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December 8, 2008

***Via Fax: (512) 239-3311
& U.S. First Class Mail***

LaDonna Castañuela
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Office of Chief Clerk, MC-105
P. O. Box 13087
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Re: SOAH DOCKET NO. 582-08-2178; TCEQ DOCKET NO. 2007-1774-MSW;
Application of BFI Waste Systems of North America, Inc. Permit No. 1447A

Dear Ms. Castañuela:


Enclosed in connection with the above referenced proceeding are an original and copy of **Northeast Neighbors Coalition's Response to BFI Waste Systems of North America, L.L.C.'s Objections to Prefiled Testimony and Exhibits**. Please return a file stamped copy to us in the envelope provided for your convenience.

All other parties of record have been provided a copy of this document pursuant to the attached service list.

Thank you for your assistance. Should you have any questions, please feel free to call me at (713) 524-1012.

Sincerely,

BLACKBURN CARTER, P.C.

by 
Zona Amerson, Legal Assistant

Enclosures

C: Service list

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

APPLICATION OF BFI WASTE § BEFORE THE STATE OFFICE
SYSTEMS OF NORTH AMERICA, §
LLC, FOR A MAJOR AMENDMENT § OF
TO TYPE I MSW PERMIT NO. MSW- §
1447A § ADMINISTRATIVE HEARINGS

**NORTHEAST NEIGHBORS COALITION'S RESPONSE TO APPLICANT BFI WASTE
SYSTEMS OF NORTH AMERICA, L.L.C.'S OBJECTIONS TO
PREFILED TESTIMONY AND EXHIBITS**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE WILLIAM E. NEWCHURCH:

COMES NOW Northeast Neighbors Coalition ("NNC"), Protestant herein, and files this
their response to the Applicant, BFI Waste Systems of North America, L.L.C.'s ("BFI"),
Objections to Prefiled Testimony and Exhibits. In support thereof NNC respectfully shows the
following:

JEREMIAH BENTLEY

JB-2, JB-4

The Applicant objects to exhibit JB-2 and JB-4 on the basis that the exhibits are an out of
court statement, are hearsay, and separately, a violation of SOAH Order No. 1 requiring question
and answer testimony.

JB-2 is signed by Mr. Bentley and properly authenticated by a notary public. TEX. R.
EVID. § 901(a) states that "the requirement of authentication or identification as a condition
precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter
in question is what its proponent claims. (b) By way of illustration, but not by way of limitation,
the following are examples of authentication or identification conform to the requirements of the
rule: 1) testimony of witness with knowledge. Testimony that a matter is what it is claimed to
be;"

According to commentary on rule 901, the standard for admissibility “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” According to Texas Rules of Evidence Handbook regarding authentication and identification, examples of authenticating evidence by testimony of a witness with knowledge that the evidence is what its proponent claims include testimony by a party that he executed and signed a document. Texas Rules of Evidence Handbook, Eighth Edition 2008-2009, Peter Hoffman, page 954-955. Mr. Bentley identifies in his prefiled testimony that exhibit JB-2 is an affidavit filled out, signed and is true and correct to the best of his knowledge. (Page 2, lines 22 – 25.)

In the alternative, NNC requests that JB-2 and JB-4 be admitted as non-hearsay. A statement is not hearsay if it is not offered for the truth of the matter asserted, but rather to show the statement was made. See TEX. R. EVID. § 801: *O'Connor v. National Motor Club, Inc.*, 385 S.W. 2d 558, 560-561 (Tex. Civ. App.-Houston 1st Dist. 1964) (complaint letters were admissible for the limited purpose of showing complaints were made, and not to prove the merits of the complaints). Here, the existence of the affidavits is relevant in this matter to show that Mr. Bentley and his neighbors are concerned enough about the numerous problems with the existing landfill, that they have made sworn statements under threat of perjury. Therefore they are being offered to show that the statements were made. *O'Connor v. National Motor Club, Inc.*, 385 S.W. 2d at 560-561.

Similarly, exhibit JB-4 is identified as affidavits filled out by residents of Harris Branch and delivered to Mr. Bentley for submission in this hearing. (Page 6, line 30 – page 7, line 2.) These affidavits have not been submitted necessarily for the issues raised in each individual affidavit, although each one has been filled out by the individual resident and notarized by a

notary public. These affidavits are included in the testimony of Mr. Bentley, president of the Homeowners Association and of Northeast Neighbors Coalition to demonstrate the level of concern and number of concerned citizens in the neighborhood, and should be admitted on that basis.

