

TJFA, L.P.,

Plaintiff,

v.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,

Defendant.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

353rd JUDICIAL DISTRICT

**PLAINTIFF TJFA, L.P.’S AMENDED SUPPLEMENTAL RESPONSE TO DEFENDANT
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY’S PLEA TO THE
JURISDICTION AND ALTERNATIVE MOTION TO DISMISS**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, TJFA, L.P. (“Plaintiff”) and files this its *Amended Supplemental Response to Defendant Texas Commission on Environmental Quality’s Plea to the Jurisdiction and Alternative Motion to Dismiss* (“Amended Supplemental Response”). Plaintiff asks the court to deny Defendant’s motion to dismiss for lack of jurisdiction and retain Plaintiff’s suit on the Court’s docket. In support of this filing, Plaintiff would respectfully show the Court as follows:

I. INTRODUCTION

1. Plaintiff is TJFA, L.P. Defendant is the Texas Commission on Environmental Quality (“TCEQ” or the “Commission”).

2. Plaintiff brought suit against Defendant seeking judicial review of the Commission’s decision to grant the application for permit amendment of BFI Waste Systems of North America, LLC (“BFI”) for an expansion of a municipal solid waste (“MSW”) landfill (Permit No. MSW-1447A), known as the Sunset Farms Landfill, which lies in Travis County.

3. A *Supplemental Response* was filed in this proceeding this afternoon. This *Amended Supplemental Response* is filed to make a clarification to Attachment 1 regarding the *Original Petition* served on TCEQ. Neither the *Supplemental Response* nor this *Amended Supplemental Response* is to take the place of Plaintiff’s *Response to Defendant Texas*

Commission on Environmental Quality's Plea to the Jurisdiction and Alternative Motion to Dismiss on file in this case, but is to supplement same.

4. This Court has subject-matter jurisdiction over Plaintiff's suit and therefore should retain the suit on the Court's docket and deny Defendant's motion.

II. FACTS

5. On December 1, 2009, Plaintiff electronically filed its *Original Petition* against the Texas Commission on Environmental Quality ("TCEQ" or the "Commission") with the Travis County District Clerk. On that same day, a copy of the *Original Petition* was served on Defendant and every other party to the underlying contested case hearing.

6. Thus, the prompt notice that an appeal of an agency decision had been filed, as contemplated by Texas Health and Safety Code Section 361.321(c), was actually provided. Notice was provided to the Executive Director of TCEQ on December 1, 2009, the same day on which the *Original Petition* was file with the Travis County District Court, when a true and correct copy of Plaintiff's *Original Petition* was served on the Executive Director via hand delivery.

7. Plaintiff attaches an affidavit to this *Amended Supplemental Response* to establish facts not apparent from the record and incorporates that affidavit, all related factual information, and attachments to that affidavit by reference. See Attachment 1, attached hereto and incorporated herein for all purposes.

III. ARGUMENT

8. Defendant had actual knowledge that the suit had been filed as of December 1, 2009, when a copy of the *Original Petition* was served on the Executive Director of the Commission.

IV. CONCLUSION AND PRAYER

9. Because Plaintiff's pleadings establish the Court's jurisdiction and because Defendant's factual allegations disputing jurisdiction fail to clearly demonstrate that this Court lacks jurisdiction, the Court should retain Plaintiff's suit on the Court's docket.

10. For these reasons, Plaintiff respectfully requests that a hearing be held and after such hearing the Court deny Defendant's *Plea to the Jurisdiction, or, in the Alternative, Motion to Dismiss* and retain Plaintiff's suit on the Court's docket.

Respectfully submitted,

BIRCH, BECKER & MOORMAN, LLP

By:

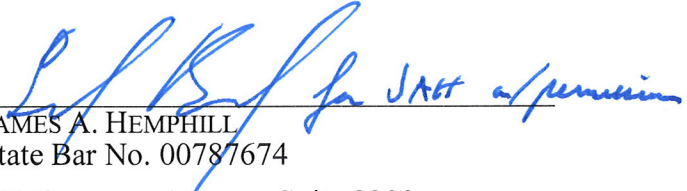

ERICH M. BIRCH
State Bar No. 02328395

ANGELA K. MOORMAN
State Bar No. 24007700

4601 Spicewood Springs Road
Building 4, Suite 101
Austin, Texas 78759
Phone: (512) 349-9300
Fax: (512) 349-9303

GRAVES DOUGHERTY HEARON & MOODY, PC

BY:


JAMES A. HEMPHILL
State Bar No. 00787674

401 Congress Avenue, Suite 2200
Austin, Texas 78701
Phone: (512) 480-5762
Fax: (512) 536-9907

ATTORNEYS FOR TJFA, L.P.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on the following via hand delivery, express mail, electronic mail, facsimile, and/or U.S. First Class Mail, on this the 17th day of May, 2010.

