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TO: Name The Honorable William G Neurchurch
 Organization SOAH
 FAX Number 475 4994

FROM: **TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**
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NOTES:

SOAH
Re: Docket 582-08-2178

TCEQ Docket 2007-1774-MSW

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 30, 2009

VIA HAND DELIVERY

Ms. LaDonna Castañuela, Chief Clerk
Office of Chief Clerk
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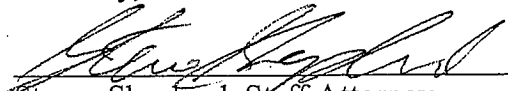
RE: SOAH Docket No. 582-08-2178
TCEQ Docket No. 2007-1774-MSW
*Application of BFI Waste Systems of North America, LLC. for a Major Permit
Amendment to the Existing Type I Municipal Solid Waste Landfill in Travis County,
Permit No. 1447A*

Dear Ms. Castañuela:

Enclosed for filing, please find an original and two (2) copies of the **Executive Director's Reply to Closing Arguments**. Please file-stamp the original and the copies and return one copy to me.

If you have any questions or comments, please call me at (512) 239-0464. Thank you for your assistance in this matter.

Sincerely,


Steven Shepherd, Staff Attorney
Environmental Law Division, MC 173

Enclosures

cc: Mailing list (attached)

The Hon. William G. Newchurch (*Via e-mail and fax*)
Administrative Law Judge
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STYLE/CASE: BFI WASTE SYSTEMS OF NORTH AMERICA INC
SOAH DOCKET NUMBER: 582-08-2178
REFERRING AGENCY CASE: 2007-1774-MSW

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE

ALJ WILLIAM G. NEWCHURCH

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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, §
LLC, FOR A MAJOR AMENDMENT § OF
TO TYPE I MSW PERMIT NO. 1447A §
§ ADMINISTRATIVE HEARINGS

EXECUTIVE DIRECTOR'S REPLY TO CLOSING ARGUMENTS

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) submits this reply to closing arguments in the above-referenced matter. The ED has reviewed the Application, considered the evidence and arguments, and determined that BFI Waste Systems of North America, LLC (BFI or applicant) has met its burden of proof regarding this Application for a permit amendment. The ED has prepared a draft permit for the proposed expansion of the municipal solid waste landfill.

DRAINAGE

Protestant, TJFA, raised an issue for the first time in its closing arguments related to issue A. Issue A is:

“Whether the application demonstrates that natural drainage patterns will not be significantly altered by the expansion, in accordance with agency rules, including 30 TAC §330.56(f)(4)(A)(iv).”

TJFA claims that BFI’s analysis of whether “natural drainage patterns” would be significantly altered is flawed, because BFI used the existing permitted condition at the landfill as the baseline to compare to discharges under proposed conditions instead of using the drainage conditions that existed before any development had occurred at the site. TJFA claims that TCEQ’s guidance document (RG-417, June 2004), which

acknowledges that this is an acceptable approach, is in irreconcilable conflict with applicable rules which require the Commission to evaluate changes to natural drainage patterns. The ED disagrees with TJFA's argument for four reasons.

The first reason is that the Commission has authority to interpret what "natural drainage patterns" means as used in its rules, and the interpretation reflected in RG-417 is consistent with the purpose of the rules. The law is well established that agencies have the authority to interpret their rules and that those interpretations must be given deference unless they are plainly erroneous or inconsistent with the language of the rule. See e.g. *Engelman Irrigation District v. Texas Commission on Environmental Quality*, 251 S.W.3rd 184, 191 (Tex. App – Austin 2008, no pet.); and, *BFI Waste Systems of North America, Inc. v. Martinez Environmental Group*, 93 S.W.3d 570, 575-576 (Tex. App – Austin 2002, pet. denied).

The ED developed RG-417 and published it in 2004 consistent with the Commission's practices in processing and considering applications in preceding years by considering changes to existing drainage patterns. The guidance was intended to assist applicants and permitting staff in evaluating whether applications would result in significant changes to natural drainage patterns. The guidance recognizes that it is appropriate to consider existing drainage patterns in the watershed, including permitted drainage conditions at an existing landfill, as a baseline for evaluating potential changes to natural drainage patterns.

