

1984 ——— 25 Years ——— 2009

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August 26, 2009

Via Hand Delivery

Ms. LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle, Bldg. F – 1st Floor
Austin, Texas 78753

Re: TCEQ Docket No. 2007-1774-MSW; SOAH Docket No. 582-08-2178
Permit Amendment Application of BFI Waste Systems of North America, LLC;
MSW Permit No. 1447A

Dear Ms. Castañuela:

Enclosed for filing in the above referenced matter is an original and seven copies of "Applicant's Brief Regarding Operating Hours." All parties of record have been copied pursuant to the Certificate of Service attached to the document. By copy of this letter, a copy of "Applicant's Brief Regarding Operating Hours" is being provided to Les Trobman, General Counsel and to the Honorable William J. Newchurch, SOAH Administrative Law Judge.

Should you have any questions, please do not hesitate to contact me at (512) 322-5806. Thank you for your attention to this matter.

Respectfully submitted,



Paul Gosselink

PGG/mpj

Enclosure

cc: William J. Newchurch, SOAH Administrative Law Judge – *via facsimile & hand delivery*
Les Trobman, TCEQ General Counsel – *via hand delivery*
Certificate of Service – *via facsimile & electronic transmission*

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

IN RE THE APPLICATION OF BFI WASTE	§	BEFORE THE
	§	
SYSTEMS OF NORTH AMERICA, LLC	§	TEXAS COMMISSION ON
	§	
PERMIT NO. MSW-1447A	§	ENVIRONMENTAL QUALITY

APPLICANT’S BRIEF REGARDING OPERATING HOURS

Applicant BFI WASTE SYSTEMS OF NORTH AMERICA, LLC (BFI) files this brief regarding the ALJ’s recommendation that the permit be issued with 24/7 operating hours, respectfully showing:

I. INTRODUCTION

The ALJ’s conclusion that the appropriate operating hours for the Sunset Farms Landfill should remain 24/7 is plainly correct based on the evidentiary record. In fact, as the ALJ stated there was no evidence of any kind showing that BFI’s weekend or nighttime hours were inappropriate during the two week contested case hearing. BFI is filing this trial brief not because it has concluded that the ALJ has wrongly assigned the burden of proof to the protestants but because it is concerned that the protestants may urge such argument on appeal, even though they presented no controverting evidence during the hearing. BFI believes that the prudent, more traditional and better approach to the operating hours issue is to determine that BFI presented a *prima facie* case and, therefore, met its burden of proof for that reason and, moreover, that BFI presented evidence that satisfied the fuller preponderance of evidence standard and met its burden of proof for that additional reason.

BFI appreciates ALJ Newchurch’s well-earned reputation as a respected, fair-minded, logical jurist and certainly appreciates the result of his analysis. However, BFI is concerned that

while the ALJ's burden of proof analysis may be logical and correct, it will present an unnecessary legal issue of first impression on appeal on what was a *factually uncontroverted issue*. BFI would prefer not to be a test case, and incur the risk that this issue could be relitigated on remand – especially when it has satisfied its traditional burden of proof on this uncontroverted issue. Consequently, BFI requests that the Commissioners modify the proposed findings of fact and conclusions of law consistent with the recommendations set forth below, including the explanations required by §361.0832 of the Texas Health and Safety Code, in order to ensure that the ALJ's substantive conclusion is upheld while his approach to the burden of proof not become an issue on appeal.

II. THE OPERATING HOURS RULE

The relevant rule provides that the waste acceptance hours of a municipal solid waste (MSW) 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 of the facility.¹ Unlike other MSW rules – indeed, perhaps uniquely among the MSW rules² – this rule does not set forth any qualitative standards or performance criteria or do anything else to establish a basis for agency approval of hours longer than the 7-to-7 weekday-only hours. It does not require the applicant to obtain authorization from any local governmental authority for weeknight or weekend hours, or to include a governmental coordination letter regarding operating hours in the application. It does not require an applicant to show “good cause” for hours outside the 7-to-7 weekday-only time frame. In fact, the agency specifically considered and rejected a good cause standard for this rule

¹ 30 TAC §330.118(a). (The pre-March 2006 rules apply to this application. The operating hours rule is currently found at 30 TAC §330.135 of the MSW rules.)