Ms. Nancy Elizabeth Olinger Mr. Brian E. Berwick Ms. Cynthia Woelk Assistant Attorney General Environmental Protection and Administrative Law Division Office of the Attorney General P.O. Box 12548 Austin, Texas 78711-2548	<i>Attorneys for the Texas Commission on Environmental Quality.</i>
Mr. Paul G. Gosselink Lloyd Gosselink Rochelle & Townsend, P.C. 816 Congress Avenue, Suite 1900 Austin, Texas 78701	<i>Attorney for BFI Waste Systems of North America, LLC. Courtesy Copy</i>
Mr. Paul M. Terrill III The Terrill Firm, P.C. 810 West 10th Street Austin, Texas 78701	<i>Attorney for Giles Holdings, L.P.</i>
Mr. James B Blackburn, Jr. Ms. Mary W. Carter Blackburn Carter, P.C. 4709 Austin Street Houston, Texas 77004	<i>Attorneys for Northeast Neighbors Coalition. (Courtesy Copy)</i>


ERICH M. BIRCH


AFFIDAVIT OF ERICH M. BIRCH

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

BEFORE ME, the undersigned notary, on this day personally appeared Mr. Erich M. Birch, a person whose identity is known to me. After I administered an oath to him, upon his oath he said:

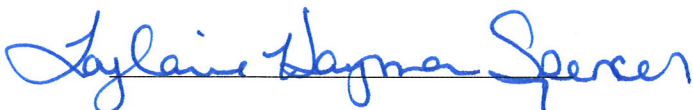
1. My name is Erich M. Birch. I am over eighteen years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.
2. I am a partner with Birch, Becker & Moorman, LLP (“BBM”). I am one of the attorneys of record for TJFA, L.P., the Plaintiff in Cause No. D-1-GN-09-004062, *TJFA, L.P. v. Texas Commission on Environmental Quality*.
3. On December 1, 2009, on behalf of Plaintiff, BBM electronically filed Plaintiff’s *Original Petition* against the Texas Commission on Environmental Quality (“Defendant” or the “Commission”) with the Travis County District Clerk.
4. On that same day, December 1, 2009, a copy of the *Original Petition* was served on Defendant, the Commission, and every other party to the underlying contested case hearing. A true and correct copy of the *Original Petition* was served on the Executive Director of the Commission via hand delivery, as shown by the Commission’s file stamp receipt. *See Attachment 1*, providing a true and correct copy of the Original Petition, except for the handwritten cause number and judicial district, which were added after service.

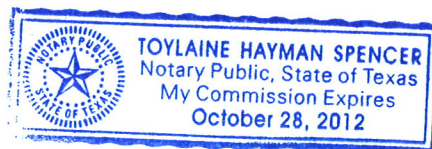
FURTHER, AFFIANT SAITH NOT.



Erich M. Birch

SUBSCRIBED AND SWORN TO BEFORE ME by Mr. Erich M. Birch on the 17 th day of May, 2010, to certify which witness my hand and seal.





Notary Public, State of Texas

Taylor Hayman Spencer
Print name

My Commission Expires: 10/28/12

CAUSE NO. D-1-GN-09-004062

TJFA, L.P.,

Plaintiff,

v.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
Defendant

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

353rd JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, TJFA, L.P. ("Plaintiff" or "TJFA") and files this its Original Petition against the Texas Commission on Environmental Quality (the "Commission" or "TCEQ") and for cause of action would respectfully show the Court as follows:

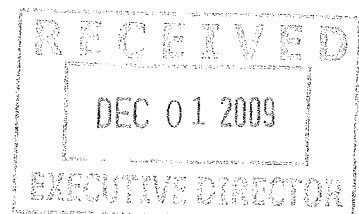
I. DISCOVERY CONTROL PLAN

This cause of action is a judicial review of an action by an administrative agency and therefore will be based on the administrative record. Designation of a level of discovery is not applicable.

II. BACKGROUND

This lawsuit arises out of a decision by TCEQ to grant the application for permit amendment of BFI Waste Systems of North America, LLC ("BFI" or "Applicant") for an expansion of a municipal solid waste ("MSW") landfill (Permit No. MSW-1447A), known as the Sunset Farms Landfill, which lies in Travis County. Substantial rights of Plaintiff have been prejudiced because the decision is in violation of statutory provisions, is in excess of the Commission's statutory authority, and is arbitrary and capricious. See TEX. GOV'T CODE § 2001.174. Because BFI failed to meet the burden of proof that the application for permit amendment complies with all legal requirements, the application should have been denied by

Attachment 1



TCEQ. Instead, the application for permit amendment was granted. Plaintiff is seeking judicial review of this decision by TCEQ and is requesting that it be reversed by this Court.

III. PROCEDURAL BACKGROUND

A preliminary hearing was held by the State Office of Administrative Hearings (“SOAH”) that established jurisdiction and named parties, including Plaintiff, to the contested case hearing on the MSW landfill application for permit amendment. The Hearing on the Merits was held January 20, 2009, through January 30, 2009, and the Proposal for Decision (“PFD”) was issued by Administrative Law Judge William G. Newchurch on May 8, 2009. At its Agenda meeting on September 9, 2009, the Commission granted to BFI a permit (*i.e.*, approved the application for permit amendment) after having changed, in part, the Administrative Law Judge’s Findings of Fact and Conclusions of Law. The Commission’s Order was issued on September 14, 2009, and mailed on September 17, 2009. Plaintiff timely filed its Motion for Rehearing on October 9, 2009. TCEQ failed to rule on said Motion for Rehearing, and thus, it has been overruled by operation of law. All conditions precedent to the filing of this review of an administrative action have been accomplished.

