SOAH Docket No. 582-08-2178
TCEQ Docket No. 2007-1774-MSW

IN RE THE APPLICATION OF BFI WASTE	§	**BEFORE THE**
	§	
SYSTEMS OF NORTH AMERICA, LLC	§	**TEXAS COMMISSION ON**
	§	
PERMIT NO. MSW-1447A	§	**ENVIRONMENTAL QUALITY**

APPLICANT'S RESPONSE TO MOTIONS FOR REHEARING

Applicant BFI WASTE SYSTEMS OF NORTH AMERICA, LLC (BFI) files this Response to the Motions for Rehearing filed by protestants TJFA, LP (TJFA) and Northeast Neighbors Coalition (NNC), respectfully showing:

I. INTRODUCTION

Neither TJFA nor NNC have provided any basis for rehearing or reversal. Instead, they are re-asserting tired arguments that have been duly considered, and properly rejected, by the ALJ and now the Commissioners. The findings of fact, conclusions of law and proposed permit adopted and ordered by the Commissioners are fully supported by the record and the law.

In this response, BFI will first present several general observations regarding TJFA's and NNC's arguments and those arguments' lack of merit. Next, BFI will present a "case study" regarding one of the points raised – TJFA's contention that the Commissioners somehow failed to properly consider its apocryphal "landfill is leaking" claim – and show how that contention, like many of the protestants' contentions, falls squarely within BFI's general observations. Finally, BFI will address the individual issues raised by TJFA and NNC in their motions. However, because most of the items raised in the motions for rehearing are simply re-treads of

matters already raised, BFI will refer liberally back to its earlier briefing and incorporate those briefs by reference.

II. General Observations

Nothing New. The motions for rehearing fundamentally fail to raise anything new. Indeed, with the exception of two narrow issues – one pertaining to the Commissioners' recent ruling regarding the facility's operating hours and another pertaining to the ALJ's exclusion of TJFA Exhibit 10 – all of these issues have been thoroughly briefed several times before in the parties' Closing Arguments, Responses to Closing Arguments, Exceptions, and Responses to Exceptions.

Ignoring Substantial Portions of the Record. TJFA and NNC continue to ignore substantial portions of the record in asserting that the ALJ and Commissioners have erroneously considered the evidence. The record does not start and stop with the pre-filed direct testimony of TJFA's and NNC's witnesses, as they seem to believe. Instead, the *complete* record is replete with evidence that shows that *(a)* BFI prevailed on every referred issue by a preponderance of the evidence, and thus *(b)* there is substantial evidence to support each and every aspect of the Commission's final order on appeal.

Continued Attempts to Rehabilitate TJFA's Experts. TJFA continues its post-PFD effort to rehabilitate the credibility of its expert witnesses. The findings, comments and observations regarding TJFA's experts' opinions are all completely justifiable. The ALJ had a very extensive record to consider each expert witness' credentials, the substance of their opinions, and their credibility. As fact-finder, he was present for all of the testimony, he personally observed the character and demeanor of the witnesses, and he had access to the entirety of the record. Based on all of this, he properly concluded that although TJFA's expert witnesses had the credentials to

offer expert opinion testimony in certain designated areas, their opinions were often far-fetched and their credibility on the issues was strained. In a nutshell, the ALJ was simply doing his job and doing it correctly.

Attacking the ALJ with Claims of Bias. TJFA also continues to claim that the ALJ is somehow biased against TJFA, its affiliates and its witnesses – and asserts that this alleged bias somehow raises due process concerns. These claims of bias are simply sour grapes and not a legitimate basis for appeal on this record under any standard of review. There was no such bias, and the record fully supports the ALJ's observations, findings and conclusions. If anything, the record shows that the ALJ showed great patience, care and restraint in a case in which a wholly-owned-and-controlled affiliate (alter ego) of one of BFI's competitors that purports to be a "real estate investment company" purchased a small tract of land worth $90,000 catty-corner from the landfill shortly before BFI filed its application and then spent several years and many hundreds of thousands of dollars opposing BFI's application.

"Spaghetti on the Wall." TJFA and, to a lesser extent, NNC, continue to assert any number of tenuous arguments that BFI has previously characterized as the protestants' "throwing spaghetti at the wall" strategy: make every argument possible, however weak, and hope that something sticks. The motions for rehearing continue to throw figurative spaghetti at the wall.

III. "THE LANDFILL LEAKS": A CASE STUDY IN BFI'S GENERAL OBSERVATIONS

TJFA's continued insistence that the Sunset Farms landfill leaks provides a good case study regarding the general observations set out above. TJFA has pushed its landfill-is-leaking theory throughout the post-hearing briefing. Indeed, the issue has been briefed inside and out by

the parties. It was thoroughly addressed by the ALJ in the PFD.[1] TJFA is now raising the matter yet again – this time as an alleged basis for rehearing – but fails to raise anything at all new in its motion.

The theory is rooted in TJFA's expert Robert Kier's testimony that a dotted-and-dashed line depicted on some cross-sections in the application indicates that the landfill is leaking.[2] It's a silly theory that was readily debunked at the hearing. Among other things, Mike Snyder, the geologist who prepared the cross-sections, testified that the dotted-and-dashed line was simply a representation of historic groundwater levels that existed before the landfill was constructed and was not a reflection of leachate levels inside the landfill.[3] Arten Avakian, the staff geologist who reviewed the application for the Executive Director, testified that he clearly understood this.[4] In its motion for rehearing, TJFA once again ignores the Snyder and Avakian testimony and takes the position that Kier's pre-filed direct testimony – and, apparently, *only* that testimony – should be considered.

TJFA complains that the ALJ unfairly discounted Kier's testimony on the landfill-is-leaking issue. But this complaint ignores many things that served to undermine Kier's credibility on this issue. Among other things, Kier admitted on cross-examination that he hadn't even bothered to look at the groundwater monitoring data for geochemical evidence confirming or refuting the existence of a leak.[5] (Groundwater quality data is among the first things that credible geoscientists look at to try to confirm whether a landfill is leaking leachate into the groundwater.) He also couldn't specifically identify where TJFA's property was located vis-à-vis the Sunset Farms landfill, and had made no attempt to determine what effect, if any, an

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[1] PFD at 29-42.
[2] PFD at 31; Tr. 1624 & 1724-26.
[3] PFD at 32-33.
[4] *Id.* at 33.
[5] *Id.* at 31; Tr. 1617, 1620 & 1738.

alleged leak would have on his client's property.[6] Kier also took intellectually inconsistent positions when he was shown a cross-section from the Texas Disposal Systems Landfill (TDSL) application: whereas he claimed that the historic groundwater information in the BFI cross-sections represented leachate levels in the Sunset Farms landfill, he hypocritically (but correctly) asserted that similar representations in the cross-sections from TDSL's application merely represented historic groundwater levels at the TDSL site.[7] And Kier's testimony regarding the landfill-is-leaking issue was not consistent with the testimony of one of TJFA's other experts, Pierce Chandler, who opined that the dotted-and-dashed line did not represent leachate levels *within* the landfill but instead reflected water *beneath* the landfill that was under pressure.[8] The ALJ thus had plenty of reasons to question Kier's credibility on this issue.