² See, for example, §330.56(f) regarding site drainage design, §330.119 regarding signage for the site, or §330.133 regarding landfill cover (all references are to the pre-March 2006 rules).

in 2004 during the rulemaking process.³ In sum, the rule does not state how or why an applicant must justify anything over and above 7-to-7 weekday-only operating hours – it just requires that the hours must be “otherwise approved.”

The rule also does not state *who* must “otherwise approve” anything over and above 7-to-7 weekday-only operating hours – the Executive Director (“ED”) or the Commissioners. Presumably the ED is the final decision-maker in uncontested cases and the Commissioners are the final decision-makers in contested cases, basing their decision, at least in part, on the recommendation of the ED. In practice, the ED has been vested with a fair degree of discretion to review an applicant’s request and authorize operating hours on a case-by-case basis. In this case, the ED has consistently authorized 24/7 operating hours.

III. THE REFERRED ISSUE

The operating hours issue, as referred by the Commissioners to SOAH in this case, was simply whether “the landfill’s operational hours are appropriate.” The order of referral did not ask whether 7-to-7 weekday-only hours should be the hours in lieu of the 24/7 hours requested by BFI and contained in the draft permit, whether the facility should be open or closed on Saturdays or Sundays (or portions thereof), whether the operating hours should be limited to daylight hours only, whether hours should be limited on weeknights, etc. Nor did the issue, as referred, ask anyone to determine what might be “more appropriate” than those contained in the draft permit.

What constitutes “appropriate hours” for Sunset Farms or any other individual MSW facility in this state is not defined in the order of referral, in the MSW rules, in any agency

³ 29 Tex. Reg. 11070 (Nov. 26, 2004) (“The rule has not been changed in regard to comments that a variance from the operating hours designated in the rule should only be granted on a showing of good cause, and that a 24-hour operation should not be authorized in a populated area.”).

guidance document, or in any case law. The “appropriate” hours are not necessarily the default 7 to 7 hours. Indeed, most landfills have permitted hours that are not 7 to 7 which in each of those cases are, by definition, the appropriate hours. The Commission has historically placed a relatively minimal burden on applicants seeking weeknight or weekend operating hours to justify those hours – particularly when, as here, no protestant had specifically requested operating hours other than those contained in the draft permit and there is no evidence in the record that addresses much less warrants limiting the facility to 7-to-7 weekday-only hours. Moreover, the ED has historically been given the authority to approve extended operating hours when, in his judgment, such hours satisfy the statutory requirement to protect the public and the environment. The resultant hours (24/7) are, therefore, the “appropriate” hours in the ED’s judgment.⁴

IV. THE EVIDENTIARY RECORD REGARDING OPERATING HOURS

In the original PFD the ALJ stated that “the only evidence that supports BFI’s deviation from the 7 to 7 standard for waste acceptance hours is the fact that the industry standard is 24/7, which applies to other permitted landfills in Travis County. The ALJ does not find that very persuasive.” However, BFI and other parties presented more evidence than just the single point referred to by the ALJ. That evidence was further supplemented by evidence presented by Travis County, as well as testimony by the ED’s staff engineer.

Specifically, BFI presented the following evidence relating to the hours of operation issue:

- Sunset Farms has always operated 24/7 since it first opened in 1982;⁵

⁴ See ED’s Exceptions to Proposal for Decision and Order at p. 2.

⁵ BFI Exh. RS-1 at 109.