Plaintiff seeks judicial review of the final decision by TCEQ in this matter pursuant to the Administrative Procedure Act, TEX. GOV’T CODE § 2001.171 and the Solid Waste Disposal Act, TEX. HEALTH & SAFETY CODE § 361.321.

IV. VENUE

Venue properly exists in Travis County, Texas, pursuant to TEX. GOV’T CODE § 2001.176 and TEX. HEALTH & SAFETY CODE § 361.321.

V. PARTIES

TJFA, L.P. is an entity that owns property in close proximity to the Sunset Farms Landfill.

The Commission is an agency of the State of Texas. Service on the Commission may be accomplished by delivering a copy of this instrument to Mark R. Vickery, Executive Director of TCEQ, at 12100 Park 35 Circle, Austin, Texas, 78753.

Other parties in the underlying administrative hearing were:

- (1) BFI Waste Systems of North America, LLC's ("BFI" or "Applicant"), represented by Paul G. Gosselink, Lloyd Gosselink Rochelle & Townsend, P.C., 816 Congress Avenue, Suite 1900, Austin, Texas, 78701.
- (2) The TCEQ Office of Public Interest Counsel ("OPIC"), represented by Amy Swanholm, P.O. Box 13087, MC-103, Austin, Texas, 78711-3087.
- (3) The TCEQ Executive Director, represented by Steve Shepherd and Susan White, P.O. Box 13087, MC-173, Austin, Texas, 78711-3087.
- (4) Giles Holdings, represented by Paul M. Terrill III, The Terrill Firm PC, 810 West 10th Street, Austin, Texas, 78701.
- (5) Travis County, represented by Kevin Morse, P.O. Box 1748, Austin, Texas, 78767.
- (6) The City of Austin, represented by Holly C. Noelke, P.O. Box 1088, Austin, Texas, 78767.
- (7) Northeast Neighbors Coalition, represented by James B. Blackburn, Jr., Blackburn Carter PC, 4709 Austin Street, Houston, Texas, 77004.
- (8) Mark McAfee, 6315 Spicewood Springs Road, Austin, Texas, 78759
- (9) Melanie McAfee, 6315 Spicewood Springs Road, Austin, Texas, 78759
- (10) Roger Joseph, P.O. Box 7, Austin, Texas, 78767
- (11) Delmer D. Rogers, 5901 Speyside Drive, Manor, Texas, 78653
- (12) Williams, Ltd., c/o Evan M. Williams, P.O. Box 2144, Austin, Texas, 78768
- (13) Pioneer Farms, which withdrew as a party prior to the Hearing on the Merits.

Copies of this *Plaintiff's Original Petition* have been sent by U.S. certified mail, return receipt requested, to each of the parties in the underlying administrative hearing as indicated on the attached Certificate of Service.

Additionally, a copy of *Plaintiff's Original Petition* has been sent to C T Corporation System, Registered Agent of BFI Waste Systems of North America, LLC, at 350 North St. Paul Street, Dallas, Texas, 75201, and to Administrative Law Judge William G. Newchurch of SOAH at 300 West 15th Street, Suite 504, Austin, Texas, 78701.

VI. TRANSMISSION OF RECORD

Pursuant to TEX. GOV'T CODE § 2001.175, demand is hereby made that the Commission transmit the original or a certified copy of the entire record of the proceeding to the Court within the time permitted by law.

VII. GROUNDS FOR REVERSAL OR REMAND

Plaintiff would show that the decision of the Commission is in violation of statutory provisions, is in excess of the agency's statutory authority, and is arbitrary and capricious. Substantial rights of Plaintiff have been prejudiced because of TCEQ's decision to grant the application for permit amendment to Applicant, BFI, in spite of BFI's failure to comply with all of the rules, regulations, and laws for obtaining such a MSW permit.

VIII. SUMMARY OF COMMISSION ERRORS

The Commission erred in granting Permit No. MSW-1447A under the TCEQ rules, due in part to the following:

1. The failure of Applicant, BFI, to demonstrate that natural drainage patterns will not be significantly altered as required by Commission rules, and especially:
 - a. the Commission's impermissible reliance on a guidance document, *Guidelines for Preparing a Surface Water Drainage Report for a*

Municipal Solid Waste Facility, TCEQ Publication No. RG-417 (the “Drainage Guidance”), which conflicts with the plain meaning of TCEQ’s MSW rules governing the proper evaluation of impacts on natural drainage patterns resulting from the proposed expansion of the Sunset Farms Landfill. Reliance on the Drainage Guidance is contrary to Commission rules. Or, in the alternative,

