19 A Howdy.
20 Q Mr. Lesniak, you were asked a few questions
21 by counsel for TJFA and the counsel for NNC, and one
22 of them related to some of the complaints that you
23 received or were aware of in the nineties, and you
24 identified those as basically relating to sediment
25 runoff. Do you remember that?

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1 A Yes.
2 Q Okay. And was it your intent in helping
3 craft the Rule 11 Agreement that the provisions in the
4 Rule 11 Agreement would seek to address those concerns
5 and remedy them?
6 A Yes, definitely.
7 Q Do you think that, in fact, those provisions
8 will remedy those concerns that you observed back in
9 the nineties?
10 A Yes.
11 Q Okay. And you commented that there were
12 some -- you put it in an interesting context, that a
13 landfill is like a large ongoing construction project.
14 Right? Do you remember that?
15 A Yes.
16 Q And you commented that you did observe in the
17 past that there were historical erosion problems at
18 this large ongoing construction project. Right?
19 A Yes.
20 Q And again, does the Rule 11 Agreement, as you
21 have helped craft it, address those concerns?
22 A Yes, it does.
23 Q You also were asked specifically about a
24 circumstance at the BFI site where there were two -- I
25 think you called them in your prefiled testimony a

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1 slope failure, but you really I think modified that to
2 be more of a slump of a few feet on the cover
3 material. Do you remember that?
4 A Yes.
5 Q Okay. And one of the things that you
6 testified about, as I recall, was that in addition to
7 the observable slumps, there were some areas of
8 freshly placed material. Do you remember that --
9 cover material?
10 A Yes, freshly placed or freshly repaired. I
11 don't know if new material had been brought in or --
12 Q Yes, I think that's what you actually said,
13 there was just fresh material there.
14 A Yes, just freshly disturbed.
15 Q Okay. And you asked the landfill manager --
16 was that Everett Moore? Do you know Everett Moore?
17 A Yes --
18 Q Okay.
19 A -- I believe it was.
20 Q And you asked him, "What was that about?"
21 essentially, why was that material there?
22 A Yes, I think so. I don't know if I asked him
23 explicitly. Generally we were talking about the
24 condition of the slope and just having a conversation
25 about the conditions out there.

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1 Q Okay. And did he explain to you that he had,
2 in fact, spotted this erosion and was fixing it, and
3 that was evidence of some of the repair and
4 restoration process that was ongoing?
5 A Yes; yes, he did.
6 Q Okay. Now, I know that you were out to the
7 site in September as part of an effort to be diligent
8 and check out the status of the site, somewhere before
9 any negotiations took place about the Rule 11
10 Agreement. Right?
11 A Yes.
12 Q Have you been out there more recently?
13 A Not on the facility itself, but I have driven
14 by it recently.
15 Q Okay. Well, let's just talk about -- well,
16 it might apply to both. During your site visits,
17 either in September or more recently, did you observe
18 the constructed Ditch K?
19 A Yes, I did.
20 Q Okay. And did it appear to be constructed
21 consistent with the approved design?
22 A I didn't review that site plan very closely.
23 But, yes, based on my understanding of how it was to
24 be constructed, it has been, yes.
25 Q And was there a lot of vegetation in the

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<p>1 channel? 2 A Yes, certainly. 3 Q Okay. Cattails and other -- 4 A Yes. 5 Q -- types of vegetation -- 6 A Yes. 7 Q -- that were intended to be in the channel? 8 A Yes. 9 Q Okay. Did you develop an opinion as to 10 whether or not Ditch K was or would function in the 11 way that the City had envisioned it to function? 12 A I don't think I can comment on that as far as 13 how the City envisioned it to function, because I 14 wasn't involved in the original discussions of what 15 the intent of Ditch K was to be. 16 Q Okay. That was Mike Lyday? 17 A Yes. 18 Q Okay. But as far as you could tell, you 19 know, did it look like that BFI had done what it 20 promised to do? 21 A Yes. 22 Q Okay. And assuming that Mr. Lyday had a good 23 motive in mind -- and as far as you could tell, this 24 was going according to plan? 25 A Yes.</p>	<p>1 downchutes. But, yes, I did see downchutes in a 2 number of places. 3 Q Okay. And just out of curiosity, was your 4 observation of those downchutes what gave rise to your 5 idea or somebody's idea to put that 100-foot buffalo 6 grass sod strip on the top of them? That's just a 7 curiosity question. 8 A No, that wasn't my idea. But, yes, as a 9 practical matter, I believe that's effective. 10 Q And when you were out there, did you see any 11 evidence of maintenance of the sedimentation basins on 12 the west side? 13 A Yes, they appeared to have been recently 14 cleaned out. 15 Q Did you have a conversation with Mr. Dugas 16 about how do you get in and out of these things in 17 order to do that? 18 A Yes, I believe we did. 19 Q Okay. And when you talked to Mr. Dugas, did 20 you talk to him about the new irrigation system? 21 A I don't remember a conversation specifically 22 about a new irrigation system. 23 Q Okay. 24 A We may have, but I don't remember that. 25 Q I think that -- you know, I looked at my</p>
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<p>1 Q Okay. And while you were out there, did you 2 see additional sediment controls that you hadn't seen 3 in the past? 4 A Yes, certainly. 5 Q Okay. And these sediment controls that you 6 hadn't seen in the past, these were in place 7 notwithstanding the fact that the Rule 11 Agreement 8 had not yet been executed. Correct? 9 A Yes, certainly, because at that time there -- 10 I don't know which controls you're talking about 11 specifically. But when I was out there for the site 12 visit, we had not done the Rule 11 Agreement yet, yes. 13 Q What were the additional controls that you 14 did see? 15 A I don't remember specifically. But to the 16 extent that vegetated areas are controlled, you know, 17 the site vegetation was generally much improved over 18 what it had been during past visits. There was 19 probably more silt fencing in place than I had seen 20 historically. Generally the site outside of the areas 21 that were being actively worked, the vegetation was 22 more mature. 23 Q Did you see the temporary downchutes? 24 A I saw a number of downchutes. I don't 25 remember specifically which ones are temporary</p>	<p>1 notes, and I'm glad you didn't, because that I don't 2 think happened. Let me ask you the right question. 3 (Laughter) 4 A That's good. 5 Q Okay. And the right question is, did you 6 hear Mr. Dugas testify about it when he was here? 7 A Yes, I did. 8 Q Okay. And do you appreciate that the 9 irrigation system which he has presently put in prior 10 to the Rule 11 Agreement, and that which he has 11 presently put in, indeed subsequent to the Rule 11 12 Agreement, is in place on the north slope? 13 A What's the question? 14 Q Did you hear him say that, is the question? 15 A Yes, yes. 16 Q Okay. And that's something that the City 17 wanted to have happen, isn't it? 18 A Yes, absolutely. 19 Q It's part of the Rule 11 Agreement? 20 A Yes. 21 Q So they're taking steps to implement the 22 Rule 11 Agreement as it relates to that provision. 23 Correct? 24 A Yes, it appears so. 25 Q In general, Mr. Lesniak, your observations of</p>

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1 BFI as it has performed in its relationships with you
 2 as part of the negotiations and even prior to the
 3 negotiations, do you have reason to believe that BFI
 4 is committed to implementing the terms of the Rule 11
 5 Agreement?
 6 A No, not at all. I don't have any reason to
 7 believe that.
 8 Q I hope we had a disconnect.
 9 (Laughter)
 10 A Okay. Ask the question again.
 11 Q All right. Do you have any reason to believe
 12 that BFI is not committed to implementing the terms of
 13 the Rule 11 Agreement?
 14 A I don't have any reason to believe that they
 15 are not committed. I believe that they are committed
 16 to implementing the Rule 11 Agreement.
 17 Q Thanks. I asked the wrong question. I'm not
 18 sure if I asked the wrong question twice or you
 19 answered --
 20 A Okay. We got there.
 21 Q We got there. And considering your
 22 observations about how the site is now being operated
 23 in comparison to the way it had been operated and
 24 considering the provisions in the Rule 11 Agreement
 25 and considering your observations about BFI's

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1 commitment to implement the terms of the Rule 11
 2 Agreement, are you satisfied that this site, assuming
 3 all three of those factors continue, will have
 4 effective erosion and sedimentation control practices
 5 at that site?
 6 A Yes, I do.
 7 MR. GOSSELINK: I pass the witness.
 8 JUDGE NEWCHURCH: Any further cross?
 9 MR. RENBARGER: One quick question.
 10 FURTHER CROSS-EXAMINATION
 11 BY MR. RENBARGER:
 12 Q Mr. Lesniak, I believe counsel just asked you
 13 a number of questions about a September of 2008 site
 14 visit. Correct?
 15 A Yes.
 16 Q Do you recall when that was scheduled?
 17 A As far as when it was scheduled before we
 18 actually went and did the visit?
 19 Q Yes, sir.
 20 A No. It was probably scheduled a few weeks, a
 21 week ahead. I'm not sure exactly.
 22 MR. RENBARGER: Okay. Pass the witness.
 23 JUDGE NEWCHURCH: Any other cross?
 24 MR. BLACKBURN: No cross.
 25 JUDGE NEWCHURCH: Ms. Noelke?

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1 MS. NOELKE: No questions.
 2 JUDGE NEWCHURCH: Thank you,
 3 Mr. Lesniak. You're excused.
 4 Ms. Noelke, your next witness.
 5 MS. NOELKE: I call Mr. Michael Kelly.
 6 (Witness sworn)
 7 JUDGE NEWCHURCH: Please have a seat.
 8 Mr. Kelly.
 9 Ms. Noelke.
 10 MS. NOELKE: Thank you.
 11 MICHAEL PATRICK KELLY,
 12 having been first duly sworn, testified as follows:
 13 DIRECT EXAMINATION
 14 BY MS. NOELKE:
 15 Q Would you state your full name, please.
 16 A My name is Michael Patrick Kelly.
 17 Q Thank you. And who is your employer?
 18 A The City of Austin Watershed Protection and
 19 Development Review Department.
 20 Q What is your job with the City?
 21 A I'm a civil engineer specializing in water
 22 resources.
 23 Q Thank you. Would you please look at City of
 24 Austin Exhibits 8 and 9. Would you identify these
 25 exhibits.

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1 A Exhibit 8 is my prefiled testimony. Exhibit
 2 9 is a summary, resume of my qualifications as they
 3 pertain to this case.
 4 Q Thank you. Regarding Exhibit 8 and Exhibit
 5 9, do you have any corrections or changes that need to
 6 be made?
 7 A I do. I have four typographic errors that I
 8 would like to correct.
 9 Q All right. Would you identify those, please.
 10 A Page 2 of 6, Line 7, the word "and" between
 11 "analyze" and "stormwater" should be deleted.
 12 Line 20 of the same page, the word "no"
 13 should be changed to "on."
 14 Page 4 of 6, Line 18, there should be a
 15 "d" at the end of the word "place," "berms should be
 16 placed."
 17 And one more. On Page 5 of 6, Line 9,
 18 the word "stormwater" near the end of the sentence,
 19 the "m" and the "r" are transposed.
 20 JUDGE NEWCHURCH: Page 5, Line 9, is
 21 that what you said?
 22 WITNESS KELLY: That's correct.
 23 MS. NOELKE: Second to the last word in
 24 that Line 9.
 25 JUDGE NEWCHURCH: Oh, I see.

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1 Stormwater.
 2 WITNESS KELLY: Yes.
 3 Q (BY MS. NOELKE) Is that it?
 4 A That is it.
 5 Q Do you adopt your prefiled testimony today as
 6 if you had given it here live?
 7 A I do.
 8 MS. NOELKE: We would offer City of
 9 Austin Exhibits 8 and 9.
 10 JUDGE NEWCHURCH: Just a second.
 11 Mr. Kelly --
 12 WITNESS KELLY: Sir?
 13 JUDGE NEWCHURCH: -- look at Page 4,
 14 Line 21. Isn't there a word that needs to be fixed
 15 there?
 16 MS. NOELKE: Oh, yes.
 17 JUDGE NEWCHURCH: Line 21, Page 4.
 18 WITNESS KELLY: Yes. I see the word
 19 "slope" has a zero in there that should be deleted.
 20 JUDGE NEWCHURCH: So that should be
 21 s-l-o-p-e?
 22 WITNESS KELLY: Correct.
 23 MR. BLACKBURN: I'm sorry. Where are
 24 you?
 25 WITNESS KELLY: Page 4, Line 21.

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1 MS. NOELKE: Page 4, Line 21.
 2 JUDGE NEWCHURCH: Mr. Kelly, you type
 3 like I do.
 4 (Laughter)
 5 WITNESS KELLY: A rather embarrassing
 6 start.
 7 (Laughter)
 8 JUDGE NEWCHURCH: Ms. Noelke, with that
 9 you offered 8 and 9. Correct?
 10 MS. NOELKE: Yes, Your Honor.
 11 JUDGE NEWCHURCH: And is there
 12 objection?
 13 MR. RENBARGER: No objection.
 14 MR. BLACKBURN: No objection.
 15 JUDGE NEWCHURCH: Both are admitted.
 16 (Exhibit City of Austin Nos. 8 and 9
 17 admitted)
 18 MS. NOELKE: Pass the witness.
 19 JUDGE NEWCHURCH: Mr. Gosselink?
 20 CROSS-EXAMINATION
 21 BY MR. GOSSELINK:
 22 Q Good afternoon, Mr. Kelly.
 23 A Good afternoon.
 24 Q Are you familiar with the Rule 11 Agreement?
 25 A I am.