- the ED has independently approved BFI's request for 24/7 hours at Sunset Farms on at least three separate occasions (in the original permit, during in 2006 "call in" process for SOP revisions, and as part of this application);⁶
- BFI has developed long-standing waste delivery schedules and acceptance procedures based on the 24/7 schedule, and its customers rely upon these waste delivery schedules and acceptance procedures;⁷
- BFI's traffic study shows that a not-inconsequential number of waste haul vehicles (23% of the daily volume) accessed the facility between 7:00 pm and 7:00 am on the date of the survey (waste that would have to be accepted by one of BFI's competitors, (TDSL or WMTX) if it were limited to 7-to-7 weekdays-only);⁸
- 24/7 hours are consistent with the other Type I landfills in the County ;⁹
- 24/7 hours are consistent with industry practices;¹⁰
- BFI's application otherwise complies with MSW rules governing site operations;¹¹
- BFI's and the facility's compliance histories are "average";¹² and
- the application otherwise satisfied the provisions of the operating hours rule.¹³

None of this evidence was refuted or rebutted by any party protesting the application.

Additionally, the ED witness provided the following testimony regarding operating hours:

- BFI had requested 24/7 operating hours in its application;¹⁴
- the hours requested were the same as the site's existing hours;¹⁵

⁶ *Id.* at 109.

⁷ *Id.* at 110.

⁸ BFI Exhs. MM-3 at Table II.E-10 (APP000192) & MM-4 at 2 .

⁹ BFI Exh. RS-1 at 110.

¹⁰ *Id.*

¹¹ *E.g., id.* at 79, 86 & 110; *see generally* PFD.

¹² BFI Exh. RS-1 at 104-05.

¹³ *Id.* at 110.

¹⁴ ED Exh. ED-AA-1 at 41.

¹⁵ *Id.*

- the ED is unaware of potential impacts justifying restricting the proposed 24/7 hours;¹⁶ and
- BFI's application satisfied the provisions of the relevant rule.¹⁷

Notably, the ED's testimony that the agency was "unaware of potential impacts justifying restricting the proposed 24/7 hours" was given after the application was submitted and reviewed for administrative and technical completeness, after public comments were made and received, after the draft permit was issued, and after all of the other parties in this proceeding had filed their pre-filed testimony. None of the ED's evidence was refuted or rebutted by any party protesting the application.

Moreover, Jon White, the sole witness for Travis County, testified that any decrease of the hours of operation at Sunset Farms would decrease waste acceptance rates such that the landfill's capacity would not be reached by the agreed-upon November 1, 2015 closure date.¹⁸ Should the capacity not be reached for this reason, BFI will be deprived of the benefit of the bargains that it struck after extensive, arms length negotiations with the City of Austin and Travis County (who acted essentially on behalf of the neighbors during these negotiations) when it agreed to cease acceptance of waste by that date certain in addition to multiple other concessions, including never locating a transfer station on the site, reducing the size of the landfill footprint, extensive drainage and erosion control design and operational provisions, prohibition of BFI trucks on Blue Goose Road, installation of a wheel wash, elimination of its waste solidification basin and agreement to not recirculate leachate.

Most important of all these negotiated concessions was the agreement to cease accepting waste on November 1, 2015. The original design would have resulted in a proposed closure date

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Travis County Exh. 4 at 14.

of 2023. An integral aspect of BFI's agreement to cease accepting waste in 2015 was premised on its ability to continue to operate on a 24/7 basis. The County clearly understood that these hours were required in order for BFI to satisfy this deadline – and get the benefit of its bargain in exchange for all the above referenced concessions – as evidenced by Mr. White's testimony and the very specific end date of November 1, 2015 not a typical year end date of December 31, 2015. BFI has organized its business, including number and timing of collection routes, number of trucks and other equipment and staffing based on 24/7 operating hours.

