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

APPLICATION OF BFI WASTE SYSTEMS OF NORTH AMERICA, LLC, FOR A MAJOR AMENDMENT TO TYPE I MSW PERMIT NO. 1447A	§ § § §	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

TJFA, L.P.'s MOTION FOR REHEARING

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, TJFA, L.P. ("TJFA") and files this *Motion for Rehearing* requesting that the Commissioners of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission") grant the requested hearing, and thus reopen the above-referenced matter for additional consideration allowing the Commission to revise previous determinations that are not supported by the great weight of the evidentiary record in this proceeding and that are contradictory to applicable law and policy, as set out in its *Order Granting in Part the Application of BFI Waste Systems of North America, LLC, for Type I MSW Permit No. 1447A*, which was signed on September 14, 2009.[1] In support thereof, TJFA respectfully shows the following:

I. SUMMARY

The Commission should grant TJFA's *Motion for Rehearing*, and thus, should reconsider its decision to approve BFI Waste Systems of North America, LLC's ("BFI") application ("Amendment Application") for a major amendment for Type I Municipal Solid Waste ("MSW") Permit No. 1447A to expand the existing Sunset Farms Landfill. The Commission should instead deny the requested permit amendment on the following grounds.

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[1] *An Order Granting in Part the Application of BFI Waste Systems of North America, LLC for Type I MSW Permit No. 1447A*, SOAH Docket No. 582-08-2178, TCEQ Docket No. 2007-1774-MSW (Sept. 14, 2009) [hereinafter the "Final Order"].

A. ***The Commission Erred in Issuing Permit No. MSW-1447A Where the Evidentiary Record Demonstrates that BFI Failed to Prove by a Preponderance of the Evidence that Natural Drainage Patterns Will Not Be Significantly Altered in Violation of Commission Rules. (Referred Issue A)***

In the development, evaluation, and approval of the Amendment Application, the TCEQ (and BFI) impermissibly relied on a guidance document, *Guidelines for Preparing a Surface Water Drainage Report for a Municipal Solid Waste Facility*, TCEQ Publication RG-417[2] (the "Drainage Guidance"), which conflicts with the plain meaning of the TCEQ's MSW rules governing the proper evaluation of impacts on natural drainage patterns resulting from the proposed expansion of the Sunset Farms Landfill. The Drainage Guidance further represents an unauthorized rule as it establishes agency policy in a manner which is contrary to the mandatory rulemaking procedures found in the Texas Administrative Procedures Act ("APA").

In the alternative, if reliance on the Drainage Guidance was permissible, both TCEQ and BFI failed to follow it. BFI improperly substituted drainage values for the "pre-development" condition called for in the Drainage Guidance for numbers guaranteed to result in a finding of "no significant alteration" to natural drainage patterns.

The Commission's failure to follow its unambiguous MSW rules, as well as its unauthorized rulemaking through the adoption of and reliance on the Drainage Guidance, constitutes reversible error.

B. ***The Commission Erred in Issuing Permit No. MSW-1447A Where the Evidentiary Record Demonstrates that BFI Failed to Prove by a Preponderance of the Evidence that the Amendment Application Proposes Adequate Protection of Ground Water and Surface Water in Violation of TCEQ MSW Rules. (Referred Issue C)***

The evidentiary record shows that BFI failed to demonstrate by a preponderance of the evidence that the design set out in the Amendment Application for the vertical expansion of the Sunset Farms Landfill would be protective of ground water and surface water as required by TCEQ's MSW rules. The evidence in the record demonstrates that there are significant issues

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[2] Exh. BFI RS-34, TEXAS COMM'N ON ENVTL. QUALITY, GUIDELINES FOR PREPARING A SURFACE WATER DRAINAGE REPORT FOR A MUNICIPAL SOLID WASTE FACILITY, TCEQ Publication RG-417 (Aug. 2006) [hereinafter the "DRAINAGE GUIDANCE"].

with ground water monitoring, potential leakage from the landfill liner, elevated leachate levels in landfill gas recovery wells, and offsite contamination. The Amendment Application fails to address any of these issues in compliance with TCEQ MSW rules, and thus, it was error for the Commission to approve the Amendment Application.

C. The Commission Erred in Issuing Permit No. MSW-1447A Where the Evidentiary Record Demonstrates that BFI Failed to Prove by a Preponderance of the Evidence that Its Slope Stability Analyses Were Adequate Pursuant to TCEQ MSW Rules and that BFI Failed to Provide an Adequate "Unstable Area" Evaluation in Conformance with Applicable TCEQ MSW Rules. (Referred Issue F)

Record evidence proved that BFI's expert failed to perform a sufficient slope stability analysis and that his evaluation (1) included unrealistic inputs affecting his calculations and unconservative assumptions regarding the strengths of the components of the Sunset Farms Landfill, (2) departed from accepted geotechnical literature on conducting valid slope analyses, and (3) omitted key interfaces within the landfill and disregarded the actual construction design in evaluating the stability of the Sunset Farms Landfill. Moreover, the Amendment Application contained an inadequate "unstable area" evaluation, as it failed to include an analysis of any of the "human-induced" events or forces at the facility (*i.e.*, vertical expansion), which could result in instability of the Sunset Farms Landfill. The Commission erred in approving this flawed slope stability analysis and incorrect interpretation of the applicable TCEQ MSW rules.

D. The Commission Erred in Issuing Permit No. MSW-1447A Where the Evidentiary Record Demonstrated that BFI Failed to Prove that the Proposed Ground Water Monitoring System for the Expansion of the Sunset Farms Landfill Complies with Applicable TCEQ MSW Rules. (Referred Issue H)

The evidentiary record shows that BFI failed to prove by a preponderance of the evidence that the ground water monitoring system proposed for the expansion of the Sunset Farms Landfill would comply with applicable TCEQ MSW rules. The proposed ground water monitoring system fails to comply with applicable MSW rules in two key areas: (1) the Amendment Application contains no justification for the location of the ground water monitoring wells based on site-specific conditions; and (2) the ground water monitoring system proposed in

the Amendment Application did not include any upgradient ground water monitoring wells, nor did it provide the required evaluation and explanation for the exclusion of such upgradient ground water monitoring wells. Both of these omissions are fatal flaws. The MSW rule requirements for ground water monitoring systems are mandatory. Hence, the Commission erred in finding that the proposed ground water monitoring system met the applicable TCEQ MSW rules.

E. The Commission Erred in Issuing Permit No. MSW-1447A Where the Evidentiary Record Demonstrated that BFI Failed to Prove by a Preponderance of the Evidence that Adequate Provisions Were Contained in the Amendment Application Regarding Cover Needs Related to the Vertical Expansion and Future Operation of the Sunset Farms Landfill. (Referred Issue Q)

The Amendment Application and the evidentiary record proved that BFI has insufficient soils on-site at the Sunset Farms Landfill to provide for the daily, intermediate and final cover for the proposed expansion of the facility. It was error for the Commission to find that BFI met its burden with respect to the provision of adequate cover.

F. The Commission Erred in Issuing Permit No. MSW-1447A Where the Evidentiary Record Demonstrated that BFI Failed to Prove by a Preponderance of the Evidence that the Proposed Vertical Expansion of the Sunset Farms Landfill Represents a Compatible Land Use. (Referred Issue U)

Citizen and expert testimony during the Hearing on the Merits demonstrated that the vertical expansion and subsequent operation of the Sunset Farms Landfill was incompatible with the existing and rapidly-increasing residential character of the surrounding land. Where the preponderance of the evidence does not support a finding of compatibility, the Commission erred in finding the proposed expansion of the Sunset Farms Landfill compatible with existing land uses.

G. The Commission Erred in Issuing Permit No. MSW-1447A Where the Evidentiary Record Demonstrated that BFI Failed to Prove by a Preponderance of the Evidence that Its Proposed Erosion Control Methods Are in Compliance with TCEQ MSW Rules. (Referred Issues C and Y)

The evidentiary record demonstrated that existing and proposed erosion controls at the Sunset Farms Landfill are inadequate. Not only are the drainage features undersized, but they have a record of failure in significant rainfall events. Based on the evidentiary record, it was error for the Commission to conclude that BFI satisfied the requirements for adequate cover and protection of surface water based on the erosion control methods proposed in the amendment application.

H. The Commission Erred in Substituting Its Findings of Fact and Conclusions of Law for Those Set Forth in the Administrative Law Judge's Proposal for Decision and Amendments Thereto on the Issue of the "Operational Hours" Sought in the Amendment Application

In attempting to justify its departure from the Administrative Law Judge's proposed Findings of Fact and Conclusions of Law on the issue of proper hours of operation for the Sunset Farms Landfill, the Commission failed to satisfy the statutory requirements of Section 361.0832 of the Texas Health and Safety Code.[3] Noncompliance with the mandatory requirements of Section 361.0832 regarding changing or amending the Administrative Law Judge's proposed Findings of Fact and Conclusions of Law is reversible error.

I. The Commission Erred in Allocating Reporting and Transcription Costs to TJFA.

In allocating one-half of the costs to TJFA, the Commission did not apply the factors set forth in Texas Administrative Law Title 30, Section 80.23(d)(1). Instead, without any record evidence in this proceeding to support this conclusion, the Administrative Law Judge's Proposal for Decision—the basis for the Final Order since it was not questioned by the Commission—found that TJFA's participation was a transparent attempt by Bob Gregory, a nonparty in this proceeding, to delay and complicate the proceeding, increase BFI's costs, and perhaps gain a

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[3] TEX. HEALTH & SAFETY CODE § 361.0832.

business edge on BFI. None of these alleged "facts" are true or supported by the evidentiary record. There was absolutely no testimony or evidence that TJFA sought to delay, complicate, increase costs, or gain a competitive advantage against BFI. It was improper, and error, for the Commission to base the assessment and of reporting and transcription costs on information not in the evidentiary record and without merit.

J. The Exclusion of Certain Evidence Offered by TJFA Was Legal Error.

Exhibit TJFA 10 was ruled inadmissible by the Administrative Law Judge and the ruling was not reconsidered and reversed by the Commission. The exclusion of Exhibit TJFA 10 was error and harmed the substantive and due process rights of TJFA for a just and fair administrative proceeding. Exhibit TJFA 10 is relevant to the matters considered in this proceeding and is admissible pursuant to the applicable rules of evidence.

K. The Commission Erred in Adopting Certain Findings of Fact, as Proposed by the Administrative Law Judge, Where the Administrative Law Judge's Proposal for Decision Included Findings Regarding Some of TJFA's Expert Witnesses that Are Not Based on Substantial Evidence, Exceed the Scope of the Administrative Law Judge's Discretion, and Deprive TJFA of Due Process.

