

Date: December 12, 2016

To: Whom It May Concern

From: Gary Newton, General Counsel, Texas Disposal Systems

Re: City of Austin Council Agenda, December 15, 2016, Item 46
Proposed Republic Services Citywide Dumpster Contract and the
Re-opening of Sunset Farms Landfill

If the Austin City Council approves Item 46 on the above referenced agenda awarding "Republic Services" a 6 year "Citywide Dumpster Collection Services" contract, with its Scope of Work, which includes "Non-Residential Collection Services for Refuse, Recycling, Brush, Compostable Materials, Special Events, Class 2 Non-Hazardous Waste, and Emergency Collection Assistance," it could be the catalyst for re-opening the Sunset Farms Landfill (SFL) TCEQ Permit 1447A ([Tab A](#)) in order to expand the SFL to fulfill the requirements of the still undisclosed terms of the contract with the City. Moreover, by awarding the contract, Republic Services would have a basis to challenge the City if the City Council were to oppose the expansion of SFL.

SFL stopped accepting waste on November 1, 2015, due to a permit condition agreed to in an October 31, 2008 Rule 11 Agreement ([Tab B](#)). The Rule 11 Agreement signed by Robert Goode, Assistant City Manager, and Holly Noelke, Assistant City Attorney, on behalf of the City was entered into with BFI Waste Systems of North America, LLC (BFI, LLC) and Giles Holdings, L.P. (GH, L.P.) for the City to drop its opposition to the specific contested case hearing process for the 2008 SFL amendment to Permit 1447A. As stated in the Republic Services, Inc. Securities and Exchange Commission filings, BFI, LLC is a subsidiary or affiliate of Republic Services.

The 2008 Rule 11 Agreement Purportedly Closed The Landfill

The Rule 11 Agreement also contained a condition that a Restrictive Covenant ([Tab C](#)) placing a deed restriction on the SFL property prohibiting any waste disposal or processing activities after November 1, 2015, even though the deeds indicate BFI, LLC and GH, L.P. are not, and were not, the owners of the land comprising the SFL according to the Travis County deed records. The reality is the City staff should have known, and possibly did know at the time the Rule 11 Agreement was signed that the deed restriction language would not accomplish the goal of permanently closing SFL on November 1, 2015.

In 2008, Bob Gregory, President and CEO of Texas Disposal Systems (TDS), provided a memo to the Mayor informing the City how to draft an effective deed restriction. Mr. Gregory sent a memo ([Tab D](#)) to the Mayor outlining the defects with the form of the proposed deed restriction and suggesting ways to make it enforceable against subsequent owners. In 2007, BFI, LLC proposed a deed restriction to Travis County in exchange for Travis County dropping its opposition to the landfill expansion in Permit 1447A. The proposed 2007 deed restriction was substantially similar to the version agreed to by the City in 2008. TDS informed the parties opposed to the landfill 2007 proposed expansion that the deed restriction was ineffective and provided language to cure the defects as contained in Exhibit B of the 2008 memo contained in Tab D.

There are two reasons why the deed restriction on file in the Travis County Deed Records is ineffective to keep SFL from operating after November 1, 2015. First, the SFL property owners, then and now according to the deed records, did not execute the deed restriction, so it is not binding on the property. Second, the language of the deed restrictions in the Restrictive Covenant only restricts two entities BFI, LLC and GH, L.P., from operating SFL after November 1, 2015. Any other entity that Republic Services chooses can operate SFL unrestrained by the deed restriction.

If the proposed Citywide Dumpster Collection Services contract in Item 46 is approved on December 15, 2016, Republic Services, the assumed current entity in control of SFL, can move forward with an amendment to the SFL Permit 1447A to eliminate the November 1, 2015 closing date requirement and expand SFL to accommodate the volume of waste anticipated to be received from the City under the Item 46 contract. This new City contract can be used by BFI, LLC, the current owner of the permit, and an affiliate of Republic Services as the reason SFL would have to be re-opened, and SFL was closed with unfilled capacity previously approved by the TCEQ in its most recent major permit amendment.

