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

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**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 § STATE OFFICE OF
PERMIT NO. MSW-1447A § ADMINISTRATIVE HEARINGS**

**APPLICANT BFI WASTE SYSTEMS OF NORTH AMERICA, LLC'S
(1) RESPONSE TO NNC'S MOTION FOR CONTINUANCE AND FOR
ADDITIONAL TIME TO FILE PRE-FILED TESTIMONY; (2) RESPONSE
TO NNC'S "RESPONSE TO FILINGS"; AND (3) REQUEST FOR HEARING**

Applicant BFI WASTE SYSTEMS OF NORTH AMERICA, LLC (BFI) files this its response in opposition to Northeast Neighbor Coalition's (NNC's) "Response to Filings by City of Austin and BFI Waste Systems of North America, LLC and Giles Holdings, LP., Motion for Continuance and Motion for Additional Time to File Pre-filed Testimony." BFI also requests a hearing on NNC's motions and this response.

**I. RESPONSE TO MOTION FOR CONTINUANCE
AND MOTION TO EXTEND SCHEDULING ORDER**

A. The motion for continuance is defective.

As a threshold matter, NNC's motion for continuance is defective – for a variety of reasons. First and foremost, it is not supported by an affidavit. TEX. R. CIV. P. 251 & 252 (affidavit required in support of motion for continuance); *see Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986) (same). Second, no proposed date(s) or range of dates are offered in the motion. *See* 1 TAC §§155.30(b)(2)(A) & (e)(4) (proposed dates or range of dates required under SOAH rules). Third, the motion does not contain a certificate of conference (and, indeed, counsel for NNC made no attempt to confer with counsel for BFI or Giles). *See id.* at §§155.30(b)(2)(B) & (e)(3)) (conference required under SOAH rules). Finally, the motion does

not contain any mention of other continuances sought or obtained in this proceeding. *See id.* at §155.30(e)(1)) (discussion of prior continuances required under SOAH rules).

B. NNC's purported "surprise" is no basis for granting a continuance or extension.

In its motion NNC expresses "surprise" about BFI and Giles' agreement with the City of Austin, and cites this surprise – and its concordant lack of preparation – as a basis for obtaining (1) a continuance of unspecified duration of the hearing on the merits, and (2) an extension of unspecified duration to fundraise, retain one or more expert witnesses, and then prepare and file additional pre-filed testimony of such witnesses. NNC's surprise is in and of itself surprising. Parties settle all the time in multi-party cases at various points in the litigation – including at the steps of the courthouse on the eve of trial. Indeed, it is commonplace in multi-party litigation like this that at least some parties resolve their differences amicably prior to the hearing on the merits. Parties and their counsel must anticipate this as part and parcel of the development of any case.

NNC is represented by able counsel, and has been since well before this application was referred to SOAH. Twenty-six issues – including land use compatibility – were referred to hearing in TCEQ's Commissioners' order of referral. NNC has had ample opportunity to analyze these issues and anticipate the expert testimony it needs, if any, to address any, some or all of these issues – especially since most, if not all, of the referred issues were suggested by the NNC and the aligned parties. NNC made a conscious decision not to designate its own expert witnesses at the time designations had to be made under the agreed-upon procedural schedule, and made no effort to do so through the date pre-filed testimony was due. It also apparently did not have a written agreement to co-designate, co-retain or otherwise "share" experts with any party – including the City of Austin.

Nor should NNC be surprised by the terms of the agreement between BFI, Giles and the City. That agreement addresses issues that have been referred to hearing and matters about which NNC has previously expressed concern – including the implementation of supplemental drainage, erosion, sedimentation and water quality control features at the site and the recording of a restrictive covenant that further memorializes BFI's promise to cease accepting waste for disposal at the site on or before November 1, 2015.

Neither NNC's surprise regarding the BFI/Giles/City Austin agreement nor its lack of preparation regarding an issue that was quite specifically referred to hearing constitute sufficient cause for granting either a continuance of the hearing or an extension of the existing scheduling conference. *See State v. Wood Oil Distrib.*, 751 S.W.2d 863, 865 (Tex. 1988) ("[T]he failure of a litigant to diligently utilize the rules of civil procedure for discovery purposes will not authorize the granting of a continuance."); *see also* TEX. R. CIV. P. 252 (requiring moving party to show that he has used due diligence to procure testimony).

C. The relief NNC seeks would unnecessarily delay this proceeding.

A continuance, if granted, would unnecessarily delay this proceeding and harm BFI. The current (agreed) procedural schedule in the case is already pushing the one-year deadline contained in the TCEQ Commissioners' order of referral. BFI's application has already been on file with the TCEQ for almost three years. The amended permit will likely not be issued for perhaps six to eight months if BFI prevails on the merits. BFI needs to secure its permit amendment sooner rather than later due to diminishing disposal capacity at the facility under the existing permit. Further delay would also risk overlapping with the procedural schedule in the

Austin Community Landfill proceeding¹ involving Waste Management of Texas, Inc. and many of these same protestants – an overlap that the protestants have previously cited as a basis for seeking delay in one or both of the proceedings at various points in time.

II. RESPONSE TO NNC'S "RESPONSE" TO THE BFI/GILES/AUSTIN AGREEMENT

In its pleading, NNC also indicates that it is responding to the BFI/Giles/Austin agreement – though it is unclear what the nature of NNC's response to the filing really is. Indeed, NNC's "response" to the filing of the agreement appears to be a procedural red herring because it contains nothing but speculation regarding the enforceability of that agreement and does not ask for any form of relief vis-à-vis the agreement itself. Even if NNC is seeking some sort of relief pertaining to the agreement, nothing before the ALJ suggests that NNC has standing to challenge the enforceability of an agreement it is not party to.

Settlement is a highly favored method of resolving disputes among litigants. *Forest Oil Corp. v. McAllen*, ___ S.W.3d ___, 51 TEX. SUP. CT. J. 1309, 2008 WL 3991058, *5 (Tex., Aug. 29, 2008). In this case, the City of Austin has extracted promises from BFI that include additional features pertaining to drainage, erosion and sediment controls at the site and the protection of surface waters at and around the site. BFI and Giles have also agreed to the filing of the restrictive covenant that further binds the future use of the property for handling and disposal of solid waste – including (once again) a commitment to stop accepting waste for disposal at the site on or before November 1, 2015. These facets of the agreement address issues which NNC and its aligned parties have previously complained about, and resolves them in a manner that is beneficial not only to the City but also to NNC and the aligned parties. It would be manifestly unfair to BFI to turn an arms-length, negotiated agreement that addresses and

¹ SOAH Docket No. 582-08-2186; TCEQ Docket No. 2006-0612-MSW; Application of Waste Management of Texas, Inc. for Permit No. MSW-249-D.

resolves the City's expressed concerns with the application and potentially streamlines this proceeding into an exercise of undue delay and an opportunity for NNC and its cohorts to engage in a game of pure political football during a period of undefined delay.

III. REQUEST FOR ORAL HEARING

BFI requests an oral hearing on NNC's motion for continuance and motion to extend the procedural schedule.

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing document was served on the following counsel/parties of record by certified mail (return receipt requested), regular U.S. mail, facsimile transmission and/or hand delivery and via e-mail on November 12, 2008:

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