Before receiving any evidence in this proceeding, the Administrative Law Judge expressed unsubstantiated bias against TJFA's witnesses. That unfounded bias is evidenced in some of the Findings of Fact in the Administrative Law Judge's Proposal for Decision, which, in turn, was the basis for the Commission's adopted Findings of Fact and Final Order. An Administrative Law Judge has the general discretion to assess the credibility of witnesses and to weigh opposing experts' opinions, but an Administrative Law Judge does not have the discretion to make such determinations without evidence to support the determination. Nor does an Administrative Law Judge have the discretion to make such determinations based on misunderstandings or misinterpretations of the opinions of an expert. Such determinations are beyond the scope of an Administrative Law Judge's discretion and, to the extent they are based on unfounded bias, constitute a violation of due process. Some of the specific determinations

about which TJFA complains are incorporated into the substantive discussions below. Further background regarding the Administrative Law Judge's Proposal for Decision and related proposed Findings of Fact regarding TJFA's expert witnesses is included in Section II.K., below.

TJFA submits that the errors identified in this *Motion for Rehearing* warrant further review and deliberation on the part of the Commission and ultimately the denial of the Amendment Application. Below, TJFA provides a concise explanation of each error alleged.

II. SUBSTANTIVE ERRORS

A. The Commission Erred in Issuing Permit No. MSW-1447A Where the Evidentiary Record Demonstrates that BFI Failed to Prove by a Preponderance of the Evidence that Natural Drainage Patterns Will Not Be Significantly Altered in Violation of Commission Rules. (Referred Issue A)

The Commission's MSW rules require the applicant to demonstrate that the proposed landfill expansion will not result in a significant alteration of natural drainage patterns. The pertinent MSW rules state, in relevant part:

- Sample calculations shall be provided to verify that *natural* drainage patterns will not be significantly altered.[4]
- Cross-sections or elevations of levees should be shown tied into contours. *Natural* drainage patterns shall not be significantly altered.[5]
- As part of the attachment, the following information and analyses must be submitted for review, as applicable. (A) Drainage and run-off control analyses: . . . (iv) discussion and analyses to demonstrate that *natural* drainage patterns will not be significantly altered as a result of the proposed landfill development . . . .[6]

Instead of comparing drainage conditions after the proposed expansion (*i.e.*, post-development drainage conditions) to the natural drainage patterns, as required by the explicit language of the applicable TCEQ MSW rules, BFI compared post-development drainage conditions to the drainage conditions defined as the existing permitted conditions at closure (*i.e.*,

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4 30 TEX. ADMIN. CODE § 330.55(b)(5)(D) (2005) (emphasis added).

5 *Id.* § 330.56(f)(2) (emphasis added).

6 *Id.* § 330.56(f)(4)(A)(iv) (emphasis added).

existing permitted conditions pursuant to Permit No. MSW-1447). In approving the Amendment Application, the Commission mistakenly accepted this comparison in violation of its own MSW rules; thus, such approval of the Amendment Application was reversible error.

BFI relied on the Drainage Guidance (*i.e.*, RG-417[7]) as the rationale for its drainage analysis. The Drainage Guidance impermissibly substitutes currently approved (*i.e.*, permitted) site closure conditions as the starting point for a drainage evaluation in the case of MSW permit amendments.[8] The Drainage Guidance is in irreconcilable conflict with applicable TCEQ rules. The applicable MSW rules identify that the required demonstration must show that "natural" drainage patterns will not be significantly altered when compared to "existing" drainage patterns at the permitted site closure condition, as defined in the amendment application.[9] Nowhere in the Commission's MSW rules (*i.e.*, 30 TEX. ADMIN. CODE Chapter 330) that are applicable to the amendment application are there regulatory definitions for the terms "existing condition," "pre-development condition" or "post-development condition." In this proceeding, by relying on the Drainage Guidance, TCEQ has attempted to engage in unauthorized rulemaking contrary to the APA to provide a meaning for the undefined term "natural drainage pattern."

The Drainage Guidance is clearly intended to be an agency statement of general applicability to all MSW permit applicants.[10] Further, the Drainage Guidance provides definitions for the terms "existing condition," "pre-development condition," and "post-development condition" that are not included in the applicable MSW rules or state law, and the Drainage Guidance prescribes how one must satisfy TCEQ's MSW rules related to alteration of natural drainage patterns.[11] To these ends, the Drainage Guidance represents an unauthorized rule as it was not adopted by the Commission pursuant to the procedures set out in

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7 Exh. BFI RS-34, DRAINAGE GUIDANCE, *supra* note 2.

8 *See id.* at 6.

9 *See, e.g.*, 30 TEX. ADMIN. CODE §§ 330.55(b)(5)(D), 330.56(f)(2), & 330.56(f)(4)(A)(iv) (2005).

10 *See* Exh. BFI RS-34, DRAINAGE GUIDANCE, *supra* note 2, at 2.

11 *See id.* at 6-7.

Texas Government Code Chapter 2001 for the adoption of agency rules of general applicability.[12] Moreover, the unauthorized rulemaking contained in the Drainage Guidance contradicts the plain meaning of existing rules in Texas Administrative Code Title 30, Chapter 330, Subchapter E, relating to drainage evaluations.[13] Because the Drainage Guidance represents an invalid rule, and thus an invalid and incorrect interpretation of the applicable MSW rules, and because BFI relied on the Drainage Guidance in developing the Amendment Application, BFI failed to make the demonstration required by applicable MSW rules, and thus failed to demonstrate by a preponderance of the evidence that the proposed vertical expansion of the Sunset Farms Landfill would not result in significant alterations of *natural* drainage patterns because the Amendment Application fails to include a comparison to the pre-existing *natural* drainage condition.

TJFA also disagrees with the Administrative Law Judge's adoption of the "chain-of-approval" argument.[14] As approved by the Commission, the cumulative effect of numerous alterations in drainage patterns, while not individually substantive, in a series of permit modifications/amendments comparing developed conditions to proposed conditions, could be, and in this case is, a significant alteration of natural drainage patterns.

In the alternative, if one accepts that the drainage analysis called for in the Drainage Guidance is valid, BFI failed to demonstrate by a preponderance of the evidence that there would not be a significant alteration of drainage patterns when comparing currently permitted conditions to post-development conditions as proposed in the Amendment Application. As identified by BFI's expert witness, Ray Shull, P.E., the currently permitted conditions (*i.e.*, the

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12 *See* TEX. GOV'T CODE ch. 2001, subch. B.

13 *See* 30 TEX. ADMIN. CODE ch. 330, subch. E (2005).

14 *See* Proposal for Decision, *Application of BFI Waste Systems of North America, LLC, for Type I MSW Permit No. 1447A*, SOAH Docket No. 582-08-2178, TCEQ Docket No. 2007-1774-MSW, at 17 (May 8, 2009) [hereinafter "Proposal for Decision"].

pre-development conditions) were established in a 2002 permit modification (the "2002 MOD") sought by BFI and approved by the Commission.[15]

As identified in the 2002 MOD, the peak flow for Outfall 4 was 26 cubic feet per second (cfs) and the peak flow for Outfall 5 was 66 cfs.[16] The calculated peak flows from Outfalls 4 and 5 were carried forward without change in a 2006 permit modification (the "2006 MOD").[17] When BFI submitted the Amendment Application, also in 2006, the peak flow under existing conditions for Outfall 4 was 66 cfs with a 61 cfs peak flow under proposed (*i.e.*, post-development) conditions.[18] Also in the Amendment Application, the peak flow under existing conditions for Outfall 5 was 175 cfs with a peak flow of 171 cfs under proposed conditions.[19] In other words, the existing conditions, as defined in the Amendment Application, were not the same as the post-development conditions defined in the 2002 MOD, which BFI's own expert

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15 *See* Transcript of the Hearing on the Merits [hereinafter "Tr."] at 152 ln.2 – 153 ln.12 (Cross Exam (by Jim Blackburn) and Clarifying Questions (by The Honorable William Newchurch) of Ray Shull, P.E.). Specifically, Mr. Shull testified:

> Q. And is it fair to say that this is the existing condition that became – that it was the starting point for the application that we are, in fact, before the Court on today?
>
> A. Yes, as of -- the 2002 MOD is our existing conditions.
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> Q. It's the starting point?
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> A. That's correct.

Id. at 152 lns.2-9 (Cross Exam (by Jim Blackburn) of Ray Shull, P.E.).

16 *See* Exh. NNC-1, ACE Associated Consulting Engineers, Inc., Sunset Farms Sanitary Landfill, Permit Modification, TNRCC MSW Permit No. 1447 at Fig. 3 at T 29821 (May 2002); *see also* Tr. at 157-58 (Cross Exam (by Jim Blackburn) of Ray Shull, P.E.).

17 *See* Exh. BFI AM-33, Permit Modification, Letter from TCEQ to Michael Stewart, at Fig. 3 (Feb. 1, 2006). Interestingly, the 2006 MOD was filed around the same time as the Amendment Application, but while the peak flows for Outfalls 4 and 5 were carried forward from the 2002 MOD to the 2006 MOD, the Amendment Application contains much higher peak flow rates for both outfalls. *See id.*; *see also* Exh. BFI RS-11, Permit Amendment Application for the Sunset Farms Landfill in Travis County, Texas, BFI Waste Systems of North America, LLC, Permit No. MSW-1447A, at pt. III, att. 6, tbl. 6-8 at III-ATT6-25 at APP 000950 [hereinafter "Amendment Application.].

18 *See* Exh. BFI RS-11, Amendment Application, *supra* note 17, at pt. III, att. 6, tbl. 6-8 at III-ATT6-25 at APP 000950.

19 *Id.*

witness, Mr. Shull, testified were the "starting point" for the required drainage calculations and comparison. Specifically, the "starting point" from the 2002 MOD was a peak flow rate of 26 cfs for Outfall 4 and 66 cfs for Outfall 5.

While BFI's witness, Adam Mehevec, P.E., testified at the Hearing on the Merits that the changes in existing drainage conditions from the 2002 MOD and the 2006 MOD modifications to the Amendment Application were due, in part, to the fact, that BFI's engineers did not properly account for the landfill's topography and did not include the existing buffer zone areas in their analysis. There were also time of concentration computational changes due to a revised Texas Department of Transportation ("TxDOT") model. Even allowing for the higher existing condition peak flow due to changes in the TxDOT model, BFI should be bound by its prior permit representations to TCEQ.

The actual "starting point" utilized in the Amendment Application was a peak flow rate of 66 cfs for Outfall 4 and 175 cfs for Outfall 5—both more than 150% of the 2002 MOD "starting points." Coincidentally, the "starting point" in the Amendment Application is very similar to the post-development condition, or "ending point," in the Amendment Application.

BFI's attempt to modify the pre-development conditions in its Amendment Application from those identified in the approved 2002 MOD to clearly coincide with post-development conditions, as defined in the Amendment Application, was inappropriate and not in conformity with the Drainage Guidance. The increase of 145.1 cfs at Outfall 5 evidences a substantial alteration of drainage patterns—natural or otherwise. BFI failed to meet its burden of proof because it failed to demonstrate no alteration of natural drainage patterns.[20] The Commission erred in making Finding of Fact Nos. 60 through 64, 67, 69, 73 through 84, 91, 93 through 96, and 98. The Commission erred in making Conclusions of Law Nos. 9 and 10.

