

PREHEARING CONFERENCE

SOAH DOCKET NO. 582-08-2186

TCEQ DOCKET NO. 2006-0612-MSW

TRANSCRIPT OF PROCEEDINGS BEFORE THE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
(TEXAS COMMISSION ON ENVIRONMENTAL QUALITY)
AUSTIN, TEXAS

APPLICATION OF)	SOAH DOCKET NO.
WASTE MANAGEMENT OF TEXAS,)	582-08-2186
INC., MSW PERMIT AMENDMENT)	TCEQ DOCKET NO.
APPLICATION NO. 249D)	2006-0612-MSW

PREHEARING CONFERENCE
MONDAY, MARCH 23, 2009

BE IT REMEMBERED THAT AT approximately
9:00 a.m., on Monday, the 23rd day of March 2009, the
above-entitled matter came on for hearing at the State
Office of Administrative Hearings, 300 West 15th
Street, Hearing Room 404, Austin, Texas, before
ROY SCUDDAY, Administrative Law Judge; and the
following proceedings were reported by Evelyn Coder, a
Certified Shorthand Reporter of:

Volume 1

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5 REMMERT, ALFRED WENDLAND, JEREMIAH BENTLEY, WILLIAMS,
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1 PROCEEDINGS
2 MONDAY, MARCH 23, 2009
3 (9:00 a.m.)
4 (All prefiled exhibits marked)
5 JUDGE SCUDDAY: Call to order the
6 prehearing on SOAH Docket No. 582-08-2186 in the
7 matter of the application of Waste Management of
8 Texas, Inc., for a municipal solid waste permit
9 amendment.
10 My name is Roy Scudday. I'm the
11 Administrative Law Judge hearing this matter.
12 We'll start out with announcements, with
13 the applicant.
14 MR. MOORE: Good morning, Judge. I'm
15 Bryan Moore with the law firm of Vinson & Elkins, and
16 we represent the applicant in this matter, Waste
17 Management of Texas, Inc. Also with me today are my
18 colleagues from V&E, John Riley and Rachel Chester.
19 We also have with us today Ruth Muelker, who is senior
20 counsel at Waste Management of Texas, Inc.
21 JUDGE SCUDDAY: Okay. Let's see. City
22 of Austin?
23 MS. FARHADI: Yes, Your Honor. Meitra
24 Farhadi, representing the city of Austin, and with me
25 today I also have Holly Noelke, also representing the

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1 city of Austin.
2 JUDGE SCUDDAY: County?
3 MS. COX: Yes, Your Honor. I'm Annalynn
4 Cox, for Travis County, and with me is Sharon Talley.
5 JUDGE SCUDDAY: Executive Director?
6 MS. RICHARDSON: Good morning, Your
7 Honor. I'm Amie Dutta Richardson, with Timothy Reidy,
8 for the Executive Director.
9 JUDGE SCUDDAY: All right. TFJA -- or
10 TJFA?
11 MR. BIRCH: Good morning, Your Honor.
12 I'm Erich Birch. With me this morning are Angela
13 Moorman and Cindy Becker who represent TJFA.
14 JUDGE SCUDDAY: And protestant?
15 MR. FRIEDMAN: Your Honor, Adam Friedman
16 with Blackburn & Carter on behalf of the Northeast
17 Neighbors Coalition.
18 JUDGE SCUDDAY: Okay. Anybody I missed?
19 Oh, yes, Ms. Mann. I'm sorry.
20 MS. MANN: Good morning. I'm Christina
21 Mann, representing the Office of Public Interest
22 Counsel. Here today with me is Amy Swanholm, another
23 attorney in our office, and she will actually be lead
24 counsel on this case and -- excuse me -- and I'll take
25 this opportunity to use this as my substitution of

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1 counsel motion. I would like to move that Amy
 2 Swanholm be substituted as counsel on this --
 3 JUDGE SCUDDAY: No. You have to stay
 4 here for two weeks --
 5 (Laughter)
 6 MS. MANN: -- on this and all future
 7 matters related to this docket.
 8 JUDGE SCUDDAY: The withdrawal and
 9 substitution will be admitted.
 10 All right. Anybody else I overlooked?
 11 (No response)
 12 JUDGE SCUDDAY: All right. We're set
 13 for hearing starting next Monday. I have received
 14 numerous objections and responses to the prefiled
 15 testimony and exhibits. I have reviewed them.
 16 As far as the prefiled testimony is
 17 concerned on the experts, I'm going to overrule the
 18 objections to the experts' testimony. However, that
 19 will not prevent cross-examination, if you want to
 20 question any particular area of the expertise, to
 21 allow cross-examination in that area. I'm going to
 22 allow testimony of Mr. Kier, Mr. Uliana, Mr. Chandler,
 23 Mr. Guernsey, Mr. Word, Mr. Lesniak, Mr. White,
 24 Mr. Udenenwu, Mr. Avakian, Mr. Smith, Mr. Dominguez,
 25 Mr. Worrall, Mr. McInturff, Mr. Sherrod, Ms. Castille,

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1 Mr. Winters.
 2 And then the protestants, landowners, I
 3 will allow their testimony as lay testimony, and they
 4 can give me their lay opinions, but their opinions
 5 will be based on the personal knowledge, and anything
 6 that's not will be given appropriate weight. I'm not
 7 going to not allow their testimony.
 8 Now, that takes care of the testimony,
 9 but that doesn't take care of the exhibits, and so at
 10 this point, I need to ask you, do we want to go
 11 through each one of the exhibits one by one today, or
 12 do we want to wait until you actually offer the
 13 specific exhibit during the testimony?
 14 MR. BIRCH: Your Honor, excuse me.
 15 Before we move on, we didn't hear Rex Hunt, one of our
 16 experts.
 17 JUDGE SCUDDAY: Well, I didn't see an
 18 actual objection to his testimony. It was just
 19 questioned, the relevance of it, but there wasn't an
 20 actual objection.
 21 MR. BIRCH: We were just clarifying.
 22 Thank you.
 23 JUDGE SCUDDAY: Anybody got any thoughts
 24 on how we want to do the exhibits? Applicant?
 25 MR. MOORE: Our preference would be to

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1 go through them now since we're all here, and get it
 2 out of the way, and hopefully that will speed our
 3 hearing along.
 4 JUDGE SCUDDAY: All right. I don't have
 5 any problem with that. I'm here all day. I guess
 6 let's start with the applicant's objections. Let's
 7 start with the objections to protestant TJFA's
 8 exhibits, starting with, I guess, the exhibits that
 9 went with Mr. Kier's testimony.
 10 Bear with me. I've been moving for the
 11 last several days. I'm stiff and I'm sore, and you
 12 guys' boxes don't help my mood any.
 13 The first objection was to Exhibit 203.
 14 Mr. Moore?
 15 MR. MOORE: Yes, Judge. We objected
 16 to -- our first objection to Exhibit 203 was under
 17 Rule 703 of Texas Rules of Evidence. Rule 703 allows
 18 an expert to rely upon inadmissible materials, only if
 19 the materials are of a type that are reasonably relied
 20 upon by the expert in a particular field in forming
 21 opinions or inferences on the subject that the expert
 22 is testifying on.
 23 With respect to 203, 204, 205 and 212 of
 24 TJFA's exhibits, Dr. Kier does not demonstrate that
 25 these are of a type that are reasonably relied upon by