The second reason the ED disagrees with TJFA's argument is that its interpretation that "natural drainage patterns" means pre-development drainage patterns

does not take into account the broader purpose of the rules to protect the environment and interests of the public in the existing watershed. This purpose would not be served by only considering what is known about the drainage conditions that existed at some point in the past. For example, if changes have been made over time increasing the amount of drainage in the watershed in which a landfill is proposed to be located, it would not serve the public interest to ignore those changes and issue a permit that the Commission could have known would result in negative impacts on neighbors under the actual drainage conditions. Considering existing drainage conditions enables the Commission to make better technical decisions to protect the public and is well within the Commission's authority to interpret what "natural drainage patterns" means as used in its rules.

The third reason the ED takes issue with TJFA's arguments is that TJFA challenged this approach for the first time after its expert witness acknowledged in the hearing that he did not think the expansion would significantly alter natural drainage patterns. (Tr. Pages 1896-1897) TJFA refers to using pre-development conditions to reflect natural drainage patterns, but it does not elaborate on what it would consider to be pre-development conditions or how that information would be obtained. TJFA does not specify what point in time it would expect an applicant to establish natural drainage patterns. TJFA's argument could be that the commission should consider the drainage patterns that existed in the watershed before man made any changes like roads or flood control dams, or it could be to consider drainage patterns at the time before any landfill operations occurred at the site. If it is the former, it is not practical or useful for the Commission to consider what drainage patterns were before there were any impacts from

man. If it is the latter, the approach used in this case takes into account what drainage patterns were before any landfill operations began at the site.

Fourth, the Commission's (and predecessor agencies) evaluation of the original landfill application in the early 1980s considered the impacts on natural drainage patterns under the same rule requirement at that point in time. The prohibition to not significantly alter natural drainage patterns has been in effect since before BFI obtained its original permit in 1982, and it has remained in effect during subsequent changes to the permit. (See attached, Texas Board of Health rules effective November 19, 1980, Section E – Permit Procedures and Design Criteria, E-2.3e(6)(c)) So if the natural drainage patterns TJFA is referring to are the conditions that existed when landfill operations began in the 1980s, BFI's existing permit is based on an evaluation which concluded that pre-development natural drainage patterns would not be significantly altered. Since the existing permitted drainage conditions are based on not significantly altering pre-development natural drainage patterns, the protections from that evaluation are carried forward into the present evaluation which uses the existing permitted condition as the drainage condition baseline.

Considering existing drainage patterns as the natural conditions baseline provides a more reliable and practical approach for considering proposed changes to drainage and impacts to the public. The ED has reviewed the Application, considered the evidence and arguments, and determined that BFI has adequately demonstrated that natural drainage patterns will not be significantly altered as required by the rules.

GROUNDWATER

TJFA asserts that the Application does not comply with rules related to issues C and H which are:

C. "Whether the application proposes adequate protection of groundwater and surface water, in compliance with agency rules, including 30 TAC §§330.55(b)(1), 330.56(f), 330.134, and 330.200-330.206?"

H. "Whether the application includes adequate provisions for groundwater monitoring, in compliance with agency rules, including 30 TAC §§330.230-330.233?"

TJFA cites the following rule to support its argument that BFI failed to comply with a requirement to establish background groundwater quality in hydraulically upgradient wells:

30 TAC §330.233(e) "The owner or operator shall establish background groundwater quality in hydraulically upgradient wells or in background wells for each of the monitoring parameters or constituents required in the ground-water monitoring program...."

TJFA does not acknowledge the "or" in this rule, underlined above, which allows applicants to establish background in wells that are not upgradient. The rule cited by TJFA should also be read in conjunction with 30 TAC §330.231(a)(1) which provides for establishing background groundwater quality in wells that are not hydraulically upgradient if hydrogeologic conditions do not allow the owner or operator to determine which wells are hydraulically upgradient or if sampling at other wells will provide a better indication of background groundwater quality than is possible from upgradient

wells. The information submitted in this Application and testimony from the hearing indicate the general direction of groundwater flow in the area, but there is also evidence that the direction of flows varies at the site. (Exhibit JS 1, Pages 34-35; Tr. Page 440) In such a case, it is appropriate to establish background groundwater quality for each monitoring well as is proposed without designating wells as upgradient.