TJFA ascribes the ALJ's statements regarding Kier's lack of credibility on this issue to an alleged bias against TJFA, TDSL, Texas Disposal Systems (TDS), and persons and entities related to them. This claim of bias unfairly impugns the ALJ and totally ignores the record, which convincingly demonstrates that TJFA should properly be characterized as the alter ego of TDSL *et al.* and not merely as an "affiliate" of those entities and persons as the ALJ and Commissioners have found.[9] Even Kier had a hard time distinguishing between TJFA, TDSL and TDS during his testimony – despite (or perhaps because of) a 25-plus year history of working for TDSL and its principals at the TDSL site in southeastern Travis County and a more recent history of consulting for TJFA in its serial challenges to expansion applications filed by TDSL's and TDS's competitors in Central Texas.[10]

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[6] Tr. 1742.
[7] PFD at 33-34; Tr. 1764-70.
[8] *See* Tr. 1424, 1521-22, 1525-26 & 1719-20.
[9] PFD at 8-9 & 120; TCEQ Final Order Finding of Fact No. 403.
[10] PFD at 9; Tr. 1696-98 & 1825-27.

Ultimately, the landfill-is-leaking assertion is but one of many unfounded assertions and kitchen-sink arguments that TJFA has made over the course of this proceeding, and continues to make, in an effort to defeat BFI's application. Taken together, these assertions and arguments demonstrate the spaghetti-at-the-wall approach that TJFA has taken in this proceeding in an effort to find something – assert anything – that may stick. BFI has been forced to spend a substantial amount of time, effort and money defending its application against these spaghetti-at-the-wall charges (here in the form of TJFA's 41-page motion for rehearing), and the record in this case amply supports the ALJ's conclusion that TJFA's challenge was "was a transparent attempt by Mr. Gregory to delay, complicate, increase the cost of, and with luck defeat BFI's Application so as to gain a business edge on BFI."[11]

IV. SPECIFIC RESPONSES TO TJFA'S AND NNC'S MOTIONS

Drainage

TJFA and NNC have taken fundamentally inconsistent approaches in their drainage challenges. Whereas TJFA challenges the use of Technical Guidance RG-417 as a basis for analyzing drainage, NNC does not and instead relies on the guidance document to try to make its case that drainage patterns have been significantly altered. TJFA contends that the Commission has impermissibly relied on RG-417 in approving BFI's drainage design and analysis, using an interpretation of "natural drainage patterns" that supposedly conflicts with the plain meaning of the phrase. In so doing, TJFA's argument goes, the agency has engaged in an unauthorized rulemaking. NNC (and TJFA in an "in the alternative" argument) accepts RG-417 and its applicability, but contends that the evidence reflects a significant alteration in peak flows at Outfalls 4 and 5, warranting denial of the permit. Neither TJFA nor NNC have raised anything

[11] PFD at 129.

new regarding the drainage analysis and calculations in their motions for rehearing; these issues have already been briefed in excruciating detail in the post-hearing briefing.

These drainage arguments fail for a variety of reasons. First and foremost, as the ALJ correctly noted, every expert witness who testified on the drainage issue – Adam Mehevec and Ray Shull (BFI), Mathew Udenenwu (Executive Director), Mike Kelly (City of Austin) and, perhaps most significantly, TJFA's expert on the subject, Steve Stecher – concluded that there will be no significant alteration in natural drainage patterns.[12] Second, TJFA's position regarding RG-417 is fundamentally at odds with NNC's because NNC has accepted the definition of "natural condition" that everyone but TJFA uses.[13] Third, RG-417 is nothing more than a reflection of the agency's long-held interpretation of its own rules, is not a rule, and was not any intended or unintended effort at rulemaking. Fourth, while NNC has accepted the correct definition of natural drainage patterns, its lawyer's effort to make an apples-to-oranges comparison was found to be a failed attempt because it compared the wrong predevelopment and post-development conditions.[14] The apples-to-apples comparison shows that no significant alterations will occur.[15]

Matters pertaining to drainage are discussed in much greater detail in BFI's Closing Argument (at pages 29-36), its Reply to Closing Arguments (at pages 31-51), and in its Response to Exceptions (at pages 7-26).

Protection of Groundwater and Surface Water

TJFA is reasserting its landfill-is-leaking theory based on its experts' tortured interpretations of the historic water levels shown on certain cross-sections in the application.

[12] PFD at 15; Tr. 69, 1896-97, 2197, 2278 & 2286; BFI Exh. AM-1 at 30; ED Exh. ED-MU at 11.
[13] Tr. 152-53.
[14] Tr. 1025; *see* BFI's Closing Argument at 29-31 and Reply to Closing Arguments at 42-43.
[15] PFD at 22; *see* BFI's Closing Argument at 29-36 and Reply to Closing Arguments at 42-49.

This issue is addressed in the "case study" in Section III above and at pages 22-23 of BFI's Closing Argument, pages 5-8 of its Reply to Closing Arguments, and pages 7, 11-12 and 29 of its Response to Exceptions.

TJFA is also re-urging its contention that the subsurface investigation was inadequate, with perhaps a slightly new twist: it contends that that the subsurface investigation was somehow improper because it was performed in contemplation of a lateral expansion which was never done. Notably, this new twist on the argument conflicts with the testimony of TFJA's own expert. Pierce Chandler, TFJA's geotechnical expert on this very issue, admitted on cross-examination that no additional borings were required for this expansion because it was a vertical-only expansion of a site that had been previously characterized (a view shared by the Executive Director's witness).[16] BFI has previously addressed TJFA's other contention that the boring and logging techniques used by BFI's consultants fell below established standards in its Closing Argument (at page 25), its Reply to Closing Arguments (at page 4) and in its Response to Exceptions (at page 11). Among other things, the record shows that Chandler hypocritically criticized boring and logging techniques used by BFI's consultants that it turns out he and Kier had used in their subsurface investigations for other, similar MSW projects.[17]

TJFA also contends that the Commission erred in adopting the findings of the ALJ regarding the Applied Materials site. TJFA does not identify specific findings of fact it believes are incorrect; BFI presumes that TJFA's complaint pertains to the ALJ's discussion of the Applied Materials evidence on pages 34-37 of the PFD. TJFA's contention, which once again presents nothing substantively new, is flat-out wrong. The ALJ's findings are utterly consistent with the great weight of the credible evidence – including the findings that eight wells on the

[16] PFD at 29; Tr. 1470.
[17] *See* Tr. 1473-80.