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1 experts in this field. It's simply -- the response to
 2 that question is simply that these are public record
 3 documents. If we allowed any expert to rely on any
 4 public record document, we would eviscerate the
 5 protection under 703.
 6 JUDGE SCUDDAY: Mr. Birch?
 7 MR. BIRCH: Thank you, Your Honor.
 8 Essentially for evidentiary purposes, we need to make
 9 sure that these documents are something -- that they
 10 actually are what they purport to be, and I think
 11 that, first off, what we're dealing with are agency
 12 records, the TCEQ and its predecessor agencies, and
 13 the agencies are reliable in the sense that they are
 14 kept in a public forum -- in a public agency, and the
 15 records are of the type that are relied upon by an
 16 expert like Mr. Kier. In fact, the entire
 17 environmental industry relies on the records of the
 18 TCEQ.
 19 Now, in addition, Your Honor, we went
 20 back, after the applicant's objections, to our agency
 21 records, and we actually have certified copies of all
 22 of those records that are available, and we can
 23 introduce those, which we think would additionally
 24 address the concerns with those documents.
 25 JUDGE SCUDDAY: So you've got a

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1 certificate? Is that what this binder is? I haven't
 2 had a chance to look a it.
 3 MR. BIRCH: Yes, Your Honor. And those
 4 are copies up there that you have.
 5 JUDGE SCUDDAY: We'll start with 203. I
 6 don't see a certificate -- I don't have a certificate
 7 in this binder on 203.
 8 MR. BIRCH: They're on the documents
 9 themselves, Your Honor. They're stamped.
 10 JUDGE SCUDDAY: I gotcha. Well,
 11 unfortunately, I remember this. I was there, so I
 12 recognize these documents. Okay. Let's see here.
 13 There's a certificate on the order, and I'm trying to
 14 read it. Okay. Does it indicate what pages are
 15 attached to this? I'm having a hard time reading the
 16 stamp, my copy.
 17 MR. BIRCH: I beg your pardon, Your
 18 Honor?
 19 JUDGE SCUDDAY: I'm having a hard time
 20 reading the stamp, what the certificate says. Do you
 21 have a better -- a copy that I can read?
 22 MR. BIRCH: Your Honor, in spite of all
 23 the other binders we brought, somehow we left the
 24 original binder, and we can get that to you as quickly
 25 as we can get someone over here today.

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1 JUDGE SCUDDAY: All right. We'll
 2 just --
 3 MR. BIRCH: But, Your Honor, that is the
 4 standard certification.
 5 JUDGE SCUDDAY: I understand. I
 6 just can't -- I can't see what it says.
 7 MR. BIRCH: I understand.
 8 JUDGE SCUDDAY: I can see part of it.
 9 Since there's so many different documents within this
 10 exhibit that I -- I can't see that it's attesting that
 11 all of these attachments are part -- or all these
 12 individual documents are part of that record pursuant
 13 to that certification.
 14 MR. BIRCH: Your Honor, each separate
 15 document was certified.
 16 JUDGE SCUDDAY: Each separate document
 17 within the exhibit?
 18 MR. BIRCH: Yes, Your Honor.
 19 JUDGE SCUDDAY: I see. Okay. Let me go
 20 through it then.
 21 MR. BIRCH: And, Your Honor, I found one
 22 copy of this that I can read to you, if that would
 23 help.
 24 JUDGE SCUDDAY: That's fine. That would
 25 be -- yeah. Maybe one of these others is better. Let

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1 me see. They've all got a big space in the middle, so
 2 what does it say?
 3 MR. BIRCH: The one that I can read here
 4 says, "I hereby certify that this is a true and
 5 correct copy of a Texas Commission on Environmental
 6 Quality record," and then it has the date stamped on
 7 it.
 8 JUDGE SCUDDAY: All right. What does it
 9 say under the date?
 10 MR. BIRCH: Well, I'm still struggling
 11 with that.
 12 (Brief pause)
 13 JUDGE SCUDDAY: All right. Well, I find
 14 that each one of them does have the certification
 15 stamp on it, so I'm going to allow Exhibit 203 as
 16 certified copies of documents in the records of TCEQ
 17 as being admissible. Whether or not -- what weight
 18 they will be given will come out during the
 19 proceedings.
 20 Now, Exhibit 204, is that the same
 21 situation?
 22 MR. BIRCH: No, Your Honor.
 23 Exhibit 204, those are two internal Waste Management
 24 memoranda, and there, Your Honor, those are the
 25 applicant's own records from their files, and the

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1 applicant is relying on its own records throughout
 2 this application, and we think it would be
 3 disingenuous for the applicant to object to these
 4 records from their files and then allow their own --
 5 use of their own records from their files for their
 6 application.
 7 JUDGE SCUDDAY: Response?
 8 MR. MOORE: Yes, Your Honor. When
 9 counsel for TJFA refers to these as records from our
 10 own files, these records were not produced in
 11 discovery in this matter. It's represented by
 12 Dr. Kier in his testimony that these documents came
 13 from the files of Waste Management in a prior
 14 litigation that Dr. Kier was involved in, I believe
 15 back in the early '90s, but these documents were not
 16 produced by Waste Management in this matter.
 17 MR. BIRCH: Your Honor, we -- TJFA
 18 actually has Bates-stamped copies of the documents
 19 that were produced by Waste Management in this matter,
 20 and, Your Honor, those would be Attachment 2 in your
 21 notebook that you have up there.
 22 JUDGE SCUDDAY: I've got considerably
 23 more in Exhibit 204.
 24 MR. MOORE: Yes, Your Honor. We did not
 25 object to the entirety of 204. We called out specific

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1 pages.
 2 JUDGE SCUDDAY: I show WM 034952 through
 3 034958. And those aren't objected to? That part of
 4 it was not objected to?
 5 MR. MOORE: No. When TJFA 204 was
 6 offered through the testimony of Dr. Kier, the pages
 7 were not Bates labeled by Waste Management, and we
 8 also have another situation in this matter where the
 9 documents that were produced by TJFA originally were
 10 Bates labeled WM. And so there was some confusion as
 11 to who produced what. We haven't had the opportunity
 12 to go back and cross-check these against our file
 13 records of what we produced, given that the two
 14 documents both bear a WM label.
 15 JUDGE SCUDDAY: I'll tell you what I'm
 16 going to do on Exhibit 204. I'm going to hold off
 17 ruling on it between now and Monday. Let's make sure
 18 which ones you agree to and which ones you don't.
 19 Then we'll talk about what he don't agree to on
 20 Monday. Okay?
 21 MR. MOORE: Okay.
 22 JUDGE SCUDDAY: Okay. 205?
 23 MR. BIRCH: Your Honor, these are
 24 documents prepared by one of the expert in this
 25 matter, Dr. Kier. And in this case, Dr. Kier has,