Although JB-2 is offered as an exhibit to Mr. Bentley's prefiled testimony, all of the information contained in JB-2 regarding the Sunset Farms landfill is contained in question and answer form in JB-1, the prefiled testimony.

With regard to the concerns in the affidavit, note that Mr. Bentley's prefiled testimony speaks to the concerns as follows: Odor, the question and answers are presented on page 2, lines 27 - page 3, line 21. Birds and buzzards are discussed on page 3, lines 21 - page 4, line 7. Windblown trash is discussed on page 4, lines 8 - 16. Similarly dust is discussed on page 4, lines 17 - 21. Mud and dirt on the neighborhood streets are discussed on page 4, line 22 - page 5, line 2.

JB-3

With regard to Exhibit JB-3, the Applicant objects to the entire exhibit on the basis of hearsay and additionally to individual parts of the exhibit (assuming we are following the Exhibit "B" chart submitted by the Applicant). The Applicant complains of hearsay with the testimony on page 6, line 4 - line 9 and page 6, lines 16-23. JB-3 is identified in prefiled testimony on page 5, line 3 - page 6, line 15. The letters to the TCEQ memorialized a meeting held June 2, 2007. (Page 5, line 25 - page 6, line 3.) In accordance with the discussion above regarding Rule 901, Mr. Bentley identified the letters as those he wrote and they should be admitted on that basis. In the alternative, we ask that Exhibit JB-3 be admitted as non-hearsay demonstrating that letters were written to the TCEQ.

With regard to page 6, lines 4 - 9, Mr. Bentley identifies that as president of M.N.C., he has been approached by residents on the Westside of the landfill regarding runoff. The only hearsay is that “the runoff from the site is destroying their backyard”. The fact that Mr. Bentley has received complaints is within his personal knowledge and not hearsay.

With regard to testimony on page 6, line 16 – 23, lines 16 – 20 are not hearsay. Again Mr. Bentley may testify that residents have approached him in his capacity as president of the Harris Branch Property Owners Association, and he remembers reading an article in the Austin American Statesman again within his personal knowledge. The testimony on page 6, line 18 is not hearsay but rather Mr. Bentley’s own conclusion that the landfill would close when the capacity in the permit has been reached.

JOYCE BEST

Best-2

The applicant objects to exhibit Best-2 on the basis that the exhibit is hearsay and a violation of SOAH Order No. 1. We repeat that arguments made on behalf of Mr. Bentley, specifically including Rule 901, and in the alternative, we ask to admit Best-2 as non-hearsay.

Ms. Best’s prefiled testimony, presented in question and answer form identifies the same concerns as her affidavit. With regard to odor, the questions and answers are presented on page 4, line 11 - page 5, line 4, page 6, lines 4 - 120. Birds and buzzards, are discussed on page 5, line 5 - 7. Truck traffic is discussed on page 5, line 8 - 20. Windblown trash and dust are discussed on page 5, line 21 - 29. Noise is discussed on page 5, line 30 - page 6, line 3.

Best-4

The applicant complains that Ms. Best would not be allowed to testify about the statements of Ms. Mitchell from the stand and must not be allowed to submit Ms. Mitchell's statements through hearsay within the hearsay exhibit. It is clear that NNC moves for admission of Best 4 as a copy of the odor report form that Ms. Best created. (See testimony on page 8, lines 3 - 7.) NNC is clear and it moves to admit Best 4 into evidence, not for the truth of the matter, but as exemplary of the type of information that was gathered and submitted to Joyce Best. (See testimony on page 8, lines 16 - 18.)

Best-5

Similarly, Best-5 is a compilation of odor reporting forms. Again they were not submitted on the basis of the truth of the matters asserted therein, but as a compilation of odor complaints submitted by Ms. Best to the TCEQ. Best-5 demonstrates the level of concern and number of neighbors with concerns in the neighborhood.

DELMER ROGERS

DR-2

The Applicant objects to exhibit DR-2 on the basis that the exhibit is hearsay and a violation of SOAH Order No. 1. Mr. Rogers filled out the affidavit, signed it, and had it notarized. We repeat the arguments made on behalf of Mr. Bentley, regarding Rule 901 as discussed above, and in the alternative ask to admit DR-2 as non-hearsay. As far as Order No. 1 is concerned, Mr. Rogers' prefiled testimony, in question and answer form, identifies the concerns expressed in the affidavit.