Applied Materials site were all nondetect for Appendix I and Appendix II constituents (*i.e.*, nondetect for the constituents that EPA has specifically identified and listed for detecting landfill leaks); that three of the four wells that tested positive for a tentatively identified compound were not downgradient from Sunset Farms (although one was proximate to an old body repair shop and another to a closed gas station); and that the fourth well was located in the center of the Applied Materials property at least 1,350 feet from Giles Lane and 2,000 feet from the Sunset Farms Landfill such that it would have taken 130 years to travel from Sunset Farms to the well under natural groundwater flow conditions.[18] For detailed discussions of TJFA's and Kier's strained Applied Materials analysis, see pages 23-24 and 63-64 of BFI's Closing Argument, pages 18-20 of its Reply to Closing Arguments, and pages 14-15, 28-30 and 45 of its Response to Exceptions.

TJFA is asserting yet again that elevated leachate in some of the gas extraction wells suggests that the landfill is awash in leachate. That argument was thoughtfully considered by the ALJ in the PFD, and properly rejected. The credible testimony on this issue – including testimony by BFI's gas system expert Matt Stutz – demonstrated that condensation or leachate in any individual gas extraction well (there are over 180 such wells at Sunset Farms) is not reflective of general leachate levels within the landfill itself.[19] Instead, it simply reflects a condition unique to that well based most commonly on a perched leachate zone in the upper level of the landfill that was intercepted by the well bore such that the leachate flowed down the well bore rather than rose up from the landfill's bottom liner.[20] This issue is briefed extensively in BFI's Closing Argument (at pages 46-54), its Reply to Closing Arguments (at pages 8-12) and its Response to Exceptions (30-32).

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[18] *See* PFD at 34-37.
[19] *See id.* at 37 & 39-40.
[20] *See* Tr. 917-18.

Finally, TJFA asserts that Commission has somehow failed to adequately address MW-30 in its final order. MW-30 is an existing groundwater monitoring well that was in assessment monitoring at the time of the hearing for detection of two VOCs slightly above the reporting limits but below the statistical groundwater protection levels.[21] Two of BFI's experts – Mike Snyder and Kevin Carel – discussed MW-30 in their pre-filed testimony (several pages each).[22] None of TJFA's experts discussed or even mentioned MW-30 in their pre-filed testimony, even though BFI's pre-filed testimony had been prepared and filed a month before TJFA's was due. (Apparently, TJFA's experts didn't even believe that MW-30 was significant enough to warrant any discussion at the time they prepared their pre-filed testimony.)

The ALJ specifically considered and discussed the evidence pertaining to MW-30 in the PFD, concluding that that BFI's experts had reasonably opined that "the low levels of [VOCs] were the result of landfill gas migrating through the unsaturated portion of the monitor well screen" and further noting that "[n]o other constituents have been detected in MW-30 that one would expect to see if a release of leachate actually occurred."[23] Based on his review of the entire record, he also concluded that the application proposes adequate protection of groundwater and surface water in compliance with agency rules.[24] The Commissioners correctly adopted the ALJ's proposed findings and conclusions on this referred issue. There is no reason why the Commission must adopt specific fact findings for *everything* discussed by the ALJ in his 120-page PFD. In any event, exclusion of a specific finding pertaining to MW-30 in the Final Order is harmless. This is another spaghetti-at-the-wall argument.

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[21] PFD at 40; BFI Exh. JS-1 at 45-46.
[22] *Id.*; BFI Exh. KC-1 at 17-22.
[23] PFD at 40-41.
[24] *Id.* at 43.

Slope Stability

TJFA re-hashes several of its shopworn slope stability arguments in its motion for rehearing, including its contention that Gregg Adams strayed from the norms and standards employed by other geotechnical engineers (read: Pierce Chandler) and that Adams failed to properly evaluate liner interfaces and the waste mass as part of his slope stability analysis. These arguments, once again, present absolutely nothing new for the Commission to consider. They have already been fully discussed in BFI's Closing Argument (pages 21-22 & 25-27), Reply to Closing Arguments (pages 20-29) and Response to Exceptions (33-40). The ALJ and now the Commissioners have properly concluded that BFI's analysis was thorough and that the 4:1 side slope at Sunset Farms is typical. Indeed, it is the same slope design used at most modern landfills in Texas – including the TDSL landfill.[25]

TJFA also claims that BFI, the Executive Director, the ALJ and now the Commissioners have all incorrectly interpreted and applied the "unstable areas" rule (30 TAC §330.205). As BFI has previously pointed out, TJFA's argument is based on a unique interpretation of the unstable areas rule that Pierce Chandler alone has and that that nobody else shares. Chandler admitted so on the witness stand.[26] This issue is addressed in detail at pages 26-27 of BFI's Closing Argument, pages 21-23 of BFI's Reply to Closing Arguments, and pages 34-35 of BFI's Response to Exceptions.

Groundwater Monitoring

TJFA re-asserts several groundwater monitoring arguments that it has previously made – and lost – over the course of this proceeding. First, it claims that BFI has failed to give an adequate explanation for the number of groundwater monitoring wells or for their locations.

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[25] Tr. 1516; *see* BFI's Closing Argument at 25.
[26] Tr. 1482-83.

Next, it argues that the proposed expanded 32-well system does not satisfy the MSW rules because it does not include an upgradient background monitoring well. Lastly, it objects to the ALJ's characterizations of various opinions offered by TJFA's expert witnesses. None of these arguments present anything new; all have been thoroughly considered and properly addressed by both the ALJ and the Commissioners.

There is more than ample evidence in the record that demonstrates that BFI's proposed groundwater monitoring system not only meets the applicable rules – *i.e.*, the pre-March 27, 2006 rules that govern this application – but also meets and, in many instances, exceeds the current rules regarding well-spacing (allowing no more than 600 feet between wells).[27] And, BFI has designated the entire perimeter of the landfill as the point of compliance for groundwater monitoring purposes.[28] Such a designation is both a more "aggressive" (in terms of the scope of monitoring and reporting and, if necessary, initiation of assessment monitoring and corrective actions[29]) and a more "conservative" (in terms of groundwater protection) way to monitor groundwater at the site.[30] The groundwater monitoring system was specifically designed using site-specific information.[31]

BFI's proposed enhanced groundwater monitoring system is eminently reasonable, well within both the letter and spirit of the rules pertaining to background monitoring, and has been approved by the Executive Director. The site sits on a topographic high, and groundwater in the regulatory aquifer flows in all directions from the site.[32] BFI has proposed an aggressive monitoring system that defines the "entire perimeter" of the landfill site as its regulatory point of