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[20] TJFA more fully addressed these arguments regarding the drainage evaluation in its *Closing Argument* at pages 13 through 20, which are incorporated herein for all purposes. *See* TJFA, L.P.'s Closing Argument, *Application of BFI Waste Systems of North America, LLC, for a Major Amendment to Type I MSW Permit No. 1447A*, SOAH Docket No. 582-08-2178, TCEQ Docket No. 2007-1774-MSW, at 41-51 [hereinafter "TJFA Closing Argument"].

B. The Commission Erred in Issuing Permit No. MSW-1447A Where the Evidentiary Record Demonstrates that BFI Failed to Prove by a Preponderance of the Evidence that the Amendment Application Proposes Adequate Protection of Ground Water and Surface Water in Violation of TCEQ MSW Rules (Referred Issue C)

The evidentiary record demonstrates that BFI failed to demonstrate by a preponderance of the evidence that the design set out in the Amendment Application for the vertical expansion of the Sunset Farms Landfill would be protective of ground water and surface water as required by TCEQ's MSW rules. The evidence in the record shows that there are significant issues with ground water monitoring, potential leakage through the landfill liner, elevated leachate levels in landfill gas recovery wells, and offsite contamination that affects ground water monitoring at the site. The Amendment Application fails to address any of these issues in compliance with TCEQ MSW rules, and thus, it was error for the Commission to approve the Amendment Application.

The contents of the Amendment Application itself indicate that, as of December 1999, projected, inferred, or actual water levels in cross-sections of the existing Sunset Farms Landfill were, in some places, higher than the ground surface.[21] The signed and sealed cross-sections were represented as ground water levels as of 1999, and no additional explanation or clarification was provided in the Amendment Application or in the documents obtained from BFI during discovery. Only during the Hearing on the Merits were alternative explanations offered by BFI. The only way that the actual, potential, or inferred levels of ground water represented in the cross-sections and contours contained in the Amendment Application could exist is if the Sunset Farms Landfill was being "recharged" from either below or above. The Amendment Application does not address or explain this circumstance

In addition, as will be discussed further below, the Amendment Application sets forth BFI's proposed Point of Compliance ("POC") ground water monitoring system. The proposed POC ground water monitoring system consists of thirty-two ground water monitoring wells,

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[21] *See* Exh. BFI RS-11, Amendment Application, *supra* note 17, at pt. III, att. 4, appx. 4C, fig. 4C.4 at APP 000712.

seventeen of which are currently existing.[22] All of the existing wells and all of the new wells are POC wells, which by definition, are downgradient from the waste disposal areas. While the sufficiency of the ground water monitoring system will be addressed below, the important fact to note here is that ground water levels must be higher in the vicinity of the landfill in order for it to flow downhill or "downgradient" and intercept all of these monitoring wells. The logical conclusion is that, based on the Amendment Application itself, the ground water levels are higher at the landfill waste disposal areas enabling all of the ground water monitoring wells to function as POC ground water monitoring wells.

Therefore, in order for the representations contained in the Amendment Application to be true and accurate, the Sunset Farms Landfill must leak. There is physically no other explanation that would conform to the entirety of the information in the Amendment Application. The only other possible explanation is that the Amendment Application contains erroneous or misleading representations and fails to sufficiently explain these representations. Either condition warranted denial of the Amendment Application, and the Commission erred when it did not do so.

TJFA also excepts to the Commission's approval of the subsurface investigation included in the Amendment Application. The subsurface investigation included in the Amendment Application was expressly undertaken for the purposes of a possible lateral expansion. The lateral expansion was abandoned and was not part of the Amendment Application, and thus, the related subsurface investigation is unrelated to the vertical expansion proposed in the Amendment Application. Similarly, record evidence demonstrated that the boring activities and logging techniques, which were part of the subsurface investigation, fell short of both established field techniques as well as TCEQ logging rules.[23] Concerns raised by TJFA's witness, Pierce L. Chandler, Jr., P.E., regarding these issues underscores the inaccurate representations made by BFI in the Amendment Application.

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22 *See id.* at pt. III, att. 5 at 5-12 at APP 000869.

23 *See* Exh. TJFA PC-1, Direct Testimony of Pierce Chandler, P.E., at 33-43.

The Commission also erred in adopting the findings of the Administrative Law Judge regarding the movement of contaminants from the Waste Management of Texas, Inc. ("WMTX") Austin Community Landfill ("ACL"), across the Sunset Farms Landfill, and to property owned by Applied Materials. Evidence was presented regarding existing contamination at the Applied Materials property and linking that contamination to past disposal practices at the ACL. While BFI was not identified as the source of that contamination, record evidence demonstrates that ground water flows directionally from the ACL, and in part, crosses the Sunset Farms Landfill before arriving at the ground water monitoring wells on the Applied Materials property. The purpose of this evidence was to emphasize the unique nature of the setting and the site conditions of the Sunset Farms Landfill—conditions that must be considered when designing the POC ground water monitoring system pursuant to TCEQ MSW rules.

Evidence presented by TJFA also demonstrated that the ground water flow had been affected and accelerated due to the breakdown and dessication of clays in the presence of the acids, solvents, and highly saline solutions deposited at the ACL over thirty years ago.[24] The Commission's disregard of this evidence and its relationship to the proposed POC ground water monitoring system at the Sunset Farms Landfill is error.

Evidence was also presented at the Hearing on the Merits identifying that BFI's landfill gas extraction wells had experienced significantly high water levels.[25] Fluid levels of any kind within a landfill are, by definition, leachate.[26] TJFA's arguments regarding elevated levels of leachate are more fully addressed in its *Exceptions* to the Proposal for Decision at pages 24 through 27, which are incorporated herein.[27]

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[24] *See, e.g.*, Tr. at 1617-22 (Cross Exam (by Paul Terrill) of Robert S. Kier, Ph.D., P.E.).

[25] *See* Exh. TJFA 9, BFI Sunset Farms Landfill Permit Amendment, MSW 1447-A, Permit Drawings, at att. 1.1 (rev'd Aug. 22, 2006) at APP 000401; *see also* Tr. at 310-11 (Cross Exam (by Bob Renbarger) of John Michael Snyder, P.G.).

[26] *See* 30 TEX. ADMIN. CODE § 330.2(65) (2005).

[27] *See* Protestant TJFA, L.P.'s Exceptions to the Administrative Law Judge's Proposal for Decision, *Application of BFI Waste Systems of North America, LLC, for a Major Amendment to Type I MSW Permit*

The high water levels in the landfill gas extraction wells are just another example of elevated leachate levels at the Sunset Farms Landfill. As identified by TJFA during the Hearing on the Merits, BFI previously had been cited by TCEQ for high leachate levels based on a TCEQ inspection from 2001.[28] The concerns with elevated leachate levels are consistent with the issues raised by TJFA related to protection of ground water and the development of an adequate and appropriate POC ground water monitoring system.

TJFA also reasserts its position that detection of chlorinated solvents in ground water monitoring well MW-30 of BFI's current ground water monitoring system is indicative of a release from the Sunset Farms Landfill. By failing to acknowledge this evidence in the Final Order, the Commission erred in dismissing evidence of an actual release from the Sunset Farms Landfill. It is a documented release, and it has impacted ground water quality. It is another factor to consider in the issue of ground water protection, and it is relevant as it relates to the adequacy of the proposed POC ground water monitoring system and the Ground Water Sampling and Analysis Plan ("GWSAP") in this unique setting of a cluster of landfills.

For all of the above reasons, the Commission erred in its determination that there are adequate provisions in the Amendment Application to ensure proper containment and isolation of deposited waste and associated leachate from ground water and surrounding potential receptors. The Commission erred in determining that there are adequate provisions to protect ground water.[29] The Commission erred in making Findings of Fact No. 161, 378, 379, and 384.[30] The Commission erred in making Conclusions of Law Nos. 15, 18, and 19.

No. 1447A, SOAH Docket No. 582-08-2178, TCEQ Docket No. 2007-1774-MSW, at 24-27 (May 28, 2009) [hereinafter "TJFA Exceptions"].

28 *See* Exh. BFI SL-11, Agreed Order, *In the Matter of an Enforcement Action Concerning BFI Waste Systems of North America, Incorporated, Texas Pollutant Discharge Elimination System Permit Nos. TXR050000 and TXR05F277; Municipal Solid Waste Permit No. 1447; Air Account No. TH-0522-W*, Docket No. 2002-0936-MLM-E, at 5.

29 TJFA more fully addressed these arguments regarding ground water and surface water protection in its *Closing Argument* at pages 20 through 24, which are incorporated herein for all purposes. *See* TJFA Closing Argument, *supra* note 20, at 20-24.

30 The Commission erred in not entering appropriate findings of fact addressing the elevated levels of leachate

C. *The Commission Erred in Issuing Permit No. MSW-1447A Where the Evidentiary Record Demonstrates that BFI Failed to Prove by a Preponderance of the Evidence that Its Slope Stability Analyses Were Adequate Pursuant to TCEQ MSW Rules and that BFI Failed to Provide an Adequate "Unstable Area" Evaluation in Conformance with Applicable TCEQ MSW Rules. (Referred Issue F)*

The relevant and applicable rules governing stability of a landfill are found at Texas Administrative Code Title 30, Sections 330.55(b)(8) (final cover), 330.56(l) (final closure plan), 330.250 through 330.256 (closure and post-closure care) and 330.305 (unstable areas).[31] An analysis of slope stability, however, not only incorporates these various features but also requires a technical review of the landfill's design, construction, construction sequencing, operations, and interim conditions in order to ensure that the expanded landfill will be stable. The evidentiary record reflects that BFI failed in many respects to review critical landfill features or otherwise included unrealistic assumptions in performing the stability analyses for the proposed expansion of the Sunset Farms Landfill.

While TCEQ's MSW rules identify the various landfill components and issues bearing on landfill slope stability, they are silent as to what procedures must be followed to ensure that an expanded MSW landfill will be stable. In the absence of clear rules or guidance regarding the performance of slope stability analyses, experts must rely on sound engineering principles and accepted engineering practices, as set forth in the geotechnical literature. Record evidence reflects that BFI's expert, Gregory Adams, P.E., substantially deviated from these norms and standards. Mr. Adams' selection of soil strengths reflected unreasonably high values, thus resulting in factors of safety for the proposed expansion of the Sunset Farms Landfill which were erroneous.[32] The soil strengths included in Mr. Adams' analyses were contrary to published values for these same materials.[33] Mr. Adams failed to provide an evaluation of the critical soil and smooth membrane interface of the landfill's liner in the final and interim conditions, even

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at the Sunset Farms Landfill as identified in the evidentiary record.

31 30 TEX. ADMIN. CODE §§ 330.55(b)(8), 330.56(l), 330.250-330.256, & 330.305 (2005).

32 *See* Exh. TJFA PC-1, Chandler Testimony, *supra* note 23, at 58-60.

