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Re: <i>Application of BFI Waste Systems of North America, Inc. for a Major Amendment to Type I MSW Permit No. 1447-A; SOAH Docket No. 582-08-2178; TCEQ Docket No. 2007-1774-MSW</i>			
Please see attached Giles Holdings Reply to Closing Arguments.			
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**SOAH DOCKET NO. 582-08-2178
TCEQ DOCKET NO. 2007-1774-MSW**

APPLICATION OF BFI WASTE	§	BEFORE THE STATE OFFICE
SYSTEMS OF NORTH AMERICA,	§	
INC. FOR A MAJOR AMENDMENT	§	OF
TO TYPE I MSW PERMIT NO, 1447A	§	
	§	ADMINISTRATIVE HEARINGS

GILES HOLDINGS, L.P.'S REPLY TO CLOSING ARGUMENTS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Giles Holdings, L.P. ("Giles Holdings") submits this Reply to Closing Arguments and in support thereof would show the following:

I. INTRODUCTION.

The Closing Arguments of Texas Justice For All, L.P. ("TJFA") and the Northeast Neighbors Coalition ("NNC") make several assertions that merit a response. TJFA mischaracterizes Giles Holdings' role in this proceeding, falsely implying that it has operational control over the Sunset Farms landfill, and embraces NNC's flawed arguments regarding the calculation of drainage flow rates, despite the testimony of *its own expert* that the application will not significantly alter drainage patterns. Also, Giles Holdings will address the land use complaints of TJFA and the NNC neighbors who complain of conditions after moving adjacent to an operating landfill, and attempt to spin the City of Austin's position on issuance of the Permit based on a selective reading of a city employee's personal opinion. In order to address these erroneous claims, Giles Holdings presents this Reply to Closing Arguments.

II. TJFA MAKES IRRELEVANT COMPARISON TO GILES HOLDINGS' PARTICIPATION IN WASTE MANAGEMENT PROCEEDING.

In its Closing Argument, TJFA sneaks in a claim that, because Giles Holdings was granted party status in Waste Management's pending MSW permit amendment application (Permit No.

MSW- 249D, SOAH Docket No. 582-08-2186, TCEQ Docket No. 2006-0612-MSW), its motives are no different than TJFA's surrogate attack on BFI's Permit Application on behalf of Texas Disposal Systems Landfill, Inc. ("TDSL"). That bogus charge does not withstand the slightest scrutiny. As the Court acknowledged during the hearing, while TJFA's relationship with TDSL and true motives in this proceeding bear on the credibility of TJFA's witnesses, Giles Holdings' non-adverse participation in the Waste Management proceeding is irrelevant to its credibility in the present case. Tr. 1396, ln. 13 - 24 (Mobley, January 27, 2009).

Undeterred, TJFA continues to pretend in its Closing Argument that TJFA and Giles have the same motives, stating that "it was TJFA's contention that Giles was engaging in the exact conduct for which both Giles and BFI had taken exception . . . a neighboring landowner participating in a contested case for alleged economic interests." TJFA Closing Argument at 9. The differences between TJFA's conduct in the BFI Application and Giles Holdings' participation in the Waste Management proceeding are obvious. First, while TJFA tried to characterize Giles Holdings' role in that proceeding as that of a "protestant" in an "active role," nothing could be further from the truth. Tr. 1394, ln. 7 - 10 (Mobley, January 27, 2009). Giles Holdings is merely a monitoring party in the Waste Management proceeding because it is a longtime immediate neighbor of that facility; it is not opposed to the granting of Waste Management's Permit and has not filed any pleadings or prefiled testimony in opposition to Waste Management's application. Tr. 1395, ln. 9 - 13 (Mobley, January 27, 2009). Giles did not buy land next to a competitor's landfill using a shill in a thinly-veiled effort to disguise its anti-competitive motivations.