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[27] Tr. 359-62 & 760-61; *see* APP000874.
[28] BFI Exh. JS-1 at 45; Tr. 777.
[29] *See generally* 30 TAC §§330.235-238.
[30] Tr. 762, 777 & 788.
[31] BFI Exh. JS-1 at 40-44; Tr. 357, 359-62 & 760-61.
[32] BFI Exh. JS-1 at 33-34 & 42.

compliance.[33] BFI (and the agency) has up to 25 years worth of background groundwater quality data from its 17 existing wells.[34] It will also develop background data for each of the 17 new wells it is planning to install.[35] And it will use intra-well comparisons and other statistical methods allowed by TCEQ to ensure that any potential releases from the landfill are detected.[36] The application satisfies the MSW rules governing background wells and background monitoring.[37]

The ALJ and now the Commissioners have made proper findings and conclusions with respect to groundwater monitoring. Groundwater monitoring is discussed in much greater detail at pages 3, 5 and 19-24 of BFI's Closing Argument, pages 12-20 of BFI's Reply to Closing Arguments, and pages 40-48 of BFI's Response to Exceptions.

Cover

In its motion, TJFA re-asserts its unfounded argument that the application should be rejected due to a negative soil balance at the site. The argument has no more merit now than the first time TJFA asserted it. There is no rule in Chapter 330 that requires an MSW applicant or permittee to show that soil "will balance."[38] TJFA has not cited any such rule or relevant provision in any rule in its motion. The rules pertaining to cover do not address soil balance, nor do the rules pertaining to closure, post-closure and cost estimates for closure and post-closure. Instead, TJFA is simply making up a new "rule." TJFA presented absolutely no evidence of its own regarding soil balance, and, notably, entered into a mid-hearing agreed stipulation in which it agreed that "a component of Referred Issued J (pertaining to whether the application includes

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[33] BFI Exh. JS-1 at 42; Tr. 777.
[34] *See, e.g.*, APP000877-920.
[35] BFI Exh. KC-1 at 12.
[36] *Id.* at 13-15; *see* APP001341-1401.
[37] *See* BFI's Response to Exceptions at 41-42.
[38] *See* Tr. 1357; *see generally* 30 TAC §§330.1 *et seq.*

adequate provisions for closure cost estimates in accordance with the TCEQ rules) … [is] not in dispute and may be resolved as if BFI had obtained summary disposition in its favor ...".[39]

Land Use Compatibility/Nuisance

In their motions, both NNC and TJFA contend that the Commission has erred by adopting findings and conclusions that the expansion is compatible with surrounding land uses. NNC couches its motion both in terms of land use compatibility, nuisance and some site operation issues. Neither party has raised any new issue or pointed out anything different from what has already been discussed in great detail in the PFD and the parties' post-hearing briefing. Once again, there is simply nothing new here for the Commission to consider (or reconsider) or address.

The record overwhelmingly supports the Commission's findings and conclusions regarding land use compatibility. Among other things, nobody criticized the accuracy or sufficiency of the land use compatibility sections of BFI's application.[40] No governmental body opposed issuance of the permit amendment.[41] No zoning ordinance prohibits the expansion.[42] The area in which the landfill is located has been used for solid waste disposal for 50 years or more.[43] The tracts of land adjacent to Sunset Farms are all large, and no tract is used for residential purposes.[44] Another landfill borders the entirety of Sunset Farms' southern boundary.[45] An industrial facility (Applied Materials) is located immediately to the east across

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[39] Agreed Stipulations By and Between TJFA, LP, Northeast Neighbors Coalition, BFI Waste Systems of North America, LLC and Giles Holding, L.P. (Feb. 3, 2009) at ¶2.
[40] *See* BFI's Reply to Closing Arguments at 62.
[41] *See id.* at 63.
[42] *See id.* at 65; PFD at 108.
[43] Tr. 2132.
[44] *See* BFI's Reply to Closing Arguments at 64.
[45] BFI Exh. JW-1 at 11.

Giles Lane.[46] The property to the west is primarily open, though part of it has been leased by Williams, Ltd. for communications towers.[47] The properties to the north are agricultural.[48] The evidence shows that the existence of the landfill has not thwarted robust residential or commercial growth in this fast-growing segment of Austin.[49] Ultimately, the protestants' arguments were largely fuzzy NIMBY-type arguments that do not show that the landfill is incompatible under any regulatory or other standard.

For detailed discussions of all of these matters pertaining to land use compatibility that NNC and TJFA are re-asserting, as well as matters pertaining to nuisance and site operations that NNC is re-asserting, see pages 12-18, 51-52, 54 and 55-61 of BFI's Closing Argument, pages 62-74 of BFI's Reply to Closing Arguments, and pages 49-57 and 61-62 of BFI's Response to Exceptions.

BFI notes that TJFA has misstated the positions of CAPCOG and Travis County in its land use compatibility discussion. The COG concluded that BFI's application conditionally conforms with COG requirements in light of BFI's commitment to the November 1, 2015 cessation-of-waste-acceptance date and other agreements.[50] The County did not oppose the application on land use compatibility (or any other) grounds as a result of BFI's commitments and agreements.

Erosion Controls

TJFA asserts several re-tread erosion and sedimentation arguments in its motion, including its complaint that the sedimentation ponds are only designed to capture the first one-half inch of runoff; its assertion that the Commissioners' reliance on the issuance of a City of

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[46] *Id.*
[47] *Id.*; *see* Tr. 1186 & 2025 and APP000156.
[48] Tr. 1978 & 1984-85; *see* APP000156.
[49] BFI Exh. JW-1 at 20.
[50] BFI Exh. RS-1 at 21, 36-37; BFI Exhs. RS-31, RS-32 & RS-33.

Austin permit is error; its erroneous suggestion that an alleged TSS exceedance shows inadequacies in the existing erosion controls; and supposedly "persuasive testimony" that the downchutes have been improperly designed.

These arguments are all stale. They are also meritless. As BFI has pointed out on numerous occasions, the TCEQ does not have a rule that specifically addresses sedimentation pond design or performance.[51] The City of Austin does, however, and BFI has included sediment controls that satisfy the City's criteria.[52] These controls have worked well to control sedimentation and protect off-site water quality – including during very severe rain events.[53] Moreover, as the ALJ notes in the PFD, BFI entered into the Rule 11 Settlement Agreement with the City of Austin that includes supplemental erosion and sediment controls that are much more extensive (and intensive) than anything required by the Commission.[54]

Detailed discussions regarding erosion and sedimentation controls are included at pages 36-49 of BFI's Closing Argument, pages 51-62 of its Reply to Closing Arguments, and pages 57-60 of its Response to Exceptions.