- b. if reliance on the Drainage Guidance was permissible, the Commission’s acceptance of BFI’s improper substitution of drainage values for the “pre-development” condition called for in the Drainage Guidance to ensure a finding of “no significant alteration” of natural drainage patterns, and the Commission’s resulting incorrect legal conclusion that the expansion of the Sunset Farms Landfill would result in “no significant alteration” of natural drainage patterns. This conclusion is contrary to Commission precedent, rules, and regulatory guidance on this issue.
2. The failure of Applicant, BFI, to demonstrate that the design for the vertical expansion of the Sunset Farms Landfill would be protective of ground water and surface water, as required by TCEQ’s MSW rules. The Commission’s failure to acknowledge and address the significant issues with ground water monitoring, potential leakage from the landfill liner, elevated leachate levels in landfill gas recovery wells, and offsite contamination is contrary to commission precedent, rules, and regulatory guidance on these issues.
3. The failure of Applicant, BFI, to perform sufficient slope stability analyses, and the failure of Applicant to include an adequate “unstable area” evaluation in the application for permit amendment, in that it failed to include an analysis of any of the “human-induced” events or forces at the facility (*i.e.*, the vertical expansion), which could result in instability of the Sunset Farms Landfill. The Commission’s

approval of the flawed slope stability analysis and incomplete “unstable area” evaluation is contrary to Commission rules.

4. The failure of Applicant, BFI, to develop an adequate ground water monitoring system that is in compliance with TCEQ rules, particularly with regard to the location of the ground water monitoring wells and the failure to include any upgradient ground monitoring wells, or to otherwise address why upgradient ground water monitoring wells were excluded, as required by Commission rules. The Commission’s approval of the deficient ground water monitoring system is contrary to Commission precedent, rules, and regulatory guidance on this issue.
5. The failure of Applicant, BFI, to demonstrate that there are sufficient soils, either on-site or otherwise, at the Sunset Farms Landfill to provide for the daily, intermediate, and final cover for the proposed expansion of the facility, thus failing to demonstrate that it complied with the Commission’s cover soil rules. It was error for the Commission to find that BFI had complied with all TCEQ rules with respect to the provision of adequate cover.
6. The failure of Applicant, BFI, to demonstrate that the vertical expansion and subsequent operation of the Sunset Farms Landfill is compatible with existing land uses. The Commission’s approval of the land use analysis contained in the application is contrary to Commission rules.
7. The failure of Applicant, BFI, to demonstrate that existing and proposed erosion controls at the Sunset Farms Landfill are adequate and in compliance with TCEQ rules. The Commission’s approval of the proposed erosion controls is in violation of Commission precedent, rules, and regulatory guidance.
8. Through the Final Order the Commission changed the Administrative Law Judge’s Proposed Findings of Fact and Proposed Conclusions of Law regarding the operating hours for the proposed expansion of the Sunset Farms Landfill so as

to now make the landfill incompatible with surrounding land use in violation of TCEQ rules. Additionally, in attempting to justify its changes to the Administrative Law Judge's Proposed Findings of Fact and Proposed Conclusions of Law regarding operating hours, the Commission failed to satisfy the statutory requirements of TEX. HEALTH & SAFETY CODE § 361.0832. Noncompliance with the mandatory requirements of Section 361.0832 regarding changing or amending the Administrative Law Judge's Proposed Findings of Fact and Proposed Conclusions of Law is error.

9. The Commission improperly allocated transcript costs to TJFA without proper consideration of the factors required under the TCEQ rules, *e.g.*, 30 TEX. ADMIN. CODE § 80.23(d).
10. The Commission improperly excluded certain evidence offered by TJFA. The exclusion of the offered evidence was error and harmed the substantive and due process rights of TJFA for a just and fair administrative proceeding. Exhibit TJFA 10 is relevant to the matters considered in this proceeding and is admissible pursuant to the applicable rules of evidence.
11. The Commission improperly adopted certain Findings of Fact and Conclusions of Law, as proposed by the Administrative Law Judge, where the Administrative Law Judge's Proposal for Decision included Proposed Findings of Fact and Proposed Conclusions of Law regarding some of TJFA's expert witnesses, which are not based on substantial evidence, which exceed the scope of the Administrative Law Judge's discretion, and which deprive TJFA of due process.

These issues are of particular concern to TJFA, being a nearby landowner, and are contrary to Commission rules and precedent and/or are unsupported by or contrary to the evidence in the application and presented at the hearing, producing reversible error in the Order

as adopted by the Commission. A more detailed discussion of each of these issues is presented below.

IX. DETAIL OF AGENCY ERRORS

A. Inadequacy of Surface Water Drainage Plan

Plaintiff contends that the Commission's Order is in error on this issue in concluding that natural drainage patterns will not be significantly altered as a result of the development of the expansion of the Sunset Farms Landfill. The Commission's rules required Applicant, BFI, to demonstrate that the proposed landfill expansion would not result in a significant alteration of natural drainage patterns. Instead of comparing drainage conditions after the proposed expansion (*i.e.*, post-development drainage patterns) to the natural drainage patterns, as required by the explicit language of the applicable TCEQ MSW rules, BFI compared post-development drainage conditions to the drainage conditions defined as the existing permitted conditions at closure (*i.e.*, existing permitted conditions pursuant to Permit No. MSW-1447). In approving the application for permit amendment, the Commission incorrectly accepted this comparison in violation of its own MSW rules.