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1 Q Are you familiar with the proposed special
 2 conditions for the TCEQ draft permit that seek to
 3 implement the Rule 11 Agreement?
 4 A Yes, I am.
 5 Q Okay. And did you, in fact, participate in
 6 the development of the Rule 11 Agreement?
 7 A Yes, I did.
 8 Q Is it fair to characterize the first half of
 9 your testimony -- actually, the majority of the pages
 10 of your testimony as setting forth your concerns about
 11 the application in the event there was no Rule 11
 12 Agreement?
 13 A Yes.
 14 Q And is it fair to also characterize your
 15 testimony as stating at the end that because of the
 16 Rule 11 Agreement, you have no further concerns about
 17 your area of expertise, which I think has been
 18 characterized as -- let me just read your answer, if I
 19 can, and see if that is still your answer. "It is an
 20 agreement that substantially increases the
 21 requirements and protections that the site
 22 operator" -- will implement. Would that be another
 23 typo?
 24 A Yes.
 25 Q -- at the landfill. It will result in less

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1 exposed soil, quicker and denser establishment of
 2 vegetation, proper maintenance and establishment of
 3 the vegetation, better capture of sediment on the site
 4 so that ultimately the stormwater runoff leaving the
 5 site will have significant reductions in sediment."
 6 Is that still your opinion?
 7 A Yes.
 8 Q Okay. Do you, Mr. Kelly, have any doubt,
 9 based upon your negotiations with BFI and your
 10 observations of their actions in those negotiations
 11 and subsequently about whether or not BFI is committed
 12 to implementing the terms of this Rule 11 Agreement?
 13 A I have been given no reason to doubt that
 14 commitment.
 15 Q Do you believe that they're capable of
 16 implementing those terms?
 17 A Yes.
 18 MR. GOSSELINK: Pass the witness.
 19 JUDGE NEWCHURCH: Let's see. For cross,
 20 Mr. Terrill?
 21 MR. TERRILL: No questions.
 22 JUDGE NEWCHURCH: Ms. Talley?
 23 MS. TALLEY: No questions.
 24 JUDGE NEWCHURCH: Ms. Mann?
 25 MS. MANN: I have no questions.

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1 JUDGE NEWCHURCH: Mr. Shepherd?
 2 MR. SHEPHERD: No questions.
 3 JUDGE NEWCHURCH: Mr. Head?
 4 CROSS-EXAMINATION
 5 BY MR. HEAD:
 6 Q Good afternoon, Mr. Kelly.
 7 A Good afternoon.
 8 Q You looked at the -- your primary areas of
 9 concern, according to your testimony on Page 3 of 6,
 10 is drainage, water quality and erosion control. Is
 11 that accurate?
 12 A Yes.
 13 Q Did you review the portion of the
 14 application, Attachment 6, regarding the drainage?
 15 A May I --
 16 Q The application?
 17 A -- review that just to make sure I know what
 18 you're talking about.
 19 Q Where it starts, yes. It's going to be
 20 Volume 2.
 21 MR. BLACKBURN: It should be right
 22 there.
 23 Q (BY MR. HEAD) It's Attachment 6, and it
 24 begins at 000922.
 25 A Okay. Yes, I have seen this.

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1 Q Did you review the calculations during these
 2 calculation?
 3 A I do not believe I got into detail on this.
 4 I was primarily focused on the submittals for city
 5 permits, and I was looking primarily at the drainage
 6 calculations in that submittal.
 7 Q Right. Now, you testified on Page 5, Line 9
 8 of your prefiled, that "There are drainage areas that
 9 do not drain to stormwater ponds prior to discharging
 10 to off-site drainage systems." That was one of your
 11 concerns. Correct?
 12 A Correct.
 13 Q Do you believe that -- has there been any
 14 modification that you're aware of whereby all drainage
 15 areas now drain to stormwater ponds?
 16 A With the condition that the previously
 17 permitted by City of Austin wet pond be constructed
 18 and that drainage area then drain to that, I believe
 19 all the primary areas of my concern were addressed.
 20 Q Could you turn to, in the application, Page
 21 000968.
 22 A Okay.
 23 Q And do you see Drainage Area D-3 at the
 24 southeast section of the facility?
 25 A Yes, I see D-3.

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1 Q Do you see where D-3 discharges into any
 2 stormwater pond?
 3 A Will you give me a second just to follow the
 4 arrows here?
 5 Q Take your time.
 6 (Brief pause)
 7 A It appears that, if I'm reading the arrows
 8 right, that the drainage area, at least some of it
 9 goes to Ditch L. It also appears that some of it
 10 would go into the ditch that feeds the proposed wet
 11 pond.
 12 Q Point me out where you see where drainage
 13 area D-3 goes to the wet pond, if you can.
 14 A Well, I guess I would state that it's
 15 unclear. I'm seeing some arrows that point the
 16 direction to Ditch L, but then I'm seeing the contours
 17 that would force the water to the pond, and I'm not
 18 seeing any barriers or anything that would prevent
 19 surface runoff from moving there. So it's a bit
 20 unclear, but it's going to one of two places, either
 21 towards Ditch L or towards the pond, based on the
 22 contours.
 23 Q And if there had been sworn testimony in this
 24 hearing to the effect that D-1 and D-3 -- certainly
 25 D-3 does not go through any stormwater pond, would you

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1 have any reason to dispute that testimony?
 2 A I would take that as somebody more
 3 knowledgeable about it.
 4 Q All right. Now, D-1, can you tell me where
 5 D-1 enters a stormwater pond, Drainage Area D-1 which
 6 is at the northwest quadrant?
 7 A On this drawing, there doesn't appear to be
 8 any pond. What I was made aware of during this
 9 testimony and just noticing from some of the other
 10 exhibits, was that there was something called an
 11 existing sedimentation pond, I believe, at that site.
 12 Q Yes, sir.
 13 A And so that was my -- that was the pond that
 14 I believed was going to capture the outfall from D-1.
 15 Q If you look at the pond, the large ponds
 16 right below where it says D-10, 53.18-acre --
 17 A Uh-huh.
 18 Q -- does not that pond take water from
 19 Downchute B from Area D-2?
 20 A Yes.
 21 Q Do you see any conduit where water from D-1
 22 enters that pond?
 23 A No, I don't.
 24 Q Okay. Have you visited the facility?
 25 A No, I have not.

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1 Q So you never have had the occasion to look at
2 any of the detention ponds on the west of the southern
3 side.
4 A No.
5 Q Have you done any analysis as to whether
6 those ponds are adequately sized?
7 A Yes, I have.
8 Q What was your analysis?
9 A My analysis --
10 Q What did your analysis consist of?
11 A My analysis consisted first of asking
12 questions about how they were sized, when we were
13 first presented this information.
14 Q And who did you ask those questions to?
15 A I asked it of Mr. Shull.
16 Q Right.
17 A -- as the representative. And the answer I
18 got was that they were sized for a half inch of runoff
19 volume.
20 Q Right. Have you done any independent
21 analysis as to whether these ponds, being sized for
22 one-half inch of capture volume, is adequate to catch
23 the sediment from a landfill which is anticipated to
24 be expanded another 75 to 50 feet high?
25 A I have not corresponded the drainage area to

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1 the size. I accepted the word that they were sized
2 for a half inch. And then I verified that that was
3 the rule for the City of Austin Environmental Criteria
4 Manual for sizing, and which it was.
5 Q And does that rule specifically apply to
6 landfills?
7 A No, it does not specifically apply to
8 landfills. It applies to the construction phase of
9 any land development project.
10 Q Regardless of the fact that there's a half
11 inch criteria in the City of Austin manual, you have
12 done no independent analysis as to whether these
13 sedimentation ponds will be adequate to control the
14 sedimentation coming from off the slopes, have you?
15 A That's correct. I've done no additional
16 calculations to that regard.
17 MR. HEAD: All right. Pass the witness.
18 JUDGE NEWCHURCH: Mr. Blackburn?
19 CROSS-EXAMINATION
20 BY MR. BLACKBURN:
21 Q Good afternoon.
22 A Good afternoon.
23 Q I have a couple of questions to ask you,
24 Mr. Kelly, regarding City of Austin drainage
25 requirements. Is this an area that you work with?

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1 A It is.
2 Q And if you'll look in the application at Page
3 1127 and Page 1128. That's APP. It's right at the
4 very back of Part 2.
5 A Okay. I'm there.
6 Q Do you see that there is, on Page APP 1127,
7 something called "Existing Drainage Condition, City of
8 Austin." And then on 1128, "Proposed Drainage
9 Condition, City of Austin"?
10 A Yes, I see that.
11 Q Now, could you explain to me what the City of
12 Austin's review of drainage alterations involves?
13 A The bottom line is that there are no adverse
14 impacts, and that is determined by changes in certain
15 hydrologic or hydraulic parameters. The real bottom
16 line is a change in the water surface elevation
17 typically downstream off of a property, so when the
18 water leaves a property, you want to make sure that
19 downstream or adjacent property owners are not
20 flooded. That's the primary criteria, and that's done
21 by using a step-back water model. Other than that,
22 other hydrologic parameters would be the discharge
23 rate and the discharge volume to look to see for
24 increases in those.
25 Q So you are looking to see if there is an

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1 increase in both rate and volume of flow from the
2 changed condition as compared to the prior condition?
3 A Yes. May I clarify that those last two, the
4 rate and volume, are indicators. To my knowledge,
5 they are not -- it is not prohibited in and of itself
6 that thou shalt not have an increase in those two.
7 What is prohibited is an increase in the water surface
8 elevation of the 100-year storm.
9 Q Okay. So you used the 100-year storm as
10 opposed to the 25-year storm as your criteria?
11 A That's City of Austin criteria.
12 Q Now, to your knowledge, on Page 1127, does
13 the flow that's depicted at any of the outfalls, it
14 includes both the 25-year and the 100-year. Correct?
15 A That's correct.
16 Q And do I understand there is some calculation
17 difference between the way the City of Austin
18 calculates these matters and TCEQ does?
19 A That's what I've learned through this
20 hearing.
21 Q Now, there is a site development plan, I
22 believe, that has been submitted to the City of
23 Austin. Is that correct?
24 A Yes.
25 Q And would this be -- would the review of this

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1 drainage system be part of that site development
2 review process?
3 A Yes.
4 Q Now, how does the City of Austin define or
5 consider existing conditions?
6 A I believe it's the condition that is existing
7 on the ground when you bring your plan in the door.
8 Q And what if that existing condition is
9 different than a prior permitting condition for that
10 piece of property?
11 A Could you lead me a little further along?
12 I'm not quite sure -- or repeat the question.
13 Q I would be happy to lead you further along.
14 (Laughter)
15 MR. BLACKBURN: Let's see. Let me ask
16 the Court Reporter, could you find AM-33, please.
17 Q (BY MR. BLACKBURN) Mr. Kelly, if you would
18 look at the Figure 3 on the back, that should be a
19 fold-out map there. Did you find that?
20 A Okay. I did.
21 Q What I'll represent to you is that AM-33 is a
22 letter from the TCEQ with regard to the approval of a
23 permit modification for this BFI Landfill site. And
24 this modification, the date of the letter is
25 February 1, 2006, and the drawing is indicated as

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1 being revised on March 1, 2006. Do you see that?
2 A I do.
3 Q Now, this had been -- I'll represent to you
4 prior testimony indicated that this was the final
5 permitted condition of the modification that was
6 applied for and received by BFI. Have you ever seen
7 this document before?
8 A Figure 3 or the entire --
9 Q Well, first I'll ask you, have you seen the
10 letter?
11 A I believe right now is the first time I'm
12 seeing the letter.
13 Q And have you previously seen the diagram that
14 is identified as Figure 3?
15 A If it was included in these binders, then I
16 did. But I don't recall seeing it loose or as an
17 attachment here. I may have. But, quite frankly, the
18 volume, number of some of these drawings, I'm not
19 exactly sure when I saw what.
20 Q Right. And I'll represent to you that I do
21 not believe that this is in the application. I
22 believe that this comes through a separate set of
23 exhibits --
24 A Okay.
25 Q -- involving permit modification that has

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1 been introduced into evidence in this proceeding but
2 was not directly a part of the application.
3 A Okay.
4 Q Now, would you look -- and what I want you to
5 do is compare Figure 3 of AM-33, the one I just asked
6 you to look at, with the existing conditions,
7 APP 001127 from the application.
8 A Okay. I've got them side-by-side here.
9 Q Okay. Would you look at -- the nomenclature
10 is a bit different, but there is an outflow to the
11 west that goes through Sedimentation Pond A that
12 should be identified on both exhibits. Do you see the
13 sedimentation pond at sort of the top of the -- well,
14 toward the top of the west boundary?
15 A Yes. The sedimentation pond -- Sedimentation
16 Pond A?
17 Q Right.
18 A Yes, I do.
19 Q And there is a Q noted on AM-34. Do you see
20 that?
21 A I do.
22 Q And there is a Q noted on Figure 3 of AM-33?
23 A Yes.
24 Q And I will represent to you they've been --
25 one is your City of Austin calculation and another is

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1 TCEQ calculation, so the Q's will be different.
2 A Okay.
3 Q Is that your understanding?
4 A I heard that during the testimony, yes.
5 Q That the methodologies are a bit different
6 and so -- and I'm not asking you to compare the Q's.
7 I'm just trying to find the point where that outflow
8 is.
9 A Okay.
10 Q Now, in looking at the diagram, first from
11 AM-33, Figure 3 that's attached to that, can you see
12 where the boundary is of DA 5 which depicts the
13 boundary of the area flowing into Sedimentation Pond
14 A? Do you see that?
15 A I do.
16 Q Okay. Now, I want you to compare that with
17 the boundary on the existing drainage condition City
18 of Austin map, APP 1127 for the same area. Do you see
19 that?
20 A Yes, I do.
21 Q Now, do you see where, on the Figure 3 from
22 AM-33, there is a boundary line that essentially stops
23 the flow going to Sedimentation Pond A roughly at the
24 north edge of Sedimentation Pond A? Do you see that
25 boundary?