The erosion section of TJFA's motion for rehearing provides a good example of TJFA's one-sided view of the record. The "persuasive testimony" and "there was also testimony ..." arguments peppered throughout this section underscore the notion that TJFA apparently believes that the only testimony that matters was the direct, pre-filed testimony of its own experts. Those experts' many admissions and concessions on cross-examination, as well as the contrary opinions and impressions of other parties' experts (including not only BFI's experts but also the City of Austin's drainage, erosion and sedimentation experts), apparently don't matter to TJFA.

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[51] *See* BFI's Reply to Closing Arguments at 53; Tr. 2282.

[52] *See* BFI's Reply to Closing Arguments at 53-54; Tr. 2203-04.

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[54] PFD at 118-18; Tr. 939, 1529 & 1852.

In fact, TJFA's own drainage expert, Steve Stecher, agreed during the hearing that the Rule 11 Settlement Agreement resulted in substantively positive enhancements to the existing and proposed erosion and sedimentation controls.[55] It omitted any reference to this testimony in its motion, however.

Operating Hours

Both TJFA and NNC argue that the Commissioners have improperly substituted their findings and conclusions regarding operating hours for those contained in the amended PFD. Both TJFA and NNC cite §361.0832 of the Texas Health & Safety Code in support of their arguments. Both have misinterpreted and misapplied §361.0832 in their motions when they assert that the Commissioners' findings are not supported by the great weight of the evidence.

The illegitimacy of this argument has its roots in the record itself – including the pre-filed testimony of the parties, the live testimony at the hearing, and the exhibits. Aside from a line of testimony from Greg Guernsey, a witness for the City of Austin (which does not oppose issuance of the permit the Commissioners have approved), discussed below, no protesting party presented any evidence at all that specifically addressed operating hours. Indeed, as the ALJ stated in his June 29, 2009 letter and as the Commissioners noted in their Final Order,[56] the parties that opposed this application – NNC, TJFA and OPIC – presented no contravening evidence at all regarding the appropriateness or inappropriateness of the 24/7 operating hours in their pre-filed testimony, through their witnesses on the stand at the hearing, or through their cross-examination of BFI's witnesses or the ED's witnesses. Among other things, there was:

- no expert testimony by any protestant regarding operating hours;

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[55] *See* Tr. 1851-52.
[56] TCEQ Final Order at 57-58.

- no evidence that the application/draft permit fails to satisfy any provision of the relevant rule;
- no evidence that anybody had ever had requested 7-to-7 weekday-only hours, limited hours on nights or weekends, or, indeed, anything reduced from 24/7 hours;
- no evidence that any county or city ordinance or regulation limits the hours of operation of this facility or other MSW facilities;
- no evidence that any other landfill in Travis County has shorter hours (they don't vary meaningfully from 24/7);
- no evidence that, despite BFI's detailed settlement agreement with City, the City ever even requested that the hours of operation be limited (much less demanded such);
- no evidence of any complaints made to TCEQ, Travis County or the City of Austin regarding the facility's 24/7 operating hours;
- no recordings or other data regarding decibel levels at nighttime or on weekends;
- no pictures, studies or data regarding excessive lighting at nighttime; and
- no evidence that there is no need for 24/7, overnight or weekend operations.

Notably, word searches of these protestants' pre-filed and live testimony indicates that "operating hours," "operational hours," "hours of operation" and similar phrases appear nowhere in their testimony. In short, this issue (as were several others such as transportation, control of vectors and special wastes) was essentially and fundamentally uncontested by NNC, TJFA and OPIC at the hearing.

In fact, the only testimony at all about reducing the proposed hours of operation at the hearing was an offhand suggestion by Greg Guernsey, the City of Austin's Director of

Neighborhood Planning, that operating hours might "be limited to day light hours."[57] This was testimony that ALJ correctly called "conclusory" in his June 29th letter amending the PFD and proposed findings, as it was made without any study or analysis on Mr. Guernsey's part.[58] In that same letter the ALJ found that "there is no evidence of any kind showing that BFI's weekend operations during the day are inappropriate"[59] and that he saw "no basis for concluding that BFI's nighttime hours are inappropriate."[60]

Against this dearth of evidence, BFI presented the following evidence relating to the hours of operation issue:

- Sunset Farms has always operated 24/7 since it first opened in 1982;[61]
- the Executive Director has independently approved BFI's request for 24/7 hours at Sunset Farms on at least three separate occasions (in the original permit, during in 2006 "call in" process for SOP revisions, and as part of this application);[62]
- BFI has developed long-standing waste delivery schedules and acceptance procedures based on the 24/7 schedule, and its customers rely upon these waste delivery schedules and acceptance procedures;[63]
- 24/7 hours are consistent with the other Type I landfills in the County;[64]
- 24/7 hours are consistent with industry practices;[65]
- BFI's traffic study shows that a not-inconsequential number of waste haul vehicles (23% of the daily volume) accessed the facility between 7:00 pm and 7:00 am on the date of the survey (waste that would have to be

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[57] *See* City of Austin Exh. 1 at 3. Mr. Guernsey's pre-filed testimony totaled slightly more than four double-spaced pages, and did not include any references to any ordinances, regulations, studies or analyses that implicate hours of operation in any respect .
[58] ALJ's June 29, 2009 Letter at 3.
[59] *Id.*
[60] *Id.*
[61] BFI Exh. RS-1 at 109.
[62] *Id.* at 109.
[63] *Id.* at 110.
[64] BFI Exh. RS-1 at 110.
[65] *Id.*

accepted by one of BFI's competitors, TDSL or Waste Management, if it were limited to 7-to-7 weekdays only);[66]

- BFI's application otherwise complies with MSW rules governing site operations;[67]
- BFI's and the facility's compliance histories are "average";[68] and
- the application otherwise satisfied the provisions of the operating hours rule.[69]

None of this evidence was refuted or rebutted by any party protesting the application.

Moreover, in his direct case the Executive Director presented the following evidence regarding operating hours:

- BFI had requested 24/7 operating hours in its application;[70]
- the hours requested were the same as the site's existing hours;[71]
- the Executive Director is unaware of potential impacts justifying restricting the proposed 24/7 hours;[72] and
- BFI's application satisfied the provisions of the relevant rule.[73]

The Executive Director's testimony that the agency was "unaware of potential impacts justifying restricting the proposed 24/7 hours" was given after the application was submitted and reviewed for administrative and technical completeness, after public comments were made and received, after the draft permit was issued, and after all of the other parties in this proceeding had filed

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66 BFI Exhs. MM-3 at Table II.E-10 (APP000192) & MM-4 at 2 .
67 *E.g., id.* at 79, 86 & 110; *see generally* PFD.
68 BFI Exh. RS-1 at 104-05.
69 *Id.* at 110.
70 ED Exh. ED-AA-1 at 41.
71 *Id.*
72 *Id.*
73 *Id.*

their pre-filed testimony. None of the Executive Director's evidence was refuted or rebutted by any party protesting the application.