BFI relied on the Drainage Guidance as the rationale for its drainage analysis, as did the Commission in its approval of the surface water drainage plan contained in the application. But, the Drainage Guidance impermissibly substitutes currently approved (*i.e.*, permitted) site closure conditions as the starting point for a drainage evaluation in the case of MSW permit amendments, such as in this proceeding. The Drainage Guidance is in irreconcilable conflict with applicable TCEQ rules, which identify that the required demonstration must show that "natural" drainage patterns will not be significantly altered when compared to "existing" drainage patterns at the permitted site closure condition, as defined in the amendment application. *See* 30 TEX. ADMIN. CODE §§ 330.55(b)(5)(D), 330.56(f)(2), & 330.56(f)(4)(A)(iv) (2005). In this proceeding, by relying on the Drainage Guidance, TCEQ attempted to engage in

unauthorized rulemaking contrary to the Administrative Procedure Act to provide a meaning for the undefined term “natural drainage pattern.”

In the alternative, if one accepts that the drainage analysis called for in the Drainage Guidance is valid, BFI failed to demonstrate that there would not be a significant alteration of natural drainage patterns when comparing currently permitted conditions to post-development conditions as proposed in the application. As acknowledged by BFI, the currently-permitted conditions (*i.e.*, the pre-development conditions) were established in a 2002 permit modification (the “2002 MOD”) sought by BFI and approved by the Commission. But, contrary to the Drainage Guidance, BFI did not utilize the currently-permitted conditions established by the 2002 MOD as the pre-development conditions for the drainage analysis contained in the application. The pre-development conditions identified by BFI in the application differed significantly from those identified in the 2002 MOD, and instead closely coincided with the post-development conditions for the proposed post-expansion Sunset Farms Landfill. Such revisions to the pre-development conditions were inappropriate and not in conformity with the Drainage Guidance and Commission rules. A comparison of the proper pre-development conditions (*i.e.*, the conditions from the 2002 MOD) to the post-development conditions identified in the application evidences a substantial alteration of drainage patterns, contrary to Commission rules.

B. Ground Water and Surface Water Protection

Plaintiff contends that TCEQ’s Order is in error when it finds that Applicant, BFI, demonstrated that the vertical expansion of the Sunset Farms Landfill would be protective of ground water and surface water. Such a finding is not supported by the evidentiary record. The evidentiary record shows that there are significant issues with ground water monitoring, potential leakage from the landfill liner, elevated leachate levels in landfill gas recovery wells, and offsite contamination that affects ground water monitoring at the site of the Sunset Farms Landfill. The application failed to address any of these issues as required by TCEQ rules.

The Commission's MSW rules require an applicant to thoroughly characterize the geology and hydrogeology of the soils underneath a landfill site using site-specific information in order to establish an appropriate ground water monitoring system. *See* 30 TEX. ADMIN. CODE § 330.231(e)(1). This thorough characterization of the geology and hydrogeology is one of the critical components of a landfill permit application and is necessary before an acceptable ground water monitoring system can be established. It was clear during the contested case hearing that Applicant, BFI, has failed to provide complete information or to address the issues listed above.

For example, evidence presented, including the application itself, indicates that potential, inferred, or actual water levels in cross-sections of the existing Sunset Farms Landfill were, in some places, higher than the ground surface. The only way that the actual, potential, or inferred levels of ground water represented in the application could exist is if the Sunset Farms Landfill was being "recharged" from either below or above (*i.e.*, a leaking liner). The application did not address or explain this circumstance.

Similarly, all of the ground water monitoring wells proposed in the application (both existing and newly-proposed ground water monitoring wells) are "Point of Compliance" ("POC") wells, which by definition, are downgradient from the waste disposal area. Ground water levels must be higher in the vicinity of the landfill in order for it to flow downhill or downgradient and intercept all of these ground water monitoring wells. Thus, based on the application itself, the ground water levels are higher at the landfill waste disposal areas enabling all of the ground water monitoring wells to function as POC ground water monitoring wells. The only potential explanations for such a phenomenon are that the Sunset Farms Landfill liner leaks or that the application contains erroneous or misleading representations, both of which warranted denial of the application.

The other noted concerns with the ground water characterization contained in the application, *i.e.*, the elevated leachate levels in landfill gas recovery wells and offsite

contamination that affects ground water monitoring at the Sunset Farms Landfill, also resulted in legal error by the Commission.

C. Slope Stability Analysis and “Unstable Area” Evaluation

Slope stability analyses are conducted for a proposed landfill design in order to determine if the various slopes created during the excavation and filling of a landfill will be stable, based on the assumptions and parameters used as inputs into the modeled analysis. It is particularly important that the slopes are stable during construction and operation in order to protect the health, safety, and welfare of the public and the environment. The slope stability analyses require a review of the landfill’s design, construction, construction sequencing, operations, and interim conditions in order to ensure that the expanded landfill will be stable. BFI failed in many respects to review critical landfill features. BFI also included unrealistic assumptions in performing the stability analyses for the proposed expansion of the Sunset Farms Landfill.

The evidentiary record demonstrates that BFI’s engineering expert substantially deviated from sound engineering principles and accepted engineering practices, as set forth in relevant geotechnical literature. For example, BFI relied on unreasonably high soil strength values, which were contrary to published values for these materials. Such reliance resulted in an erroneous factor of safety. TCEQ’s acceptance of these flawed slope stability analyses was legal error.