Against all of this evidence, aside from one line of testimony from Greg Guernsey, a witness for the City, discussed below, no party presented any evidence that specifically addressed operating hours. Indeed, the parties that opposed this application – NNC, TJFA and OPIC – presented no evidence at all regarding the appropriateness or inappropriateness of the 24/7 operating hours in their pre-filed testimony, through their witnesses on the stand at the hearing, or through their cross-examination of BFI's witnesses or the ED's witnesses. Among other things, there was:

- no expert testimony regarding operating hours;
- no evidence that the application/draft permit fails to satisfy any provision of the relevant rule;
- no evidence that anybody had ever requested 7-to-7 weekday-only hours, limited hours on nights or weekends, or, indeed, anything reduced from 24/7 hours;
- no evidence that any county or city ordinance or regulation limits the hours of operation of this facility or other MSW facilities;
- no evidence that any other landfill in Travis County has shorter hours (they don't vary meaningfully from 24/7);
- no evidence that, despite BFI's detailed settlement agreement with the City, the City ever even requested that the hours of operation be limited (much less demanded such);

- no evidence of any complaints made to TCEQ, Travis County or the City of Austin regarding the facility's 24/7 operating hours;
- no recordings or other data regarding decibel levels at nighttime or on weekends;
- no pictures, studies or data regarding excessive lighting at nighttime; and
- no evidence that there is no need for 24/7, overnight or weekend operations.

Notably, word searches of the protestants' pre-filed and live testimony indicates that "operating hours," "operational hours," "hours of operation" and similar phrases appear nowhere in their testimony. In short, this issue (as were several others such as transportation, control of vectors and special wastes) was essentially and fundamentally uncontested by NNC, TJFA and OPIC at the hearing.

To reiterate, other than the BFI, ED and Travis County testimony discussed above, the only testimony at all about hours of operation was an offhand suggestion by Greg Guernsey, the City of Austin's Director of Neighborhood Planning, that operating hours might "be limited to day light hours."¹⁹ This was testimony that ALJ correctly called "conclusory" in his June 29, 2009 letter amending the PFD and proposed findings, as it was made without any study or analysis on Mr. Guernsey's part.²⁰ In that same letter the ALJ found that "*there is no evidence of any kind showing that BFI's weekend operations during the day are inappropriate*"²¹ and that he saw "*no basis for concluding that BFI's nighttime hours are inappropriate.*"²²

The net result of all these factors is that the ALJ concluded after reviewing all the evidence that he saw no basis to limit BFI's waste acceptance hours and, that there was more

¹⁹ See CoA Exh. 1 at 3. Mr. Guernsey's pre-filed testimony totaled slightly more than four double-spaced pages, and did not include any references to any ordinances, regulations, studies or analyses that implicate hours of operation in any respect .

²⁰ ALJ's June 29, 2009 Letter at p. 3.

²¹ *Id.*

²² *Id.*

evidence adduced than the ALJ originally realized. Additionally, when these facts are applied to the *prima facie* only burden of proof applicable here, BFI clearly met its burden of proof and the protestants did not meet either their burden of production or their burden of proof. Indeed, BFI also met the greater burden of the preponderance of the evidence as explained next.

V. THE BURDENS OF PROOF AND PRODUCTION

BFI agrees with the ALJ's ultimate conclusion that the 24/7 operating hours contained in the draft permit are appropriate and that the record evidence supports this conclusion. However, BFI believes that the ALJ's burden-shifting analysis, is not necessary to reach this result because the 24/7 operating hours are fully warranted based on a more traditional burden of proof/burden of production analysis. Under these circumstances, BFI submits that the more prudent approach for the Commissioners to take in rendering their final order in this matter on this record is to, first find that BFI satisfied its burden under the *prima facie* and/or traditional preponderance of the evidence approach *prima facie*(both are correct, either is sufficient). Then explain that neither OPIC nor any other protestant satisfied their burden of proof under the ALJ's burden-shifting approach because they did not even satisfy their burden of production under the traditional approach as the basis for changing the necessary Findings of Fact and Conclusions of Law.