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1 A I believe I'm looking at the same thing. In
 2 my exhibit, this is outlined in a blue triangle, and
 3 this would be the base of the triangle, so to speak.
 4 Q Be the base of the triangle.
 5 A Yes. Okay. I see that.
 6 Q And do you see where that triangle, that
 7 area, do you see the area that is marked as a blue
 8 triangle?
 9 A Yes.
 10 Q On Figure 3 of AM-33, that triangle is shown
 11 flowing to the north and then back around to the east
 12 as Part of DA what is called 6 on that diagram.
 13 Correct?
 14 A I have to be real honest. From the size of
 15 this, it's really difficult for me to see the arrows
 16 on this to really tell you.
 17 Q Let me ask you this, to do this as an
 18 assumption. Assume with me that the arrows indicate
 19 and prior testimony indicate that on Figure 3 of
 20 AM-33, the drainage is indicated as flowing to the
 21 north and back to the east as part of the drainage of
 22 DA 6.
 23 A Yes, that looks clear.
 24 Q Okay. Now, if you look at the existing
 25 drainage conditions on the City of Austin application

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1 on 1127 -- I'm talking about this same triangle
 2 area --
 3 A Okay.
 4 Q -- do you see that D-7, which drains to
 5 Sedimentation Pond A, has been enlarged to include the
 6 triangle as part of its drainage area?
 7 A Yes, I see that.
 8 Q Do you see that the drainage area draining to
 9 Sedimentation Pond A has increased from 27 acres,
 10 under AM-33, Figure 3, to 35.9 acres on APP 1127?
 11 A I see that.
 12 Q Now, based on your understanding of
 13 hydrology, if you increase the size of a drainage
 14 area, will you increase the flow coming out of any
 15 outlet from that drainage area?
 16 A All other conditions being equal, yes.
 17 Q And if you increase the slope on that same
 18 drainage area, will you further increase the amount of
 19 flow coming off that drainage area?
 20 A If it results in an increase in the time of
 21 concentration, your peak flow would increase.
 22 Q Okay. Now --
 23 A I'm sorry. I misspoke. If it results in a
 24 decrease in the time of concentration, it would result
 25 in an increase in the peak flow. Right.

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1 Q Is it appropriate under City of Austin
 2 requirements if, in fact, Figure 3 of AM-33 is the
 3 existing permitted condition, to represent existing
 4 conditions to be contrary to that which is permitted?
 5 A I don't know that I have a definitive City of
 6 Austin answer on that.
 7 Q Does it cause you some concern?
 8 A May I explain my thought process that's going
 9 on right now?
 10 Q Oh, I guess so (laughter), reluctantly guess
 11 so.
 12 A If I'm the person looking at this, then I
 13 understand that there is a permitted condition and
 14 there is an actual condition. I don't know under what
 15 authority the City has to operate for previous -- or
 16 for other entities' previous permitted conditions.
 17 And so that would cause me a question mark, as a City
 18 of Austin reviewer, to say, "Is it on-the-ground
 19 conditions that exist right now or am I beholden to
 20 previously permitted?" And so that would be the
 21 question mark in my mind as I looked at this.
 22 Q Okay. Well, then, let me change this a bit.
 23 Existing conditions at this location are represented
 24 as being something. There is an increase in time of
 25 concentration that is associated with that, and that

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1 might increase flow, all things being equal. If that
 2 were all that was happening and that flow were
 3 increased and there was not an offset, would that be
 4 of concern to the City of Austin?
 5 A To summarize the question, would it be of
 6 concern to the City of Austin if the flow was
 7 increased as a result of these changes?
 8 Q Yes.
 9 A If it caused an adverse effect to other
 10 property owners, it would be.
 11 Q Now, in your discussions with BFI with regard
 12 to the Rule 11 Agreement, did anyone from BFI ever
 13 point to you the fact that their prior permitted
 14 condition might be different than what perhaps is on
 15 the ground out there?
 16 A I don't recall that discussion ever
 17 happening.
 18 MR. BLACKBURN: Pass the witness.
 19 JUDGE NEWCHURCH: Any further cross?
 20 MR. GOSSELINK: Yes, Your Honor.
 21 FURTHER CROSS-EXAMINATION
 22 BY MR. GOSSELINK:
 23 Q Mr. Kelly, you were just asked some questions
 24 about more or less what's the better way to look at
 25 the situation in defining the existing conditions at

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1 the site. Is it better to rely upon a mistaken
 2 permitted condition when you're trying to figure out
 3 what will actually happen out there or is it better to
 4 rely upon the actual on-the-ground conditions when
 5 you're trying to figure out what's going to happen
 6 next with the proposed on-the-ground conditions?
 7 Which is the better thing to do?
 8 A I don't know what is better. I can --
 9 Q Wouldn't you prefer to know what the real
 10 answer is rather than be tied to some prior mistake?
 11 A In terms of -- why I'm pausing is because
 12 there are a number of things interacting here, and
 13 it's tough to answer one question without answering
 14 two or three more. Would you mind asking it again?
 15 Just maybe I can get a better handle on this.
 16 Q Yes, sir. If you were in Drainage
 17 Engineering Class 101 or 301 and the professor asked
 18 you, "I would like to find out whether or not this
 19 project is actually going to impact the downstream
 20 landowners," would you like to evaluate a condition
 21 that you knew was inaccurate, although it was written
 22 down somewhere, or would you like to evaluate the
 23 actual on-the-ground condition to make that
 24 determination?
 25 A I would certainly like to use on-the-ground

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1 accurate information.
 2 Q Okay. Now, I hesitate to ask this. Why was
 3 my first question giving you pause? Did that have
 4 something to do with City of Austin procedural issues?
 5 A Well, it was the word "previously permitted
 6 condition."
 7 Q Okay.
 8 A And then -- and now I'm outside of the
 9 classroom and I'm in the real world and I know that
 10 there are other agencies, other rules that I may not
 11 be aware of and not sure which condition am I required
 12 to look at as that condition.
 13 Q Okay.
 14 A I would be concerned if there were an error.
 15 However, knowing that sometimes rules do not always
 16 represent reality, I would want to get straight on
 17 both of them so that I could make the best decision
 18 and at least represent to somebody who could make that
 19 decision what the rub was.
 20 Q Okay. And I appreciate that you are very
 21 good at what you do. As a taxpayer, that's a
 22 distressing kind of response. But the bottom line is,
 23 what you should be doing as an engineer is, you should
 24 be trying to figure out what the actual facts are to
 25 make the actual comparisons. Right?

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1 A That's one thing that I do.
 2 Q Okay. And as part of that, you would point
 3 that out, but you would also point out this potential
 4 confusion associated with the prior permit
 5 representations. Is that what you're telling me?
 6 A Yes.
 7 Q Okay. So there's these thing that you would
 8 say to sort of a boss saying, "Hey, look. This is
 9 what's really happening, but these guys actually have
 10 a document over here that's inconsistent with what's
 11 really on the ground." Okay?
 12 A Yes.
 13 Q Okay. Now, did you hear the explanation from
 14 Mr. Mehevec about why what's in that AM-33 document is
 15 different than what's actually on the ground?
 16 A I did hear it.
 17 Q Okay. Is there anything in there that struck
 18 you as not actually affecting -- you know, he said
 19 there were three things that changed, that caused the
 20 change in the flow. Do you remember that?
 21 A I do.
 22 Q Okay. And one of them was, for example, the
 23 TxDOT manual change?
 24 A Yes.
 25 Q You're aware that that's true?

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1 A Yes.
 2 Q Okay. And the other thing he said was that
 3 they, through some due diligence, discovered a
 4 topographic inconsistency and so they said, "Wow!
 5 Since 1994, we've had this arrow going to the east;
 6 but, in fact, the water is going to the south." Okay?
 7 So he said, "We need to make that change." Do you
 8 remember that?
 9 A Yes, I do.
 10 Q And is that, in fact, one of those things
 11 that we just agreed was the right thing to do?
 12 A In terms of representing reality, yes.
 13 Q Okay. And he also admitted that part of the
 14 buffer zones weren't included.
 15 A Okay.
 16 Q If you're trying to represent reality,
 17 shouldn't you contract the buffer zones?
 18 A If they indeed drain through an outlet and
 19 you're trying to calculate the flow to that outlet,
 20 yes.
 21 Q Okay. So he did all the right things in
 22 terms of Drainage 301. Right?
 23 A I would agree.
 24 Q Okay. Now, the question on the table which
 25 you can't answer is whether or not Mr. Mehevec did

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1 something or failed to do something when he submitted
 2 AM-33. Right?
 3 A Correct.
 4 Q And, you know -- and you would say, "Gee,
 5 that might affect what I have to do or might affect
 6 what my bosses have to do, even if it doesn't reflect
 7 reality," but you can't make that decision or you feel
 8 it's not your decision to make that decision.
 9 Correct?
 10 A Yes.
 11 Q You make the decision about what's
 12 engineeringly accurate and you leave it to the
 13 policymakers to make a decision about what they have
 14 to consider other than what's real?
 15 A If I had a question that I couldn't make that
 16 decision, I would bump it up the chain and ask for
 17 assistance, yes.
 18 MR. GOSSELINK: No further questions.
 19 Pass the witness.
 20 JUDGE NEWCHURCH: Any other cross?
 21 Mr. Blackburn -- Mr. Head?
 22 MR. HEAD: No.
 23 FURTHER CROSS-EXAMINATION
 24 BY MR. BLACKBURN:
 25 Q I want you to make an assumption with me if

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1 you would, Mr. Kelly, that an applicant for a drainage
 2 permit comes into the City of Austin a few years back
 3 and they represent to you they're going to make a
 4 change, and they present to you documentation showing
 5 that there is no alteration in flow, no increase in
 6 the 100-year flood plain off-site. And on that basis,
 7 you approve it, it meets your regulations. Then
 8 sometimes later they come back in and they say, "You
 9 know, that condition that you approved for me to go
 10 to, actually, I was wrong, and there is more flow
 11 coming off than was previously thought to be." Now,
 12 had that been represented at the original time, it
 13 might not have been approved. Right?
 14 A If that additional amount resulted in an
 15 adverse impact, you're correct.
 16 Q Now, if I have represented to you I'm going
 17 to engineer something to work a certain way, does that
 18 indicate to you I have control over how that is, in
 19 fact, put on the ground?
 20 A Yes.
 21 Q And if I represent to you in a drawing to the
 22 City of Austin that I'm going to build something a
 23 certain way, will you hold me to that?
 24 A If you build it, yes.
 25 Q If I build it, it has to be built in

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1 accordance with the plans?
 2 A Correct.
 3 Q And if I come in to you later and I say,
 4 "Hey, I didn't exactly build it like I told you I was
 5 going to build it, and it's changed the flow," are you
 6 going to accept that as reality on the ground or are
 7 you going to come back at me on that?
 8 A So you're coming back for another permit?
 9 Q Another permit, that's right. And I'm going
 10 to come back and I'm going to say, "You know, I didn't
 11 do what I told you last time. But don't worry about
 12 that. This is the truth about what's out there now,"
 13 do I get that as a starting point or do you hold me to
 14 what I previously promised?
 15 A I'm going through this in my mind right now.
 16 So we've given a permit under certain assumptions.
 17 You now come back and you want to do something else
 18 and say, "Oh, but, by the way, the conditions have
 19 changed"?
 20 Q Correct. And those conditions that have
 21 changed, at least one of those, was a condition that
 22 was under my engineering control.
 23 A I think where I would first go is, you've got
 24 to make your control act the way that you said it was
 25 going to, because what that says to me is, you

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1 probably, either in construction or design or bidding
 2 or something, it didn't get built the way you
 3 permitted it. And if there is more water coming out
 4 of that control than you said, then before we start as
 5 ground zero, that control needs to function as it was
 6 permitted previously.
 7 MR. BLACKBURN: Thank you. No further
 8 questions.
 9 JUDGE NEWCHURCH: Anything more?
 10 MR. GOSSELINK: I think so.
 11 JUDGE NEWCHURCH: Okay.
 12 FURTHER CROSS-EXAMINATION
 13 BY MR. GOSSELINK:
 14 Q You were asked a hypothetical question a
 15 minute ago, and I'm going to ask you a hypothetical
 16 question which I think more closely resembles what's
 17 actually happening.
 18 A Okay.
 19 MR. BLACKBURN: I object to the
 20 testimony.
 21 JUDGE NEWCHURCH: To Mr. Gosselink's
 22 testimony?
 23 MR. BLACKBURN: Yes.
 24 JUDGE NEWCHURCH: That objection is
 25 sustained. Go ahead and ask your question.

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1 Q (BY MR. GOSSELINK) I'm going to ask you a
 2 different hypothetical question.
 3 A Okay.
 4 Q If there was a prior permit that was
 5 submitted -- and I'm going to ask you to look at
 6 what's previously been marked as AM-32 and ask whoever
 7 might have it to deliver it to you.
 8 A Okay.
 9 Q Do you have it, Mike?
 10 A I do.
 11 Q And this represents a 2002 modification which
 12 at the time reflected understood topography and the
 13 understood requirements of the TxDOT manual or the
 14 City of Austin requirements. Okay? That's the
 15 baseline piece. And in 2006, which is AM-33, you'll
 16 see that there is a section taken out of the right-
 17 hand corner of the landfill. Do you see that, "DA 1,
 18 22 acres" word there. Do you see that?
 19 A Oh, okay. I see where you're at now, yes.
 20 Q Okay. And you'll note that there is a change
 21 reflected in the flow or the Q in Outflow 1 right by
 22 the area where that change, physical design to the
 23 landfill occurred?
 24 A Okay. I see that.
 25 Q And, indeed, the Q went from 1386 to 1377.

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1 Do you see that?
 2 A I do.
 3 Q Okay. And you see that all the other Q's
 4 stayed the same?
 5 A Yes.
 6 Q Do you see the cover note of the letter on
 7 the front of AM-33 dated February 1, 2006, do you see
 8 that? And if you would turn to the third page under
 9 "Drainage calculations," do you see that?
 10 A Yes.
 11 Q It's (b), and this is a notice of deficiency
 12 letter. And the question posed by the TCEQ to BFI
 13 was, "What are the drainage calculation results for
 14 drainage areas DA 2, 3, 4, 5 and 12?" Do you see
 15 that?
 16 A I do.
 17 Q And in order to have the TCEQ be able to
 18 consider this application for the MOD in 2006, BFI had
 19 to answer the NOD question. Do you understand that?
 20 A Okay. Yes.
 21 Q And they responded by saying, "Nothing has
 22 changed on those other outflows, and so we don't
 23 really need to submit anything about that." Would
 24 that be consistent with the way the City of Austin
 25 would look at a submission like this? In other words,

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1 if nothing has changed on those portions of the
 2 project, do you have to go through any recomputations
 3 at that time?
 4 A No, just the area that was changed.
 5 Q All right. So now what happens is, the
 6 Applicant discovers three things that have changed,
 7 and we've gone over that. Okay? TxDOT, which
 8 includes a change in the C factor. Right.
 9 A (Nods head)
 10 Q Okay. A survey and the buffer zone. Faced
 11 with the reality of those changes, he needs to make a
 12 decision about what's the right thing to submit and
 13 label it "existing conditions." Is it not correct
 14 that he should include those changes in that
 15 submission so as to accurately and properly define the
 16 actual existing conditions?
 17 A Yes.
 18 MR. GOSSELINK: Pass the witness.
 19 JUDGE NEWCHURCH: Anything more?
 20 MR. BLACKBURN: No.
 21 JUDGE NEWCHURCH: Thank you,
 22 Mr. Kelly -- oh, I did it again.
 23 MS. NOELKE: I have no questions.
 24 JUDGE NEWCHURCH: I'm sorry, Ms. Noelke.
 25 Mr. Kelly, thank you for your service.