Error further exists in the manner in which BFI and TCEQ wrongfully interpreted and applied 30 TEX. ADMIN. CODE § 330.305, relating to “Unstable Areas.” Contrary to the requirements of Section 330.305, BFI failed to demonstrate that the expanded Sunset Farms Landfill would not be “susceptible to natural or human-induced events or forces capable of impairing the integrity of some or all of a landfill’s structural components responsible for preventing releases from the landfill.” 30 TEX. ADMIN. CODE § 330.305 (2005). BFI failed to evaluate certain critical interfaces of the landfill’s components (*i.e.*, liner interfaces), thus failing

to establish that the landfill components would not be impaired by the tremendous weights and stresses placed on these components by the proposed vertical expansion. Similarly, BFI failed to adequately evaluate the stability of the waste mass that is the foundation for the vertical expansion. The Commission's acceptance of this flawed "unstable areas" demonstration is legal error.

D. Inadequate Ground Water Monitoring System

As identified above, the Commission's MSW rules require an applicant to thoroughly characterize the geology and hydrogeology of the soils underneath a landfill site using site-specific information in order to establish an appropriate ground water monitoring system. *See* 30 TEX. ADMIN. CODE § 330.231(e)(1) (2005). An appropriate ground water monitoring system is one that is established at appropriate locations and depths to ensure that any contamination that might escape from the landfill into the ground water in the area will be detected before such contamination can leave the landfill site and potentially contaminate area ground water or surface water sources. *See id.* § 330.231 (2005). Commission rules further require that a ground water monitoring system must be installed that consists of a sufficient number of monitoring wells, installed at appropriate locations and depths, to yield representative ground water samples from the upper most aquifer. *See id.* § 330.231(a) (2005). In addition, according to 30 TEX. ADMIN. CODE § 330.231(e)(1), the design of the ground water monitoring system shall be based on site-specific technical information that must include a thorough characterization of various aspects of the geology/hydrogeology of the site.

There is no record evidence to technically justify the location of the ground water monitoring wells proposed as part of the POC ground water monitoring system in the application. BFI failed to provide a technical justification for the number of ground water monitoring wells or for the reasoning behind the proposed locations of those ground water monitoring wells. Also, BFI failed to include or designate one or more upgradient background

ground water monitoring wells in its proposed POC ground water monitoring system. As identified above, each and every one of BFI's proposed ground water monitoring wells is a POC, or downgradient, well. The Commission's rules require the establishment of upgradient wells to establish ground water quality in the vicinity of the ground water monitoring wells for ground water monitoring purposes. *See* 30 TEX. ADMIN. CODE § 330.233(e) (2005). BFI failed to provide any upgradient wells and failed to even attempt to meet any of the recognized exceptions to the TCEQ rule's mandatory requirement for upgradient monitoring wells. As such, BFI cannot assess background water quality at or near the location of any of the seventeen new ground water monitoring wells proposed in the application; and thus, the application is technically and legally deficient. For these reasons, TJFA contends that TCEQ erred in approving the proposed POC ground water monitoring system.

E. Landfill Cover

Plaintiff contends that the Commission erred in concluding that the application adequately addressed landfill cover soils. 30 TEX. ADMIN. CODE § 330.133 includes requirements for daily, intermediate, and final cover for a MSW landfill. The application identifies and acknowledges a shortage of over 2.7 million cubic yards of soil that will be needed for daily, intermediate, and final cover based on the design of the expansion of the Sunset Farms Landfill but fails to address how this shortfall will be dealt with during the operation of the expanded landfill. The Commission erred in finding that the application includes adequate provision for daily, intermediate, and final cover for the proposed expansion to the Sunset Farms Landfill.

F. Land Use Compatibility

Plaintiff contends that the Commission's Order is in error when it finds that the expanded Sunset Farms Landfill will be compatible with surrounding land uses, both currently and in the foreseeable future. The Commission's MSW rules do not include a specific standard by which to

determine compatibility, but citing to the Code Construction Act, TEX. GOV'T CODE Ch. 311, the Administrative Law Judge determined that the term "compatible," as commonly used, means "capable of existing together in harmony." Proposal for Decision at 96. There was abundant testimony from residents in the vicinity of the Sunset Farms Landfill regarding odors, truck traffic, noise, and storm water runoff problems in the immediate vicinity of the Sunset Farms Landfill. Moreover, Travis County had previously identified that BFI's proposed expansion of the Sunset Farms Landfill would not meet the requirements for general conformity with surrounding land use. Travis County's comments were endorsed by the Solid Waste Advisory Council of the Capital Area Council of Governments ("CAPCOG"). Additionally, testimony was elicited from the City of Austin's expert during the Hearing on the Merits that the Sunset Farms Landfill was not compatible with existing residential development.