Nor is Giles Holdings committed to serially opposing the permit applications of its competitors. TJFA and TDSL have an extensive track record of purchasing properties adjacent to landfills operated by its competitors and spending hundreds of thousands of dollars on experts and legal fees to challenge their permit applications. TJFA has used the same experts to challenge the

Waste Management landfill in Hutto (Tr. 1826, ln. 16 - 21 (Kier, January 28, 2009)), the Mesquite Creek landfill in Comal County (Tr. 1826, ln. 16 - 25 (Kier, January 29, 2009)), and the Waste Management landfill in Travis County (Tr. 1451, ln. 8 - 12 (Chandler, January 27, 2009)). TJFA also has spent several hundred thousand dollars in expert witness fees challenging competitors' applications, not including attorneys' fees. Tr. 1697, ln. 12 through Tr. 1698 ln. 1 (Kier, January 28, 2009); Tr. 1452, ln. 24 through Tr. 1453, ln. 5 (Chandler, January 27, 2009). Unlike TJFA and TDSL, Giles Holdings has never abused the administrative process to fight the permit applications of its business competitor's landfills. Thus, TJFA's dubious claim that Giles Holdings' party status in the Waste Management proceeding is akin to TJFA's presence here was properly deemed irrelevant by Judge Newchurch, while TJFA/TDSL's track record of repeatedly contesting the applications of TDSL's direct competitors has direct bearing on the motive and credibility of its witnesses.

III. TJFA RAISES UNCONTROVERTED ISSUE OF OPERATIONAL CONTROL FOR OWN PURPOSES.

TJFA complains that "Giles did not produce in discovery or at the hearing any evidence of its 'operational control' over BFI's landfilling activities as it considered its lease agreement to be proprietary business information." TJFA Closing Argument at 9. Referred Issue L asks whether the application adequately designates the owner and operator of Sunset Farms. This issue, prior to TJFA's late claims in its Closing Argument, was uncontroverted. Contrary to TJFA's claim, Giles Holdings did not produce evidence of its "operational control" over the Sunset Farms landfill for the simple reason that it does not exert any operational control. Giles Holdings is BFI's landlord, leasing to BFI the property that constitutes the Sunset Farms Landfill. Pg. 2, ln. 18 - 20 (Mobley Prefiled); Tr. 1388 ln. 17 - 19 (Mobley, January 27, 2009). Giles Holdings is only the landlord, it is not an operator of the landfill and exerts no operational control over it. Pg. 3, ln. 1 - 2 (Mobley

Prefiled). BFI is the landfill's operator, and Giles Holdings cannot dictate how the facility is operated. Tr. 1333, ln. 17 - 19 (Dugas, January 27, 2009). No evidence or testimony has been introduced by any party at any phase of this proceeding to demonstrate otherwise.

Although the uncontroverted record of this proceeding demonstrates that Giles Holdings is the landlord to BFI and exerts no operational control over Sunset Farms, TJFA continues to use this argument as a fishing expedition to obtain the lease agreement between Giles Holdings and BFI. There is no relevant purpose behind TJFA's quest to obtain the terms of this lease; whether Giles Holdings exerts operational control is all but undisputed, as all evidence shows that Giles Holdings' role is merely the landlord to BFI. Rather, TJFA seeks the full lease as a pretext to obtain confidential and proprietary business information that would be useful to its affiliate, TDSL – a competitor to BFI in the central Texas waste disposal industry. Judge Newchurch properly decided that the Commission's rules do not contemplate disclosure of the contents of the lease in order to show compliance on this issue. Tr. 1342, ln. 14 - 15 (Dugas, January 27, 2009). As TJFA continues to raise the specter of Giles Holdings' "operational control" over Sunset Farms long after the non-issue has been put to the rest, the above clarification was necessary to put into perspective TJFA's actual motive – the use of the operational control non-issue as a last-ditch means to obtain confidential business information contained in the lease.