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1 You're excused.
 2 Ms. Noelke, I think that was your last
 3 witness. Right?
 4 MS. NOELKE: Yes.
 5 JUDGE NEWCHURCH: Any other evidence to
 6 offer of any kind?
 7 MS. NOELKE: No. We rest.
 8 JUDGE NEWCHURCH: Okay. I think we are
 9 ready for the Executive Director's case. I think that
 10 the parties also asked for a break to negotiate
 11 concerning the permit provisions.
 12 Why don't we do this: You don't know
 13 how long that's going to take. Right?
 14 MR. HEAD: I would expect it will take,
 15 the way people have been getting along in some of
 16 these special provision negotiations, I hope it will
 17 take no longer than 20 or 30 minutes max.
 18 JUDGE NEWCHURCH: Okay.
 19 MR. GOSSELINK: Are you looking at me,
 20 saying this is (laughter)?
 21 (Simultaneous discussion)
 22 JUDGE NEWCHURCH: Ms. Mann, you have a
 23 pen in your hand. Would you take my desk phone
 24 number, please.
 25 MS. MANN: Sure.

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1 JUDGE NEWCHURCH: 936.0716. And call me
 2 when you're ready.
 3 MR. SHEPHERD: Judge, one last question.
 4 As far as the order of questioning the ED witnesses,
 5 are we going to follow the same basic pattern here?
 6 JUDGE NEWCHURCH: Well, I was going to
 7 ask about that. Mr. Shepherd, am I correct that your
 8 position, similarly to Austin's, is that you do not
 9 oppose the issuance of a permit but you do not favor
 10 issuance of a permit either, you're kind of neutral,
 11 aren't you?
 12 MR. SHEPHERD: We are neutral. I view
 13 our responsibility is reviewing the proposed
 14 application for whether it meets the rule in rendering
 15 a neutral opinion on that.
 16 JUDGE NEWCHURCH: Right. And that
 17 opinion is that, as I understand it from your
 18 witnesses, that you have found no deficiencies?
 19 MR. SHEPHERD: At this point in time --
 20 at the point before the SOAH hearing started, we had
 21 made a recommendation to issue that permit, that it
 22 met the rules. But we are certainly open to
 23 considering evidence from this hearing and
 24 re-evaluating that recommendation.
 25 JUDGE NEWCHURCH: Okay. I think we

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1 should proceed in the same manner. It does seem to
 2 work very well. As long as everybody had an
 3 opportunity to cross until they were exhausted, it
 4 worked out.
 5 MR. RENBARGER: Right. No, I think
 6 that's perfectly fair.
 7 JUDGE NEWCHURCH: Okay. So we'll do the
 8 same thing.
 9 MR. SHEPHERD: All right.
 10 JUDGE NEWCHURCH: I guess in the same
 11 order --
 12 MR. SHEPHERD: Okay. Thank you, Judge.
 13 JUDGE NEWCHURCH: -- with the one
 14 exception.
 15 Okay. Off the record.
 16 (Exhibits ED Nos. ED-AA-1 through
 17 ED-AA-3 and ED-MU-1 through ED-MU-3 marked)
 18 (Recess: 2:29 p.m. to 3:02 p.m.)
 19 JUDGE NEWCHURCH: All right. Back on
 20 the record. And I don't think I exactly need a
 21 report, because it's going to come up later. Right?
 22 You've been negotiating. The results of that will
 23 come up during the testimony, I think.
 24 MR. HEAD: Your Honor --
 25 JUDGE NEWCHURCH: Yes, sir?

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1 MR. HEAD: -- are we on the record?
 2 JUDGE NEWCHURCH: Yes, sir.
 3 MR. HEAD: I do think we want to make it
 4 clear on the record that all parties to this
 5 proceeding agreed to the special conditions of which
 6 you're going to hear, all parties have agreed to
 7 those.
 8 JUDGE NEWCHURCH: Okay. Excellent.
 9 MR. HEAD: And we do want that on the
 10 record when it comes before the TCEQ.
 11 JUDGE NEWCHURCH: Okay.
 12 MR. BLACKBURN: With the understanding
 13 that we are not in agreement with issuance, but if it
 14 is issued, that this language has been cleared by all
 15 the parties?
 16 JUDGE NEWCHURCH: Okay. And that will
 17 be presented during the Executive Director's case, I
 18 assume, the exact language that you've agreed on?
 19 MR. HEAD: The language is. But I just
 20 wanted it clear that all parties -- of course, we
 21 oppose the permit issuance.
 22 JUDGE NEWCHURCH: Right.
 23 MR. HEAD: All parties have agreed to
 24 the special conditions.
 25 JUDGE NEWCHURCH: Do you opposed the

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1 permit issuance?
 2 MR. HEAD: We oppose the permit. Was I
 3 not clear on that?
 4 (Laughter)
 5 JUDGE NEWCHURCH: Just making sure.
 6 Housekeeping: Mr. Carlson, you had some
 7 deposition excerpts that you wanted to offer?
 8 MR. CARLSON: That's correct, Judge.
 9 And I can either -- I'm going to offer you, obviously,
 10 the hard copy of excerpts from the deposition of
 11 Jeremiah Bentley, which would constitute BFI's
 12 cross-examination of him, since his prefiled was
 13 admitted by agreement. I can read the page lines or I
 14 can just mark it as BFI 35 and we can leave it at
 15 that.
 16 JUDGE NEWCHURCH: I would prefer if
 17 it's -- and it was agreed earlier that this would be
 18 the vehicle for establishing the cross-examination.
 19 MR. BLACKBURN: Yes, Your Honor, it was
 20 agreed.
 21 JUDGE NEWCHURCH: It's going to be
 22 easier for you to just mark it and admit it into the
 23 record.
 24 MR. CARLSON: All right.
 25 MR. BLACKBURN: And that's fine with me

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1 as well.
 2 MR. CARLSON: It will be BFI-35.
 3 (Exhibit BFI No. 35 marked)
 4 JUDGE NEWCHURCH: Okay. BFI-35. Does
 5 any party object to the admission of BFI-35?
 6 MR. CARLSON: And just for the record,
 7 everybody has a copy. It's only the yellow lines, the
 8 highlighted lines that we're offering.
 9 JUDGE NEWCHURCH: All right. So pretty
 10 limited. Okay. Only the yellow lines. And without
 11 objection, BFI-35, without limitation, is admitted.
 12 (Exhibit BFI No. 35 admitted)
 13 JUDGE NEWCHURCH: Okay. Any other
 14 housekeeping before we go to --
 15 MR. BLACKBURN: I'm sorry. What was
 16 that BFI number?
 17 JUDGE NEWCHURCH: 35.
 18 MR. BLACKBURN: 35.
 19 JUDGE NEWCHURCH: So anything else
 20 before we go to the Executive Director's case?
 21 And, Mr. Shepherd, you may call your
 22 first witness, unless you have an opening statement.
 23 MR. SHEPHERD: I do not have an opening
 24 statement. I would like to call Art Avakian.
 25 JUDGE NEWCHURCH: If you would come

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1 forward, please.
 2 (Witness sworn)
 3 JUDGE NEWCHURCH: Thank you.
 4 Mr. Shepherd.
 5 PRESENTATION ON BEHALF OF THE EXECUTIVE DIRECTOR
 6 ARTEN J. AVAKIAN,
 7 having been first duly sworn, testified as follows:
 8 DIRECT EXAMINATION
 9 BY MR. SHEPHERD:
 10 Q Mr. Avakian, do you have --
 11 MR. SHEPHERD: Could I ask the Court
 12 Reporter to hand what has been marked as ED-AA-1 to
 13 the witness.
 14 A Ready.
 15 Q (BY MR. SHEPHERD) Do you have that before
 16 you?
 17 A I do.
 18 Q Could you identify that document?
 19 A This is my prefiled testimony.
 20 Q Okay. Do you have any changes that you would
 21 like to make to that, any corrections to that
 22 testimony?
 23 A Yes, I have several corrections.
 24 Q And could you -- if there is no objection by
 25 the parties, if you could just walk through those and

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1 identify them.
 2 A I will.
 3 Q Kind of go slowly enough where people can
 4 follow along with you.
 5 A Okay. Several corrections to the listings in
 6 the table of contents. In the table of contents
 7 listing for Issue 0, Part 2, Application Materials
 8 Relating to Issue 0, it begins on Page 28, not 27 as
 9 marked in the listing. Just below that, Item 3,
 10 Technical Review Conclusion, that should be 29 instead
 11 of 28.
 12 Then for Issue X, on the next page the
 13 second item is missing. It's Subheading No. 2. No. 2
 14 would be Application Materials Relating to Issue X.
 15 And then the next item which is shown as 2 is actually
 16 No. 3, Technical Review Conclusion Relating to Issue
 17 X.
 18 Also in the table of contents, the list
 19 of exhibits, the exhibit list should begin with
 20 ED-AA-2. ED-AA-1 is the prefiled testimony which
 21 we're looking at. ED-AA-2 is my resume, which also
 22 includes my continuing education. So there is not a
 23 separate exhibit of training record.
 24 The third exhibit is not the item listed
 25 here. It's a copy of the Executive Director's

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1 response to public comment. So Exhibit ED-AA-3 should
 2 be Executive Director's Response to Public Comment.
 3 Q And then, Mr. Avakian, following that
 4 exhibit, are there also an exhibit AA-4 and an Exhibit
 5 AA-5 that should be listed there?
 6 A Yes. There are two more exhibits that were
 7 provided in a supplement to the prefiled testimony on
 8 the next day. AA-4 is a copy of the draft permit or
 9 the draft permit as it existed at the time we filed
 10 the prefiled testimony. So Exhibit ED-AA-4 is a copy
 11 of the draft permit, and ED-AA-5 is a copy of the
 12 compliance history reports.
 13 Q And then after the exhibits, are there any
 14 other corrections throughout the prefiled?
 15 A Yes, there's a few more corrections. On Page
 16 7, Line 276, at the end of that line -- this line is
 17 referring to the date of the first technical notice of
 18 deficiency. The date at the end of the line should be
 19 March 15, 2006, not March 21, 2007. The correct date
 20 is March 15, 2006.
 21 Q Okay.
 22 A And then on Page 22, Line 875 where it says
 23 "slope stability," it should read "closure and
 24 post-closure."
 25 Q So is that to delete the words "slope

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1 stability" or to make an addition?
 2 A No. It is to delete "slope stability" and
 3 substitute the words "closure and post-closure" --
 4 rather, the phrase "closure and post-closure."
 5 And a few more items. On Page 28, Line
 6 1119, the rule reference 330.177 is a typo. That
 7 should be 330.127.
 8 Now, there's a couple of other items.
 9 This is the prefiled testimony prepared in November.
 10 Since that time, there have been several revisions to
 11 the draft permit, including today, and also --
 12 Q And, Mr. Avakian, if I could, we still do
 13 have those. If we could, one that I think we had
 14 discussed out of order. But while we're still on the
 15 prefiled, I believe on Page 34 of the prefiled,
 16 there's some language identifying the compliance
 17 history that was prepared. Is that information --
 18 let's see. That would be on Page 34, Line 1335?
 19 A Yes. We have prepared another compliance
 20 history report since then. I think it was prepared at
 21 the time that the permit application was transferred
 22 from Inc. to LLC, from BFI. I can't remember the
 23 whole name now. But anyway, we prepared another
 24 compliance history, and that was attached to the
 25 supplement to the prefiled, and it is part of Exhibit

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1 ED-AA-5.
 2 Q And so that language in your existing
 3 prefiled should just be read in conjunction with the
 4 exhibit which is the compliance history which is
 5 broader than what is referenced there?
 6 A Correct.
 7 Q Okay. Thank you. And now -- sorry to
 8 interrupt you earlier -- I believe you had mentioned
 9 that we had some changes to the draft permit,
 10 including some changes discussed during our meeting
 11 just a few minutes ago, and that we've also had some
 12 corresponding revisions to the application which have
 13 been provided in two different submittals. Is that
 14 your understanding?
 15 A That is my understanding, yes.
 16 Q Okay. I would like to approach it now. And
 17 I'll bring you those and see if we can get them
 18 distributed.
 19 JUDGE NEWCHURCH: Mr. Shepherd, while
 20 you do that, this has been a little different in that
 21 you sent me all three copies of the prefiled direct.
 22 So two that the Court Reporter has for the official
 23 record are the ones that I have been holding. And I
 24 don't know that you've ensured that those correspond
 25 to the changes in the additional documents that

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1 Mr. Avakian described. So would you do that while you
 2 go up there. We'll go off the record.
 3 MR. SHEPHERD: I will do that. Would
 4 you prefer that we go through and mark those at this
 5 time?
 6 JUDGE NEWCHURCH: Yes. It's going to be
 7 best if you mark and get everything squared away
 8 before we move on.
 9 Off the record.
 10 (Off the record: 3:15 p.m. to
 11 3:21 p.m.)
 12 (Exhibit ED No. ED-AA-4 marked)
 13 JUDGE NEWCHURCH: Back on the record.
 14 Q (BY MR. SHEPHERD) If I may, Mr. Avakian, you
 15 have made the changes to the Court's copy of your
 16 testimony that we just went over?
 17 A Yes.
 18 Q Your testimony before you, you had referenced
 19 an Exhibit 4 and an Exhibit 5. Do those testimonies
 20 include those exhibits?
 21 A The testimonies in the file here?
 22 Q Yes. The ones before you.
 23 A Not yet.
 24 Q Okay. I would like to hand you what is
 25 marked as ED-AA-4. I think this was identified in our

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1 prefiled and provided to the parties, but the Court
 2 may not have the copies that it needs.
 3 MR. SHEPHERD: And, Judge, if I could on
 4 this AA-4, this is the draft permit that has continued
 5 to result in some changes, and I actually have another
 6 change to it that I would like to read into the
 7 record. But it is labeled AA-4, I think the same as
 8 an exhibit that you already have.
 9 JUDGE NEWCHURCH: So is this the
 10 substitute -- is this the revised draft permit that
 11 people have been talking about?
 12 MR. SHEPHERD: Yes.
 13 JUDGE NEWCHURCH: So this AA-4 should
 14 replace the one that was supplementally provided?
 15 MR. SHEPHERD: Correct.
 16 JUDGE NEWCHURCH: Okay.
 17 MR. SHEPHERD: I didn't know if you
 18 wanted that labeled AA-4 or if you would prefer a
 19 different exhibit number on it.
 20 JUDGE NEWCHURCH: No. Actually, that's
 21 probably a little cleaner, so we talk about one draft.
 22 Okay. So everybody is clear now that what's before me
 23 is the revision that I understood from Mr. Head's
 24 comments that the parties have agreed on with one
 25 change that Mr. Shepherd is about to read.