33 *See id.* at 58-60 & 65.

though other BFI experts underscored the necessity of such an evaluation.[34] TJFA's geotechnical expert, Mr. Chandler, pointed out numerous flaws in each of Mr. Adams' analyses.[35] TJFA's arguments regarding slope stability issues are more fully detailed in its *Exceptions* to the Proposal for Decision at pages 34 through 41 and in its *Closing Argument* at pages 32 through 51, both of which are hereby incorporated herein.[36]

Error further exists in the manner in which BFI and TCEQ wrongfully interpreted and applied Texas Administrative Code Title 30, Section 330.305, relating to Unstable Areas, during the application review process and in this contested case proceeding. Section 330.305 requires a permit applicant or permit amendment applicant to adequately demonstrate that its landfill, together with the landfill's integral components, shall not be "susceptible to natural or *human-induced* events or forces capable of impairing the integrity of some or all of a landfill's structural components responsible for preventing releases from the landfill."[37]

The Commission's MSW rules clearly define and identify a landfill's "structural components" to include its liners, leachate collection systems, final covers, *et cetera*.[38] The Commission, in its interpretation of the "unstable area" rule (*i.e.*, Section 330.305) through approval of the Amendment Application impermissibly failed to require BFI to consider anything other than the existing geological siting of the Sunset Farms Landfill. This is contrary to the clear meaning of Section 330.305 and the specific regulatory definitions of the terms contained in that rule. BFI, as set forth above, failed to evaluate certain critical interfaces of the landfill's components (*i.e.*, liner interfaces), thus failing to establish that the landfill components

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34 *See* Exh. TJFA 15, Email from Jayson J. Lang, P.E., Engineer, Geosyntec Consultants, to Michael Stewart (Aug. 30, 2006) at APP 031523.

35 *See* TJFA Closing Argument, *supra* note 20, at 41-51.

36 *See* TJFA Exceptions, *supra* note 27, at 34-41; *see also* TJFA Closing Argument, *supra* note 20, at 32-51.

37 30 TEX. ADMIN. CODE § 330.305 (2005) (emphasis added).

38 *Id.* § 330.2(143). The term "structural components" is defined as: "Liners, leachate collection systems, final covers, run-on/run-off systems, and any other component used in the construction and operation of the municipal solid waste landfill that is necessary for protection of human health and the environment." *Id.*

would not be impaired by the tremendous weights and stresses placed on these components by the proposed vertical expansion.[39] Similarly, BFI failed to adequately evaluate the stability of the waste mass that is the foundation for the vertical expansion. The Amendment Application failed to provide these analyses, and TCEQ did not require these analyses. Record testimony at the Hearing on the Merits underscored these failings.[40]

The Commission's Final Order thus contains erroneous Findings of Fact and Conclusions of Law related to the referred issue of slope stability. Specifically, Findings of Fact Nos. 170 through 172 and 174 through 176 and Conclusion of Law No. 24, relating to slope stability, are in error.[41]

Further, the Commission's findings are based in part on the Administrative Law Judge's erroneous and unfounded rejection of the testimony of TJFA's expert witnesses. The Administrative Law Judge's proposals, as outlined in the Proposal for Decision, were based on patent misunderstandings of those experts' opinions, and the Commission's Findings of Fact and Final Order in turn, are in error due to their reliance on the Administrative Law Judge's erroneous conclusions. TJFA set forth the Administrative Law Judge's errors at length at pages 28 through 40 of its *Exceptions* to the Proposal for Decision, which TJFA incorporates herein by reference.[42] TJFA seeks rehearing based on its arguments in its *Exceptions*, which include in part, without limitation, the following:

- The Administrative Law Judge erroneously characterized the testimony of TJFA expert Mr. Chandler as opining that a four-to-one side slope was inappropriate for the Sunset Farms Landfill expansion, and then erroneously discounted Mr. Chandler's opinion based on this flawed characterization. Mr. Chandler expressly testified that a four-to-one slope would be appropriate if designed properly. The Administrative Law Judge also erred—in a substantial manner—by

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39 *See* Exh. TJFA PC-1, Chandler Testimony, *supra* note 23, at 56 & 60-61.

40 *See* Tr. at 591 (Cross Exam (by Bob Renbarger) of Gregory Adams, P.E.); *see also* Tr. at 658-59 & 693 (Redirect of Gregory Adams, P.E.).

41 The Commission erred in not entering appropriate Findings of Fact and Conclusions of Law addressing BFI's failure to provide an adequate "Unstable Areas" restriction demonstration.

42 *See* TJFA Exceptions, *supra* note 27, at 28-40.

wrongly characterizing Mr. Chandler's opinion that a slope of 11.43-to-1 would be appropriate, and by discounting the opinion based on this mischaracterization.[43]

- The Administrative Law Judge erroneously characterized Mr. Chandler's testimony regarding soil strength data and compounded the error by calling the mischaracterized testimony "disingenuous."[44] Once again, the Administrative Law Judge was misled by the misinterpretation of Mr. Chandler's testimony offered by BFI, and thus made an evaluation of that testimony that is not supported by record evidence and exceeds the scope of the Administrative Law Judge's discretion.

For further discussion of the ALJ's erroneous conclusions regarding TJFA's expert witnesses, see Section II.K., below.

D. The Commission Erred in Issuing Permit No. MSW-1447A Where the Evidentiary Record Demonstrated that BFI Failed to Prove by a Preponderance of the Evidence that the Proposed Ground Water Monitoring System for the Expansion of the Sunset Farms Landfill Complies with Applicable TCEQ MSW Rules. (Referred Issue H)

One of the most critical features of a MSW landfill is its ground water monitoring system. A ground water monitoring system, if properly designed and installed, provides vital information on the measurable effects, if any, of a landfill's impacts on local ground water resources. Because ground water monitoring systems represent the "first line of defense" to detect subsurface releases of contaminants, the MSW rules governing the design, installation, and operation of these systems are precise and mandatory. Failure to follow the strict letter of the ground water monitoring system rules represents a fatal flaw to any MSW permit application. The Commission's failure to require strict adherence by BFI to these rules is reversible error.

There is no record evidence to technically justify the location of the ground water monitoring wells proposed as part of the POC ground water monitoring system in the Amendment Application. Texas Administrative Code Title 30, Section 330.231(a) requires that a ground water monitoring system "consist of a sufficient number of monitoring wells, installed at appropriate locations and depths, to yield representative ground water samples from the

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43 *See* Proposal for Decision, *supra* note 14, at 70.

44 *Id.* at 65; *see also* TJFA Exceptions, *supra* note 27, at 37.

uppermost aquifer."[45]

There is no dispute that BFI properly characterized the depths necessary to intersect local ground water. Where BFI failed to satisfy the requirements of Section 330.231(a) is that it provided no technical justification for the number of ground water monitoring wells or for the reasoning behind the proposed locations of those ground water monitoring wells.[46] Pursuant to Section 330.231, ground water monitoring systems are required to be designed based on site-specific conditions.[47] The evidentiary record established that the Sunset Farms Landfills was located in a rather complex setting. The immediate adjacency of the Sunset Farms Landfill to a neighboring landfill (*i.e.*, the ACL),[48] the history of hazardous waste disposal at the adjacent ACL,[49] the undisputed evidence of ground water flows intermingling from the Sunset Farms Landfill and the ACL properties,[50] and evidence of downgradient industrial contamination

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45 30 TEX. ADMIN. CODE § 330.231(a) (2005).

46 Record evidence reflects that BFI prepared the configuration of its well system based on its interest to comply with the new TCEQ MSW rules, which were adopted effective March 27, 2006, but which are not applicable in this proceeding because the amendment application was filed under the old MSW rules. *See* Tr. at 360-63 (Cross Exam (by Bob Renbarger) of John Michael Snyder, P.G.). New 30 TEX. ADMIN. CODE § 330.403(b) requires that new ground water monitoring systems provide spacing between wells of no greater than 600 feet apart. *See* 30 TEX. ADMIN. CODE § 330.403(b) (2009). The applicable rule for the amendment application, former 30 TEX. ADMIN. CODE § 330.231(a), however, requires a technical justification for the location and spacing of all ground water monitoring wells in the proposed ground water monitoring system. *See* 30 TEX. ADMIN. CODE § 330.23(a) (2005).

47 *See* 30 TEX. ADMIN. CODE § 330.231(e)(1) (2005). Specifically, Section 33.0231(e)(1) provides:

> The design of a monitoring system shall be based on site-specific technical information that must include a thorough characterization of: aquifer thickness; ground-water flow rate; groundwater flow direction including seasonal and temporal fluctuations in flow; effect of site construction and operations on groundwater flow direction and rates; and thickness, stratigraphy, lithology, and hydraulic characteristics of saturated and unsaturated geologic units and fill materials overlying the uppermost aquifer, materials of the uppermost aquifer, and materials of the lower confining unit of the uppermost aquifer.

Id.

48 *See* Exh. BFI JW-3, Land Use Report, BFI Waste Systems, Inc., Sunset Farms Landfill Amendment Application, at II.D-7 at APP 000152 (June 22, 2005, rev'd Jan. 18, 2007).

49 *See generally* Exh. TJFA BK-8, Memoranda by Robert S. Kier, Ph.D., P.G.; *see also* Exh. BFI RS-11, Amendment Application, *supra* note 17, at pt. III, att.4, appx. 4A at APP 000486 – APP 000505.

50 *See* Exh. TJFA BK-5, Carel Corp., Groundwater Level Maps, at APP 019698 & APP 019699; *see also* Exh. TJFA BK-6, Carel Corp., Groundwater Contour Map, at APP 029750.

detected in ground water samples from a neighboring property (the source of which is believed to be the ACL)[51] are all important site-specific considerations that must be addressed in the design and location of the individual ground water monitoring wells comprising the ground water monitoring system proposed in the Amendment Application.[52] Merely providing a sufficient number of ground water monitoring wells spaced at intervals of 600 feet or less falls short of the technical justifications specifically required for compliance with Section 330.231(a).[53]

The second fatal flaw in the proposed ground water monitoring system is that BFI failed to include or designate an upgradient background ground water monitoring well in its proposed POC ground water monitoring system. Record evidence presented at the Hearing on the Merits clearly proved that each and every one of BFI's proposed ground water monitoring wells was a "point of compliance" well.[54] As identified in the Commission's MSW rules, "point of compliance" wells are ground water monitoring wells located downgradient of the MSW landfill.[55] It is just as clear that Texas Administrative Code Title 30, Section 330.233(e) requires the establishment of upgradient wells to establish ground water quality in the vicinity of the

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51 *See* Exh. TJFA BK-8, Kier Memoranda, supra note 49; *see also* Tr. at 737-38 (Cross Exam (by Bob Rembarger) of Kevin Carel, P.G.).

52 While the Administrative Law Judge and the Commission, through adoption of the Final Order, minimized, and even ignored, the impact of the ACL on the ground water monitoring system proposed for the expansion of the Sunset Farms Landfill, TCEQ's MSW rules specifically require adjacent properties to be considered. For example, 30 TEX. ADMIN. CODE § 330.231(e)(3) provides:

> The facility owner or operator of an MSWLF unit or facility shall promptly notify the executive director in writing of changes in site construction or operation or changes in adjacent property that affect or are likely to affect the direction and rate of groundwater flow and the potential for detecting groundwater contamination from an MSWLF unit and that may require the installation of additional monitoring wells or sampling points.