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1 throughout these documents that he authored and
 2 created -- he has the citations and authority for the
 3 statements he has in those documents, and we believe
 4 that those should be admitted.
 5 JUDGE SCUDDAY: Okay. What was the
 6 objection here?
 7 MR. MOORE: With respect to 205, it's
 8 also an objection under Rule 703, and Dr. Kier
 9 purports to have prepared 205. However, not
 10 everything in 205 was prepared by Dr. Kier. There's
 11 other attachments within there.
 12 It's not apparent on the face of the
 13 summaries whether the summaries are in whole or in
 14 part summations of documents that are of a type
 15 reasonably relied upon by experts in Dr. Kier's field.
 16 While counsel for TJFA is correct that there are some
 17 citations in these documents to the documents that
 18 Dr. Kier apparently relied upon, not every statement
 19 in these documents is supported by a citation.
 20 JUDGE SCUDDAY: Okay. Well, I'm going
 21 to admit Exhibit 205. 207, the deposition of Willis
 22 Fusilier, what was the --
 23 MR. MOORE: TJFA 207 contains excerpts
 24 of depositions that were not taken in this same
 25 proceeding, and the declarant in those depositions has

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1 not been shown to be unavailable in this deposition.
 2 It's hearsay.
 3 JUDGE SCUDDAY: Mr. Birch?
 4 MR. BIRCH: Your Honor, these are the
 5 statements of the applicant, taking their sworn
 6 statements. And, Your Honor, in -- as big and
 7 complicated as this case is already, it would have
 8 been possible to possibly find this witness and
 9 perhaps take the deposition testimony again, but it
 10 would have been the identical sworn testimony.
 11 JUDGE SCUDDAY: I'm going to deny it.
 12 MR. BIRCH: Your Honor, can I ask for
 13 the reasons that you're denying it?
 14 JUDGE SCUDDAY: Well, because this is
 15 not the testimony. It was taken in a different
 16 proceeding. You have not shown the inavailability of
 17 this witness.
 18 MR. BIRCH: Your Honor, this is the same
 19 party. The distinction here is that in this case, it
 20 is the actual party whose deposition we're looking to
 21 admit. And, Your Honor, in addition to being a
 22 party's own statement, it's actually a party
 23 admission.
 24 JUDGE SCUDDAY: All right. Who is
 25 Mr. Fusilier?

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1 MR. BIRCH: Fusilier is a former
 2 engineer that works for the applicant. It was a Waste
 3 Management employee.
 4 JUDGE SCUDDAY: Mr. Moore?
 5 MR. MOORE: Well, a bit on
 6 pronunciation. It's Fusilier, just so we're all clear
 7 on that.
 8 JUDGE SCUDDAY: All right.
 9 MR. MOORE: Mr. Fusilier was a former
 10 employee of Waste Management. I'm not certain whether
 11 it was Waste Management, Inc., or Waste Management of
 12 Texas, Inc., but the objection still stands.
 13 These are simply -- these depositions
 14 were not taken in the same proceeding. The exclusion
 15 under 801 is on point here. It's not an admission by
 16 the applicant, certainly not the entire excerpts of
 17 the deposition transcripts that TJFA is seeking to
 18 offer.
 19 And, again, under 804, the declarant
 20 must be shown to be unavailable. There's been no
 21 attempt at any such showing.
 22 JUDGE SCUDDAY: All right. I'm --
 23 MR. BIRCH: Your Honor, the applicant
 24 does not have to be unavailable if it's a party
 25 admission.

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1 JUDGE SCUDDAY: Yeah, but -- okay. I
 2 understand that, but why is this deposition, admission
 3 by an employee, an admission by the applicant?
 4 MR. BIRCH: Your Honor, under 801(c)
 5 or -- I'm sorry -- 801(e)(2) is an admission by a
 6 party opponent. A statement is offered against a
 7 party and it's the party's own statement, in either an
 8 individual or representative capacity. And this was
 9 an employee of Waste Management, representative of
 10 Waste Management. It's their own statement.
 11 And, again, Your Honor we go back to
 12 what's the reliability of the statement for it to be
 13 admitted into evidence here, and this is a sworn
 14 statement. It's Waste Management's employee. They
 15 had the opportunity to correct this statement if it
 16 was incorrect. It was taken in open court.
 17 MR. MOORE: Your Honor, if I may respond
 18 to --
 19 JUDGE SCUDDAY: Okay.
 20 MR. MOORE: There's a distinction here
 21 between someone that simply works for Waste Management
 22 of Texas, Inc., and is deposed in that capacity -- in
 23 their individual capacity, and a corporate
 24 representative that is designated as a corporate
 25 representative in response to a deposition notice to

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1 depose the corporation. Here, Mr. Fusilier was
 2 apparently deposed in his individual capacity.
 3 Also, with respect to whether this is a
 4 party admission or not, the context of that litigation
 5 does deserve, then, some consideration. That was a
 6 case that was brought by Texas Disposal Systems
 7 against Waste Management of Texas, Inc. It was a
 8 slander lawsuit. It was not a permitting matter. It
 9 was not an administrative matter. It did not seek to
 10 determine whether an application complies with all
 11 applicable statutory and regulatory requirements,
 12 which is the standard in this case.
 13 MR. BIRCH: Your Honor, here all we're
 14 looking for is evidence on the history of this
 15 facility.
 16 JUDGE SCUDDAY: I'm going to deny it.
 17 Now, let's talk about Witheridge. Is that the same
 18 situation?
 19 MR. MOORE: Yes, Your Honor.
 20 MR. BIRCH: Yes, Your Honor.
 21 JUDGE SCUDDAY: Denied.
 22 209, what's the objection?
 23 MR. MOORE: The objection here, Your
 24 Honor, is it's been unauthenticated and it's hearsay.
 25 Although 209 includes a deposition on written

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1 questions in an effort to satisfy the hearsay
 2 exception conditions under 803(6), here again, this
 3 deposition was not taken in the same proceeding for
 4 801(e)(3), and the declarant, here again, has not been
 5 shown to be unavailable per 804(b)(1).
 6 Additionally, Waste Management did not
 7 have an opportunity to develop the declarant's
 8 testimony by cross-examination, nor has it been shown
 9 that a party with interests similar to Waste
 10 Management's had an opportunity and similar motive to
 11 develop that declarant's testimony, and that is under
 12 804(b)(1).
 13 JUDGE SCUDDAY: Response?
 14 MR. BIRCH: Yes, Your Honor. In this
 15 case, actually, we did file notice of deposition on
 16 written questions, and there was no response filed by
 17 the applicant. And, Your Honor, since that time, we
 18 also have affidavits that these are public records in
 19 this proceeding as well. We have it not only from the
 20 engineering company that did the work; we have it from
 21 the facility itself, from Applied Materials where the
 22 work was done, and we also have it from the lab that
 23 actually performed the analysis.
 24 MR. MOORE: Judge, may I respond?
 25 JUDGE SCUDDAY: Sure.