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1 So does anyone object to the
2 substitution of this Revised AA-4 previously provided
3 draft permit?
4 MS. NOELKE: No objection.
5 MR. BLACKBURN: No.
6 JUDGE NEWCHURCH: All right. So that
7 substitution is permitted. It hasn't actually been
8 offered yet.
9 Q (BY MR. SHEPHERD) And before I offer it,
10 Mr. Avakian, do you have that marked Exhibit 4 before
11 you now?
12 A Yes.
13 Q And that is the current, the most current
14 final draft permit?
15 A I think so, except for the things that were
16 discussed in the -- just before --
17 Q Yes. And I was getting to that. Could you
18 refer to Page 11 of that document. And it would be
19 the section on the bottom half of the page that is
20 under "Special Provisions."
21 A Okay. I'm there on 11.
22 Q Okay. And Special Provision B would read,
23 "All waste receipts shall cease on or before November
24 1, 2015." And then we would be -- the parties have
25 agreed to insert language after that sentence that

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1 would read, ". . . the permittee shall restrict the
2 property in which the landfill currently operates from
3 being used for transfer station operations on or after
4 November 1, 2015." Is that your understanding for
5 where that that language would be added?
6 A Yes.
7 Q Okay. And then at the end of that same
8 sentence, there would also be an addition of the
9 language, "The maximum heights, depths and footprint
10 for the landfill fill area, as approved by the TCEQ
11 under Permit no. MSW-1447A, shall not be exceeded by
12 any subsequent modification or amendment of the
13 permit?"
14 A Yes. That was the other change that I
15 understood had been discussed.
16 Q Okay. Very good. So that would be the --
17 with that addition, that would be the final draft
18 permit provided by the Executive Director?
19 A Yes.
20 MR. SHEPHERD: Okay. I believe the
21 other exhibit that we had made reference to was the
22 compliance history. I just wanted to make sure if the
23 Judge and the Court's file has that Exhibit 5, the
24 compliance history?
25 JUDGE NEWCHURCH: I have a compliance

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1 history. Is that being replaced?
2 MR. SHEPHERD: No, it is not. I wasn't
3 sure . . .
4 Q (BY MR. SHEPHERD) Mr. Avakian, do you have
5 that compliance history before you in the prefiled?
6 A Are you referring to Exhibit ED-AA-5?
7 Q Yes. You don't have to look too far. I
8 don't think you have it, and I wanted to provide extra
9 copies.
10 A All right.
11 (Exhibit ED No. ED-AA-5 marked)
12 Q I'm actually handing to the Court Reporter
13 two copies of ED-AA-5, compliance history. Is that
14 the compliance history that was prepared for this
15 application?
16 A Yes, this is it.
17 Q Okay. I want to back up a little bit so that
18 we have discussed the draft permit that we just made
19 the last change to a minute ago. Does that draft
20 permit incorporate the application in this case?
21 A Yes, it does. Part II of the permit
22 establishes that the application -- that is, Parts I
23 through IV of the application -- are Attachment A to
24 this permit.
25 Q And do you understand that there have been

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1 some recent requests to make revisions to that
2 application, one of which has already been offered and
3 admitted into the evidence by the Applicant? I
4 believe that that was RS-44, dated January 16th.
5 A Yes, I'm aware there are two packages of
6 changes to the application, one of them being already
7 entered as RS-44 and the other -- about to be entered?
8 MR. SHEPHERD: Okay. And if we could,
9 could I ask the Court Reporter to -- do we have RS-44
10 up here?
11 Could we go off the record for just a
12 minute?
13 JUDGE NEWCHURCH: Off the record.
14 (Off the record)
15 JUDGE NEWCHURCH: Back on the record.
16 Q (BY MR. SHEPHERD) Now, Mr. Avakian, I
17 understand that may be a red line strike-out version
18 of RS-44?
19 A Yes. This looks like the first round of
20 revisions that we looked at.
21 Q Okay. So you have reviewed the revisions
22 made and those are acceptable to the Executive
23 Director?
24 A Yes.
25 Q Okay. And now I understand that there is

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1 also a proposal which the Applicant would now like to
2 make an additional set of revisions. And I'm going to
3 hand you what is not marked at this point, hand it to
4 the Court Reporter, actually, and I believe this would
5 be marked as the next BFI exhibit in their list of --
6 MR. GOSSELINK: We will be happy to --
7 you had suggested that you would give us an
8 opportunity to sponsor these additional revised pages.
9 And since that hasn't happened yet and Mr. Shepherd
10 was about to do it, I think he just stepped -- he is a
11 volunteer. If you want us to come and offer it, we
12 will.
13 JUDGE NEWCHURCH: I think there was an
14 agreement that we could proceed this way. Is that
15 right?
16 MR. RENBARGER: That's correct.
17 JUDGE NEWCHURCH: Okay, just to make
18 things easy. So just to be clear, Mr. Gosselink, you
19 want to reopen your case --
20 MR. GOSSELINK: For the purpose of
21 introducing --
22 JUDGE NEWCHURCH: -- for the limited
23 purpose of offering what will be BFI Exhibit --
24 whatever the next number is?
25 MR. GOSSELINK: 36?

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1 THE REPORTER: Yes.
2 JUDGE NEWCHURCH: And, Mr. Gosselink,
3 what is this, please?
4 MR. GOSSELINK: These are the revised
5 pages requested by the Executive Director to implement
6 the latest agreements by BFI to add special
7 conditions.
8 MR. SHEPHERD: And, Judge, for
9 clarification, I believe it's not as thick as it
10 appears. I think there's both a clean copy and a red
11 line strike-out copy, which both sets have been
12 provided to the parties.
13 JUDGE NEWCHURCH: There is a clean copy
14 and a strike-out copy.
15 MR. SHEPHERD: If you will take the
16 binder off, I was thinking we had two little
17 binders -- yes.
18 JUDGE NEWCHURCH: Okay. So --
19 MR. SHEPHERD: You might want to have
20 like a 36A and 36B or something like that.
21 MR. GOSSELINK: Yes.
22 MR. SHEPHERD: Or 36 and 36B.
23 JUDGE NEWCHURCH: So this is -- okay.
24 So what I've got on the first page says, "Sunset Farms
25 Landfill." And if I flip in -- well, I don't know.

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1 I'm confused.
2 MR. CARLSON: There are two copies of
3 the same thing -- right, Mr. Shepherd? -- one that's
4 the clean copy and one that has the red line strike-
5 out that would reflect the changes or show the
6 changes. Right?
7 MR. SHEPHERD: That is my understanding.
8 MR. CARLSON: And I would suggest that
9 perhaps we have Exhibit -- is it BFI-36? -- and then
10 36B is the red line strike-out, would help people see
11 the changes.
12 MR. SHEPHERD: And I believe this
13 parallels what was done with RS-44 where there was
14 both a clean copy and a red line strike-out copy.
15 MR. TERRILL: Judge, one possible way
16 that this may be getting confused is on the clean
17 version, at least on my copy, Brad Dugas' Applicant
18 statement and Applicant's certification is in front of
19 that, which at least confused me initially.
20 JUDGE NEWCHURCH: Right. So that's not
21 repeated. That's --
22 MR. TERRILL: Right.
23 JUDGE NEWCHURCH: -- additional. Okay.
24 MR. SHEPHERD: May I approach, Your
25 Honor? I want to show you the one that's the red

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1 line. It's hard for anybody to find.
2 JUDGE NEWCHURCH: Okay. All right.
3 So --
4 MR. SHEPHERD: I would recommend that
5 the clean version be offered as BFI 36 and then the
6 red line version that just kind of helps give a
7 roadmap to the changes be BFI 36B perhaps.
8 JUDGE NEWCHURCH: Okay. So first of
9 all, I understand that there's no objection to BFI
10 reopening its direct case for this limited purpose.
11 Correct?
12 MR. HEAD: There is no objection. I
13 think it would be appropriate.
14 JUDGE NEWCHURCH: Okay. Without
15 objection, you're allowed to reopen. And am I also
16 correct in understanding that there is no objection to
17 the admission of 36, which is the revised page? And
18 there is no objection to 36B, which is the red line
19 strike-out version offered for the limited purpose of
20 more easily understanding the change in 36? Is that
21 right?
22 MR. GOSSELINK: That's correct.
23 JUDGE NEWCHURCH: Without objection,
24 both 36 and 36B are admitted.
25 (Exhibit BFI Nos. 36 and 36B marked and

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1 admitted)

2 MR. SHEPHERD: And, Your Honor, I should

3 have stepped in just before those were admitted. But

4 just to clarify, could I ask Mr. Avakian a few more

5 questions on these?

6 JUDGE NEWCHURCH: Yes, sir, because

7 we're back to your case now, unless you have something

8 else to offer, Mr. Gosselink.

9 MR. GOSSELINK: We do not.

10 JUDGE NEWCHURCH: All right. We're back

11 to the Executive Director's case.

12 Q (BY MR. SHEPHERD) So, Mr. Avakian, just to

13 clarify, we have two recent sets of revisions by BFI.

14 We had the one that was dated January 16th and now we

15 have one that's dated January 29th. Is that your

16 understanding?

17 A Yes.

18 Q And you understand those to be supplements to

19 each other, so you basically just stack them and they

20 are both added to the permit, with one limitation

21 we'll discuss?

22 A Yes.

23 Q And that one limitation, I believe you had

24 identified was -- let's see. In RS-44, conveniently

25 on the very last page of that document, there is a

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1 diagram. Let's see if I can get this -- this is

2 Figure 6-A-4 erosion details.

3 A The copy I have here isn't complete. This

4 RS-44 is just the red line, and it doesn't have the

5 figure -- wait a minute. Now, which one are we

6 talking about?

7 Q Let me check the red line copy and see if I

8 can get you a different . . .

9 JUDGE NEWCHURCH: Let's do this, just to

10 make things clean and clear and crisp. I'm going to

11 suggest that the Executive Director reserve an exhibit

12 number and, after the hearing, provide -- no, we'll

13 talk about it in substance here, but after the hearing

14 provide a cleaned up, all changes, single document

15 that's the current revised draft permit, circulate

16 that to all parties, and I'll give you an opportunity

17 to object to that, just so we've got -- so I'm not

18 stacking things and attaching them to the PFD. I

19 think that will just be messier.

20 Is that acceptable to everyone?

21 MR. CARLSON: Yes, Judge.

22 MR. TERRILL: Yes.

23 JUDGE NEWCHURCH: All right. I think a

24 nice big fat, fancy exhibit number is Executive

25 Director Exhibit No. 1. So let's reserve -- and I

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1 don't think there is a 1. Right? So Executive

2 Director Exhibit 1 is for the revised draft permit

3 with all changes and all agreements.

4 (Exhibit ED No. 1 reserved)

5 MR. SHEPHERD: And that's the draft

6 permit with the application?

7 JUDGE NEWCHURCH: With the application.

8 You don't -- I mean, it includes the references.

9 You're adopting the application by reference. Right?

10 MR. SHEPHERD: Yes.

11 JUDGE NEWCHURCH: Okay. A single

12 revised draft permit with all these changes, all these

13 agreements, all these iterations, no red line strike-

14 outs, a single document that shows the whole shebang.

15 And the only thing that would not be part of that,

16 there would be a reference to the application pages,

17 and that would be adopted by reference.

18 MR. SHEPHERD: Okay.

19 JUDGE NEWCHURCH: Does that make sense?

20 MR. TERRILL: Yes.

21 JUDGE NEWCHURCH: I think that will make

22 everybody's life better. I hope it will.

23 MR. GOSSELINK: Very good.

24 MR. SHEPHERD: Very good. And we will

25 do that.

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1 Q (BY MR. SHEPHERD) So, Mr. Avakian, you

2 understand that those two revision packages

3 supplemented each other, with the exception of that

4 one diagram that will be clarified in our resubmittal

5 of the clean package?

6 A Yes. And also both of the packages provided

7 fresh title pages and tables of contents with the

8 revision date, and so those title pages are repeated

9 in the second set of revisions with the newer revision

10 date.

11 Q And you understand that we would work with

12 the Applicant to make that into one clean copy with

13 just, of course, one table of contents at the

14 beginning?

15 A Yes.

16 Q Okay. Okay. Very good. With those

17 revisions that we went through on your prefiled

18 testimony and the exhibits, would your testimony be

19 the same if you provided it here today?

20 A Yes.

21 MR. SHEPHERD: Okay. With that, I would

22 like to offer ED -- let's see. That's AA-1 through 5.