30 TEX. ADMIN. CODE § 330.231(e)(3) (2005).

53 *See generally* TJFA Closing Argument, *supra* note 20, at 55-65.

54 *See* Tr. at 1596 (Cross Exam (by Christina Mann) of Robert S. Kier, Ph.D., P.G.).

55 *See* 30 TEX. ADMIN. CODE §§ 330.2(98) & 330.231(a)(2) (2005).

ground water monitoring wells used for ground water monitoring purposes.[56] Only in very limited circumstances may an applicant deviate from this requirement.[57] BFI, however, failed to provide any upgradient wells in its proposed ground water monitoring system and failed to even attempt to meet any of the recognized exceptions to the rule's mandatory requirements for upgradient ground water monitoring wells.[58] Without one or more upgradient ground water monitoring wells, BFI cannot assess background water quality at or near the location of any of the seventeen new ground water monitoring wells proposed in the Amendment Application; thus, BFI cannot ensure that the ground water quality in those new ground water monitoring wells has not been adversely affected by a release from the existing Sunset Farms Landfill. Without the ability to establish background ground water quality in one or more upgradient ground water monitoring wells, the proposed ground water monitoring system is technically and legally deficient.[59] Accordingly, the Commission erred in its Findings of Fact and Conclusions of Law related to the adequacy of BFI's proposed ground water monitoring system, as defined in the Amendment Application.[60] Specifically, Findings of Fact Nos. 181, 182, and 184 and

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56 *See id.* § 330.233(e). Section 330.233(e) provides:

> The owner or operator shall establish background ground-water quality in hydraulically upgradient wells or in background wells for each of the monitoring parameters or constituents required in the ground-water monitoring program for a MSWLF unit . . . .

Id.

57 *See id.* § 330.231(a)(1). Section 330.231(a)(1) provides, in relevant part:

> A determination of background quality may include sampling of wells that are not hydraulically upgradient of the waste management area if hydrogeologic conditions do not allow the owner or operator to determine which wells are hydraulically upgradient or if sampling other wells will provide a better indication of background groundwater quality than is possible from upgradient wells.

Id.

58 *See* Tr. at 1626 (Cross Exam (by Paul Terrill) of Robert S. Kier, Ph.D., P.G.).

59 For a discussion of the rules and evidence relevant to this issue, see TJFA's Closing Argument, *supra* note 20, at 52-67, which is incorporated herein.

60 It is also important to note that the Final Order makes no specific findings related to compliance with 30 TEX. ADMIN. CODE §§ 330.230 through 330.233. These specific TCEQ MSW rules were part of Referred Issue H, as identified in the Commission's Interim Order referring this matter to the State Office

Conclusions of Law No. 64 and 65, relating to the POC ground water monitoring system, are in error.[61]

Further, the Commission's Findings of Fact and Final Order are based in part on the Administrative Law Judge's erroneous and unfounded rejection of the testimony of TJFA's expert witnesses. The Administrative Law Judge's proposals were based on patent misunderstandings of those experts' opinions, and the Commission's Findings of Fact and Final Order, in turn, are in error due to their reliance on the Administrative Law Judge's erroneous conclusions. TJFA sets forth the Administrative Law Judge's errors at length at pages 8 through 28 of its *Exceptions* to the Proposal for Decision, which TJFA incorporates herein by reference.[62] TJFA seeks rehearing based on its arguments in its *Exceptions*, which include in part, without limitation, the following:

- The erroneous conclusion that TJFA experts Robert S. Kier, Ph.D., P.G., and Mr. Chandler concluded that the Sunset Farms Landfill was likely leaking without a reasonable or honest basis. The Administrative Law Judge did not understand that the experts' opinions were based *solely* on the contents of the Amendment Application itself and did not even purport to consider extraneous evidence. The opinions of Dr. Kier and Mr. Chandler were appropriate, reasonable, and honest. The Administrative Law Judge's conclusion lacks a basis in evidence, and the Administrative Law Judge's conclusion exceeds his discretion because it is based on a misunderstanding of the testimony. To the extent that the conclusion is based on unfounded bias, it deprives TJFA of due process.[63]

- The erroneous characterization of Dr. Kier's testimony as concluding that BFI was responsible for contamination detected in ground water at the Applied Materials site adjacent to the Sunset Farms Landfill and the ACL. Dr. Kier did

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of Administrative Hearings ("SOAH"). *See An Interim Order Concerning the Application of BFI Waste Systems of North America, Inc. for a Major Amendment to Type I MSW Permit No. 1447 (Proposed Amendment No. 1447A)*, TCEQ Docket No. 2007-1774-MSW, at 3 & 5 (Feb. 29, 2008). TJFA contends that the Final Order is deficient in that there should have been specific Findings of Fact and Conclusions of Law on these TCEQ MSW rules that address the mandatory requirements for ground water monitoring systems.

61 The Commission erred in not entering appropriate Findings of Fact and Conclusions of Law regarding BFI's failure to base the location of ground water monitoring wells on site-specific criteria. Similarly, it was error to not include appropriate Findings of Fact and Conclusions of Law regarding BFI's failure to provide upgradient ground water monitoring wells, or in the alternative, address the regulatory exceptions to such monitoring wells.

62 *See* TJFA Exceptions, *supra* note 27, at 8-28.

63 This also applies to Referred Issue C.

> not so testify, and again, the Administrative Law Judge discounted Dr. Kier's testimony based on the Administrative Law Judge's misunderstanding of that testimony. Dr. Kier cited the issues with the ACL's industrial waste unit as evidence of the unique location of the Sunset Farms Landfill, and how BFI's failure to account for this unique location violated the requirement that its ground water monitoring system be a site-specific design. Similarly, Dr. Kier was clear about the mechanism he believes is responsible for the relatively rapid migration of contaminants from the ACL to the Applied Materials site. The Administrative Law Judge's baseless dismissal of that opinion as "junk science" is again based on a misunderstanding of the testimony, and thus has no evidentiary support and is beyond the Administrative Law Judge's discretion.[64]

For further discussion of the Administrative Law Judge's erroneous conclusions regarding TJFA's expert witnesses, see Section II.K., below.

E. The Commission Erred in Issuing Permit No. MSW-1447A Where the Evidentiary Record Demonstrated that BFI Failed to Prove by a Preponderance of the Evidence that Adequate Provisions Were Contained in the Amendment Application Regarding Cover Needs Related to the Vertical Expansion and Future Operation of the Sunset Farms Landfill. (Referred Issue Q)

Texas Administrative Code Title 30, Section 330.133 includes requirements for daily, intermediate, and final cover for a MSW landfill.[65] The Amendment Application identifies and acknowledges a shortage of over 2.7 million cubic yards of soil that will be needed for daily, intermediate, and final cover based on the design of the expansion of the Sunset Farms Landfill.[66] The contract that BFI has with WMTX for an additional 1.5 million cubic yards of soil includes provisions whereby WMTX may terminate the contract on thirty days notice.[67] In addition, there is no guarantee that these soils will be available to BFI because the contract provides that WMTX must first satisfy its soil requirements before providing soil to BFI.[68] Thus, the contract between BFI and WMTX cannot be relied upon as an assurance of BFI's ability to have the soil needed for daily, intermediate, or final cover, as required by TCEQ's

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64 *See* Proposal for Decision, *supra* note 14, at 36.

65 30 TEX. ADMIN. CODE § 330.133 (2005).

66 *See* Exh. BFI RS-11, Amendment Application, *supra* note 17, at pt. III, appx. III-D at III-D-I at APP 000392.

67 *See* Exh. BFI BD-5, First Amended Purchase and Sale Agreement (Mar. 27, 2008).

68 *See id.*

MSW rules. Also, BFI testified it had no other firm commitments for obtaining cover soil.[69] The Commission erred in making Finding of Fact No. 278 that the Amendment Application includes adequate provisions for daily and intermediate cover. Moreover, the Commission erred in making Finding of Fact No. 214 that the Amendment Application includes adequate provisions for final cover. Additionally, the Commission erred in making Conclusion of Law No. 44 related to adequate provisions for cover in compliance with agency rules including Texas Administrative Code Title 30, Section 330.133.

F. The Commission Erred in Issuing Permit No. MSW-1447A Where the Evidentiary Record Demonstrated that BFI Failed to Prove by a Preponderance of the Evidence that the Proposed Vertical Expansion of the Sunset Farms Landfill Represents a Compatible Land Use. (Referred Issue U)

The Amendment Application failed to establish that the proposed expansion of the Sunset Farms Landfill was compatible with land use in the surrounding area, as required by Texas Administrative Code Title 30, Section 330.53(b)(8), and thus, the Commission's approval of the Amendment Application was error. The Commission's MSW rules do not include a specific standard by which to determine compatibility. Citing to the Code Construction Act, the Administrative Law Judge determined that the term "compatible," as commonly used, means "capable of existing together in harmony."[70] There was abundant testimony from residents in the vicinity of the Sunset Farms Landfill regarding odors, truck traffic, noise, and storm water runoff problems in the immediate vicinity of the Sunset Farms Landfill.[71] Moreover, Travis County submitted comments to the Solid Waste Advisory Council ("SWAC") of the Capital Area Council of Governments ("CAPCOG") that BFI's proposed expanded MSW landfill would not

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69 *See* Tr. at 1311 lns.19-22 (Cross Exam (by J.D. Head) of Brad Dugas).

70 Proposal for Decision, *supra* note 14, at 96.

71 *See, e.g.*, Tr. at 1642 (Cross Exam (by John Carlson) of John A. Wilkins); Tr. at 1661 (Redirect of Robert G. Andrews); Tr. at 1667 (Cross Exam (by Christina Mann) of Delmer D. Rogers); Tr. at 1997 (Cross Exam (by John Moore) of Evelyn Remmert); Tr. at 2037 (Cross Exam (by Christina Mann) of Mark McAfee); Exh. NNC JB-1, Prefiled Testimony of Jeremiah Bentley, at 5-6; Exh. NNC ER-6, Photographs; Tr. at 1999 (Redirect of Evelyn Remmert); Tr. at 1981 (Cross Exam (by Christina Mann) of Evelyn Remmert).

conform to the requirements for general compatibility with surrounding land use.[72] The SWAC endorsed the comments of Travis County relating to the incompatibility of the expansion of the Sunset Farms Landfill with existing and future land uses.[73] In addition, Mr. Gregory Guernsey, Director of the City of Austin's Neighborhood Planning and Zoning Department, provided expert testimony that the Sunset Farms Landfill was not compatible with existing residential development.[74]

The testimony set out by witnesses for the Northeast Neighbors Coalition—those persons most effected by the operations of the landfill—established that the Sunset Farms Landfill is certainly not "harmonious" with surrounding land uses.[75] Therefore, the Sunset Farms Landfill is incompatible with surrounding land uses. The Final Order contains erroneous Findings of Fact Nos. 230, 264, 353, 358, 365, 367, 368, 370, and 386 and Conclusions of Law Nos. 20, 40, 50, 51, and 53 related to the issue of land use compatibility.