IV. BFI'S PROPOSED VERTICAL EXPANSION WILL NOT SIGNIFICANTLY ALTER DRAINAGE PATTERNS.

In their respective Closing Arguments, NNC continues to argue, and TJFA has embraced, the faulty apples-to-oranges comparison of different drainage calculation methodologies first propounded by Mr. Blackburn during the hearing in order to manufacture a drainage issue. TJFA spills considerable ink — nearly eight pages — arguing its newfound position that the Application will cause a significant alteration of drainage patterns. Instead of listening to arguments of TJFA's

counsel, it is important to remember that TJFA's expert did not find that the Application will cause a significant alteration of drainage patterns. TJFA's extensive pre-filed testimony, which certainly was not understated in its criticism of the Application, contained no testimony that BFI's Application will significantly alter drainage patterns. The reason for this absence of criticism became clear on cross-examination. TJFA's drainage expert, Steve Stecher, readily conceded that the Application will not significantly alter drainage patterns:

Q: (Gosselink) "Do you recall that I asked you if you studied the issue of whether the landfill – whether the proposed landfill has altered natural drainage patterns?"

A: (Stecher) "Yes, I do. I remember that."

Q: "And you testified that, yes, you had indeed studied that."

A: "Yes."

Q: "And then I asked you: 'Do you have an opinion that the landfill amendment that's before the TCEQ at this time or before SOAH at this time violates the regulation that prohibits significant alteration of natural drainage patterns?' And you answered, 'I don't believe it does.' Do you remember that?"

A: "Yes."

Tr. 1896 ln. 22 through Tr. 1897 ln. 11 (Stecher, January 29, 2009). Despite all of the argument from counsel from NNC and now TJFA, the Court should weigh that argument against the firm conclusion of *every* expert that has reviewed this issue. All experts readily acknowledged that the expansion will not significantly alter natural drainage patterns. *See* Tr. 1897, ln. 5 - 11 (Stecher, January 29, 2009); Tr. 69, ln. 11 - 25 (Shull, January 20, 2009); Pg. 30, ln.13 - 21 (Mehevec Prefiled); Pg. 11, ln.384 - 388 (Udenenwu Prefiled); Tr. 2200, ln. 16 - 19 (Kelly, January 30, 2009).

Despite lacking any expert testimony contesting BFI's demonstration that the vertical expansion will not significantly alter natural drainage patterns, NNC and TJFA now try to generate an issue by cherry picking numbers to create the appearance of increased flow rates. During the hearing, counsel for NNC alleged (and TJFA now adopts in its Closing Argument) that the Q for

existing conditions at Outfall 4 had increased from the calculation of 26 cubic feet per second (“cfs”) in the 2006 modification to the Sunset Farms Permit (BFI Exhibit AM-33) to a calculation of 65 cfs in the Permit Application. Tr. 988, ln. 3 - 19 (Mehevec, January 23, 2009). NNC also claimed that drainage from Outfall No. 5 had increased from 66 to 175.4 cfs. *Id.* at Tr. 990, ln. 15-20.

Giles Holdings refers the Court to pages 11 - 13 of its Closing Argument for a detailed description of the faults in NNC and TJFA’s argument. In short, NNC inappropriately compared the Q measures for Outfalls No. 4 and 5 using statistics from AM-33, which does not reflect current modeling methodology, to AM-17, which does. The differing figures in these calculations are not incorrect and do not reflect any change in drainage on the ground, but simply reflect changes in the way that drainage is presently calculated. Tr. 1032, ln. 23 through Tr. 1033, ln. 6 (Mehevec, January 26, 2009). First, the release of a new TxDOT hydraulic manual with updated methodology changed and increased the flow estimates in AM-33. Tr. 1033, ln. 24 through Tr. 1034, ln. 20 (Mehevec, January 26, 2009). Second, although NNC ascribes sinister motives, a more detailed topographic survey was recently performed which revealed that flows previously thought to be going to Outfall No. 1 were actually flowing to Outfall No. 5. The engineering correction to reflect actual conditions slightly altered flow calculations. Tr. 1038, ln. 11 through Tr. 1041, ln. 22 (Mehevec, January 26, 2009). Third, the 2002 permit modifications did not include a 50 foot buffer area on the west, south, and the north side of the landfill. Tr. 1042, ln. 7 - 14 (Mehevec, January 26, 2009). These three factors have resulted in the changes in calculations Mr. Blackburn has observed; however, there has been no significant change in flows on the ground.