23 JUDGE NEWCHURCH: Five is which, please?

24 MR. SHEPHERD: That's the compliance

25 history.

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1 JUDGE NEWCHURCH: Compliance history.
 2 Okay. Is there objection to AA-1 through 5?
 3 MR. TERRILL: No.
 4 MR. CARLSON: No, Judge.
 5 JUDGE NEWCHURCH: Then they're all
 6 admitted.
 7 (Exhibit ED Nos. ED-AA-1 through ED-AA-5
 8 admitted)
 9 MR. SHEPHERD: Pass the witness.
 10 JUDGE NEWCHURCH: Just making notes
 11 here. Just a second.
 12 Okay. So I think our order of cross-
 13 examination will begin with BFI.
 14 MR. CARLSON: Thank you.
 15 JUDGE NEWCHURCH: We'll do the same
 16 thing we did with the City of Austin witnesses.
 17 MR. CARLSON: Thank you, Judge.
 18 CROSS-EXAMINATION
 19 BY MR. CARLSON:
 20 Q Mr. Avakian, my name is John Carlson. I
 21 represent the Applicant in this proceeding. You
 22 understand that?
 23 A Yes.
 24 Q You are a licensed professional geoscientist.
 25 Is that correct?

Page 2252

1 A Yes.
 2 Q Okay. And your title at the agency is
 3 Geoscientist III. Is that correct?
 4 A Yes. I'm a geoscientist. I'm now a
 5 Geoscientist IV, since the time of that.
 6 Q All right. And you serve on MSW Permit Team
 7 No. II in the MSW Permits Section. Is that correct?
 8 A Yes.
 9 Q Okay. On Pages 3 through I believe 10 of
 10 your prefiled testimony, you pretty much walk us
 11 through the history of this application, from the time
 12 it was originally submitted to the agency until we get
 13 to the hearing. Is that correct?
 14 A Which pages were those?
 15 Q Three through 10.
 16 A Yes.
 17 Q And over the course of this, the application
 18 was determined by the agency, by the ED, to be
 19 administratively complete. Correct?
 20 A Yes.
 21 Q And there was substantial review by members
 22 of the permitting team, including yourself, to
 23 determine whether it was technically compliant with
 24 the MSW rules. Correct?
 25 A Yes.

Page 2253

1 Q Which led to the issuance of a draft permit
 2 that was recommended by the Executive Director.
 3 Correct?
 4 A I'm not sure if issuance is the word. But,
 5 yes, we prepared a draft permit.
 6 Q Okay. And that has since changed a little
 7 bit or will be changing as some agreements have been
 8 made over the course of this particular proceeding.
 9 Right?
 10 A Yes.
 11 Q Okay. Now, during this period from the
 12 submission of the application until we get to the SOAH
 13 proceeding, it's the ED's understanding and position
 14 that all notices, all public notices that were
 15 required throughout that process were done properly.
 16 Is that correct?
 17 A Yes.
 18 Q Now, I understand that you personally
 19 participated in the technical review of the
 20 application. Is that correct?
 21 A Yes, that's correct.
 22 Q Okay. And you reviewed at least Parts I and
 23 II. Is that correct?
 24 A Yes, Part I and II.
 25 Q Okay. And it's a team effort. Right?

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1 A Yes.
 2 Q Different people at the agency review
 3 different parts of the application. Right? And you
 4 also reviewed Part III of the application. Right?
 5 A Yes.
 6 Q And you were the primary agency reviewer for
 7 I believe Attachments 4, 5 -- is it 4, 5, 6, 11 and
 8 14?
 9 A Four, 5, 11 and 14.
 10 Q All right. Four is the geology report.
 11 Right?
 12 A Correct.
 13 Q And Attachment 5 has to do with hydrogeology.
 14 Correct?
 15 A Yes.
 16 Q Eleven is what we've been calling the GWSAP
 17 or Groundwater Monitoring Sampling Analysis Plan.
 18 Correct?
 19 A Yes.
 20 Q And 14 has to do with the gases system.
 21 Right?
 22 A Yes. That's right; yes.
 23 Q All right. And then you also reviewed
 24 portions of Part IV. Right?
 25 A Yes.

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1 Q Which is the SOP?
 2 A Correct.
 3 Q Okay. And others again reviewed other parts
 4 of the application. Correct?
 5 A Yes. It was Matthew Udenenwu reviewed the
 6 other parts. The parts that I didn't review were
 7 reviewed by him.
 8 Q And he will be testifying later today or
 9 perhaps Monday morning, depending on how things go --
 10 A That's my understanding.
 11 Q -- timewise. Okay. This review process
 12 includes a process in which members of the staff
 13 identify problems with the application. Correct?
 14 A Yes.
 15 Q And you all issue what are called notices of
 16 deficiency. Correct?
 17 A Yes.
 18 Q And the applicant and its engineers are
 19 required to respond to those notices of deficiency.
 20 Is that correct?
 21 A Yes.
 22 Q Okay. And that was done in this case. Is
 23 that correct?
 24 A Yes.
 25 Q All right. And at some point at the process,

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1 staff determined that the application that had been
 2 submitted was technically compliant with the MSW
 3 rules. Is that correct?
 4 A Yes. We determined that it was technically
 5 complete.
 6 Q Okay. Now, you've been here throughout the
 7 proceeding or at least most of the proceeding. Is
 8 that correct?
 9 A Nearly all of it.
 10 Q Okay. You've heard a lot of discussion about
 11 this Rule 11 agreement. Correct?
 12 A Yes.
 13 Q You've had an opportunity to look at the
 14 Rule 11 agreement?
 15 A I have. I've scanned it but have not read it
 16 very carefully.
 17 Q But based on your scanning and what you've
 18 heard in testimony, do you have the understanding that
 19 the provisions that BFI has agreed to in the Rule 11
 20 Agreement pertaining to design and operational and
 21 performance type issues would go above and beyond some
 22 of the requirements of TCEQ's MSW rules?
 23 A I think so. We had already been -- we had
 24 already declared the application complete, and so
 25 these are additions beyond meeting the minimum

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1 requirements.
 2 Q All right. And you also are obviously aware
 3 that there's a special provision that's been included
 4 that would require BFI to cease accepting waste at the
 5 site on or before November 1, 2015. Is that correct?
 6 A Yes.
 7 Q And that is going to be part -- that's
 8 proposed to be part of the permit. Right?
 9 A Yes.
 10 Q Enforceable by the agency?
 11 A As I understand, yes.
 12 Q Okay. In your experience at TCEQ, have you
 13 ever seen or heard of an MSW permit that's been issued
 14 with a date certain for closure?
 15 A I haven't.
 16 Q Okay. It's a pretty unique situation, isn't
 17 it?
 18 A To the extent that I know, yes.
 19 Q Now, just a couple remaining questions. On
 20 Pages 42 and 43 of your testimony, you refer to
 21 some -- well, let me back up. You reviewed -- prior
 22 to preparing your prefiled, you reviewed the prefiled
 23 testimony of witnesses for the various parties?
 24 A Yes.
 25 Q And that included the prefiled testimony of

Page 2258

1 Mr. Chandler or Dr. Kier who were retained by TJFA's
 2 attorneys?
 3 A Yes.
 4 Q Okay. Would you turn to Pages 42 and 43 of
 5 your prefiled, please.
 6 A Okay.
 7 Q Now, without having you read or having me
 8 read your prefiled verbatim, if I understand your
 9 testimony at the bottom of 42 and the top of 43, you
 10 disagree with Mr. Chandler's position that the
 11 site -- that the application failed to adequately
 12 characterize the site. Is that correct?
 13 A Yes.
 14 Q Okay. And you heard the testimony that at
 15 some point early in the permit process, BFI had
 16 planned to laterally expand the landfill?
 17 A Several years ago, whenever it was, BFI
 18 submitted a soil boring plan explaining that they were
 19 seeking to expand laterally and they were offering
 20 that soil boring plan under those terms.
 21 Q You had the understanding that at some point
 22 in time, BFI was going to be both wider and deeper, or
 23 at least it had some thoughts of that. Right?
 24 A Yes.
 25 Q And that was the context of that soil boring

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1 plan. Right?
 2 A That's how I understood it, yes.
 3 Q Okay. And subsequent to that, you learned
 4 that BFI, in fact, did not -- or chose not to go
 5 either wider or deeper. Right?
 6 A That's right.
 7 Q This expansion is proposed to go vertically
 8 only. Right?
 9 A Yes.
 10 Q And if I understand your testimony on Pages
 11 42 and 43, because of that, the boring plan ultimately
 12 was not required. Right? It was unnecessary?
 13 A Yes, I think I said it was -- let's see.
 14 What word did I use?
 15 Q I point you to the last sentence on --
 16 A Ultimately was not needed for the
 17 application.
 18 Q Okay. And you heard a lot of discussion
 19 about the 18 additional borings that Mr. Chandler was
 20 critical of?
 21 A Yes.
 22 Q Those are the borings you're talking about
 23 that ultimately were not needed for the sub-surface
 24 investigation. Is that right?
 25 A Yes.

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1 Q And based on all the testimony you heard, has
 2 your opinion changed regarding that issue since you
 3 prepared your prefiled testimony?
 4 A No.
 5 Q Okay. And then on the bottom of Page 43, you
 6 comment on the opinions that Mr. Chandler and Mr. Kier
 7 have expressed regarding the alleged mounding of water
 8 or leachate inside the landfill. Correct?
 9 A Yes.
 10 Q And you disagree with that opinion, don't
 11 you?
 12 A Yes.
 13 Q Okay. It's your understanding that -- you
 14 understand that that opinion was based -- those
 15 opinions were based on some depictions on field
 16 cross-sections and geologic cross-sections in BFI's
 17 application?
 18 A Yes.
 19 Q And you didn't understand that dotted and
 20 dashed line that was pointed to and discussed as a
 21 representation of any sort of water level or leachate
 22 level inside the landfill. Is that correct?
 23 A That's correct.
 24 Q All right. That wasn't confusing to you when
 25 you reviewed the application, was it?

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1 A No, it wasn't.
 2 Q You had an opportunity to hear the testimony
 3 of both Mr. Chandler and Dr. Kier?
 4 A Yes, I have.
 5 Q And based on hearing that testimony -- did
 6 you have the opportunity to hear the testimony of
 7 Mr. Snyder?
 8 A Yes, I did.
 9 Q Okay. Based on all the testimony you've
 10 heard from those three gentleman in this hearing,
 11 would your opinion that you have expressed on the
 12 bottom two-thirds of Page 43 of your prefiled change?
 13 A No.
 14 MR. CARLSON: Thank you.
 15 I'll pass the witness.
 16 JUDGE NEWCHURCH: Mr. Terrill?
 17 MR. TERRILL: No questions.
 18 JUDGE NEWCHURCH: Ms. Talley?
 19 MS. TALLEY: No questions, Your Honor.
 20 JUDGE NEWCHURCH: Ms. Mann?
 21 CROSS-EXAMINATION
 22 BY MS. MANN:
 23 Q Good afternoon. I have some questions
 24 related to your review of the information provided for
 25 the land use compatibility. Your testimony is on Page

Page 2262

1 36 and 37 on that subject, if you want to look for
 2 that. I'm actually looking on Page 37, but it starts
 3 on Page 36.
 4 And you testify that -- I'm going to
 5 just read the sentence. "The land use information
 6 submitted does not justify the commission denying the
 7 application based on the landfill being an
 8 incompatible land use." Do you see your testimony?
 9 I'm sorry. That's Line 1485, the very
 10 end of that.
 11 MR. CARLSON: Ms. Mann, what page and
 12 line are you on?
 13 MS. MANN: 37, starting on Line 1485.
 14 MR. CARLSON: Thank you.
 15 MS. MANN: Yes.
 16 A Yes, I see that.
 17 Q (BY MS. MANN) Okay. What kind of review did
 18 you do of the material to determine whether or not the
 19 information did or didn't justify the Commission
 20 denying the application? What was that specific piece
 21 of testimony based on?
 22 A The rule requires that information regarding
 23 land use be included in the application. My review
 24 primarily was to confirm that the information was in
 25 the application. We don't have criteria for measuring

56 (Pages 2259 to 2262)

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1 compatibility, so I didn't attempt to measure or
 2 determine.
 3 Q I'm sorry. I'm not to understand that your
 4 testimony is that you actually made an opinion on land
 5 use compatibility, more that you made sure that all
 6 the information required by the rule has been
 7 included?
 8 A That's right.
 9 Q Okay. And if you'll flip to Page 41 of your
 10 testimony, and I'm going to look at Line 1638. The
 11 second half of that sentence says, ". . . and the
 12 Executive Director is not aware of potential impacts
 13 rising to a level that would justify restricting the
 14 proposed operating hours." Do you see that testimony?
 15 A Yes.
 16 Q What was the source of your information
 17 regarding proposed operating hours or potential
 18 impacts related to proposed operating hours?
 19 A The operating hours or the proposed operating
 20 hours are designated in the application, specified in
 21 the application. What was the rest of the question?
 22 Q Well, what kind of information -- strike
 23 that. Where would you find some information related
 24 to any potential impacts that would make you question
 25 whether or not the operating hours were appropriate?