G. Erosion Control Methods

Plaintiff contends that the Commission's Order is in error with regard to the sufficiency of erosion control methods. Evidence demonstrated that the sedimentation ponds at Outfalls 2, 3, 4, and 5 were not designed to capture the flow from a 25-year/24-hour storm runoff volume. Thus, the ponds were sized too small to control sediment from a large rainfall event. Similarly, BFI's own evidence established that in a rainfall event of only 1.34 inches, the benchmark value for Total Suspended Solids (TSS), which is established by the storm water permit for the Sunset Farms Landfill, was exceeded at Outfall 5, which is connected to an undersized sedimentation pond. The failure to provide appropriate and adequate erosion control methods results in the related failure to adequately protect surface water quality, as required by TCEQ's MSW rules.

H. Hours of Operation

The Commission erred in changing the Administrative Law Judge's Proposed Findings of Fact and Proposed Conclusions of Law regarding the operating hours for the proposed expansion

of the Sunset Farms Landfill such that the proposed landfill is now incompatible with surrounding land uses, in violation of TCEQ rules. Additionally, in attempting to justify its changes to the Administrative Law Judge's Proposed Findings of Fact and Proposed Conclusions of Law regarding operating hours, the Commission failed to satisfy the statutory requirements of TEX. HEALTH & SAFETY CODE § 361.0832.

When overturning a finding of fact, the Commission must comply with the specific procedures set forth in TEX. HEALTH & SAFETY CODE § 361.0832. With respect to a finding of fact, the Commission may overturn an underlying finding of fact that serves as the basis for a decision only if the Commission finds that the finding was not supported by the great weight of the evidence. The Commission may overturn a conclusion of law only on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules. TEX. HEALTH & SAFETY CODE § 361.0832 further provides that the Commission "shall fully explain in a ruling, order or decision the reasoning and grounds for overturning each finding of fact or conclusion of law or for rejecting any proposal for decision for an ultimate finding." TEX. HEALTH & SAFETY CODE § 361.0832(f). Noncompliance with the mandatory requirements of Section 361.0832 regarding changing or amending the Administrative Law Judge's Proposed Findings of Fact and Proposed Conclusions of Law is error.

I. Reporting and Transcription Costs

Plaintiff contends that TCEQ's Order is in error on the issue of allocation of reporting and transcription costs. 30 TEX. ADMIN. CODE § 80.23(d)(1) sets out seven factors to consider in assessing reporting and transcription costs. In allocating one-half of the costs to TJFA, the Commission did not apply the factors set forth in Section 80.23(d)(1)(A) through 80.23(d)(1)(F), instead apparently relying upon Section 80.23(d)(1)(G)—"any other factor which is relevant to a just and reasonable assessment of costs." 30 TEX. ADMIN. CODE § 80.23(d)(1)(A)-(G). Without any record evidence to support this conclusion, the Administrative Law Judge's Proposal for

Decision—the basis for the Commission’s Order—found that TJFA’s participation was a transparent attempt by a nonparty to this proceeding to delay and complicate the proceeding, increase BFI’s costs, and perhaps gain a business edge on BFI. None of these alleged “facts” are true or supported by the evidentiary record. There was no testimony or evidence that TJFA, or any nonparty, sought to delay, complicate, increase costs, or gain a competitive advantage against BFI. It was improper, and error, for the Commission to base the assessment of reporting and transcription costs on information not in the evidentiary record and without merit. Assessment of costs against a protestant—especially where in cases where protestants have put forth reasonable and relevant arguments against an application—will have the clear and chilling effect of dissuading members of the public from exercising their right to participate in the landfill permitting process, regardless of the reasonableness of their concerns.

J. Exclusion of Relevant Evidence

Relevant evidence regarding ground water quality in the vicinity of the Sunset Farms Landfill was excluded during the evidentiary hearing. TJFA offered evidence showing existing ground water contamination in the vicinity of the Sunset Farms Landfill. This evidence is relevant pursuant to 30 TEX. ADMIN. CODE § 330.231(e)(1), which requires the design of the ground water monitoring system be based on site-specific technical information, including a thorough characterization of various aspects of the geology and hydrogeology of the site. Failure to include this ground water quality evidence prevented the required consideration regarding the design of the POC ground water monitoring system. The Commission’s failure to address the inaccuracy of the Administrative Law Judge’s determination to exclude this evidence was error in its adoption of the Order.

K. Findings and Conclusions Regarding Experts Not Based on Substantial Evidence

The Commission improperly adopted certain Proposed Findings of Fact and Proposed Conclusions of Law, as proposed by the Administrative Law Judge, where the Administrative

Law Judge's Proposal for Decision included Proposed Findings of Fact and Proposed Conclusions of Law regarding some of TJFA's expert witnesses that are not based on substantial evidence, that exceed the scope of the Administrative Law Judge's discretion, and that deprive TJFA of due process. The Administrative Law Judge's Proposal for Decision included a substantial amount of harsh language regarding two of TJFA's expert witnesses. The criticism of these witnesses, and the rejection of their opinions, does not fall within an Administrative Law Judge's typical discretion to evaluate credibility or choose between the testimony of experts. Rather, the record reveals unfounded bias against TJFA and its expert witnesses, beginning before any evidence was received and continuing through issuance of the Proposal for Decision.