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1 MR. MOORE: TJFA filed a notice of
 2 deposition on written questions, obtained a subpoena
 3 from you, and has now withdrawn that. That deposition
 4 on written questions was never taken.
 5 This deposition on written questions, I
 6 believe, perhaps might have been taken in the BFI
 7 matter, the Sunset Farms matter, that came before us,
 8 but it was not this case. And whether or not TJFA has
 9 other documents that may be themselves inadmissible
 10 for the very same reasons, I don't think that goes at
 11 all to the admissibility of this document that they've
 12 offered with the support that Dr. Kier has offered up
 13 in his testimony.
 14 JUDGE SCUDDAY: Denied.
 15 MR. BIRCH: Your Honor, if I could
 16 respond --
 17 JUDGE SCUDDAY: Denied. Move on. Is
 18 that all the objections that you had to Mr. Kier's
 19 exhibits?
 20 MR. MOORE: No, Your Honor.
 21 JUDGE SCUDDAY: 212. Right?
 22 MR. MOORE: Move on to 210 actually
 23 before we skip over.
 24 JUDGE SCUDDAY: 210?
 25 MR. MOORE: Yes, Your Honor. This

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1 exhibit hasn't been authenticated. It hasn't been
 2 prepared by Dr. Kier, and it's offered for a truth of
 3 a matter asserted in the document. It's hearsay.
 4 JUDGE SCUDDAY: Response?
 5 MR. BIRCH: Your Honor, I think Waste
 6 Management has argued this might be used for an
 7 improper purpose. And, Your Honor, again, these are
 8 reliable records from an engineering firm. It's the
 9 kind of information that an expert, like a
 10 professional geologist relies upon. It shows the
 11 groundwater conditions in the area of the applicant's
 12 landfill.
 13 JUDGE SCUDDAY: I'll admit it, 212. I'm
 14 going to admit 212.
 15 MR. MOORE: Okay.
 16 JUDGE SCUDDAY: Okay. I've admitted
 17 Dr. Uliana's testimony, and I would --
 18 MR. MOORE: We don't have any objections
 19 to Dr. Uliana's exhibits.
 20 JUDGE SCUDDAY: Right. Okay. So that
 21 brings us to Mr. Chandler's exhibits, starting with
 22 405.
 23 MR. MOORE: Yes, Your Honor. We can
 24 dispense, I think, with a number of rulings on
 25 exhibits because they're all objected to on the same

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1 basis.
 2 JUDGE SCUDDAY: All right.
 3 MR. MOORE: Here we're basically getting
 4 a document dump, so to speak, from Mr. Chandler, and
 5 Rule 803(18) is on point here, and that speaks to
 6 statements contained in learned treatises.
 7 They may be read into evidence, but the
 8 rule specifically states they may not be received as
 9 exhibits. And TJFA, through Mr. Chandler, is
 10 attempting to pepper the record with voluminous
 11 amounts of what would fairly be called learned
 12 treatises when those documents should not come in as
 13 exhibits. They may simply be read into the record.
 14 JUDGE SCUDDAY: Mr. Birch?
 15 MR. BIRCH: Your Honor, we can do that.
 16 I think that it's going to tremendously delay the
 17 hearing in this matter to have the witness each
 18 time -- we've only cited a few pages from most of
 19 these documents, and those pages are readily viewable
 20 by the Administrative Law Judge. So during the
 21 hearing, we're going to probably delay matters quite a
 22 bit as we have the expert read this as testimony.
 23 JUDGE SCUDDAY: Well, I don't have
 24 any -- they're here. I'll give them -- as long as you
 25 can refer me to the specific pages you're talking

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1 about, I think we can go ahead and allow the EPA
 2 technical manual, which is 405.
 3 What other ones does that apply to? I
 4 need another book here.
 5 MR. MOORE: Judge, you might want to get
 6 another book. I think it runs a couple of volumes.
 7 JUDGE SCUDDAY: Who do I send my
 8 chiropractor bill to?
 9 406 is a slide show presentation? This
 10 is what they're using instead of written articles now,
 11 Mr. Birch?
 12 MR. BIRCH: It's from a conference.
 13 JUDGE SCUDDAY: It's admitted.
 14 JUDGE SCUDDAY: 407, Ohio's EPA?
 15 MR. BIRCH: Yes, Your Honor. That is a
 16 statement that's recognized nationwide as a document
 17 that professional engineers rely upon for design
 18 purposes.
 19 JUDGE SCUDDAY: I'll allow it and give
 20 it the appropriate weight.
 21 408, MSW Management, landfill stability
 22 article?
 23 MR. BIRCH: Yes, Your Honor. This is
 24 another article that discusses the application of that
 25 manual that we just reviewed.

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1 JUDGE SCUDDAY: I'll allow it.
 2 409, an article by Mr. Wright? As long
 3 as you people don't expect me to read these, I don't
 4 mind putting them in the record.
 5 I'll allow 409, 410, article by
 6 Abramson, et al. I'll admit 411, article by Duncan
 7 and Wright. I'll admit 412. Design of Small Dams,
 8 why is that --
 9 MR. BIRCH: Your Honor, there's very
 10 simple principles for designing a dam as designing a
 11 slope. It's the same principles, and so this is
 12 another manual that our expert relied on.
 13 JUDGE SCUDDAY: All right. Admitted.
 14 413 Design of Small Dams, updated, that will be
 15 admitted.
 16 414, Corps of Engineers Design and
 17 Construction of Levees --
 18 MR. BIRCH: It's the same --
 19 JUDGE SCUDDAY: Did they use New Orleans
 20 as the example?
 21 MR. BIRCH: Well, I don't know.
 22 JUDGE SCUDDAY: All right. 414 will be
 23 admitted. 415, Guide to Technical Resources for the
 24 Design of Land Disposal Facilities, EPA publication
 25 will be admitted. The EPA process design manual will

7 (Pages 22 to 25)

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1 be admitted. The EPA design and construction of RCRA
 2 final covers will be admitted. 418 -- okay. Why is
 3 the Navy important here?
 4 MR. BIRCH: Again, Your Honor, one of
 5 the issues here is stability analysis of slopes, and
 6 the same principles can be used in many different
 7 applications.
 8 JUDGE SCUDDAY: Mr. Chandler can explain
 9 to me why that's important. 419 will be admitted --
 10 418, I mean, will be admitted. 419, the Peck article
 11 will be admitted. 420, Taylor soil mechanics will
 12 admitted. 421, soil mechanics, will be admitted.
 13 422, what's the GundSeal design manual? The lining,
 14 is that what this is?
 15 MR. BIRCH: Yes, Your Honor.
 16 JUDGE SCUDDAY: That article will be
 17 admitted. 423, an article by Mr. Thiel, will be
 18 admitted. 424, EPA publication on barriers, admitted;
 19 425, EPA RCRA manual will be admitted; 426, EPA
 20 quality assurance and quality control manual will be
 21 admitted; 427, EPA technical guidance -- 428, the
 22 Xanthakos treatise will be admitted.
 23 Now, I jump to 437. The Boutwell
 24 treatise will be admitted. Four -- that's 437. 438,
 25 the Qian treatise will be admitted; 439, the Rowe

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1 treatise on barrier systems will be admitted; 440,
 2 Koerner on geosynthetics, will be admitted; 441 and
 3 442 will be admitted, and the slope stability manual,
 4 Corps of Engineers, 443, will be admitted.
 5 But, again, Mr. Birch, if there's
 6 something you want me to look at in any of these
 7 things, you're going to have to be very specific.
 8 MR. BIRCH: Yes, Your Honor.
 9 JUDGE SCUDDAY: Okay. Now, there's some
 10 objections to the city's exhibits?
 11 MR. MOORE: Yes, Judge. Are we still
 12 with the applicant's objections?
 13 JUDGE SCUDDAY: Yes. Okay. I thought
 14 we -- was there any others?
 15 MR. MOORE: No, no; no others to TJFA's.
 16 Then we skip over to the Protestants 1.
 17 JUDGE SCUDDAY: I was looking at
 18 exhibits. City's TF-6, 7 and 8 --
 19 MR. MOORE: Whichever order you would
 20 like to take them in. We also have JW-4 and TF-6, 7
 21 and 8.
 22 JUDGE SCUDDAY: I went to TF-6, 7 and 8,
 23 so let's do them first.
 24 MR. MOORE: Okay.
 25 JUDGE SCUDDAY: And is this a similar