With regard to odor, questions and answers are presented on page 2, lines 30 - page 3, line 7. Birds and buzzards, are discussed on page 3, line 8 - page 4, line 2. Traffic issues, traffic

accidents, mud and dirt, and slippery conditions are discussed on page 4, line 3 - line 30. Windblown trash is discussed on page 4, line 31 - page 5, line 11. Drainage, is discussed on page 5, line 12 - line 24. Noise is discussed on page 5, line 25 - page 6, line 12.

EVELYN REMMERT

ER-2, ER-8

The Applicant objects to the Affidavit of Ms. Remmert (ER-2) and the Affidavits of six of her neighbors (ER-8) that were part of her prefiled testimony. The Applicant objects that all the affidavits are impermissible hearsay. These statements are not hearsay because they are not being offered for the truth of the matters asserted. Here, the existence of the affidavits is relevant in this matter to show that Ms. Remmert and her neighbors are concerned enough about the numerous problems with the existing landfill, that they have made sworn statements under threat of perjury. Therefore they are being offered to show that the statements were made. *O'Connor v. National Motor Club, Inc.*, 385 S.W.2d at 560-561.

Each of the concerns identified in exhibit ER-2, are presented in question and answer format by the witness in her prefiled testimony. With regard to odor, questions and answers are presented on page 2, line 13, page 3, line 11. Noise is discussed on page 3, line 21 - line 26, page 7, line 8 - 15. Birds are discussed on page 3, line 27- page 4, line 18. Truck and traffic are discussed on page 4, line 19 - page 5, line 6. Windblown trash and dust are discussed on page 5, line 7 - page 6, line 18. Dust is discussed on page 6, line 19 - page 7, line 7. Drainage is discussed on page 7, line 17 - 26.

ER-3

ER-3 is identified by Ms. Remmert in prefiled testimony as an email complaint sent to the TCEQ. (Page 3, line 15 – 19.) It should be admitted as non-hearsay as discussed above

demonstrating the level of concern exhibited by Ms. Remmert in taking the time to compose and send it.

ER-7

The Applicant objects to the journal entries recording observations made by Ms. Remmert and offered as exhibit ER-7 to her prefiled testimony. The Applicant contends that the exhibit is inadmissible hearsay. Exhibit ER-7 is admissible under the present sense impression exception. TEX. R. EVID. § 803(1). Present sense impressions gain their reliability from the virtual contemporaneity of the making of the out-of-court statement and the occurrence of the event described or explained. See *Houston Oxygen Co. v. Davis*, 161 S.W.2d 474, 477 (Tex. 1942). Here, the substantial contemporaneity of the events observed and the statements negate the likelihood of deliberation or conscious misrepresentation. During live testimony, Ms. Remmert will be able to testify how soon the journal entries were made after each observation. The Applicant was provided with this exhibit during Ms. Remmert's deposition on Oct. 28, 2008, and will have another opportunity to cross-examine during the hearing.

Should Exhibit ER-7 not be found to fall under the hearsay exception, in the alternative, Protestant requests that it be admitted as non-hearsay. A statement is not hearsay, if it is not being offered for the truth of the matter asserted, but rather to show the statement was made. See TEX. R. EVID. § 801; *O'Connor v. National Motor Club, Inc.*, 385 S.W.2d 558, 560-561 (Tex. Civ. App. Houston 1st Dist. 1964) (complaint letters were admissible for the limited purposes of showing that the complaints were received, and not to prove the merits of the complaints). Here, the making of the statement is relevant because it shows that Ms. Remmert is concerned enough about the impacts from the landfill to record those concerns in her journal.

EVAN WILLIAMS

EW-2

The Applicant objects to exhibit EW-2 on the basis that the exhibit is hearsay and a violation of SOAH Order No. 1. We repeat that arguments made on behalf of Mr. Bentley, specifically including Rule 901, and in the alternative, we ask to admit EW-2 as non-hearsay.

With regard to odor, questions and answers are presented on page 2, lines 8 - 18. Birds and buzzards are discussed on page 2, line 19 - 25. Traffic is discussed on page 2, line 26 - 30. Trucks are discussed on page 3, line 1 - 9. Windblown trash and dust are discussed on page 3, line 10 - 18. Drainage is discussed on page 3, line 19 - 31.

Page 4, line 22 – page 5, line 11.

The Applicant objects to Mr. Williams' testimony because he is not an expert, but admits that Mr. Williams is testifying with a general understanding of land use regulation. It is clear Mr. Williams is not testifying as an expert witness (see testimony at page 4, line 22 – 24). He testified he has knowledge about rules and regulations of the City of Austin to some extent. He has knowledge of various land use regulations and designations applicable to this portion of the City in a general sense.