Jon White, the sole witness for Travis County, testified that any decrease of the hours of operation at Sunset Farms would decrease waste acceptance rates such that the landfill's capacity would not be reached by the November 1, 2015 cessation-of-waste-acceptance date BFI has agreed to after extensive negotiations with the County and the City of Austin.[74] Mr. White clearly understood that the agreement to stop accepting by November 1, 2015 was predicated on continued 24/7 operating hours.

Section 361.0832 of the Health and Safety Code provides, in pertinent part[75]:

> (c) The commission may overturn an underlying finding of fact that serves as the basis for a decision in a contested case only if the commission finds that the finding was not supported by the great weight of the evidence.
>
> (d) The commission may overturn a conclusion of law in a contested case only on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules.
>
> (e) If a decision in a contested case involves an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgment of the commission by law, the commission may reject a proposal for decision as to the ultimate finding for reasons of policy only.
>
> (f) The commission shall issue written rulings, orders, or decisions in all contested cases and shall fully explain in a ruling, order, or decision the

[74] *See* Travis County Exh. 4 at 14. Should the capacity not be reached for this reason, BFI will be deprived of the benefit of the bargains that it struck after extensive, arms length negotiations with the City of Austin and Travis County (who acted essentially on behalf of the neighbors during these negotiations) when it agreed to cease acceptance of waste by that date certain in addition to multiple other concessions. Most important of all these negotiated concessions was the agreement to cease accepting waste on November 1, 2015 (the original design would have resulted in an estimated closure date of 2023). An integral aspect of BFI's agreement to cease accepting waste in 2015 was premised on its ability to continue to operate on a 24/7 basis. The County clearly understood that these hours were required in order for BFI to satisfy this deadline – and get the benefit of its bargain in exchange for all the above referenced concessions – as evidenced by Mr. White's testimony and the very specific end date of November 1, 2015, which is not a typical year end date. BFI has organized its business, including the number and timing of collection routes, number of trucks and other equipment and staffing based on 24/7 operating hours.

[75] TEX. HEALTH & SAFETY CODE ANN. §361.0832(c)-(f).

> reasoning and grounds for overturning each finding of fact or conclusion of law or for rejecting any proposal for decision on an ultimate finding.

The Austin Court of Appeals first construed and applied these provisions in *Hunter Industrial Facilities, Inc. v. Tex. Nat. Res. Conservation Comm'n*, 910 S.W.2d 96 (Tex.App.–Austin 1995, writ denied). With respect to overturning findings of facts, the *Hunter* court held that the "not supported by the great weight of the evidence" language contained in §361.0832 is not functionally equivalent to the "against the great weight of the evidence" standard that TJFA and NNC both claim apply here. [76] Indeed, the court held that "they appear to have opposite meanings." [77] The proper analysis, the court held, is that the Commission "can only exercise its discretion to reverse those findings [of fact] that do not find support in the 'great weight' of the evidence." [78]

The *Hunter* court also discussed overturning conclusions of law and the "clearly erroneous" standard under §361.0832(d). Quoting from the U.S. Supreme Court's decision in *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525 (1948), the court held that a conclusion of law "is considered clearly erroneous when the reviewing body 'is left with the definite and firm conviction that a mistake has been committed.'" [79] "The 'clearly erroneous' standard," the court continues, "is generally considered to give the reviewing body broader authority than is allowed under a 'substantial evidence' review because a decision may be overturned despite its theoretical reasonableness." [80]

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[76] *Hunter Industrial Facilities, Inc. v. Tex. Nat. Res. Conservation Comm'n*, 910 S.W.2d 96, 102-03 (Tex.App.–Austin 1995, writ denied).
[77] *Id.* at 103 n.6.
[78] *Id.* at 103.
[79] *Id.* at 104.
[80] *Id.* (citing cases).

Finally, the *Hunter* court discussed the interplay between §§361.0832(c) and (d) and §361.0832(e), which pertains to reversals of ultimate findings. (An ultimate finding usually involves "a conclusion of law or at least a determination of a mixed question of law and fact."[81]) The court held that the legislature "[c]learly … did not intend that the PFD may be rejected as to an ultimate finding *only* on the basis of policy, but rather that it could be rejected if the ultimate finding: (1) is not supported by the underlying facts, (2) is clearly erroneous, *or* (3) contravenes the Commission's policies."[82]

The Austin Court of Appeals clarified its *Hunter* opinion in *Southwestern Public Service Company v. Public Util. Comm'n*, 962 S.W.2d 207 (Tex.App.–Austin 1998, pet. denied). Noting that a portion of its discussion in *Hunter* "has apparently misled some readers" to "construe it as suggesting that the preponderance of the evidence standard of proof was never applicable to [Commission] proceedings, either before or after the enactment of §361.0832(c)," the appellate court held that "[t]hat was never the case."[83] "*Hunter* did not abrogate the well-established rule that the standard of proof for any administrative agency finding can never be less than a preponderance of the evidence."[84]

The Commission's actions here with respect to the operating hours findings and conclusions – three of which involve ultimate findings (Finding No. 286, the second sentence of Conclusion No. 7, and Conclusion No. 55) – are consistent with the proscriptions of §361.0832 as articulated by the Austin Court of Appeals in *Hunter* and subsequently clarified in *Southwestern*. As a threshold matter, the Commissioners plainly had a definite and firm conviction that the ALJ had reached the erroneous legal conclusion that a party other than BFI

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[81] *Id.*
[82] *Id.* at 105 (italics in original).
[83] *Southwestern Public Service Company v. Public Util. Comm'n*, 962 S.W.2d 207, 213 (Tex.App.–Austin 1998, pet. denied).
[84] *Id.*

had the burden of proof on the operating hours issue. That conviction was correct as a matter of law and was consistent with long-held agency practice and precedent placing the burden on applicants. The Commissioners fixed that clear legal mistake when they substituted their correct legal conclusion (the first sentence of Conclusion No. 7) for the erroneous proposed conclusion. Even TJFA "agrees that BFI does have the burden of proof" on the operating hour issue.[85] Given this, TJFA's argument makes no sense and cannot be a correct application of the law: it is claiming that the Commissioners somehow erred under §361.0832(c) when they substituted a *correct* legal conclusion regarding the burden of proof for a proposed legal conclusion that TJFA agrees was *incorrect* (another spaghetti-at-the-wall argument).

The Commission's substitution of its fact finding regarding operating hours (No. 286) for the ALJ's proposed finding was necessitated by the Commission's proper re-allocation of the burden of proof in Conclusion of Law No. 7, and squares with §361.0832, *Hunter* and *Southwestern*. In short, the proposed finding made little sense as written when the legal standard was correctly re-established to be on BFI. It had to be rewritten. Since the ALJ and Commissioners found that there was no evidence on the protestants' side, then the great weight of evidence inescapably had to support the Commissioners' revised finding that the proposed hours are appropriate. The ALJ's finding was either not supported by the great weight or had become inapplicable due to the change to the legal standard.