The True Owners According To The Deed Records

According to the Travis County Deed Records, the entities that executed the Restrictive Covenant were not the SFL landowners of record in 2008 with the authority to bind the property. The landowners of record with the last deeds on file are BFI Waste Systems of North American, Inc. (BFI, Inc.) since 2004, and Mobley Chemicals, Inc. (MCI) since 1982. The diagram ([Tab E](#)) indicates the four tracts of land that comprise the SFL property. One of the tracts, as indicated, appears to be owned by BFI, Inc., not BFI, LLC, who signed the Rule 11 Agreement and Restrictive Covenant. The other three tracts appear to be owned by MCI, not GH, L.P., who also signed the Rule 11 Agreement and Restrictive Covenant. Please see the deed records currently on file in the Travis County Deed Records, which indicate BFI, Inc. ([Tab F](#)) and MCI ([Tab G](#)) were the owners of record in 2008, and continue to be the owners of record, for the four tracts and not the entities which actually executed the Rule 11 Agreement and Restrictive Covenant.

On October 31, 2008, BFI, LLC and GH, L.P. were totally different entities from the SFL property owners according to the Travis County deed record – the property owners were BFI, Inc. and MCI. BFI, Inc. and MCI should have signed the Rule 11 Agreement and Restrictive Covenant. BFI, LLC and GH, L.P. purported to be the only SFL property owners in the Rule 11 Agreement, even though the last deeds on file, as discussed above and attached, indicate they were not the owners of the property when they entered into the Rule 11 Agreement and executed the Restrictive Covenant as part of settlement in the SFL expansion case (SOAH Docket No. 582-08-2178). This Rule 11 Agreement was signed by Brad Dugas for BFI, LLC, Steve Mobley for GH, L.P., in addition to Robert Goode and Holly Noelke on behalf of the City of Austin.

Limitations of the Rule 11 Agreement and Restrictive Covenant Create An Expansion Opportunity

The language of the Restrictive Covenant prohibited BFI, LLC and GH, LP, and only these two entities, from receiving, processing, recycling, and disposing of waste at SFL. Any other entity besides BFI, LLC and GH, LP can conduct these activities. Through a simple permit modification, Republic Services can transfer the SFL TCEQ Permit 1447A from BFI, LLC to another specific Republic Services affiliated entity, perhaps the Republic Services entity whose name will be on the yet-to-be-revealed contract being considered for an award under Item 46 on the December 15, 2016 Austin City Council agenda. Republic Services could pursue the re-opening of SFL without any recourse by the City of Austin or the public. The need for landfill capacity and the revenue from a contract with the City in Item 46 above could be the justification for Republic Services to re-open SFL. The TCEQ Permit 1447A for SFL can then be amended by the new permit holder to re-open SFL, expand it, or combine it with the adjacent Waste Management-Austin Community Landfill (WMI-ACL) in order to process, transfer, recycle, compost or dispose of that waste as allowed under an amended combined permit.

The Need To Expand Is Imminent And Republic Services Needs An Excuse To Do So

SFL has about 3 years of unused landfill capacity remaining in its TCEQ Permit 1447A, as originally approved by the TCEQ, which could be utilized for the City waste disposed under the Item 46 contract. The adjacent WMI-ACL has an estimated life of less than 5 years (see calculations on [Tab H](#)). If Republic Services combines SFL with the adjacent WMI-ACL and expands the combined landfill footprint, the combined landfill could have decades of landfill capacity and could rise more than 200 feet above the ground level.

Conclusion: Deny Republic Services A Citywide Dumpster Contract

For the above stated reasons, the Austin City Council should seriously consider the possible ramifications of a vote to approve the contract under Item 46 on the December 15, 2016 agenda, and require City staff to identify the specific name of the Republic Services contracting entity; the landfill which Republic Services intends to utilize for the disposal of the waste generated as part of the proposed contract; the location of the facility for the processing of recyclables and compostable material collected under the contract with the City and whether that location is the SFL or the WMI-ACL; whether the Republic Services RFP response and the proposed contract have any provisions regarding the utilization of the SFL and/or the adjacent WMI-ACL facility; and whether the specific Republic Services contracting entity has waived its right to seek a permit amendment to re-open SFL.