Burden Shifting. In MSW permitting cases, the burden of proof is generally on the "moving party" by a preponderance of the evidence.²³ As such, the burden of proof typically falls on the applicant for each contested issue. The ALJ correctly notes, however, that there are instances where the burden of proof itself shifts (as opposed to a shift in the burden of production) from an MSW applicant to a party protesting the draft permit because the protestant is moving for something other than the rules or the draft permit provide.

²³ 30 TAC §80.17(a).

The Austin Court of Appeals addressed one such instance in *BFI v. Martinez Environmental Group*, 93 S.W.3d 570 (Tex.App.–Austin 2002, pet. denied). In *Martinez*, the protestants appealed issuance of an MSW permit for the “life of the site” instead of for a shorter term.²⁴ On appeal, the court noted that the relevant rule (30 TAC §330.63) established the life of the site as the default permit term, subject to the ED’s authority to shorten the permit term at his discretion.²⁵ The court held that the burden of proof fell on the Martinez protestants to show by a preponderance of the evidence why a permit-for-term, as opposed to a permit-for-life of site, was proper for that facility because they were seeking something other than the default regulatory provision.²⁶

Martinez presented a situation that is similar, though not identical, to the situation presented in this proceeding. Here, the draft permit contains the 24/7 operating hours that BFI has always had and is not seeking to change. In its closing argument, OPIC sought to change the hours of operation provision in the draft permit even though it had offered no direct case evidence to show that the current 24/7 hours are inappropriate.²⁷ Nor did NNC or TJFA present any evidence in their direct cases that would have supported such an argument. Under the ALJ’s reasoning – and following the conceptual framework of *Martinez* – this makes OPIC the moving party on this issue and imposes upon it the burden to show by a preponderance of the evidence that the alternate operating hours it is seeking are appropriate. But *Martinez* is potentially distinguishable from this case in one fairly obvious way: in *Martinez* the draft permit contained the regulatory “default” provision, whereas here the draft permit contains something other than the purported “default.” *Martinez*, therefore, is an uncertain precedent upon which to rely.

²⁴ *BFI v. Martinez Environmental Group*, 93 S.W.3d 570, 575-79 (Tex.App.–Austin 2002, pet. denied).

²⁵ *Id.* at 576.

²⁶ *Id.* at 577-78.

²⁷ See ALJ’s June 29, 2009 Letter at p. 3.

While the ALJ may ultimately be correct regarding burden-shifting, BFI reiterates that the 24/7 operating hours are plainly warranted under a more traditional burden of proof/burden of production analysis based on the evidentiary and administrative record that is presently before the Commissioners. BFI believes the Commissioners can and should avoid this approach and instead find that BFI met its burden of proof under the traditional burden analysis, and should note that such a finding necessarily means that OPIC (and the other protestants) failed to meet its (their) burden under the ALJ's burden-shifting analysis.

Burden of Proof. Under the traditional analysis, BFI, as the applicant, had the burden to show that the 24/7 operating hours contained in the draft permit were appropriate. As discussed above, what constitutes "appropriate hours" is not defined in the referral order, in the MSW rules, or in any case law. In large part due to the general language of the rule, the burden has typically been relatively minimal – especially when, as here, no opposing party requested alternative/reduced hours and the issue was essentially uncontested. The Commission has specifically rejected the suggestion that the rule requires an applicant to show "good cause," in order to be allowed extended operating hours. Finally, the Executive Director has made clear that it does not interpret the rule as requiring an applicant to include justification in its application to exceed 7-to-7, weekday-only hours.

BFI clearly met the traditional burden any way the record is dissected. It made a *prima facie* case that the hours were appropriate when it showed that it was simply seeking to maintain its current operating hours, that the ED had independently authorized the 24/7 operating hours on three separate occasions, and that the draft permit otherwise satisfies the provisions of the relevant rule. No party rebutted or refuted any part of BFI's *prima facie* case, and no party contended that the 7-to-7 weekday-only provisions of the relevant rule were in fact more

appropriate than the 24/7 hours in the draft permit. But BFI did more than simply make a *prima facie* case regarding the 24/7 operating hours. It proved by a preponderance of the evidence that the 24/7 hours of operation contained in the draft permit – hours that the facility has always had, hours BFI is not seeking to change, hours that the ED specifically considered and approved, hours that BFI’s competitors in Central Texas have, hours that are standard throughout the industry, waste collection route and delivery hours that BFI and its customers have come to rely upon, hours that no person or party has complained of, hours that no protestant addressed in their direct cases – were appropriate. Again, no protestant rebutted or refuted any aspect of BFI’s direct case regarding operating hours, and the evidence offered by the ED and Travis County simply buttressed BFI’s direct case.