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1 situation where we've got a reliance on these
 2 articles?
 3 MR. MOORE: Yes, Judge.
 4 MS. FARHADI: Yes, Your Honor. These
 5 were relied upon by one of the city's expert
 6 witnesses. They are technical documents. The entire
 7 documents have been attached to his testimony.
 8 However, he does reference specific areas, and they're
 9 not voluminous.
 10 JUDGE SCUDDAY: Not in comparison.
 11 TF-6, 7 and 8 will be admitted.
 12 What was the other one, JW --
 13 MR. MOORE: JW-4 of the city's.
 14 JUDGE SCUDDAY: Okay. What is your
 15 response to the objection on JW-4?
 16 MS. FARHADI: Your Honor, JW-4 is an
 17 agreed order from the TCEQ. This is part of the
 18 compliance history of the applicant, which is one of
 19 the factors that the TCEQ must consider.
 20 Additionally, the applicant points to
 21 some language that this shall not be held against them
 22 in a civil proceeding. This is an administrative
 23 proceeding, not a civil proceeding, and, indeed, a
 24 significant purpose of agreed orders is to be
 25 considered in permitting proceedings.

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1 JUDGE SCUDDAY: Mr. Moore?
 2 MR. MOORE: In response to -- I think
 3 the second part, civil proceeding, I believe it says a
 4 civil proceeding. And the distinction should not be
 5 made between civil and administrative for the reason
 6 that this order should be excluded from civil
 7 proceedings should also be excluded from this
 8 proceeding.
 9 Also, with respect to compliance
 10 history, that is something that the TCEQ calculates.
 11 It cannot be challenged in this permitting matter. It
 12 has to be challenged through a separate appeal of an
 13 applicant's compliance history.
 14 MS. FARHADI: Your Honor, this isn't
 15 going to challenging the classification that was given
 16 for compliance history. It's merely part of the
 17 compliance history, which is required to be
 18 considered.
 19 MS. COX: Your Honor, if I may, Travis
 20 County filed this exact same exhibit, which the
 21 applicant also objected to in ours, which was JW-6 as
 22 our exhibit.
 23 And I would just further like to add to
 24 the arguments made by Ms. Farhadi that it would appear
 25 that this -- including the language in this agreed

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1 order that it could not be used in a civil proceeding
 2 would appear to be more designed to prevent others
 3 from trying to also collect fines from Waste
 4 Management for those penalties, such as one -- as a
 5 hypothetical, one of the neighbors couldn't use this
 6 as a basis to collect some damages from Waste
 7 Management.
 8 The intention, I don't believe, should
 9 have been to not allow it to be used in a proceeding
 10 like this where compliance history is one of the
 11 requirements that the Court is to take into
 12 consideration when deciding on this application.
 13 JUDGE SCUDDAY: I agree. I'll let it
 14 in, JW-4 in what was -- will be admitted.
 15 Is that all of the applicant's
 16 objections on exhibits?
 17 MR. MOORE: Yes, Your Honor. So just to
 18 be clear, it's JW-4 of the City's and JW-6 of the
 19 county's.
 20 JUDGE SCUDDAY: Right. Let's talk about
 21 the county's objections. The county seems to be
 22 concerned about where their landfill was.
 23 MS. COX: That's correct. And the
 24 majority of our -- all of our objections against the
 25 applicant's exhibits and their testimony dealt with

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1 when there was mention of the closed Travis County
 2 landfill being included as a portion of Waste
 3 Management's landfill.
 4 We strongly deny that our landfill ever
 5 encroached onto Waste Management's property, and we
 6 object to any exhibits being entered in evidence or
 7 any testimony related to this matter by the applicant.
 8 This is not a matter that should be before this Court,
 9 and we have asked that this matter -- that that area
 10 be relabeled, as it has always been, as "Phase I
 11 complete." The testimony in all of the depositions
 12 has been that no one did any research before this
 13 labeling was done, and we would ask that those
 14 exhibits be struck.
 15 JUDGE SCUDDAY: Okay. Response?
 16 MR. MOORE: Yes, Your Honor. It's a
 17 question of fact whether the exhibits are properly
 18 labeled of the area that is designated on any exhibit
 19 is exactly part of the closed Travis County landfill,
 20 whether Travis County at any point in time ever
 21 operated that portion of the facility, and exactly
 22 where the boundaries of the closed Travis County
 23 landfill are or were are all questions of fact and can
 24 be explored through cross-examination and direct
 25 testimony of the witnesses in this case.

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1 JUDGE SCUDDAY: I'm going to allow the
 2 exhibits. I understand the county can establish
 3 exactly what they want as far as where their line is,
 4 and that would also apply, I believe, also to the
 5 Executive Director?
 6 MS. COX: That's correct, Your Honor.
 7 JUDGE SCUDDAY: I'm going to allow --
 8 which one of those --
 9 MS. RICHARDSON: That was Executive
 10 Director No. 5.
 11 JUDGE SCUDDAY: Executive Director 5 and
 12 Applicant 101, 102, 104.
 13 MS. COX: Yes.
 14 MR. MOORE: I believe it's Applicant
 15 101, 202, 204, 205, 207 and 213, is what I have.
 16 JUDGE SCUDDAY: Okay. Applicant 101,
 17 102 -- no -- 101, 202, 204, 205, 207 and 213?
 18 MR. MOORE: That is correct. That's
 19 what I have.
 20 JUDGE SCUDDAY: And ED-5? ED which?
 21 MS. RICHARDSON: 5, Your Honor.
 22 JUDGE SCUDDAY: We've got other
 23 objections to ED-5, I think.
 24 MS. COX: The only objections were to
 25 the -- from Travis County on ED --

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1 JUDGE SCUDDAY: No. I understand, but I
 2 think there's objections to ED-5.
 3 MS. RICHARDSON: Yes. TJFA lodged some.
 4 JUDGE SCUDDAY: All right. Those
 5 exhibits will be admitted.
 6 All right. TJFA's objections. Let's
 7 start with the objections to the applicant's exhibits.
 8 102 is the direct referral request.
 9 You're objecting to that why?
 10 MR. BIRCH: Your Honor, a lot of the
 11 objections that you see here are really the documents
 12 just weren't properly authenticated. Sometimes they
 13 were not offered into evidence. Sometimes there was
 14 no showing that there was personal knowledge.
 15 JUDGE SCUDDAY: All right. Let's see.
 16 102 will be admitted.
 17 MR. BIRCH: Your Honor, we also objected
 18 to 101.
 19 JUDGE SCUDDAY: 101, aerial photos --
 20 because they weren't properly authenticated. Is that
 21 right?
 22 MR. BIRCH: Yes, Your Honor.
 23 JUDGE SCUDDAY: Response?
 24 MR. MOORE: Yes, Your Honor, a two-part
 25 response. One, I believe it's commonly said that

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1 authentication under the Texas rules is a bump, not a
 2 hurdle. It's, by evidence, sufficient to support a
 3 finding that the matter in question is what its
 4 proponent claims to be. Mr. Smith testifies about his
 5 familiarity with the landfill that is owned and
 6 operated by his company, Waste Management of Texas,
 7 Inc.
 8 And this one is a bit of a head
 9 scratcher, too, as to why TJFA object to this
 10 photograph when Dr. Kier offers the very same
 11 photograph.
 12 JUDGE SCUDDAY: 101 will be admitted.
 13 104?
 14 MR. BIRCH: Again, Your Honor, this is
 15 not properly authenticated. There's no indication
 16 that it is what it is -- what it says it purports to
 17 be.
 18 JUDGE SCUDDAY: At this point, I'll
 19 sustain the objection. When we get a certificate or
 20 something --
 21 MR. MOORE: It actually appears at the
 22 bottom, Your Honor. That date of December 12, 2008,
 23 that is the --
 24 JUDGE SCUDDAY: That's the stamp? Can
 25 you get me a copy that I could read?