The record demonstrates the application of a double-standard by which TJFA's witnesses were found not credible due to their previous work for a nonparty, whereas the testimony of BFI's witnesses was not discounted even in light of substantial work for BFI and BFI's enormous financial stake in the proceeding. The findings based on these erroneous determinations are not supported by the substantial evidence and constitute an abuse of discretion. To the extent that the determinations are based on the application of a baseless double standard flowing from unfounded bias, such determinations violate TJFA's due process rights.

Similarly, the Administrative Law Judge criticized TJFA's experts based on mischaracterizations of their testimony. An Administrative Law Judge does not have the discretion to make recommendations based on misreadings of evidence, and the Commission cannot base its findings on such misreadings. Any such findings are not based on substantial evidence, constitute an abuse of discretion, and deny TJFA its due process rights.

X. CONCLUSION

In conclusion, Plaintiff contends the TCEQ Order that issues the requested permit amendment is fatally flawed and in error for the reasons set forth herein.

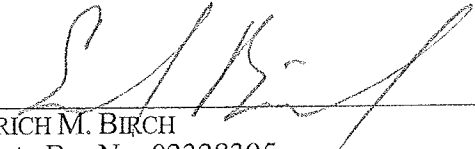
WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that the Commission be cited and required to answer and appear herein, that a hearing be held, and that on final hearing hereof, Plaintiff have judgment of the Court as follows:

1. Reversing and vacating the decision of the Commission and remanding the matter back to the Commission for further proceedings; and
2. Awarding Plaintiff costs incurred together with all other relief to which Plaintiff may be entitled.

Respectfully submitted,

BIRCH, BECKER & MOORMAN, LLP

By:

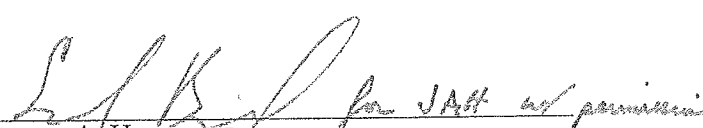

ERICH M. BIRCH
State Bar No. 02328395

ANGELA K. MOORMAN
State Bar No. 24007700

4601 Spicewood Springs Road
Building 4, Suite 101
Austin, Texas 78759
Phone: (512) 349-9300
Fax: (512) 349-9303

GRAVES DOUGHERTY HEARON & MOODY, PC

BY:


JAMES A. HEMPHILL
State Bar No. 00787674

401 Congress Avenue, Suite 2200
Austin, Texas 78701
Phone: (512) 480-5762
Fax: (512) 536-9907

ATTORNEYS FOR TJFA, L.P.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on the following via hand delivery, express mail, electronic mail, facsimile, and/or U.S. First Class Mail, on this the 1st day of December, 2009.

Mr. Mark Vickery
Executive Director (MC-109)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
12100 Park 35 Circle
Austin, Texas 78753

The Honorable William G. Newchurch
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701

Mr. Paul G. Gosselink
Lloyd Gosselink Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701

C T Corporation System
350 North St. Paul Street
Dallas, Texas 75201

Ms. Amy Swanholm
Office of Public Interest Counsel (MC-103)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Mr. Steve Shepherd
Ms. Susan White
Environmental Law Division (MC-173)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Mr. Paul M. Terrill III
The Terrill Firm PC
810 West 10th Street
Austin, Texas 78701

Mr. Kevin Morse
Travis County
P.O. Box 1748
Austin, Texas 78767

Ms. Holly C. Noelke
City of Austin
P.O. Box 1088
Austin, Texas 78767

James B. Blackburn, Jr.
Blackburn Carter PC
4709 Austin Street
Houston, Texas 77004

Mark McAfee
6315 Spicewood Springs Road
Austin, Texas 78759

Melanie McAfee
6315 Spicewood Springs Road
Austin, Texas 78759

Roger Joseph
P.O. Box 7
Austin, Texas 78767

Delmer D. Rogers
5901 Speyside Drive
Manor, Texas 78653

Williams, Ltd.
c/o Evan M. Williams
P.O. Box 2144
Austin, Texas 78768

BIRCH, BECKER & MOORMAN, LLP

4601 SPICEWOOD SPRINGS ROAD, BUILDING 4, SUITE 101, AUSTIN, TEXAS 78759 • (512) 349-9300 • FAX (512) 349-9303

b|b|m

Mr. Birch's Direct Line: (512) 413-0813
E-mail: ebirch@birchbecker.com

TUESDAY, DECEMBER 1, 2009

VIA HAND DELIVERY

Mr. Mark Vickery
Executive Director (MC-109)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

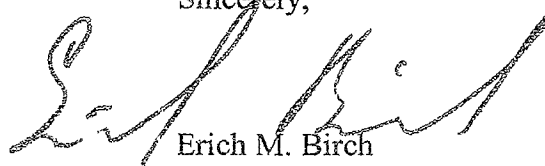
Re: Plaintiff's Original Petition; *TJFA, L.P. v. Texas Commission on Environmental Quality*,
In the District Court of Travis County, Texas.

Dear Mr. Vickery:

Please see attached Plaintiff's Original Petition in the above matter. Please return a file-stamped copy of each to me via my courier.

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

Sincerely,



Erich M. Birch

ENCLOSURES

cc: Service List
Mr. Dennis Hobbs, TJFA, L.P.