TJFA also asserts that the proposed groundwater monitoring system is deficient, because the Application is silent as to the justification for the location and spacing of the wells in the system. BFI provided thorough technical information on subsurface conditions as required by 30 TAC §330.56(d)(5). The Application includes a geotechnical report and a groundwater investigation report which provided adequate information for BFI's groundwater expert to design the groundwater monitoring system and for the ED's permitting staff to determine that the proposed monitoring system complies with the rules. In addition to this information, BFI provided a certification from a groundwater scientist that the monitoring system was designed to comply with 30 TAC §§330.56(d)(6) and 330.231.

In short, the ED has reviewed the Application, considered the evidence and arguments, and determined that adequate provisions are provided to protect and monitor groundwater in compliance with the rules.

CONCLUSION

The ALJ should reject TJFA's argument that evaluations of changes to natural drainage patterns requires applicants to reassess drainage patterns that existed before any development occurred at a site. BFI was justified in relying on the Commission's

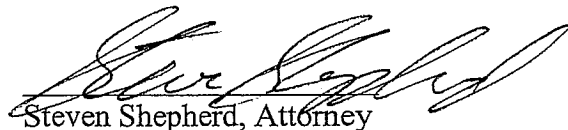
interpretation of its rules to compare proposed drainage conditions to existing drainage conditions. As to the adequacy of the groundwater monitoring system, the ALJ should reject TJFA's arguments that BFI has not properly proposed to establish background water quality or space its monitoring wells. Based on reviewing the Application and considering all of the evidence and arguments, the ED concludes that all regulatory requirements for an MSW landfill expansion have been met. Therefore, the ED stands by the preliminary decision to issue the MSW permit amendment.

Respectfully Submitted,

TEXAS COMMISSION
ON ENVIRONMENTAL QUALITY

Mark Vickery, P.G.
Executive Director

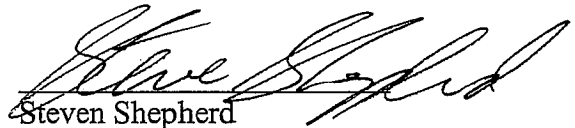
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CERTIFICATE OF SERVICE

I certify that on March 30, 2009, the foregoing was sent by e-mail, first-class mail, agency mail, or facsimile to all persons on the attached mailing list.



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Adopted by the Texas Board of Health: September 27, 1980

Effective Date: November 19, 1980

These regulations supersede the April 1977 Edition of the "Municipal Solid Waste Management Regulations" published by the Texas Department of Health. They are published in loose-leaf format for filing in a standard three-ring binder. In the future, minor revisions will be made by issuance and substitution of only the sheets affected.

generation using the water-balance method based on rainfall, evapotranspiration, and soils data as described in U.S. Environmental Protection Agency report SW-168 entitled "Use of Water Balance Method for Predicting Leachate Generation from Solid Waste Disposal Sites", or other improved procedure. Applicants should consult with the Department early in the design phase to determine if favorable water-balance conditions exist.

- (d) The need for monitor wells shall be considered. The design engineer should consult with the Department during the design of the facility for guidance. If Departmental evaluation deems it necessary, monitor wells will be required. Location, construction and sampling of monitor wells shall be in accordance with Departmental guidelines and/or permit special provisions. The Department may require that earth electrical resistivity surveys be used in lieu of or as a supplement to monitor wells. Use of these surveys shall be in accordance with Departmental guidelines.

(5) Drinking Water Protection

Solid waste shall not be deposited where a hazard may result to a drinking water supply well, intake of a water treatment plant, or raw water intake which furnishes water for human consumption. If any of these are located within 500 feet of actual disposal areas, engineering data shall be provided to show that adequate protection to drinking water sources is provided.

(6) Surface Water Protection

- (a) For the purposes of these regulations, the following definitions apply:

1. "Discharge of pollutant" means any addition of any pollutant to navigable waters from any point source, or any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source.
2. "Point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe,

ditch, channel, tunnel, conduit, well or discrete fissure, from which pollutants are or may be discharged.