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1 MR. MOORE: Absolutely.
 2 JUDGE SCUDDAY: You do that, and we'll
 3 admit it.
 4 MR. MOORE: Okay.
 5 JUDGE SCUDDAY: I might ask the
 6 Commission to get a stamp that can be copied.
 7 MR. MOORE: Get the Commission some ink,
 8 Your Honor.
 9 MS. RICHARDSON: That would not be a
 10 matter for the Executive Director. That would be a
 11 matter for the Commissioners.
 12 JUDGE SCUDDAY: Okay. On 204, I see the
 13 stamp. I can actually read the stamp. 204 will be
 14 admitted.
 15 MR. BIRCH: Your Honor, the problem with
 16 that one is the document simply doesn't contain
 17 everything that it claims to have in it. It was an
 18 incomplete document.
 19 JUDGE SCUDDAY: A copy of the permit,
 20 technical summary, compliance history and Executive
 21 Director's preliminary decision.
 22 MR. MOORE: If I understand TJFA's
 23 objection, it's to the assertion that it doesn't
 24 contain the Executive Director's preliminary decision.
 25 That's not a stand-alone document.

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1 JUDGE SCUDDAY: I'm sorry?
 2 MR. MOORE: If I understand TJFA's
 3 objection, it's that this -- as far as the cover
 4 letter, 204, Page 1, states what's included, and the
 5 technical summary, compliance history and Executive
 6 Director's preliminary decision. I understand that
 7 the objection is to the Executive Director's
 8 preliminary decision not being included in -- along
 9 with these documents. My experience is it's not a
 10 stand-alone document. It's simply that the cover
 11 letter is basically the preliminary decision because
 12 it attaches a draft permit and technical summary.
 13 MS. RICHARDSON: And the Executive
 14 Director would agree with that.
 15 JUDGE SCUDDAY: All right. 204 will be
 16 admitted. 211A, what's the objection?
 17 MR. BIRCH: The objection is hearsay,
 18 Your Honor. It's an out-of-court statement offered
 19 for the truth of the matter asserted. This was
 20 offered after the application was deemed technically
 21 complete by the applicant.
 22 JUDGE SCUDDAY: Response?
 23 MR. MOORE: Yes, Your Honor. This is a
 24 document that's signed and sealed by Mr. Dominguez,
 25 who is the sponsoring witness. Mr. Dominguez prepared

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1 the documents, the attachments. He relies upon them
 2 for purposes of his testimony in this matter. It's
 3 perfectly permissible for him to do that under Rule
 4 703, and disclosure is appropriate under 705(a).
 5 JUDGE SCUDDAY: Mr. Birch?
 6 MR. BIRCH: Your Honor, we don't believe
 7 that this document fits any of the exclusions to
 8 hearsay under the hearsay rule and should be denied.
 9 JUDGE SCUDDAY: 211A will be admitted.
 10 211B, same thing?
 11 MR. BIRCH: Yes, Your Honor.
 12 JUDGE SCUDDAY: It will be admitted.
 13 212?
 14 MR. BIRCH: Your Honor, this document,
 15 again, hasn't been properly authenticated. It
 16 contains hearsay, and it hasn't been identified as a
 17 certified copy of a record of the agency.
 18 JUDGE SCUDDAY: Sustained. 213?
 19 MR. BIRCH: Your Honor, similar to some
 20 of the other objections, we believe this contains
 21 inadmissible hearsay and doesn't qualify for the
 22 exception to the hearsay rule.
 23 JUDGE SCUDDAY: Response?
 24 MR. MOORE: With regard to 212, if I
 25 could step back, 212 was a document that was filed by

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1 counsel for the Executive Director in the context of
 2 this case. It shows service on counsel for TJFA.
 3 The same is true with respect to
 4 APP-213. That's a document that was filed by myself,
 5 counsel for Waste Management of Texas, in the context
 6 of this case. It was served on all parties, including
 7 counsel for TJFA.
 8 If the objection is to authentication;
 9 again, bump, not a hurdle. All parties are shown as
 10 being served a copy of these documents. The submittal
 11 was -- is not hearsay. It's simply included to show
 12 that it has been -- that it was made, to prove its
 13 existence. That is not hearsay.
 14 Also, Mr. Dominguez relies on this
 15 exhibit in forming his opinions in this proceeding,
 16 and, therefore, is permitted to disclose the document
 17 under 705(a).
 18 JUDGE SCUDDAY: I'm going to allow 212
 19 and 213. Similar situation on 214?
 20 MR. MOORE: Yes, Your Honor.
 21 MR. BIRCH: Yes, Your Honor.
 22 JUDGE SCUDDAY: I'll allow it -- admit
 23 it.
 24 215A is a map relied upon by Mr.
 25 Dominguez. Is that what this was?

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1 MR. MOORE: If I may, Judge. Yes, it's
 2 a floodplain map. It's commonly relied upon by
 3 experts in Mr. Dominguez's field. It's prepared by
 4 Federal Emergency Management Agency. Mr. Dominguez
 5 gives the website address where the document can be
 6 obtained and compared to that which he offers in his
 7 testimony.
 8 MR. BIRCH: But, Your Honor, it's not a
 9 certified copy. There's no record indicating it's a
 10 record of a regulatory agency.
 11 MR. MOORE: If I may, Your Honor, a
 12 certified copy is not required under 703 for experts
 13 to rely upon the document. Mr. Dominguez has been
 14 recognized as an expert in this case. His testimony
 15 has been admitted as expert testimony. Regardless of
 16 whether the materials that he may or may not rely upon
 17 are admissible, if he does rely upon them, that's
 18 permissible under 703. Their disclosure is
 19 permissible under 705(a)
 20 JUDGE SCUDDAY: I'm going to allow 215A,
 21 215B, 216A, 216B and 216C.
 22 MR. BIRCH: Your Honor, 216C was never
 23 offered into evidence by the applicant.
 24 JUDGE SCUDDAY: Okay. Then I won't have
 25 to --

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1 MR. MOORE: If it was not offered, Your
 2 Honor, it was an oversight. We can correct it at
 3 the --
 4 JUDGE SCUDDAY: We'll correct it.
 5 MR. MOORE: -- at the hearing.
 6 JUDGE SCUDDAY: 216 -- no, 217?
 7 MR. BIRCH: Your Honor, this is
 8 another --
 9 JUDGE SCUDDAY: Right. It will be
 10 admitted. 218 has a certificate on it. What's the
 11 objection here?
 12 MR. BIRCH: Your Honor, it's similar to
 13 the others. I guess it actually has a certificate on
 14 it. We'll withdraw that objection.
 15 JUDGE SCUDDAY: It will be admitted.
 16 220?
 17 MR. MOORE: Your Honor, 220 and 221 are
 18 documents -- again, this is TJFA -- I'm sure they will
 19 be given an opportunity to explain their objection.
 20 I'm not quite sure I understand it.
 21 Both of these documents, 220 and 221,
 22 bear Mr. Dominguez's seal and signature. They were
 23 prepared by him for purposes of his prefiled
 24 testimony. They are authenticated and relied upon by
 25 Mr. Dominguez. The reliance is permissible under 703.