G. *The Commission Erred in Issuing Permit No. MSW-1447A Where the Evidentiary Record Demonstrates that BFI Failed to Prove by a Preponderance of the Evidence that Its Proposed Erosion Control Methods Are in Compliance with TCEQ MSW Rules. (Referred Issues C and Y)*

With respect to the sufficiency of erosion control methods, the Commission erred in entering Findings of Fact Nos. 99, 100, 116 through 119, 122, and 123. At the Hearing on the Merits, evidence was introduced that the sedimentation ponds at Outfalls 2, 3, 4, and 5 were

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72 *See* Exh. TJFA 24, Letter from Betty Voights, Executive Director, Capital Area Council of Gov'ts, to Richard C. Carmichael, Ph.D., P.E., Texas Comm'n on Envtl. Quality (Aug. 23, 2006), and attached Proposal for SWAC for 8/2/06).

73 *See* Exh. BFI RS-32, CAPCOG Conditional Conformance Letter.

74 *See, e.g.*, Tr. at 2125 lns.21-25 (Cross Exam (by Jim Blackburn) of Greg Guernsey).

75 *See, e.g.*, Tr. at 1642 (Cross Exam (by John Carlson) of John A. Wilkins); Tr. at 1661 (Redirect of Robert G. Andrews); Tr. at 1667 (Cross Exam (by Christina Mann) of Delmer D. Rogers); Tr. at 1997 (Cross Exam (by John Moore) of Evelyn Remmert); Tr. at 2037 (Cross Exam (by Christina Mann) of Mark McAfee); Exh. NNC JB-1, Prefiled Testimony of Jeremiah Bentley, at 5-6; Exh. NNC ER-6, Photographs; Tr. at 1999 (Redirect of Evelyn Remmert); Tr. at 1981 (Cross Exam (by Christina Mann) of Evelyn Remmert).

designed with a one-half inch capture volume.[76] A one-half inch capture volume would capture water from only a 1.3-inch rain event.[77] Evidence presented at the Hearing on the Merits established that this was too small of a capture volume to control sediment from a large rainfall event.[78] The capture volume of the sedimentation ponds is only approximately 7.5% of the 25-year/24-hour storm runoff volume.[79] In his Proposal for Decision identifying the analysis behind the proposed Findings of Fact, which were later adopted by the Commission, the Administrative Law Judge relied on the City of Austin Land Development Code, which requires a sedimentation pond to capture the one-half inch of runoff and infers that members of the City of Austin's staff cross-checked the calculations with regard to erosion control. There is no evidence in the record that BFI, TCEQ, or the City of Austin staff cross checked the calculations with regard to erosion control. Nevertheless, the Administrative Law Judge seemed to conclude that the City of Austin's issuance of a permit for the sedimentation ponds at Outfalls 4 and 5 is evidence that the four sedimentation ponds will control sediment at the site. The Commission's reliance on this erroneous conclusion is error.

BFI's own evidence established that in a rainfall event of only 1.34 inches, the benchmark value for Total Suspended Solids (TSS), which is established by the storm water permit for the Sunset Farms Landfill, was exceeded at Outfall 5, which is connected to an undersized sedimentation pond.[80] This, in itself, establishes insufficient erosion controls for that particular small rainfall event. The Commission erred in making Finding of Fact No. 122 inasmuch as the TCEQ inspection report included in evidence as Exhibit BFI 29 established a sediment exceedance at Outfall 2.[81] There was persuasive testimony that the downchutes are

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76 *See* Exh. TJFA SS-1, Direct Testimony of L. Stephen Stecher, P.E., at 8 ln.14 – 9 ln.20.

77 *See id.*

78 *See id.*

79 *See id.*

80 *See* Exh. BFI RS-36, Storm Water Pollution Prevention Plan for the Sunset Farms Landfill, at 303.

81 *See* Exh. BFI 29, Letter from Carolyn Runyon, Texas Comm'n on Envtl. Quality, to Joyce Best (Apr. 27,

improperly designed, which could result in a major failure of this erosion control method.[82]

Mr. L. Stephen Stecher, P.E., formerly with the City of Austin as Senior Engineer and Section Manager for the Water Resource and Evaluation Section, testified that the one-half inch capture volume of the sedimentation ponds was an insufficient volume and would lead to excessive sediment discharges from the site of the Sunset Farms Landfill.[83] He further testified that the City of Austin's one-half inch capture volume was not applicable to above ground landfills.[84] The evidentiary record demonstrates that no analysis was conducted by BFI, the TCEQ, or the City of Austin to confirm that the one-half inch capture volume of the sedimentation ponds was adequate to prevent a discharge of sediment from the site of the Sunset Farms Landfill. In its findings on protection of surface water, the Commission erred in making Findings of Fact Nos. 135, 137 through 140, 143, and 144. Testimony at the Hearing on the Merits clearly established that the silt fences, rock berms, and sedimentation basins will not function properly to control sediment runoff from the site of the Sunset Farms Landfill. For example, Mr. Stecher testified that the erosion control practices in Ditch K were not adequate to control erosion and the resulting potential silt going to Outfall 1. In fact, Mr. Stecher identified multiple deficiencies with regard to sediment control and Ditch K. There was also testimony that the drainage downchutes and their component materials are not appropriately designed and sized to control surface drainage off the Sunset Farms Landfill.[85]

The Administrative Law Judge, and in turn the Commission, erred in determining that the erosion control were adequate. Conclusion of Law No. 19 is in error insofar as it states BFI

2005), and attached TCEQ Investigation Report, BFI Waste Systems of North America Inc. (Apr. 27, 2005), at NNC 001125 – NNC 001129.

82 *See* Tr. at 1924-27 (Redirect of L. Stephen Stecher, P.E.).

83 *See id.* at 1928-34.

84 *See id.* at 1932-33.

85 TJFA more fully addressed these arguments regarding surface water protection and erosion issues in its *Closing Argument* at pages 24 through 32, which are incorporated herein for all purposes. *See* TJFA Closing Argument, *supra* note 20, at 24-32

proposes adequate protection of surface waters. In addition, Conclusion of Law No. 56 is in error inasmuch as the evidence established that the erosion control methods identified in the Amendment Application and draft permit are not sufficient.

H. The Commission Erred In Substituting Its Findings of Fact and Conclusions of Law for Those Set Forth in the Administrative Law Judge's Proposal for Decision and Amendments Thereto on the Issue of the "Operational Hours" Sought in the Amendment Application

In the Proposal for Decision, the Administrative Law Judge found that the evidence did not justify BFI's operating hours to be any different than the default hours of operation set forth in TCEQ's MSW rules at Texas Administrative Code Title 30, Section 330.118(a).[86] Subsequent to the filing of exceptions to the Proposal for Decision, the Administrative Law Judge modified the Proposal for Decision to reflect a shift of the "burden of proof" from BFI, *i.e.*, the applicant, to the protestants on this issue. In addition, the Administrative Law Judge made corresponding changes to proposed Finding of Fact No. 286 and Conclusions of Law Nos. 7, 55, and 68.[87] Proposed Finding of Fact No. 286 in the revised Proposal for Decision provided: "286. The evidence fails to show that the Landfill's operational hours are inappropriate."[88]

The proposed Conclusions of Law in the revised Proposal for Decision stated:

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[86] *See* Proposal for Decision, *supra* note 14, at 111–14; *see also* Proposed Order, *Application of BFI Waste Systems of North America, LLC, for Type I MSW Permit No. 1447A*, SOAH Docket No. 582-08-2178, TCEQ Docket No. 2007-1774-MSW, at Proposed Finding of Fact No. 286, Proposed Conclusions of Law Nos. 7, 55, & 68, & Proposed Ordering Provision No. 1 at 37, 50, 55, 57, & 58 (May 8, 2009). Texas Administrative Code Title 30, Section 330.118(a) provides, in relevant part:

> The waste acceptance hours of a municipal solid waste facility may be any time between the hours of 7:00 a.m. and 7:00 p.m., Monday through Friday, unless otherwise approved in the authorization for the facility. Waste acceptance hours within the 7:00 a.m. to 7:00 p.m. weekday span do not require other specific approval.

30 TEX. ADMIN. CODE § 330.118(a) (2005).

[87] *See* Letter from William G. Newchurch, Administrative Law Judge, State Office of Admin. Hearings, to Les Trobman, General Counsel, Texas Comm'n on Envtl. Quality (June 29, 2009) (amending recommended proposed Findings of Fact and Conclusions of Law).

[88] *Id.* at 4.

> 7. The burden of proof was on the Applicant, in accordance with 30 Tex. Admin. Code § 80.17(a) to the extent it sought to amend its permit. BFI met its burden with respect to all referred issues on which it had the burden of proof.
>
> 55. The operating hours proposed in the Application have not been shown inappropriate.
>
> 68. Pursuant to the authority of, and in accordance with applicable laws and regulations, the attached Permit should be granted. [deleted paragraph setting operating hours comporting to 30 TAC § 330.113(a)].[89]

The Commission, in adopting its Final Order, substituted its own Finding of Fact No. 286 for that proposed by the Administrative Law Judge, as follows: "286. The evidence shows that the landfill's operating hours are appropriate."[90] The Conclusions of Law were amended to state:

> 7. The burden of proof was on the Applicant, in accordance with 30 Tex. Admin. Code § 80.17(a). BFI met its burden with respect to all referred issues.
>
> 55. The operating hours proposed in the Application are appropriate.[91]

The Final Order then attempted to explain the changes to the proposed Finding of Fact and Conclusions of Law by stating:

> 2. In response to the ALJ's June 29, 2009 letter regarding operating hours, the Commission adopted the ALJ's conclusion that the Applicant's existing and proposed 24 hour per day, seven day per week operating hours are appropriate for the landfill. However, the Commission modified the ALJ's underlying reasoning, finding instead that the Applicant bore the burden of proof on all issues in this matter and that it presented sufficient evidence to meet its burden on all issues referred to SOAH by the Commission. With regard to operating hours, the Commission determined that the *evidence in the record supported a finding that BFI made a prima facie showing that its' existing and proposed operating hours are appropriate and there was no contravening evidence offered by the Protestants in the record to warrant any changes to those hours.* Thus, the Commission modified proposed Finding of Fact No. 286 and proposed Conclusion of Law Nos. 7 and 55 to reflect that the proposed operating hours for the facility are appropriate and that the Applicant bore the burden of proof on all issues referred to SOAH for hearing in this matter. Conforming clarification changes to proposed Conclusion of Law No. 68 and Ordering Provision No. 1 were also made to effectuate the clear intent of the Commission's action on this matter pursuant to the Commission's Resolution in Docket No. 2009-0059-RES.[92]

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89 *Id.*

90 Final Order, *supra* note 1, at 37.

91 *Id.* at 49 & 55.

92 *Id.* at 57–58 (emphasis added).