3. "Pollutant" means dredged spoil, solid waste, incinerator residue, sewage, sewage sludge, munitions, chemical wastes, or biological materials discharged into water.
4. "Water in the State" means ground-water, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the State, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the State or inside the jurisdiction of the State.
5. "Waters of the United States" means all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide, with their tributaries and adjacent wetlands; interstate waters and their tributaries, including interstate wetlands; all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats and wetlands, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters which are or could be used by interstate or foreign travelers for recreational or other purposes; from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; which are used or could be used for industrial purposes by industries in interstate commerce; and all impoundments of waters otherwise considered as navigable waters under this paragraph; including tributaries of and wetlands adjacent to waters identified above.

6. "Wetlands" means areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include playa lakes, swamps, marshes, bogs and similar areas.
7. "Discharge of dredged material" means any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified disposal site located in waters of the United States and the run-off or overflow from a contained land or water disposal area.
8. "Dredged material" means material that is excavated or dredged from waters of the United States.
9. "Discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes placement of fill necessary to the construction of any structure in waters of the United States; the building of any structure or improvement requiring rock, sand, dirt or other material for its construction; the building of dams, dikes, levees, and riprap.
10. "Fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste.
11. "Non-point" source means any origin from which pollutants emanate in an unconfined and unchannelled manner, including but not limited to surface runoff and leachate seeps.
12. "100-year frequency flood" means a flood that has a one percent or greater chance of recurring in any

year or a flood of a magnitude equalled or exceeded once in 100 years on the average over a significantly long period.

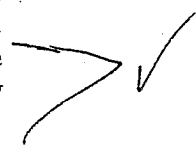
13. "Washout" means the carrying away of solid waste by waters of the 100-year frequency flood.

(b) A facility shall be designed to prevent:

1. A discharge or solid wastes or pollutants adjacent to or into the water in the State that is in violation of the requirements of Section 21.251, Texas Water Code, Vernon's Texas Codes Annotated.
2. A discharge of pollutants into waters of the United States that is in violation of the requirements of the National Pollutant Discharge Elimination System (NPDES) under Section 402 of the Federal "Clean Water Act", as amended.
3. A discharge of dredged or fill material to waters of the United States that is in violation of the requirements under Section 404 of the Federal "Clean Water Act", as amended.
4. Non-point source pollution of waters of the United States that violates applicable legal requirements implementing an areawide or statewide water quality management plan that has been approved by the Administrator of the U.S. Environmental Protection Agency under Section 208 of the Federal "Clean Water Act", as amended.

- (c) Surface drainage controls for a land disposal site shall be designed so as to minimize surface water runoff onto the working area. Dikes, embankments, drainage structures or diversion channels of adequate size and grade shall be graded for adequate drainage, and the slopes of the sides and toe shall be graded in such a manner so as to minimize the possibility of erosion. Drainage calculations should be based upon the heaviest 24-hour rainfall in a 25-year period and submitted with the design. Calculations for areas of 200 acres or less should follow the rational method, and utilize appropriate surface runoff

coefficients, as specified in the State Department of Highways and Public Transportation "Bridge Division Hydraulic Manual". Discharges from areas greater than 200 acres shall be computed by using USGS/DHT hydrologic equations compiled by the U.S. Geological Survey and the State Department of Highways and Public Transportation (SDHPT Administrative Circular 80-76); the HEC-1 and HEC-2 computer programs developed through the Hydrologic Engineering Center of the U.S. Army Corps of Engineers; or an equivalent or better method approved by the Department. Designs of all drainage facilities within the site area shall include such features as typical cross-sectional areas, ditch grades, and flow-line elevations. Natural drainage patterns shall not be significantly altered.



- (d) Handling and temporary storage of contaminated surface water shall be considered. If required, contaminated surface water storage areas shall be designed with regard to size (verifying calculations included), locations, and methods and amounts of lining of the sides and bottoms of the storage areas. The linings shall conform to the requirements of Subsection E-2.3e(4), Groundwater Protection.
- (e) The site shall be protected from flooding with suitable levees constructed to provide protection from a 100-year frequency flood and in accordance with the rules and regulations of the Texas Department of Water Resources relating to levee improvement districts and approval of plans for reclamation projects. Flood protection levees shall be designed and constructed to prevent the washout of solid waste from the site. Such levees shall not significantly restrict the flow of a 100-year frequency flood nor significantly reduce the temporary water storage capacity of the 100-year floodplain.
- (f) Any construction, fill or levee within a 100-year floodplain shall receive plan approval, if required, by the Texas Department of Water Resources prior to construction.