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1 Their disclosure is permissible under 705(a).
 2 And then just stepping back, these
 3 documents are no different than the vast array of
 4 documents that are sealed by Mr. Dominguez that are
 5 included in the application.
 6 JUDGE SCUDDAY: What was the basis of
 7 the objection, Mr. Birch?
 8 MR. BIRCH: Your Honor, again, we don't
 9 see that these documents qualify for any exception to
 10 the hearsay rule, and we believe they're inadmissible
 11 hearsay. They're out-of-court statements offered for
 12 the truth of the matter.
 13 JUDGE SCUDDAY: Well, I think they're
 14 part of Mr. Dominguez's testimony, and I'm going to
 15 allow them, 220 and 221. You certainly have an
 16 opportunity to cross-examine him on them.
 17 Okay. 302?
 18 MR. MOORE: Your Honor, if I may; 302,
 19 different witness, same story as 220 and 221. This is
 20 a document that was prepared -- this APP-302 is a
 21 document that was prepared by an expert witness in
 22 this proceeding, Mr. Worrall.
 23 Mr. Worrall testifies regarding his
 24 preparation of this document for purposes of his
 25 prefiled testimony. Mr. Worrall will, of course,

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1 appear and be subject to cross-examination.
 2 JUDGE SCUDDAY: Mr. Birch, this seems to
 3 be similar to what you have already gotten in for
 4 Mr. Chandler and Mr. Kier.
 5 MR. BIRCH: Yes, Your Honor, it is
 6 similar. In this case, the applicant already has this
 7 analysis in its application and this was --
 8 JUDGE SCUDDAY: It goes with
 9 Mr. Worrall's testimony. He can make specific
 10 reference and I won't have to go through the
 11 application. It will be admitted.
 12 502 -- 502 and 503, I guess?
 13 MR. MOORE: Yes, Your Honor. 502, I
 14 would here again assert is the same ruling as 302 and
 15 220 and 221, a document prepared by an expert in this
 16 case for purposes of his prefiled testimony and the
 17 expert will be here to be cross-examined.
 18 JUDGE SCUDDAY: I agree. It will be
 19 admitted.
 20 MR. BIRCH: Your Honor, 502, that
 21 document is not sealed. There's no indication --
 22 JUDGE SCUDDAY: Well, if he can -- okay.
 23 All right. So we'll have him identify it then at the
 24 hearing. 502 -- we won't act on 502. 503 will be
 25 admitted.

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1 702?
 2 MR. MOORE: Here again, Your Honor, 702
 3 is a document prepared by an expert in this case,
 4 Ms. Castille, for purposes of her prefiled testimony.
 5 Ms. Castille will be -- appear in this case, testify
 6 and be subject to cross-examination.
 7 JUDGE SCUDDAY: So you're basing the
 8 same objections that you had on --
 9 MR. BIRCH: Yes, Your Honor.
 10 JUDGE SCUDDAY: 702 will be admitted.
 11 Was that all of the objections to the applicant's
 12 exhibits? That's all I see.
 13 So now we go to the Executive Director's
 14 exhibits. Basically it's ED-5. That's the technical
 15 summary we've already admitted. Isn't this what we
 16 just admitted a minute ago?
 17 MS. RICHARDSON: Yes, Your Honor. I
 18 think it was part of the applicant's Exhibit 204 or
 19 205. The Executive Director is willing to withdraw
 20 any exhibits that are duplicative.
 21 JUDGE SCUDDAY: Okay. ED-5 will be
 22 admitted. I see it's the same thing and it's part of
 23 it.
 24 Okay. So we have not -- we will hold
 25 off any ruling on TJFA Exhibit 204, Applicant's 216C

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1 and Applicant's 502 until the testimony of the
 2 witnesses.
 3 MS. RICHARDSON: Your Honor, could I
 4 clarify? On Executive Director's Exhibit No. 3, which
 5 is the response to comments, that one, I don't
 6 believe, has been offered by any other party.
 7 JUDGE SCUDDAY: Is that an objection by
 8 TJFA?
 9 MS. RICHARDSON: Yes.
 10 MR. BIRCH: Your Honor, that was simply
 11 the objection; it was not offered into evidence and it
 12 was not authenticated.
 13 MS. RICHARDSON: The Executive Director
 14 offers that that witness personally prepared the
 15 response to comments and it is --
 16 JUDGE SCUDDAY: I think he's just saying
 17 it wasn't offered in his testimony.
 18 MS. RICHARDSON: What we would prefer to
 19 do is offer it live as --
 20 JUDGE SCUDDAY: Yeah. Right.
 21 MS. RICHARDSON: Okay. Thank you.
 22 JUDGE SCUDDAY: I'll -- when you call
 23 your witnesses, just be sure to offer all of the
 24 exhibits that we haven't dealt with specifically today
 25 to make sure they all get in the record.

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1 MR. BIRCH: I'm sorry. Your Honor,
 2 we're having just a little trouble --
 3 JUDGE SCUDDAY: When you come and offer
 4 your prefiled to admit it, when you have your witness
 5 there, and you're admitting, just make sure that we
 6 have -- that the court reporter has all of the -- all
 7 of the record -- in the record all the exhibits so
 8 that we don't get -- at the end of the day we don't
 9 have an exhibit that was left out when we do our "last
 10 minute" going through all the multitude of books that
 11 are on the reporter's desk. I just don't want to
 12 overlook any exhibits that should have been admitted.
 13 Okay. I will admit all the prefiled
 14 exhibits, other than the ones we've talked about
 15 specifically now, but let's just make sure they're
 16 all -- everybody checks to make sure they've got
 17 everything. Okay?
 18 (All prefiled exhibits admitted, EXCEPT
 19 for TJFA Nos. 204; 207 Pages 1 and 23 and TJFA 209 and
 20 Applicant's Exhibit Nos. 104, 216 and 502)
 21 MR. BIRCH: Your Honor, before we go,
 22 can we ask for clarification on one of the exhibits
 23 that you denied?
 24 JUDGE SCUDDAY: Sure.
 25 MR. BIRCH: It is Exhibit 209, which is

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1 the PBS&J report, and we're just trying to make sure
 2 we understand why that exhibit was denied, because we
 3 did file a notice of deposition on written questions,
 4 and the applicant had the opportunity to respond to
 5 that and submit questions, but they chose not to. And
 6 that was the reason why the deposition notice was
 7 canceled, because we were provided the information by
 8 PBS&J. And so we withdrew the deposition because
 9 everyone was in depositions for basically two to three
 10 weeks constantly. There was no need for that, and
 11 there was no objection by the applicant.
 12 MR. MOORE: Your Honor, if can I
 13 respond?
 14 JUDGE SCUDDAY: Okay.
 15 MR. MOORE: TJFA never picked up the
 16 phone to call us to say, "This is why we're going to
 17 withdraw the notice of deposition. This is why we're
 18 not going to take the deposition." Had I been asked,
 19 I would have told them we're going to object to this
 20 exhibit, and our objection stands. Our objection is
 21 on multiple grounds, one of which is it was a
 22 deposition that was not taken in this matter. TJFA
 23 had the opportunity to take --
 24 JUDGE SCUDDAY: No. They're talking
 25 about 209.