Burden of Production. The burden of production (sometimes called the burden of going forward or the burden of persuasion) fell on the protestants once BFI met its *prima facie* burden in its direct case.²⁸ This is the burden BFI believes the ALJ could have found that the protestants failed to meet in his June 29, 2009 letter when he concluded that the burden of proof had shifted to OPIC on the operating hours issue. The ALJ’s conclusion that he saw “no evidence of any kind” and “no basis” for concluding the BFI’s operating hours were inappropriate must be reiterated as it directly addresses the issue as referred. The protestant witnesses weren’t asked a single question about whether they thought that the 24/7 hours were inappropriate and why that would be the case. Nor did they present evidence of a single instance in which anybody had complained of the 24/7 hours to anyone or requested reduced hours. Once the protestants did not

²⁸ In *FPL, EPS*, an applicant for two injection wells, had the burden, as the applicant, to show that it would not “impair FPL’s existing rights.” EPS produced some evidence in support of its position. The Court noted “It was then FPL Farming’s burden to produce some evidence to refute EPS’s evidence. If failed to carry that burden” (at p. 5). Protestant’s here similarly failed to carry that burden, which is the burden of production. *FPL Farming, Ltd. v. Tex. Nat. Res. Conservation Comm’n*, 2003 WL 247183, *4 (Tex.App.–Austin, Feb. 6, 2003).

meet their burden of production BFI had no further burden to present any additional evidence and therefore did not present more evidence.

As discussed in the ALJ's letter of June 29, 2009, the concept of applying the burden of proof on the operating hours was originally presented by an argument of the ED in its Exceptions to the original PFD.²⁹ This argument was based on the process of review the ED uses under 30 TAC 330.118 in which an applicant has no burden to produce additional information/justification for the operating hours it is requesting unless and until the ED or the Commission becomes aware of information suggesting that the requested hours are inappropriate. The ALJ stated that he did not agree that Section 330.118 supports the ED's exception and that the process described by the ED is not set out in Section 330.118. Despite these misgivings, the ALJ stated that he agreed with the "heart of the ED's argument as applied in this case."

BFI suggests that the heart of the ED's argument is that no party put on any evidence that the 24/7 operating hours were inappropriate. It is not necessary to place the burden of proof on the protestants in order to effectuate the heart of the ED's argument. By applying the traditional placement of the burden of proof on the applicant as discussed herein, by recognizing the additional evidence on operating hours put in the record by BFI, Travis County and the ED, and by acknowledging the heart of the ED's argument that no other party put on controverting evidence -- the Commission can enter an order achieving the result supported by the applicant, the ED and the ALJ himself, without creating a potential point of appeal based on the possible misconstruing of the difference between the burden of proof and the burden of production.

²⁹ See ALJ's June 29, 2009 Letter at p. 2.

VI. SUBSTANTIAL EVIDENCE REVIEW

If appealed, the Commission's decision may be subject to judicial review under substantial evidence review.³⁰ The rule provides that:

If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but:

- (1) may affirm the agency decision in whole or in part; and
- (2) shall reverse or remand the case for further proceedings if the substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

...

- (D) affected by other error of law;
- (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or . . .