Finally, despite its own expert on drainage concurring that the Application satisfies all requirements regarding alteration of natural drainage patterns, TJFA attempts to introduce a novel theory in its Closing Argument – that all experts in this proceeding, including those of the TCEQ, have used the incorrect definition of “natural.” *See* TJFA Closing Argument at 13. TJFA opines

that the term "natural drainage patterns" is not defined in the TCEQ's MSW rules and that therefore the TCEQ, the agency responsible for enforcing the rule, cannot interpret or clarify the term's meaning without undertaking a formal rulemaking. BFI followed – and all experts in this proceeding have deferred to – the definition that the TCEQ has used in its review of MSW permits, found in TCEQ guidance document RG-417, "Guidelines for Preparing a Surface Water Drainage Plan for a Municipal Solid Waste Facility," which was published in June 2004 and revised in June 2006. Pg. 55, ln. 18 through pg. 16, ln. 5 (Mehevec Prefiled). It has long been held that an agency's interpretation of its own rules is given broad deference. *Public Util. Comm'n of Texas v. Gulf States Utils. Co.*, 809 S.W.2d 201, 207 (Tex. 1991); *BFI Waste Sys. of N. America, Inc. v. Martinez Env'tl. Group*, 93 S.W.3d 570, 575 (Tex.App.–Austin 2002, pet. denied). If there is vagueness, ambiguity, or room for policy determinations in a rule, deference is given to an agency's interpretation unless it is plainly inconsistent with the language of the rule. *BFI Waste Sys.*, 93 S.W.3d at 575. Because it represents the view of the regulatory body that drafted and administers the rule, the agency interpretation actually becomes part of the rule. *Id.* at 575-76. However, TJFA would prefer to disregard both policy and expert testimony in favor of its selection of one of several definitions found in the dictionary for "natural." That is not the law. TCEQ has consistently and properly interpreted its rule language with a definition of "natural drainage patterns" that has been followed by all experts in this proceeding, and TJFA's last-ditch attempt to challenge it is both erroneous and too late.

V. THE OVERWHELMING MAJORITY OF NNC AND TJFA PROTESTANTS ARRIVED AFTER LANDFILLS WERE IN EXISTENCE.

NNC claims in its Closing Argument that Sunset Farms is "in violation of the prohibition against operating in a manner that causes nuisance conditions to the surrounding communities." NNC Closing Argument at 1. Despite this assertion, there has not been any finding of nuisance at

Sunset Farms since the single odor violation in 2002. In its 27 years of its operation, the TCEQ has found only one nuisance odor violation, which occurred in 2002 and which BFI quickly addressed. Since the single odor violation approximately 7 years ago, no actual nuisance conditions have been found at Sunset Farms despite some allegations, repeated by NNC in this proceeding, and no nuisance suits have been filed. BFI has made every necessary demonstration that Sunset Farms is compatible with neighboring land uses, the overwhelming majority of which began well after the landfill was already in operation.

The overwhelming majority of the NNC and TJFA protestants who now complain of the existing landfill moved to the vicinity of Sunset Farms well after it was permitted and already in operation. Moreover, even before Sunset Farms was in operation, two other landfills next to Sunset Farms had been in operation dating back to the 1960s. Pg. 18, ln. 7 - 13 (Worrall Prefiled). Sunset Farms itself has been a permitted landfill facility since 1982. *Id.* at pg. 21, ln. 5 - 6. TJFA, however, acquired both of its properties near the landfill in late 2004 for the obvious purpose of protesting its competitors' landfill applications. The Harris Branch subdivision, where many of the NNC protestants reside, was platted several years after the Sunset Farms landfill was in existence, and subsequently developed. Tr. 2126, ln. 13 - 25 (Guernsey, January 30, 2009).