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1 A I don't know of any criteria to determine
 2 whether or not they're appropriate.
 3 Q Okay. So what was your review of operating
 4 hours? Did you just check to make sure they hadn't
 5 increased from the previous one, previous or the
 6 currently permitted conditions?
 7 A Mainly I checked to make sure that they were
 8 plainly stated and that it was clear what they were
 9 proposing.
 10 MS. MANN: Okay. I have no further
 11 questions. Thank you.
 12 JUDGE NEWCHURCH: Ms. Noelke?
 13 MS. NOELKE: I have no questions, Your
 14 Honor.
 15 JUDGE NEWCHURCH: Mr. Renbarger?
 16 MR. RENBARGER: Thank you.
 17 CROSS-EXAMINATION
 18 BY MR. RENBARGER:
 19 Q Good afternoon, Mr. Avakian. You are aware,
 20 I'm sure, that this particular case was referred over
 21 by the TCEQ, the Commissioners, on 26 referred issues.
 22 Correct?
 23 A Yes.
 24 Q And as I go through your testimony, if you'll
 25 bear with me, it appears in your prefiled testimony

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1 that you've attempted to address a majority of those
 2 issues. And I may just want to identify them for the
 3 record, if I may, very quickly.
 4 A Okay.
 5 Q It seems to me that you provide prefiled
 6 testimony on Issue B concerning the control of the
 7 disease vectors. Is that your understanding?
 8 A Yes.
 9 Q And Issue C, with respect to ponded water as
 10 a part of the groundwater demonstration, and surface
 11 water?
 12 A Yes.
 13 Q Issue D, odors?
 14 A Yes.
 15 Q Issue E, landfill gas?
 16 A Yes.
 17 Q Issue G, spilled and windblown waste?
 18 A Yes.
 19 Q Issue H, groundwater monitoring?
 20 A Yes.
 21 Q Issue I, rate of solid waste deposition and
 22 operating life?
 23 A Yes.
 24 Q Issue K, special waste?
 25 A Yes.

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1 Q Issue L, responsible parties and qualified
 2 personnel?
 3 A Yes.
 4 Q Issue M, preventing unauthorized wastes?
 5 A Yes.
 6 Q Issue O, dust control and maintenance of site
 7 access roads?
 8 A Yes.
 9 Q And I believe you also provide testimony on
 10 Issue P, endangered species. However, TJFA is not
 11 contesting that issue. You did provide prefiled on
 12 that, though. Correct?
 13 A Yes.
 14 Q Issue Q, cover?
 15 A I reviewed the parts relating to daily and
 16 intermediate cover.
 17 Q Okay. Issue R, compliance history?
 18 A Yes.
 19 Q Issue S, fire protection?
 20 A Yes.
 21 Q Issue U, land use comparability?
 22 A Yes.
 23 Q Issue V, buffer zones and landscape
 24 screening?
 25 A Yes.

57 (Pages 2263 to 2266)

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1 Q Issue W, health protection, avoiding
2 nuisance?
3 A I'm sorry. Where were we?
4 Q Issue W, health protection and avoiding
5 nuisance. It appeared at least that perhaps you and
6 Mr. Udenenwu may have participated jointly on that
7 issue?
8 A Yes.
9 Q Issue X, operational hours?
10 A Yes.
11 Q Okay. And you understand on each of the
12 referred issues I just identified, with the exception
13 of Issue P, that TJFA considers those to be contested.
14 Correct?
15 A Without checking, I --
16 Q Well, I will represent to you TJFA contests
17 each and every one of those issues that we've just
18 identified that you provided prefiled testimony on,
19 with the exception of Issue P.
20 A Okay.
21 Q Fair enough? And I believe Mr. Carlson
22 elicited some testimony from you regarding Pages 42
23 and 43 of your prefile application. Correct?
24 A Yes.
25 Q And you further understand that TJFA

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1 obviously disagrees with the conclusions in your
2 prefiled testimony on Pages 42 and 43. Correct?
3 A Yes, I think I gathered that from --
4 Q I thought you might. Mr. Avakian, you have
5 been involved in the technical review of quite a
6 number of applications for MSW facilities, haven't
7 you?
8 A Applications in general, that that would
9 include permit modification applications, also
10 amendment applications, but there are only a few of
11 those.
12 Q I understand. And as Mr. Carlson talked
13 about, there is a process that you go through. And
14 ultimately in the technical review process, you get to
15 the point where you declare an application technically
16 complete. Correct?
17 A Yes.
18 Q Now, isn't it true in the past that you
19 participated in some applications that have been
20 determined to be technically complete, that
21 subsequently the TCEQ Commissioners denied the permit
22 applications on?
23 A I don't know.
24 Q Do you remember a facility called Texas
25 Organic Composting?

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1 A Vaguely. I was involved early on in that and
2 did not have much to do with that for the most part.
3 Q So your testimony is, you had nothing to do
4 with the technical completeness review of that
5 application?
6 A Strictly speaking, I think that's correct. I
7 think I reviewed the soil boring plans, so I didn't
8 review the application that they subsequently would
9 have submitted.
10 Q Okay. But you did approve the boring plan.
11 Is that correct?
12 A I think I did.
13 Q Okay. And isn't it also true that the TCEQ
14 Commissioners subsequently denied that permit
15 application, based on improper site characterization?
16 A I don't know that myself. I've heard that a
17 lot. There's discussion about it, but I am not myself
18 aware of any of the facts about that case.
19 Q Notwithstanding that you participated in the
20 boring plan. Correct?
21 A That's right.
22 MR. RENBARGER: Pass the witness.
23 JUDGE NEWCHURCH: Mr. Blackburn?
24
25

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1 CROSS-EXAMINATION
2 BY MR. BLACKBURN:
3 Q Mr. Avakian, I'm Jim Blackburn, and I just
4 really have a couple of questions for you. As I
5 understand your prefiled testimony, is it fair to say
6 that you didn't go out and undertake an on-site
7 investigation?
8 A What do you mean by --
9 Q In other words, let me ask this: Your
10 prefiled testimony is based primarily on your review
11 of the application. Is that right?
12 A That's correct.
13 Q And like you didn't go out and do site visits
14 and interview neighbors and conduct your own fact-
15 finding with regard to the, say, operational aspects
16 of the landfill. Is that fair?
17 A I did visit the site.
18 Q But I'm talking about more than that, where
19 you actually went out and tried to uncover
20 information, talked with neighbors, that type of
21 thing.
22 A I didn't talk with neighbors.
23 Q Okay. Did you undertake independent
24 corroboration of the facts in the application or did
25 you basically depend upon the representation of the

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1 Applicant and the Applicant's representatives?
 2 A I think I separately checked some of the
 3 facts or, rather, some of the information in the
 4 application against the references from which they
 5 were drawn. I don't think I did that in every case.
 6 Some of the information is information I'm already
 7 fairly familiar with.
 8 If I had some doubt about it, I may have
 9 checked the reference from which the information was
 10 drawn, but I don't have an accounting of each detail
 11 which I checked separately and which I accepted, based
 12 solely on the information in the application.
 13 Q And, for example, the water levels or things
 14 like that, that are recorded, you would basically just
 15 assume that those were correct. Is that a fair
 16 statement?
 17 A I would rely on the information in the
 18 application. If I saw something unusual in those data
 19 provided in the application, I would likely have asked
 20 a question about them, mainly to ensure that they were
 21 being reported correctly and that there weren't any
 22 errors in the information.
 23 MR. BLACKBURN: Your Honor, in the
 24 interest of time, I'm going to pass the witness,
 25 with -- at least I would like to stipulate on the

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1 record that I by no means am giving away or otherwise
 2 making any type of concession with regard to the
 3 issues that he's testified on, but I just think our
 4 time would be better spent moving on.
 5 JUDGE NEWCHURCH: Okay. Is there
 6 further cross-examination?
 7 MR. CARLSON: No, Your Honor.
 8 JUDGE NEWCHURCH: Does the Executive
 9 Director have redirect?
 10 MR. SHEPHERD: No.
 11 JUDGE NEWCHURCH: Mr. Avakian, thank you
 12 for your testimony. You're excused.
 13 WITNESS AVAKIAN: Thank you.
 14 MR. CARLSON: Judge, I have to track
 15 down Mr. Gosselink, who I know is in the building, for
 16 the next witness.
 17 JUDGE NEWCHURCH: Okay. Off the record.
 18 (Off the record)
 19 JUDGE NEWCHURCH: Back on the record.
 20 MR. SHEPHERD: The Executive Director
 21 would like to call Matthew Udenenwu.
 22 JUDGE NEWCHURCH: Mr. Udenenwu, if you
 23 would come forward, please. Help me with the
 24 pronunciation.
 25 MR. UDENENWU: "Ou-den-en-woo."

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1 JUDGE NEWCHURCH: "Den-en-woo"?
 2 MR. UDENENWU: That's right.
 3 JUDGE NEWCHURCH: The "U" is silent. Is
 4 that correct?
 5 MR. UDENENWU: The what?
 6 JUDGE NEWCHURCH: The "U" at the
 7 beginning is silent?
 8 MR. UDENENWU: No, it's "ou," starts
 9 with an "ou."
 10 JUDGE NEWCHURCH: "Ou-den-en-woo"?
 11 MR. UDENENWU: That's correct.
 12 (Witness sworn)
 13 JUDGE NEWCHURCH: Mr. Shepherd.
 14 MATTHEW UDENENWU,
 15 having been first duly sworn, testified as follows:
 16 DIRECT EXAMINATION
 17 BY MR. SHEPHERD:
 18 Q Mr. Udenenwu, do you have before you what is
 19 marked as ED-MU-1?
 20 A That's correct.
 21 Q Could you identify that document?
 22 A It's my prefiled testimony.
 23 Q Okay. Do you have any corrections or
 24 revisions you would like to make to that testimony?
 25 A Yes, two corrections. On Page 42 of 45 --

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1 let's see. On Line 1674 -- okay. The very last word
 2 on Line 167- -- sorry. It's not 1676. I'm sorry.
 3 Let me get this right. Sorry.
 4 It looks like the lines here are
 5 different than the line that I have in the one that I
 6 have. I'm sorry. Get to it. Okay. Yes. 1674, the
 7 word "separate" in the text "with no separate liner
 8 system," the word "separate" should be "separatory."
 9 Q Okay. Was there any other correction?
 10 A Yes. On Page 44 of 45, the very first line
 11 on that page, the last word should be "demonstrates,"
 12 not "emonstrates."
 13 JUDGE NEWCHURCH: And I'm sorry. Where
 14 was that.
 15 WITNESS UDENENWU: Line 1750, the very
 16 last word on Line 1750.
 17 Q (BY MR. SHEPHERD) Okay. Are there any
 18 other corrections you would like to make?
 19 A No, that's it.
 20 Q Okay. And there on your exhibit, is there
 21 also a -- do you also have an ED-MU-2?
 22 A That's correct.
 23 Q What is that document?
 24 A This is my resume.
 25 Q And is that a current resume?

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1 A Yes, it is.
 2 Q Okay. Now, what you've stated in your
 3 prefiled testimony, would you state that same thing if
 4 I were to ask you all those questions here today?
 5 A That's correct.
 6 MR. SHEPHERD: Okay. The Executive
 7 Director moves -- offers this evidence.
 8 JUDGE NEWCHURCH: Is there any objection
 9 to MU-1 or MU-2?
 10 MR. HEAD: No objection.
 11 MR. BLACKBURN: No objection.
 12 JUDGE NEWCHURCH: They're both admitted.
 13 (Exhibit ED Nos. ED-MU-1 and ED-MU-2
 14 admitted)
 15 A There's another, MU-3. I'm not sure you had
 16 that one.
 17 Q (BY MR. SHEPHERD) Thank you. And let me
 18 check to see what that MU-3 is.
 19 A Okay.
 20 Q Okay. Could you identify MU-3?
 21 A It's a list of special training that I have
 22 taken.
 23 Q Very good. And that's an accurate list of
 24 that training?
 25 A That's correct.

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1 MR. SHEPHERD: Very good. Executive
 2 Director moves for -- offers ED-U-3.
 3 JUDGE NEWCHURCH: Any objection?
 4 MR. BLACKBURN: No objection.
 5 JUDGE NEWCHURCH: Three is admitted.
 6 (Exhibit ED No. ED-MU-3 admitted)
 7 MR. SHEPHERD: Pass the witness.
 8 JUDGE NEWCHURCH: Cross-examination,
 9 beginning with BFI.
 10 MR. GOSSELINK: Yes, sir.
 11 CROSS-EXAMINATION
 12 BY MR. GOSSELINK:
 13 Q Good afternoon, Mr. Udenenwu.
 14 A Good afternoon, sir.
 15 Q May we be able to say that you were the last
 16 witness to go today, and we're all done with you?
 17 That would be my hope, yes.
 18 Okay. Your role in this proceeding,
 19 Mr. Udenenwu, has been to review the application. Is
 20 that correct?
 21 A That's correct.
 22 Q And you teamed with Mr. Avakian?
 23 A That's correct.
 24 Q Okay. And you split up the issues that you
 25 would look at?

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1 A That's right.
 2 Q And the issues that you looked at, as I
 3 understand it, are Issue A related to natural drainage
 4 patterns. Is that right?
 5 A That's right.
 6 Q And Issue C related to protection of
 7 groundwater and surface water?
 8 A That's correct.
 9 Q And Issue F related to slope stability?
 10 A That's right.
 11 Q And Issue J related to closure and
 12 post-closure?
 13 A That's right.
 14 Q And N related to transportation?
 15 A That's correct.
 16 Q And T related to financial assurance?
 17 A Yes.
 18 Q And Y related to erosion control methods?
 19 A Yes.
 20 Q And Z related to contaminated water?
 21 A Yes.
 22 Q Did I miss any that you were responsibility
 23 for?
 24 A No.
 25 Q Okay. And A couple of general questions.

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1 You have been here for most of the proceeding.
 2 Correct?
 3 A Correct.
 4 Q And you've heard the testimony with regard to
 5 the various special provisions that have been proposed
 6 to be added to this permit, should it be issued?
 7 A Correct.
 8 Q Okay. And those special provisions include
 9 special provisions related to Rule 11. Are you
 10 familiar with that?
 11 A That's right, yes.
 12 Q Have you had a chance to look at the Rule 11
 13 Agreement?
 14 A I have looked at parts of it.
 15 Q Okay. And you've heard the testimony that
 16 the Rule 11 Agreement constitutes an enhancement to
 17 the otherwise proposed erosion and sedimentation
 18 control features and drainage features?
 19 A That's right.
 20 Q And do you agree with that?
 21 A I agree.
 22 Q Okay. And you would also agree that the
 23 application as it stood without that Rule 11 Agreement
 24 was also independently satisfactory?
 25 A That's correct.