When overturning a finding of fact, the Commission must comply with the specific procedures set forth in Texas Health and Safety Code Section 361.0832.[93] With respect to a finding of fact, the Commission may overturn an underlying finding of fact that serves as the basis for a decision *only if the Commission finds that the finding was not supported by the great weight of the evidence.*[94] The Commission may overturn a conclusion of law *only on the grounds that the conclusion was clearly erroneous* in light of precedent and applicable rules.[95] The statute goes on to provide that the Commission "*shall fully explain in a ruling, order or decision the reasoning and grounds for overturning each finding of fact or conclusion of law or* for rejecting any proposal for decision for an ultimate finding."[96]

The Final Order fails to satisfy the specific statutory requirements, as identified above, in the following particulars:

1. The Commission's Finding of Fact No. 286 is a conclusory finding with no recitation to the evidence upon which it is premised. A review of Findings of Fact Nos. 283 through 285 does not support such a finding. Assuming BFI had the burden of proof (which TJFA agrees that BFI does have the burden of proof), there must be evidence other than "what its current operating hours are" to meet this burden of proof. Moreover, the Commission, in overturning the Administrative Law Judge's proposed Finding of Fact, must establish by "a great weight of the evidence" that it was incorrect. It did not do so in its amended Findings of Fact or explanation of changes. The Final Order is thus flawed and violates applicable law.

2. The Final Order is further deficient in that it does not include a holding that the Administrative Law Judge's proposed Conclusions of Law Nos. 7 and 55 are "clearly erroneous" as required by the statute. Nowhere in the Commission's changes to Conclusions of Law Nos. 7 and 55, nor in the Commission's explanation of changes, is there any reference to this "clearly erroneous" standard. A mere disagreement on the Administrative Law Judge's proposed "burden of proof" or "reasoning" behind the change is legally insufficient.

3. The evidentiary record contains a wealth of evidence that the existing operating hours are problematic.[97] This evidence was relied upon by the Administrative

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93 TEX. HEALTH & SAFETY CODE § 361.0832.

94 *See id.* § 361.0832(c).

95 *See id.* § 361.0832(d).

96 *Id.* § 361.0832(f) (emphasis added).

97 *See* Proposal for Decision, *supra* note 14, at 111-14.

Law Judge in his original Proposal for Decision to demonstrate that BFI failed to meets its burden of proof on this issue.[98] Citizen protestants provided numerous complaints of noise and odors resulting from the nighttime operation of the Sunset Farms Landfill. The City of Austin's expert testified as to the incompatibility of nighttime operations with residential uses of adjacent properties.[99] Even BFI's odor expert testified that most odor problems and complaints occur at night.[100] The Explanation of Changes included in the Final Order is in irreconcilable conflict with the record evidence.

4. In its Explanation of Changes, the Commission found that 24-hour per day, seven-day per week operating hours were appropriate. Counsel for BFI represented to the Commission during its deliberations on September 9, 2009, that 24/7 operating hours were consistent with other Type I MSW landfills in Travis County and with industry practice.[101] That statement is incorrect and is not based on any record evidence. To the extent that the Commission relied on this representation in determining the appropriateness of BFI's operating hours at the Sunset Farms Landfill, it did so in error. The evidentiary record does not support that BFI met its burden of proof with respect to its proposed operating hours and the Commission erred in so concluding.

Based on the foregoing, it is clear that the Final Order amending Finding of Fact No. 286 and Conclusions of Law Nos. 7 and 55 does not meet the requirements of Texas Health and Safety Code Section 361.0832. As such, adoption of the Final Order is contrary to applicable law.

I. The Commission Erred in Allocating Reporting and Transcription Costs to TJFA.

Texas Administrative Code Title 30, Section 80.23(d)(1) sets out seven factors to consider in assessing reporting and transcription costs.[102] In allocating one-half of the costs to TJFA, the Commission did not apply the factors set forth in Section 80.23(d)(1)(A) through 80.23(d)(1)(F). Therefore, it only follows that the Commission must have relied on "any other factor which is relevant to a just and reasonable assessment of costs."[103] Without any record evidence in this proceeding to support this conclusion, the Administrative Law Judge's Proposal

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98 *See id.*

99 *See* Exh. COA 1, Pre-filed Testimony of Greg Guernsey, at 3; *see also* Tr. at 2077 (Cross Exam (by Bob Renbarger) of Greg Guernsey).

100 *See* Tr. at 531-32 (Cross Exam (by Jim Blackburn) of Shari Beth Libicki).

101 *See* Transcript of Sept. 9, 2009 Commissioners' Agenda at BFI Rebuttal.

102 *See* 30 TEX. ADMIN. CODE § 80.23(d)(1)(A)-(F).

103 *Id.* § 80.23(d)(1)(G).

for Decision—the basis for the Final Order since it was not questioned by the Commission—found that TJFA's participation was a transparent attempt by Bob Gregory, a nonparty in this proceeding, to delay and complicate the proceeding, increase BFI's costs, and perhaps gain a business edge on BFI. None of these alleged "facts" are true or supported by the evidentiary record, and in making these findings, the Administrative Law Judge was essentially adopting BFI's *Reply Brief* on this issue. The Administrative Law Judge, and thus the Commission, imputes motive to a nonparty in assessing transcript costs to TJFA, an adjacent landowner with Commission approved party status as an affected person in this proceeding.[104] In effect, the Administrative Law Judge assumes, without an evidentiary basis, that TJFA's participation in this proceeding and stated issues and concerns regarding the Amendment Application are only about competition. Other valid reasons for TJFA's participation as a party exist.

There was absolutely no testimony or evidence that TJFA sought to delay, complicate, increase costs, or gain a competitive advantage against BFI. There was likewise no evidence to this effect regarding Mr. Gregory, a limited partner of TJFA. TJFA is a free standing legal entity and a landowner in the immediate vicinity of the Sunset Farms Landfill. TJFA is not engaged in landfill operations or trash hauling. TJFA is a not a subsidiary of other businesses owned by Mr. Gregory, including Texas Disposal Systems, Inc. ("TDS") or Texas Disposal Systems Landfill, Inc. ("TDSL"). And, contrary to the Commission's Finding of Fact No. 403,[105] TDSL, TDS, and TJFA are completely separate businesses that are not affiliated in any way.[106] It was

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104 The only record evidence involving Mr. Gregory established that he had no input whatsoever on Dr. Kier's engagement as an expert witness for TJFA, or any person working under Dr. Kier's direction. See Tr. at 1787 lns.1-15 (Redirect of Robert S. Kier, Ph.D., P.G.).

105 *See* Final Order, *supra* note 1, at 48.

106 Finding of Fact No. 403 affirmatively states that "TJFA is an affiliate of TDSL . . . ." *Id.* There is no evidence in the record to support this, and the statement is legally incorrect. The term "affiliate" is defined as a "corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation." BLACK'S LAW DICTIONARY, 2d Pocket Ed. at 23 (West 2001). No such corporate relationship exists between TJFA and TDSL or TJFA and TDS.

improper, and error, for the Commission to base the assessment of reporting and transcription costs on information not in the evidentiary record and without merit.

J. The Exclusion of Certain Evidence Offered by TJFA Was Legal Error.

Exhibit TJFA 10 was ruled inadmissible by the Administrative Law Judge and the ruling was not reconsidered and reversed by the Commission. The exclusion of Exhibit TJFA 10 was error and harmed the substantive and due process rights of TJFA for a just and fair administrative proceeding. Exhibit TJFA 10 is relevant to the matters considered in this proceeding and is admissible pursuant to the applicable rules of evidence.

A decision in an administrative proceeding such as this fails for arbitrariness if it does not comply with procedural due process.[107] Specifically, the Texas Supreme Court in *Lewis v. Metropolitan Savings & Loan Association* includes the following discussion:

> The governing rule was stated in *Donnelly Garment Co. v. NLRB,* 123 F.2d 215 (8th Cir.1941), and restated with approval in *NLRB v. Burns,* 207 F.2d 434 (8th Cir.1953), as follows:
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> > "That a refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate. * * * That the Board would or might have reached no different conclusion had the rejected evidence been received, is entirely beside the point. *The truth is that a controversy tried before a court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered. . . .*"
>
> In the eyes of the law there is no hearing unless a fair opportunity is afforded the parties to prove their case before an administrative agency. *People ex rel. Hirschberg v. Board of Supervisors,* 251 N.Y. 156, 167 N.E. 204, 211 (1929). See also *Gallant's Case,* 326 Mass. 507, 95 N.E.2d 536 (1950); *Prince v. Industrial Comm'n,* 89 Ariz. 314, 361 P.2d 929 (1961).[108]

In other words, because competent and material evidence offered by TJFA was excluded from the administrative record, the proceeding was not ripe for decision, and thus, issuance of the

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[107] *See Lewis v. Metropolitan Savings & Loan Assoc.*, 550 S.W.2d 11, 15 (Tex. 1977).

[108] *Id.* at 16 (quoting *National Labor Relations Bd. v. Burns*, 207 F.2d 434 (8th Cir. 1953)).

Final Order by the Commission was arbitrary. The failure to admit Exhibit TJFA 10 denied TJFA's due process rights and thus made it impossible for the Commission to make a final finding in this proceeding that will not be considered arbitrary on review.

Exhibit TJFA 10 is a report setting out Ground Water Monitoring Results from the Applied Materials Harris Branch Facility for monitoring conducted in 2002. The report, as clearly noted on the cover, was prepared by PBS&J in October 2002.[109] The report was provided pursuant to a Deposition on Written Questions completed by Steven R. McVey of PBS&J, who stated that while PBS&J did not have a designated custodian of records, he was familiar with the records being produced. The Deposition on Written Questions was admitted in this proceeding as Exhibit TJFA 11.[110] The Deposition on Written Questions was in substantial compliance with the requirements of TEX. R. EVID. 902(10)(b).

It appears that the objection to Exhibit TJFA 10 is a claim that the report is hearsay and unauthenticated. Giles Holdings and BFI provided no factual basis for challenging the authenticity of the report comprising Exhibit TJFA 10. The hearsay arguments are disingenuous and contradicted by common sense and case law.

TJFA asserts that the documents are indeed either not hearsay[111] or are excepted from the hearsay rule pursuant to a combination of rules, but primarily under TEX. R. EVID. 803(6) as business records. To be properly admitted under TEX. R. EVID. 803(6), the proponent must prove that the document was made at or near the time of the events recorded, from information

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109 *See* Exh. TJFA 10, PBS&J, Ground Water Monitoring Results for the Applied Materials Harris Branch Facility, July 2002 (Oct. 2002) at T 49472 -- T49453.

110 *See* Exh. TJFA 11, Written Questions to Be Propounded to the Custodian of Records for PBSJ.

111 When a fact is asserted by a non-human entity, such as a clock telling the time or a tracking dog following a scent, the "statement" is not hearsay because the "declarant" is not a person. Accordingly, the data contained in the report is not hearsay because the declarant is not a person, but rather is a computer analyzing and generating test results. Texas courts, as well as courts from other jurisdictions have ruled that computer-generated information, as opposed to printouts of information entered into a computer by a person, is not hearsay because a machine is not a declarant. *See, e.g., Stevenson v Texas,* 920 S.W.2d 342, 343-44 (Tex App.—Dallas 1996) (breath test results are not hearsay); *Oregon v Weber,* 172 Or. App. 704, 708-709, 19 P.3d 378 (2001) (photo radar inscription of vehicle's speed is not hearsay).

transmitted by a person with knowledge of the events, and made or kept in the course of a regularly conducted business activity. The predicate for admission of a business record may be established by an affidavit that complies with TEX. R. EVID. 902(10). Clearly, the sworn deposition on written questions, which was limited solely to the topic of authentication of the business records, substantially complies with the requirements of TEX. R. EVID. 902(10), and Texas case law supports TJFA's assertions. In *Spradlin v. State*,[112] a business records custodian's affidavit via deposition on written questions was found to have "substantially complied" with TEX. R. EVID. 902(10).