In evaluating NNC and TJFA's claims, it is very significant that practically all of them purchased property near the Sunset Farms landfill many years after it was in operation. Jeremiah Bentley purchased his property in Harris Branch approximately five years ago. Pg. 1, ln. 3 - 8 (Bentley Prefiled). Joyce Best lived in Harris Branch roughly between 1990 and 2006. Pg. 1, ln. 12 - 18 (Best Prefiled). Delmer Rogers has lived in Harris Branch for approximately three years. Pg. 1, ln. 3 - 6 (Rogers Prefiled); Tr. 1663 ln. 9-11 (Rogers, January 28, 2009). Robert Andrews has lived in Harris Branch since roughly 1991. Pg. 1, ln. 2 - 5 (Andrews Prefiled); Tr. 1651 ln. 24 - 25 through Tr. 1652 ln. 1 (Andrews, January 28, 2009). Marion Childress-Usher has lived in Harris

Branch since approximately 1992. Pg. 1, ln. 1 - 5 (Childress-Usher Prefiled). Marcelina Cook has lived in Harris Branch since about 1999. Pg. 1, ln. 1 - 5 (Cook Prefiled). Jennifer Wells has lived in Harris Branch for less than two years. Pg. 1, ln. 4 - 6 (Wells Prefiled). And finally, Barbara Winchell has lived in Harris Branch for less than three years. Pg. 1, ln. 1 - 5 (Winchell Prefiled).

Indeed, the overwhelming majority of all development in the Sunset Farms area has occurred many years after several landfills were already operating in the area. Pg. 21, ln. 10 - 16 (Worrall Prefiled). As seen, the majority of the protestants in this proceeding moved to a location adjacent to an operating landfill, not the other way around. Neighbors who purchased property near Sunset Farms and the other nearby landfills complain of permitted conditions that existed well before they arrived. Although Sunset Farms was in operation before the arrival of its new neighbors, BFI has taken great pains to abide by the requirements of its Permit and has accepted changes in its Application to address land use compatibility.

VI. CITY OF AUSTIN DOES NOT OPPOSE VERTICAL EXPANSION OF THE BFI LANDFILL.

In their Closing Arguments, TJFA and NNC make a concerted effort to imply that the City of Austin opposes issuance of the Permit based on land use compatibility issues. Giles Holdings does not speak for the City of Austin, but respectfully wishes to clarify some points on this issue.

As expected, TJFA and NNC have selectively used parts of the testimony of one of the City's witnesses, Greg Guernsey. In his Prefiled and during the hearing, Mr. Guernsey expressed his personal opinions about the compatibility of landfills and single family residential homes. However, Mr. Guernsey stated during the hearing that he was not testifying as to compliance of the landfill or the Application with TCEQ land use compatibility criteria, and that he defers to the TCEQ and its consideration of the land use compatibility issues. Tr. 2097 ln. 11 - 22 (Guernsey, January 30, 2009). The TCEQ's expert on land use compatibility concluded that the Application complies with all applicable rules regarding compatibility with land use in the surrounding area. Pg. 37, ln. 1472 -

1489 (Avakian Prefiled). Despite testifying that he defers to TCEQ's expert regarding satisfaction of land use requirements, the protestants seize upon Mr. Guernsey's personal opinions and concerns to create an impression that the City of Austin opposes issuance of the Permit on these grounds. The City of Austin does not oppose issuance of the Permit; rather, its position is that the proposal for decision and any permit issued should contain the provisions set out in the October 31, 2008 Rule 11 Agreement between the City, BFI, and Giles Holdings. City of Austin Closing Argument at 3. Regardless of Mr. Guernsey's personal opinions, the City of Austin *does not oppose* issuance of the Permit, and any effort of TJFA or NNC to create the impression that it does is misplaced.

VII. CONCLUSION.

The BFI Application has met or exceeded all relevant regulatory requirements, and Giles Holdings urges that the Application should be granted. The expert testimony received in this contested case hearing overwhelmingly demonstrates BFI's satisfaction of all issues that have been referred to SOAH, including demonstrations that natural drainage patterns will not be significantly altered and that the proposed expansion is compatible with surrounding land uses. Having demonstrated the evidence necessary to meet its burden, the Application should be granted.

Respectfully submitted,

THE TERRILL FIRM, P.C.

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CERTIFICATE OF SERVICE

I hereby CERTIFY that on March 30, 2009, a true and complete copy of the above was sent by facsimile to counsel of record at the following addresses:

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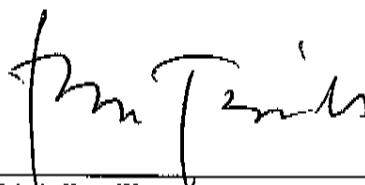
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