60 (Pages 2275 to 2278)

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1 Q Okay. And you're familiar with the fact that
 2 a key ingredient in that agreement and, indeed, an
 3 independent special provision prior to that agreement,
 4 that the landfill would close no later than November
 5 1, 2015?
 6 A Yes.
 7 Q And that there would be no transfer station
 8 after that date?
 9 A Yes.
 10 Q Okay. And the same question: Are you
 11 individually familiar with a situation where any other
 12 landfill permitting -- any other landfill application
 13 you've ever worked on has ever come forward with a
 14 date certain for closure?
 15 A No.
 16 Q Okay. Your prefiled testimony relates to
 17 your analysis of the issues that I just went over with
 18 you. Correct?
 19 A That's right.
 20 Q And I'm not going to reiterate with prefiled
 21 testimony. I would like to perhaps address one or two
 22 issues in your prefiled testimony that relate to your
 23 response to prefiled testimony by TJFA. Do you
 24 remember those?
 25 A Okay.

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1 Q And you can find those beginning on Page 40
 2 of 45. Are you with me?
 3 A Yes.
 4 Q Okay. The first one that comes up is
 5 Mr. Chandler's testimony with regard to unstable
 6 areas.
 7 A That's right.
 8 Q All right. And were you here for
 9 Mr. Chandler's testimony?
 10 A Yes.
 11 Q And you reviewed Mr. Chandler's prefiled?
 12 A Yes.
 13 Q And Mr. Chandler took the position that the
 14 existing waste inside an already permitted existing
 15 landfill constitutes an unstable area in his view
 16 under the regulations. Do you remember that?
 17 A I remember that.
 18 Q Is that also the TCEQ's view?
 19 A No.
 20 Q Okay. And what is the TCEQ's view of the
 21 unstable areas' restriction regulation?
 22 A Where we are is actually reviewed by the
 23 geologist, not by the engineer. And my understanding
 24 of it is that it relates to the formation underneath
 25 the facility, not placed waste.

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1 Q And you also had commentary with regard to
 2 the position of Mr. Stecher and Mr. Chandler as it
 3 related to surface water protection and drainage
 4 design. Correct?
 5 A Yes.
 6 Q Okay. And this would in particular -- let me
 7 start again. Is it your opinion that the BFI
 8 application adequately presents a plan to control
 9 erosion and sedimentation control?
 10 A As provided in the application, yes.
 11 Q Yes. And is it further your opinion that the
 12 Rule 11 Agreement, as reflected in the special
 13 conditions, indeed only serves to enhance that
 14 protective capacity?
 15 A It does enhance -- it does put it on a fast
 16 track.
 17 Q Okay. And as you went through the
 18 application and reviewed the design, did you find that
 19 the BFI design on the site slopes at four-to-one was a
 20 typical site slope design?
 21 A Four-to-one is typical for most landfills
 22 that we review, yes.
 23 Q And the topdeck at an average of four
 24 percent, is that typical?
 25 A Yes. Three to five percent.

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1 Q Okay. And there was criticism of the
 2 adequacy of the sedimentation ponds. First of all,
 3 are sedimentation ponds required in an application?
 4 A It's yes and no. If the designer feels that
 5 he needs a pond to attend that flow and he presents it
 6 that way, then it's required.
 7 Q Okay.
 8 A But the regulations by themselves do not say,
 9 "You shall provide a pond."
 10 Q Okay. And you looked at the ponds that were
 11 presented. And did you find them to be adequately
 12 sized?
 13 A Yes.
 14 MR. GOSSELINK: Okay. Pass the witness.
 15 JUDGE NEWCHURCH: Mr. Terrill?
 16 MR. TERRILL: No questions.
 17 JUDGE NEWCHURCH: Ms. Noelke?
 18 MS. NOELKE: No questions.
 19 JUDGE NEWCHURCH: Ms. Talley?
 20 MS. TALLEY: No questions.
 21 JUDGE NEWCHURCH: Ms. Mann?
 22 MS. MANN: I have no questions.
 23 JUDGE NEWCHURCH: Mr. Renbarger --
 24 Mr. Head. Sorry.
 25 MR. HEAD: I have questions.

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1 CROSS-EXAMINATION
2 BY MR. HEAD:
3 Q You just stated that you believed that ponds,
4 the sediment ponds, were adequately sized?
5 A That's correct.
6 Q What do you base that testimony on? What did
7 you look at?
8 A I looked at the outflow from the outfall from
9 the pond. And the pre-existing condition outflow from
10 the pond and the proposed development condition
11 outflow match each other, and that's our basis.
12 Q That has to do with drainage?
13 A Yes.
14 Q Did you analyze the ponds for sediment
15 control?
16 A No.
17 Q Okay. I didn't think so. Now, when you
18 looked at the pre-development and post-development
19 conditions --
20 A Yes.
21 Q -- did you go back and look at the 2002
22 drainage MOD, modification?
23 A No.
24 Q When you looked -- okay. When you looked at
25 the pre- and post-development draining conditions, did

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1 you look at the 2006 modification which reduced the
2 size of the landfill?
3 A No.
4 Q Okay. Did you have discussions with the
5 engineers for the Applicant with regard to the
6 drainage calculations?
7 A As contained in the application, yes, we have
8 continuing discussions to review.
9 Q Were you ever informed by the engineers for
10 BFI that the peak flow numbers in the 2002 MOD and the
11 peak flow numbers for the 2006 modification were
12 different than the pre-development conditions in this
13 application?
14 A No.
15 MR. HEAD: Pass the witness.
16 JUDGE NEWCHURCH: Mr. Blackburn?
17 MR. BLACKBURN: With the same
18 stipulation, I pass the witness.
19 JUDGE NEWCHURCH: Is there any further
20 cross-examination?
21 MR. CARLSON: No.
22 JUDGE NEWCHURCH: Mr. Udenenwu, thank
23 you for your testimony. You're excused.
24 MR. SHEPHERD: Judge --
25 JUDGE NEWCHURCH: I'm sorry. You know,

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1 I've gotten so used to them being the last ones. So
2 I'm sorry. Excuse me.
3 MR. SHEPHERD: I want to go home as bad
4 as everybody else.
5 JUDGE NEWCHURCH: Mr. Shepherd.
6 REDIRECT EXAMINATION
7 BY MR. SHEPHERD:
8 Q I just want to ask a couple of follow-up
9 questions to that. The questions that you just had
10 about whether or not you considered the 2002
11 modification information and the 2006 modification
12 information as opposed to what was represented in this
13 application as the existing drainage from the
14 facility, does that cause you any concern at this
15 point that you had not reviewed the 2002 and 2006
16 modifications?
17 A Not really, because I reviewed the
18 application based on the information provided. I have
19 to state that I wasn't the initial reviewing engineer,
20 and I took over the review after the previous reviewer
21 left the agency. So, no, it doesn't cause me concern.
22 Q Does it give you any reason to question your
23 determination that there would not be a significant
24 alteration in the drainage patterns?
25 A You know, looking at those two drawings, I

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1 probably would have liked, you know, if I took up the
2 review from the one, I probably would have asked them
3 to update the 2000 to 2006 approvals, because those
4 seemed to be incomplete, because a lot of areas were
5 left out in the analysis.
6 Q But do you feel comfortable, based on what
7 was submitted in the application as the exiting
8 condition and comparing that to what's being proposed,
9 so that there will not be a significant alteration in
10 off-site discharges?
11 A Again, based on the information in the
12 application, yes.
13 MR. SHEPHERD: Okay. Thank you. No
14 more questions.
15 JUDGE NEWCHURCH: Any further
16 cross-examination?
17 MR. GOSSELINK: No.
18 JUDGE NEWCHURCH: Anyone?
19 Mr. Shepherd, anything more?
20 MR. SHEPHERD: No.
21 JUDGE NEWCHURCH: Mr. Udenenwu, thank
22 you for your testimony. You're excused.
23 WITNESS UDENENWU: Thank you.
24 JUDGE NEWCHURCH: With the exception of
25 the reservation for the revised draft permit to

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1 reflect all the agreements, changes, does the
 2 Executive Director have anything else to offer as part
 3 of its direct case?
 4 MR. SHEPHERD: No.
 5 JUDGE NEWCHURCH: Okay. I think we
 6 agreed yesterday that we would break at this point and
 7 return on Monday morning to talk about rebuttal. Is
 8 that everyone else's understanding?
 9 MR. CARLSON: Yes.
 10 JUDGE NEWCHURCH: And I guess I should
 11 ask, just to clean up, is there any other direct case
 12 evidence at this point that anyone neglected to offer,
 13 any kind of oversights, anything like that?
 14 MR. GOSSELINK: We have a -- I'm not
 15 sure. I think we didn't close the loop on something
 16 that came up in the very first day, which was we
 17 identified that the description of the property had a
 18 duplicate deed in it so that it had the wrong -- it
 19 had the wrong deed, and we doubled up one of the three
 20 deeds so that --
 21 MR. CARLSON: In the copies.
 22 MR. GOSSELINK: -- in the copies. Okay?
 23 And so we explained that, and I think you said you
 24 understood and we should bring it back, and we forgot
 25 until now.

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1 So I've got the correct deed to insert
 2 into the application. And I know you've seen a lot of
 3 these changes, but we did talk about this the first
 4 day, this wouldn't constitute a surprise.
 5 JUDGE NEWCHURCH: Okay. So you're
 6 making a motion to reopen your direct case for the
 7 limited purpose of substituting one of the deeds?
 8 MR. GOSSELINK: Yes, sir.
 9 JUDGE NEWCHURCH: And is there objection
 10 to the reopening?
 11 MR. HEAD: Sounds like a major amendment
 12 to me, Your Honor.
 13 (Laughter)
 14 MR. BLACKBURN: That's where I am, too,
 15 Your Honor. I move for a continuance.
 16 MR. HEAD: And I'm sorry. I withdraw
 17 that. I think we're still on the record.
 18 JUDGE NEWCHURCH: All right. We are on
 19 the record.
 20 MR. CARLSON: We have one little problem
 21 here. We only have --
 22 JUDGE NEWCHURCH: So the motion is not
 23 objected to, jokes aside. Correct?
 24 MR. HEAD: Jokes aside, it's not
 25 objected to.

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1 MR. BLACKBURN: No objection.
 2 JUDGE NEWCHURCH: Okay. Without
 3 objection, the motion to reopen is granted. And what
 4 exactly are you wishing to substitute?
 5 MR. GOSSELINK: Okay. We wish to
 6 substitute -- what I wish to substitute, I will be
 7 helped in answering that question when Mr. Jimenez
 8 comes up and whispers to me.
 9 JUDGE NEWCHURCH: Mr. Jimenez, will you
 10 please describe what BFI seeks to substitute.
 11 I think it's time for -- (applause).
 12 MR. JIMENEZ: Your Honor, APP 0081
 13 through APP 0088 is a duplicate of the deed that is
 14 described in APP 000065 through 72. We would switch
 15 out the Pages 81 through 88 with the document that is
 16 labeled APP 038304 through APP 038310, which is a
 17 warranted deed for 73.20 acres.
 18 JUDGE NEWCHURCH: Is there objection to
 19 that motion?
 20 MR. HEAD: No objection.
 21 MR. BLACKBURN: No objection.
 22 JUDGE NEWCHURCH: All right. Let's go
 23 off the record while you make those changes in the
 24 official record copies. And I assume you have copies
 25 for the other parties?

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1 MR. CARLSON: Well, we can get them real
 2 quick. He is going to do it very quickly.
 3 JUDGE NEWCHURCH: Okay. As in they're
 4 here or they have to go be copied?
 5 MR. CARLSON: I think there is a copying
 6 machine on the floor.
 7 JUDGE NEWCHURCH: Right. There is;
 8 there is. Okay. So the motion to substitute those
 9 pages is not objected to. Right?
 10 MR. BLACKBURN: Correct.
 11 JUDGE NEWCHURCH: And it is granted.
 12 Now, you had something else?
 13 MR. GOSSELINK: You asked about, is
 14 everybody done with their direct case? And Mr. Shull
 15 would like to know whether or not the protestants are
 16 done with him as a possible hostile witness in their
 17 direct case, which is where I understood that to be,
 18 not in their rebuttal case.
 19 MR. HEAD: We rested our direct case,
 20 and we're not going to call Mr. Shull.
 21 JUDGE NEWCHURCH: Okay.
 22 MR. GOSSELINK: Thank you.
 23 Ditto, Jim?
 24 MR. BLACKBURN: I never planned to, but
 25 I'm happy to close my case again.

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1 JUDGE NEWCHURCH: All right. So let's
 2 go off the record, then, and talk about scheduling --
 3 informally.
 4
 5 (Off the record: 4:26 p.m. to
 6 4:31 p.m.)
 7 JUDGE NEWCHURCH: Back on the record.
 8 Okay. We're going to recess at this
 9 time. All parties have concluded their presentation
 10 of their direct cases. And we are going to reconvene
 11 on Monday at 10 a.m. by telephone to talk about a
 12 rebuttal schedule. And the rebuttal hearing itself
 13 will occur on Wednesday.
 14 And, Mr. Gosselink, by Monday morning,
 15 you will have faxed us a call-in number for the
 16 conference on Monday at 10:00. Right?
 17 MR. GOSSELINK: We will fax and e-mail,
 18 try and double it up.
 19 JUDGE NEWCHURCH: Okay. Great! So we
 20 are recessed until Monday morning.
 21 Off the record.
 22 MR. GOSSELINK: Thank you, Your Honor.
 23 (Off the record: 4:31 p.m.)
 24
 25

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1 C E R T I F I C A T E
 2 STATE OF TEXAS)
 3 COUNTY OF TRAVIS)
 4 WE, Kim Pence, Virginia Bunting, Evie
 5 Coder, Steven Stogel, Lou Ray and Aloma J. Kennedy,
 6 Certified Shorthand Reporters in and for the State of
 7 Texas, do hereby certify that the above-mentioned
 8 matter occurred as hereinbefore set out.
 9 WE FURTHER CERTIFY THAT the proceedings
 10 of such were reported by us or under our supervision,
 11 later reduced to typewritten form under our
 12 supervision and control and that the foregoing pages
 13 are a full, true and correct transcription of the
 14 original notes.
 15 IN WITNESS WHEREOF, WE have hereunto set
 16 our hand and seal this 13th day of February 2009.
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