In sum, the Commissioners were well within their statutory authority to substitute their findings and conclusions on this issue for the ALJ's.[86] There was no error.

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[85] TJFA Motion for Rehearing at 31.

[86] *See* TEX. HEALTH & SAFETY CODE ANN. §361.0832; *see also Hunter* and *Southwestern, supra.*

Transcript Costs

TJFA objects to the Commissioners' assessment of one-half of the transcript costs to TJFA. TJFA's complaint is rooted in the ALJ's finding that TJFA is an "affiliate" of TDS, TDSL and Bob Gregory. It cites from Black's Law Dictionary in support of its complaint. The evidentiary record fully supports *(a)* the statement that TJFA is affiliated with TDS, TDSL and Mr. Gregory; and *(b)* an assessment of one-half of the transcript costs against TJFA. Indeed, TJFA's agreed stipulations toward the end of the hearing are, in and of themselves, sufficient for the ALJ to conclude that TJFA is affiliated with the other entities. The stipulations are[87]:

1. TJFA, LP is a Texas limited partnership. TJFA, LP was formed in November 2004.

2. Bob Gregory is the sole (99%) limited partner of TJFA, LP.

3. Garra de Aguila, Inc., a Texas corporation, owns the remaining 1% interest in TJFA, LP and serves as the managing general partner of TJFA, LP.

4. Bob Gregory owns 100% of the shares of Garra de Aguila, Inc.

5. Bob Gregory serves as president, chief executive officer and principal owner of Texas Disposal Systems Landfill, Inc. and Texas Disposal Systems, Inc.

6 Texas Disposal Systems Landfill, Inc. owns a municipal solid waste landfill near Creedmoor in southeast Travis County.

7. Neither TJFA, LP nor Garra de Aguila, Inc. have any employees.

8. Dennis Hobbs currently serves as the sole officer and director of Garra de Aguila, Inc.

9. Dennis Hobbs is employed by Texas Disposal Systems, Inc. as its Director of Special Projects.

[87] Agreed Stipulations Between TJFA, LP and BFI Waste Systems of North America, LLC (Feb. 3, 2009).

10. TJFA, LP shares a common business location, telephone number and fax number with Texas Disposal Systems Landfill, Inc. and Texas Disposal Systems, Inc.

These stipulations alone show sufficiently common ownership and control for the ALJ to have reasonably concluded that the entities are affiliates. With respect to the assessment of one-half of the transcript costs against TJFA, the applicable rule provides that an ALJ may consider six listed factors and "any other factor which is relevant to a just and reasonable assessment of costs."[88] The ALJ was well within his discretion under the rules to assess costs against TJFA based on the facts and circumstances presented here. See BFI's Reply to Closing Arguments at pages 74-76 and BFI's Response to Exceptions at page 63 for additional discussion.

Exclusion of TJFA Exhibit 10

TJFA complains that the exclusion of TJFA Exhibit 10 ("TJFA 10") by the ALJ was legal error which harmed its "substantive and due process rights." However, exclusion of this proposed exhibit was proper because the document was hearsay that presented unreliable scientific testimony and lacked a proper foundation. Moreover, even if the ALJ's exclusion of TJFA 10 was in error (it was not), no harm occurred because the excluded exhibit was not material and was cumulative of other evidence already in the record, and because exclusion of the exhibit did not result in rendition of an improper judgment.

Kier attached and referenced TJFA 10 in his pre-filed testimony. The exhibit purports to be a 2002 report prepared by PBS&J, a consulting firm that had no role in the preparation of the permit application or in the contested case hearing, regarding groundwater monitoring activities at the Applied Materials facility adjacent to Sunset Farms. Kier did not prepare or assist in the preparation of the report, and the persons who did so were not witnesses in the hearing subject to

[88] 30 TAC §80.23(d)(1)(A)-(G).

potential cross-examination regarding their out-of-court statements. The report's authors were never deposed regarding their credentials, their methodology, the provenance of the report, the preparation of the report, or its substance. No showing was made that the report's authors (who appear to maintain their office in Austin, where the evidentiary hearing was held) were unable to be present or testify at the hearing. TJFA nevertheless offered the report for the truth of the matters asserted therein – essentially trying to bootstrap the report and its out-of-court assertions into the evidentiary record through a witness who admittedly had absolutely nothing at all to do with it.[89] Giles Holdings and BFI objected on the grounds that the exhibit is hearsay and lacked a proper foundation for admission. The objections were sustained by the ALJ. TJFA now complains that the report should have been admitted under the business records exception to the hearsay rule. TJFA's complaint is misplaced, for several reasons.

As the ALJ properly noted, the business records exception applies to routine recordings – not analytical studies like the PBS&J report.[90] Even if it is the routine practice of a business such as PBS&J to record certain information, recorded statements do not automatically make the information trustworthy and admissible.[91] Such information must fall within some other exception to the hearsay rule for it to be included in a record that is admitted into evidence.[92] No such exception applied here.

The trustworthiness of hearsay in a business record must also be demonstrated in order to make the record admissible under the hearsay exception.[93] For a business record to be admitted, it must be shown that the person who either made the record or transmitted the information to another to record had personal knowledge of the act, event or condition recorded. "Such

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[89] Tr. 337.
[90] Tr. 338.
[91] *Cornelison v. Aggregate Haulers, Inc.*, 777 S.W.2d 542, 545 (Tex.App.–Fort Worth 1989, no writ).
[92] *Id.* (citing Texas Rule of Evidence 805).
[93] TEX. R. EVID. 803(6).

personal knowledge is not supplied by way of hearsay statements to the author of the record."[94] TJFA never established a proper foundation for admitting the exhibit.

TJFA 10 contains scientific information that is not inherently reliable and could not be admitted into evidence because the basis and foundation of the report are unknown and the person who made the report was not available for cross-examination. All expert testimony must be shown to be reliable before it is admitted.[95] Scientific experts are required to give their opinion according to the rules of scientific discipline – requiring consideration of the extent to which the theory has been or can be tested, whether the theory has been or could be subject to peer review, whether the underlying theory is generally accepted within the scientific community, and the extent to which the theory relies on the subjective interpretation of the expert.[96] TJFA 10's authors were not present at the hearing to testify as to any of these factors – how the document was created, who created it, the basis and assumptions for the report, and the methods PBS&J used and any potential limitations in those methods. Nor did TJFA retain PBS&J as experts in this proceeding.[97] An expert's opinion testimony must be based on sufficient underlying facts or data, and is properly excluded if this foundation is absent.[98]

Finally, TJFA 10 also contains hearsay within hearsay – including analytical lab results from laboratories that do not purport to be affiliated with PBS&J or the report's authors – that does not meet any hearsay exception. Hearsay within hearsay is not admissible unless each part of the combined statements conforms with exceptions to the hearsay rule.[99] No such exceptions applied here.