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1 MR. MOORE: 209, exactly --
 2 JUDGE SCUDDAY: The report.
 3 MR. MOORE: -- deposition on written
 4 questions to satisfy the --
 5 JUDGE SCUDDAY: Mr. Birch, I'm going to
 6 disallow it at this time. If you want to -- when you
 7 have Mr. Kier on, if you want to resubmit it, I'm
 8 going to give the -- Mr. Moore an opportunity to take
 9 it on voir dire.
 10 MR. BIRCH: Thank you, Your Honor.
 11 JUDGE SCUDDAY: It's primarily a lack of
 12 notice that --
 13 MR. BIRCH: Well, Your Honor --
 14 JUDGE SCUDDAY: Whatever it was, I
 15 just -- I think that would be the best way to take
 16 care of it.
 17 MR. MOORE: Your Honor, if we're done
 18 with objections, we have one more matter that we would
 19 like to take up.
 20 JUDGE SCUDDAY: I've got several
 21 matters. I just want to make sure that we're all
 22 clear on the testimony and exhibits.
 23 Let me find my cheat sheet here. All
 24 right. Let's talk a little bit about the proceeding.
 25 I guess -- what was it that you wanted to talk about?

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1 I was going to talk about the procedures.
 2 MR. MOORE: Okay. This is a matter that
 3 has been taken up previously with counsel for all
 4 parties. I don't have any objection to it that I'm
 5 aware of. I believe I have heard back from all the
 6 parties.
 7 In the process of -- well, actually, one
 8 of our witnesses just getting prepared for depositions
 9 and hearing in this matter, Mr. Dominguez discovered
 10 that Appendix F.2 to Attachment 3 of Part IV of the
 11 application -- it's a 12-page document, Your Honor,
 12 and Mr. Dominguez discovered that the version that we
 13 have included in our Exhibit APP 202, which has been
 14 identified as a technically complete application, that
 15 this appendix is the wrong version.
 16 It's the earlier version. It went
 17 through the notice of deficiency process. We
 18 resubmitted an August 2007 version that the agency
 19 accepted, and -- in response to one of their NODs.
 20 The master application that the applicant was keeping,
 21 this appendix did not get updated.
 22 JUDGE SCUDDAY: Okay.
 23 MR. MOORE: So we would move to
 24 supplement APP 202 to switch out the Appendix F.2 to
 25 Attachment 3 to Part III that's currently in there

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1 with the correct version that was submitted to TCEQ in
 2 August 2007.
 3 I have paginated, three-hole punched
 4 copies for everyone. And, again, this matter was
 5 brought up previously with counsel, and I don't
 6 believe any counsel has an objection.
 7 JUDGE SCUDDAY: Any objection?
 8 (No response)
 9 JUDGE SCUDDAY: The supplement will be
 10 admitted.
 11 Okay. Let's talk about procedure. All
 12 right. For presentation of testimony, the applicant
 13 will go first followed by -- my proposal would be the
 14 city, the county, TJFA; protestants, landowners, OPIC
 15 and the ED gets to go last. Anybody have any problem
 16 with that?
 17 MR. BIRCH: Well, Your Honor, actually,
 18 the protestants -- we talked this over, and throughout
 19 the depositions we've had an order that we've gone in,
 20 and we thought we would just stay consistent with
 21 that.
 22 JUDGE SCUDDAY: What's that?
 23 MR. BIRCH: That has been with TJFA
 24 going after the applicant, and then it would be the
 25 county, the city and protestants 1.

13 (Pages 46 to 49)

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1 JUDGE SCUDDAY: Is that the city and
2 county --
3 MS. FARHADI: We agree with that, Your
4 Honor.
5 MS. COX: Yes, sir.
6 JUDGE SCUDDAY: So TJFA, then county,
7 then city, then protestant landowners. Any other
8 suggestions, changes?
9 MR. BIRCH: Your Honor, I would just
10 bring this up, but Giles Holdings is also a party, and
11 we don't know where they really fit or if they plan on
12 taking a part.
13 JUDGE SCUDDAY: Who is speaking for
14 Giles Holdings? Are they here?
15 (No response)
16 MR. MOORE: They don't look to be,
17 Judge.
18 JUDGE SCUDDAY: They don't look to be.
19 Okay. Then we're not going to worry about them.
20 Then the cross-examination will be in
21 the same basic order, subject to limitations on
22 redundancy. I don't need the same question from each
23 one of the protestants. Anything else?
24 (No response)
25 JUDGE SCUDDAY: Are we all ready?

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1 (No response)
2 JUDGE SCUDDAY: Everybody?
3 (No response)
4 JUDGE SCUDDAY: All right then.
5 We'll -- I'll have a -- we'll put this recording on
6 the hard drive, so if you wanted to listen to it for
7 anything. I don't -- unless you just want me to issue
8 an order for this morning. I don't propose to, but it
9 will be on it. You can just contact my assistant,
10 Angela Pardo, and she can get you a copy, or docketing
11 can get you a copy if you need it. All right?
12 Otherwise, we'll be ready to go Monday
13 morning at nine o'clock. Yes, ma'am?
14 MS. COX: I had one question, Your
15 Honor. Will the parties be allowed to make opening
16 statements?
17 JUDGE SCUDDAY: Yes.
18 MS. COX: Would that be next Monday?
19 JUDGE SCUDDAY: Yes.
20 MS. COX: Thank you.
21 JUDGE SCUDDAY: It's opening. Let's
22 open with openings.
23 One other thing I need to let you know,
24 I teach a class in San Marcos on Wednesday and
25 Thursday evenings. So I probably am going to want to

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1 try to get away from here -- we'll probably want to
2 get through around 4 on those days.
3 Other than that, we will go as long as
4 we need to until we get to an appropriate break point.
5 We'll obviously have a morning break, lunch break and
6 afternoon break, but as far as the testimony, we'll
7 just kind of see where we are, and there's no magic
8 about what time we actually stop. Okay?
9 Also, I have been told I'm going to be
10 on the April 8th agenda, so depending on -- as we get
11 closer to the April 8th agenda, we'll see where we are
12 as far as working around that. And I'm also supposed
13 to close on my house, but whenever the bank tells me
14 that they're finally ready, we'll let you know about
15 that.
16 MS. FARHADI: If I may, Your Honor, one
17 further questions about -- obviously, with the
18 applicant putting forth their witnesses on Monday, do
19 you have any anticipation on timing, as to how many
20 witnesses you believe we will get through Monday to
21 prepare for?
22 MR. MOORE: Since I have no control of
23 the cross-examination, I don't know.
24 MS. FARHADI: Does anybody want to
25 discuss that?

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1 JUDGE SCUDDAY: Yeah, you-all might want
2 to -- I was going to suggest -- you know your order.
3 So because you've got so many experts, you need to
4 kind of work out your own timing as to when you want
5 to have them here, and then if you have to shuffle
6 somebody around, just let everybody know so we don't
7 have any dead time while we're sitting around waiting
8 for somebody.
9 All right. Thank you very much.
10 (Proceedings recessed at 10:16 a.m.)
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