Under this rule, the court will review the evidence as a whole to determine if it is such that reasonable minds could have reached the same conclusion as the Commission.³¹ The court may not substitute its judgment for that of the Commission.³² The issue on appeal is not whether the agency reached the correct conclusion, but whether there is some basis in the record for its action.³³ Substantial evidence is more than a mere scintilla. However, even if the evidence in the record actually preponderates against the agency's decision, it can nonetheless amount to substantial evidence.³⁴ The court will presume the agency's findings, inferences, conclusions

³⁰ TEX. GOV'T CODE ANN. §2001.174.

³¹ *H.G. Sledge, Inc. v. Prospective Inv. & Trading Co.*, 36 S.W.3d 597, 602 (Tex.App.—Austin 2000, pet. denied).

³² *Stratton v. Austin ISD*, 8 S.W.3d 26, 30 (Tex.App.—Austin 1999, no pet.)

³³ *City of El Paso v. Public Util. Comm'n*, 883 S.W.2d 179, 185 (Tex. 1994).

³⁴ *State v. Public Util. Comm'n*, 883 S.W.2d 190, 204 (Tex. 1994).

and decisions are supported by substantial evidence, and the burden to show otherwise is on a party appealing the agency's decision.³⁵

BFI is confident that the record here regarding the appropriateness of 24/7 operating hours can and would readily withstand judicial review under the substantial evidence standard. By finding that BFI met its burden of proof under the *prima facie* or traditional preponderance of evidence *prima facie* method, the Commissioners can sidestep any alleged error of law associated with the ALJ's burden-shifting exercise – in particular, if the Commissioners explain in any finding that BFI satisfied its burden under the traditional method necessarily that the protestants did not satisfy their burden under the burden-shifting approach.

VII. POLICY CONSIDERATIONS

In addition to the evidentiary reasons, there are policy reasons that support issuance of the permit with 24/7 operating hours. Those reasons, which are discussed in BFI's exceptions to the PFD, include the following:

- 24/7 hours keep large vehicles out of the downtown commercial and school areas during times of heavier commuter, pedestrian and bike traffic;
- 24/7 hours limit the number of vehicles using narrow alleyways and driveways during business hours;
- 24/7 hours ensure prompt collection of wastes after bars and restaurants close;
- 24/7 hours eliminate potential queues of diesel trucks waiting to enter the landfill after it has been closed (thus reducing diesel emissions in a near nonattainment area);
- Competitors in the MSW business should be permitted to operate during similar hours so as to prevent different permit conditions to result in unfair competitive advantages; and

³⁵ *Stratton*, 8 S.W.3d at 30.

- The Commission should not reward protestants, such as TJFA, whose *“participation in this case was a transparent attempt by Mr. Gregory to delay, complicate, increase the cost of, and with luck defeat BFI’s application so as to gain a business edge on BFI”*³⁶ by reducing BFI’s hours of operation to less than TDSL’s. The result will be that TDSL would absorb some of BFI’s lost business and effectively be rewarded with the very business advantage the ALJ deplored in his PFD as an abuse of the environmental permitting process.

VIII. COMPROMISE HOURS SHOULD NOT BE IMPOSED

BFI is aware that the Commission has recently issued a 24/7 permit to Regional Land Management Services, Ltd. and two landfill permits with waste acceptance hours greater than 7 to 7 but less than 24/7. Specifically, the Mesquite Creek Landfill and the Williamson County Landfill are authorized to accept waste Monday through Friday from 4:00 a.m. or 5:00 a.m., respectively, until 8:00 p.m. and on Saturday from 4:00 a.m. to 3:00 p.m. and 6:00 a.m. to 4:00 p.m., respectively. These two recent decisions are distinguishable and similar compromise hours should not be imposed on BFI in this case.

The most important distinction is that neither of these two landfills had incorporated any multiple design and operating concessions into their applications similar to the concessions BFI made in this case. As discussed, the key concession is the agreed date certain to cease accepting waste. To the best of BFI’s knowledge no other landfill has ever made a similar concession. The end date was calculated based upon a 24/7 schedule. This good faith agreement and the total lack of testimony/evidence addressing operating hours by any protestant in the BFI case are two very significant differences.