In support of its authenticity argument, Giles Holdings and BFI provided no factual basis for challenging the authenticity of the report comprising Exhibit TJFA 10 nor do they assert that the document is uncertain or an otherwise untrustworthy material. Undercutting their conclusory assertion is the Deposition on Written Questions completed by PBS&J.

Even if Exhibit TJFA 10 is hearsay and/or unauthenticated, it should still be admitted pursuant to the Texas APA. Pursuant to the SOAH Rules of Procedure regarding evidence, the Texas Rules of Evidence apply to contested case hearings, but evidence may also be admitted if it meets the standards of Section 2001.081 of the APA, which states that evidence may be admitted if the evidence is:

> (1) necessary to ascertain facts not reasonably susceptible of proof under [the Texas Rules of Evidence];
> (2) not precluded by statute; and
> (3) of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs.[113]

Pursuant to TEX. R. EVID. 901, TJFA has provided evidence sufficient to support a finding that the report within Exhibit TJFA 10 is what TJFA claims it to be and furthermore, Giles Holdings and BFI failed to provide any evidence, aside from conclusory statements, otherwise. For all of these reasons, Exhibit TJFA 10 should have been admitted, and the failure

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[112] 100 S.W.3d 372, 382-83 (Tex. App.—Houston [1st Dist.] 2002, no pet.)

[113] TEX. GOV'T CODE § 2001.081.

to do so was legal error.

K. The Commission Erred in Adopting Certain Findings of Fact, as Proposed by the Administrative Law Judge, Where the Administrative Law Judge's Proposal for Decision Included Findings Regarding Some of TJFA's Expert Witnesses that Are Not Based on Substantial Evidence, Exceed the Scope of the Administrative Law Judge's Discretion, and Deprive TJFA of Due Process.

The Administrative Law Judge's Proposal for Decision contains a substantial amount of harsh language regarding two of TJFA's expert witnesses, Dr. Kier and Mr. Chandler. TJFA submits that the criticism of these witnesses, and the rejection of their opinions, does not fall within an Administrative Law Judge's typical discretion to evaluate credibility or choose between the testimony of competing experts. Rather, the record in this proceeding reveals unfounded bias against TJFA and its witnesses, beginning before any evidence whatsoever was received, and continuing through issuance of the Proposal for Decision. The record demonstrates the application of a double standard by which TJFA's witnesses were found not credible due to their previous work for a non-party, whereas the testimony of BFI's witnesses was not discounted even in light of substantial work for BFI or BFI's enormous financial stake in the proceedings. The findings based on these erroneous determinations are not supported by substantial evidence and constitute an abuse of discretion. Further, to the extent that the determinations are based on the application of a baseless double standard flowing from unfounded bias, such determinations violate TJFA's due process rights.

The Proposal for Decision also reveals that BFI consistently offered erroneous characterizations of TJFA's expert testimony, which were then accepted by the Administrative Law Judge, who in turn criticized TJFA's experts based on the mischaracterizations of their testimony. An Administrative Law Judge does not have the discretion to make recommendations based on misreadings of the evidence, and the Commission cannot base its findings on such misreadings. Any such findings are not based on substantial evidence and constitute an abuse of discretion.

Also, the Administrative Law Judge repeatedly makes statements, where referring to TJFA's arguments, such as "no other party makes that argument."[114] Whether any other party makes a particular argument is immaterial. As with any proceeding such as this, different parties focus on different issues, many times to avoid duplication of effort, to conserve resources, and to shorten the timeframe of the Hearing on the Merits. TJFA is not aware whether any other party agrees or disagrees with its particular concerns, especially where they have not made arguments on those issues, *i.e.*, where the other parties have not affirmatively expressed an opinion one way or the other. In these cases where other parties did not express an opinion, it is improper for the Administrative Law Judge to minimize the importance of or slight the credibility of the evidence presented by TJFA. Silence by the other parties is not evidence regarding the accuracy or veracity of the evidence presented by TJFA and to conclude otherwise is additional evidence of bias on the part of the Administrative Law Judge.

In an August 26, 2008 pretrial hearing—before any evidence was heard—the Administrative Law Judge indicated that he agreed that "TJFA's witnesses should be taken with a giant bo[u]lder of salt."[115] The Administrative Law Judge further stated:

> it's clear to me that TJFA is closely aligned with the Texas Disposal Systems. . . .
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> . . . I think it strongly impacts the credibility of any expert witness that TJFA might call. . . . If TJFA and Texas Disposal Systems want to play in somebody else's permit sand box, then things might happen to them.[116]

This is strong evidence of pre-existing unfounded bias.

To be sure, the Proposal for Decision includes language indicating that the Administrative Law Judge's findings regarding TJFA's experts are based on the substance of their testimony, not their association with TJFA. However, the actual content of the Proposal for Decision shows otherwise and also demonstrates that the Administrative Law Judge frequently

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114 *See, e.g.*, Proposal for Decision, *supra* note 14, at 83.

115 Transcript for Aug. 26, 2008 Prehearing Conference at 18.

116 *Id.* at 46-47.

based his recommendations not on what TJFA's witnesses *actually said*, but rather on BFI's erroneous *characterizations* of that testimony.[117] In addition to the examples set forth in Sections II.C. and II.D., above, TJFA points to the following examples:

- After stating that his credibility determinations are based on the substance of expert witness' testimony because all experts are employed by parties with financial interests, the Administrative Law Judge contradicts this by questioning Dr. Kier's credibility due to TJFA's purported affiliation with TDS and TDSL, "which are economic competitors of Waste Management," the owner of the ACL adjacent to BFI's Sunset Farms Landfill.[118]

- The Administrative Law Judge says TJFA expert Mr. Chandler "stunningly" recommends a "safety factor" of 2.0 for the slopes at the BFI facility because "the Application lacks any high quality soil strength data, thus its strength is uncertain and the lowest published strength values should be used."[119] The Administrative Law Judge calls this "disingenuous."[120] But the Administrative Law Judge's characterizations—"stunning" and "disingenuous"—are based on a mischaracterization of Mr. Chandler's testimony. Rather, Mr. Chandler pointed out that BFI's expert put forth calculations that, in many instances, greatly exceeded recognized values for similar materials.

- The Administrative Law Judge implies that TJFA expert Dr. Kier in this case contradicted his 1998 findings that the Sunset Farms Landfill likely did not contribute to ground water pollution detected at the Applied Materials site.[121] But Dr. Kier in this case simply does not suggest that the pollution at Applied Materials has as its source the Sunset Farms Landfill.[122] This is yet another erroneous characterization of TJFA's proffered expert testimony.[123]

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117 Similarly, the language of the Proposal for Decision makes it clear that the Administrative Law Judge's evaluation of TJFA's witnesses' testimony is based not only on their affiliation with TJFA, but also on their past relationships with TDS and TDSL. *See* Proposal for Decision, *supra* note 14, at 10-11. This is contrary to the Administrative Law Judge's treatment of the testimony of BFI's expert witnesses.

118 *See id.* at 81.

119 *See id.* at 64-65.

120 *Id.* at 65.

121 *Id.* at 36.

122 *See* Tr. at 1618-19 (Cross Exam (by Paul Terrill) of Robert S. Kier, Ph.D., P.G.).

123 Similarly erroneous is the Administrative Law Judge's assertion that Dr. Kier's explanation "made no sense" on the issue of whether contaminants could have migrated from the adjacent landfill to the Applied Material site in a short amount of time. The Administrative Law Judge erroneously asserts that Dr. Kier's answer was "junk science," when in fact he clearly testified: "tests have shown that strong acid – and even field measurements have shown that strong acids will desiccate clays and drastically change their hydraulic conductivity." *Id.* at 1621. Further, Dr. Kier testified that it was impossible to measure the velocity of the impacted clays because it is unknown when the contaminants were first placed in the ACL or when they first appeared in the Applied Materials' wells. *Id.* at 1620. The calculated ground water velocity would then depend on whether the contaminants took, *e.g.*, ten years or 50 years, to travel the distance to the

Thus, TJFA seeks rehearing on all portions of the Commission's Final Order that are based in whole or in part on the Administrative Law Judge's errors with regard to TJFA's expert witnesses, as set forth herein.

III. ADDITIONAL ERRORS

In addition to the specific Findings of Fact and Conclusions of Law discussed above, there are a number of generic Findings of Fact and Conclusions of Law affected. These Findings of Fact and Conclusions of Law are arguably broad enough to encompass the specific issues addressed in this *Motion for Rehearing* and thus must also be corrected. TJFA submits that Findings of Fact Nos. 37 through 40, 161, 197, 201, 214, 391, and 404 through 406, Conclusions of Law Nos. 5, 7, 8, 18, 19, 28, 59, 60, 64 through 66, 68, 70, 71, and Ordering Provisions 1, 2, 3, and 5 are also in error due to the specific objections and information contained herein. These Findings of Fact, Conclusions of Law, and Ordering Provisions must be revised in any subsequent Commission order denying the requested permit amendments to conform to the evidence and legal issues presented.

IV. CONCLUSION

The Final Order in this proceeding is replete with factual and legal errors. As set forth in this, *TJFA, Inc.'s Motion for Rehearing*, the Commission should reconsider, review, and re-evaluate the erroneous Findings of Fact, Conclusions of Law, and Ordering Provisions enumerated herein. For all of the reasons addressed above, TJFA respectfully requests that the

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Applied Materials wells. Dr. Kier affirmatively testified that he had seen tests that show the hydraulic conductivity of clays could be drastically changed. *Id.* at 1621. No data was specifically available at the Applied Materials site since this would have involved entering private property, finding the specific subsurface contaminant migration pathway, and then conducting tests on these impacted clays. Further, BFI's expert tried to explain the Caprolactam identified in the sample from the Applied Materials ground water monitoring well by saying this compound was used in the manufacture of nylon, and he "thought" nylon rope was used to sample the wells and "suggested" that this was "probably" where the nylon came from. *Id.* at 321 (Cross Exam (by Bob Renbarger) of John Michael Snyder, P.G.). Notwithstanding the fact that this was pure speculation on the part of the BFI witness, even if the rope was the source of the Caprolactam found in the sample, it did not account for the other 11 identified and one unidentified compounds also identified in the sample. *Id.*

Commission grant this *Motion for Rehearing* and thus reopen the above-referenced matter for additional consideration allowing the Commission to revise previous determinations that are contradictory to applicable law and policy. Upon reconsideration or rehearing, the Commission should deny the Amendment Application for Permit No. MSW-1447A.

Respectfully submitted,

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On this the 9th day of October, 2009,

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