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[94] *Texas Farm Bureau Mut. Ins. Co. v. Baker*, 596 S.W.2d 639, 644 (Tex.Civ.App.–Tyler 1980, writ ref'd n.r.e.) (citations omitted).
[95] TEX. R. EVID. 702; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).
[96] *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995).
[97] Tr. 330.
[98] *Merrell Dow Pharms v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997); *see* TEX. R. EVID. 702, 703 & 705(c).
[99] TEX. R. EVID. 805.

Even if TJFA is correct and the exclusion of TJFA 10 was error, such error was harmless and is not grounds for reversal. A party seeking reversal based on the erroneous exclusion of evidence must establish three elements: *(1)* the trier of fact erroneously excluded the evidence; *(2)* the excluded evidence was controlling on a material issue and was not cumulative of other evidence; and *(3)* the error probably caused the rendition of an improper judgment.[100] In its motion, TJFA has only made conclusory statements that the exclusion of the exhibit "harmed [its] substantive and due process rights" and that the report "is relevant to the matters considered in this proceeding."[101] It made no showing that the excluded evidence was controlling on a material issue, was not cumulative of other evidence, and that any error probably caused the rendition of an improper judgment.

In fact, the PBS&J report is not controlling on any material contested issue in the proceeding. Indeed, TJFA conceded during the hearing that the purpose of the report was merely to show that BFI had knowledge of the report and therefore of "events that are taking place across the street."[102] For reasons discussed at length in the PFD's section on the Applied Materials testimony, the report does not demonstrate any failure by BFI to meet its burden with regard to any referred issue – including the sufficiency of its proposed groundwater monitoring system. Moreover, the report was cumulative of other evidence that was already in the record – evidence that was also discussed and considered by the ALJ in the PFD. TJFA has not demonstrated, and cannot demonstrate, that exclusion of TJFA 10 resulted in an improper judgment.

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[100] *Texas Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000).
[101] TJFA Motion for Rehearing at 34.
[102] Tr. 336-37.

Adopting Facts Showing Bias Against TJFA Witnesses

Finally, TJFA objects to the inclusion of any findings of fact that reflect the ALJ's alleged bias against TJFA's witnesses – primarily Kier and Chandler. BFI's response is simple: there was no such bias.

Notably, nowhere in the PFD does the ALJ question the credentials of these witnesses or their expertise in their respective subject areas. Nor are there any *ad hominem* attacks on any of these witnesses. Instead, the ALJ carefully considered their opinions and, where appropriate, rejected or discredited certain opinions. And he had ample reasons to do so. In some cases, these witnesses failed to test or support their opinions with even the most rudimentary attempts at analysis. Kier's fundamental failure to look at groundwater monitoring data in connection with the landfill-is-leaking theory is an example of this.[103] In some cases, the witnesses offered opinions that were inconsistent with their work on other projects. Chandler's insistence on use of a 2.0 factor of safety here when he used factors of safety of 1.5 and less on projects he engineered is an example of this.[104] So was Chandler's criticism of the boring and logging methods used here in light of the similar methods he and Kier used for the North Texas Municipal Water District project.[105] In other instances, these witnesses refused to fairly compare Sunset Farms and its application with the TDSL landfill and its permit. Kier's hypocritical testimony regarding the meaning of historic water level information in two applications is an example of this.[106] And, these two witnesses were in conflict with each other on several matters – including the industry standard factor of safety, the level of complexity and uniformity of the soils at the Sunset Farms site, and the meaning of the dotted-and-dashed line on the application

[103] Tr. 1526, 1617, 1620 & 1738.
[104] *Id.* at 1506-07.
[105] Tr. at 1473-80; *see* BFI's Closing Argument at 25.
[106] Tr. at 1764-70; *see* BFI's Reply to Closing Arguments at 8.

cross-sections.[107] The ALJ, the Commissioners and anyone else reviewing this record have ample reason to be skeptical of many of the opinions offered by TJFA's experts. The ALJ and Commission's findings and conclusions regarding TFJA's experts' opinions are fully supported by the record, were well within the scope of the ALJ's discretion as fact-finder, and have no due process implications whatsoever.

In its motion, TJFA includes a few quotes of the ALJ at an August 26, 2008 pre-trial hearing as "strong evidence of [the ALJ's] pre-existing unfounded bias." In addition to not properly quoting the ALJ (TJFA has very carefully selected only portions of what the ALJ said and then spliced these snippets together), TJFA completely mischaracterizes what actually occurred at the hearing. The hearing took place three months after the jurisdictional hearing and involved numerous discovery issues, including a motion to compel[108] that BFI had filed and TJFA was opposing. BFI had provided compelling evidence with its motion that strongly suggested that TJFA was *exceedingly* closely related to, if not the alter ego of, several TDS entities (common ownership and management; same address; same physical office space; same phone and fax numbers; no employees; no business cards; history of purchasing a single property immediately adjacent to TDS competitors' landfills and then opposing expansion applications; use of TDS fax cover sheets for TJFA filings; etc.). The parties had an extensive discussion with the ALJ at the hearing regarding the scope of discovery as well as the scope of the hearing. In its entirety, the 88-page hearing transcript shows that the ALJ was measured and even-handed in his approach to *all* parties to the discovery dispute.

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[107] *See* BFI's Closing Arguments at 44.
[108] Applicant BFI Waste Systems of North America, LLC's Motion to Compel (TJFA) (filed Aug. 22, 2008).

V. Incorporation of Prior Briefing by Reference

BFI incorporates the following briefing it has filed in this proceeding by reference for all purposes herein:

- Applicant's Closing Argument (filed March 12, 2009);
- Applicant's Reply to Closing Arguments (filed March 30, 2009);
- Applicant BFI Waste Systems of North America, LLC's Exceptions (filed May 28, 2009); and
- Applicant BFI Waste Systems of North America, LLC's Response to Exceptions (filed June 9, 2009).

VI. Conclusion and Prayer

For all of the reasons set forth herein and in BFI's Closing Argument, Response to Closing Argument, Exceptions, and Replies to Exception, BFI prays that the Commissioners either deny TJFA's and NNC's motions for hearing outright or simply let them be denied by operation of law. BFI prays for any and all other relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Applicant's Response to Motions for Rehearing was served on the following counsel/parties of record by certified mail (return receipt requested), regular U.S. mail, facsimile transmission and/or hand delivery and via e-mail on October 21, 2009:

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