The second distinguishing feature is that the Mesquite Creek and Williamson County Landfills agreed to these “compromise” hours as the result of negotiations with the protestant parties. In the case of Mesquite Creek, a specific separate settlement agreement was reached

³⁶ May 8, 2009 PFD, p. 129.

with Guadalupe County which, in due course, was incorporated into the permit. The applicant, WMTX, did not except to the “compromise” hours proposed in either case.

The third distinguishing factor is that neither the Mesquite Creek nor Williamson County landfills had been historically operating under a 24/7 permit. Consequently, their collection and disposal operations were not all predicated on the ability to accept waste throughout the entire day, as BFI has done at Sunset Farms since 1982. To the contrary, the “compromise” hours in the case of both Mesquite Creek and Williamson County represented expanded hours of operation beyond their existing permitted hours.

The final reason is that limiting BFI’s hours, despite no evidence to support such a decision (as evidenced by the ALJ’s express Finding to that effect) would result in an unfair economic benefit to a protestant/competitor who, as found by the ALJ, participated in this case for the express reason of trying to gain an economic advantage. This would reward that conduct and yield that economic benefit.

IX. REQUESTED RELIEF

For all of the foregoing reasons, BFI requests that the Commissioners replace Finding of Fact No. 286, as amended by the ALJ, with the following:

286. The evidence establishes that the Landfill’s existing and proposed 24/7 operational hours are appropriate.³⁷

BFI further requests that the Commissioners replace Conclusions of Law Nos. 7, 55 and 68, as amended by the ALJ, with the following:

³⁷ BFI suggests that the Commissioners include the following language as an explanation in support of this change in Finding of Fact 286: “The Commission finds consistent with the requirements of §361.0832(c) of the Texas Health and Safety Code that Finding of Fact 286 was not supported by the great weight of the evidence.”

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 on which it had the burden of proof.
55. The operating hours proposed in the Application comply with statutory and regulatory standards and are appropriate. No protestant has shown these operating hours to be inappropriate.³⁸
68. Pursuant to the authority of, and in accordance with applicable laws and regulations, the attached Permit should be granted.

Finally, BFI requests that the proposed language in the draft permit regarding operating hours remain unchanged to reflect the 24/7 operating hours currently recommended by the ALJ.

X. CONCLUSION AND PRAYER


The difference in 7-to-7 weekday-only hours versus 24/7 operating hours is stark: 60 hours per week versus 168 hours, with no weekend hours at all under the former. The evidentiary record here clearly supports 24/7 operating hours – whether the traditional burden of proof approach is used or the burden-shifting approach employed by the ALJ is used. As such, BFI requests that, in the final order, the Commissioners find that BFI met its burden to show that 24/7 hours are appropriate. The Commissioners can then also note in the final order that such a finding necessarily means that the protestants did not meet their burden even if the ALJ’s

³⁸ BFI suggests that the Commissioners include the following language as an explanation in support of the changes to proposed Conclusions of Law Nos. 7 and 55 because the statute requires these recitations in order to justify any changes to the PFD. BFI reiterates that it makes this request to better fortify the ultimate PFD from appeal. “The Commission disagrees with the ALJ that the burden of proof was on OPIC or any other protestant regarding the appropriateness of the hours of operation and finds, consistent with the requirements of §361.0832(d) of the Texas Health and Safety Code, that Conclusions of Law Nos. 7 and 55 were clearly erroneous in light of precedent and applicable rules and that Conclusions of Law Nos. 7 and 55 should be rejected for reasons of policy as provided for by §361.0832(f) of the Texas Health and Safety Code. Moreover, the Commission concludes that, if the burden of proof was shifted per the ALJ’s analysis, OPIC and the other protestants failed to meet any such burden for the same reason that they failed to meet their burden of production.”

burden-shifting approach is used. BFI prays for 24/7 operating hours in the final permit that is issued, and for any and all other relief to which it is entitled.

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