TEX. R. EVID. § 701 allows opinion testimony by lay witnesses. It provides that a lay witness may testify in the form of opinions or inferences only if the proffered opinions or inferences are rationally based on the witness' perception TEX. R. EVID. § 701(a) and are helpful either to a clear understanding of the testimony or to the determination of a fact in issue. TEX. R. EVID. § 701(b).

Rule 701 does not preclude testimony by business owners or officers on matters that relate to their business affairs. The helpfulness standard of Rule 701 leaves the admissibility

decision largely to the trial judge who is able to most accurately gauge the need for the opinion, the centrality of the opinion to the material issues, the adequacy of the factual basis for the opinion, and the ability of the witness on direct or cross-examination to further specify and clarify his perceptions. Texas Rules of Evidence Handbook, page 692. See, *Laproad v. Laprade*, 784 S.W. 2d 490, 492 (Tex. Civ. App.- Ft. Worth 1990): “If a witness has personal knowledge of facts from which an opinion is derived, a rational connection exists between the opinion and the facts, and such is helpful, then it is within the Court’s discretion to allow the lay person to express an opinion on the value” quoting, *Soden v. Freightliner Corp.*, 714 F.2d 498, 511 (5th Cir. 1983). Mr. Williams has personal knowledge based on his business experience in a general sense and is testifying to that extent.

JOHN WILKINS

JAW-2

The Applicant objects to exhibit JAW-2 on the basis that the exhibit is hearsay and a violation of SOAH Order No. 1. We repeat that arguments made on behalf of Mr. Bentley, specifically including Rule 901, and in the alternative, we ask to admit JAW-2 as non-hearsay.

With regard to odor, questions and answers are presented on page 1, line 23 - page 2, line 6. Birds and Buzzards are discussed on page 2, line 7 - 10. Traffic is discussed on page 2, line 11 – 16.

MARK MCAFEE

Hearsay page 3, line 16 – 18.

No response.

Page 4, line 7 – 18.

This testimony involves questions regarding TCEQ investigator Barry Kalda. The only hearsay in this line of questions is the answer contained on page 4, lines 15 – 16. The information that Mr. McAfee knows Mr. Kalda, and has met with him at the Barr Mansion are within his personal knowledge. Similarly, he can interpret a conversation with Mr. Kalda based on his personal knowledge.

ROBERT ANDREWS

RGA-1

The Applicant complains that Mr. Andrews was never identified as a person with knowledge of relevant facts in disclosures provided pursuant to BFI's request under TRCP 194.1 and Mr. Andrews was never identified as a witness in response to specific interrogatories. We agree that Mr. Andrews was not identified as a person with knowledge, nor was he identified as a witness in response to specific interrogatories. However, in defense of this failure, NNC respectfully submits that in order to respond to a request for persons with relevant knowledge, NNC would have had to list every single person in the Harris Branch subdivision and surrounding communities. That information could easily have been a thousand names or more. NNC identified as many persons with knowledge as were known at the time of submittal. Additionally, the affidavits, which identified many more persons with knowledge, and included Mr. Andrews' affidavit were submitted to Applicant's counsel on October 17, 2008 nearly three weeks prior to prefiled testimony being submitted. Additionally, Mr. Andrews has been scheduled for deposition and has been cooperative in all requests by the Applicant.

RGA-2

The Applicant objects to exhibit RGA-2 on the basis that the exhibit is hearsay and a violation of SOAH Order No. 1. We repeat that arguments made on behalf of Mr. Bentley, specifically including Rule 901, and in the alternative, we ask to admit RGA-2 as non-hearsay. Mr. Andrews concerns are identified on page 2, lines 1 – 7 of his testimony.

MARION CHILDRESS-USHER

MCU-1

We repeat the argument made above for Mr. Andrews regarding NNC's failure to disclose Ms. Childress-Usher as a person with knowledge and as a witness.

MCU-2

The Applicant objects to exhibit MCU-2 on the basis that the exhibit is hearsay and a violation of SOAH Order No. 1. We repeat that arguments made on behalf of Mr. Bentley, specifically including Rule 901, and in the alternative, we ask to admit MCU-2 as non-hearsay.

See her prefiled testimony on page 2, lines 1 – 13 for the questions and answers regarding her concerns.

MARCELINA COOK

MCO-1

We repeat the argument made above for Mr. Andrews regarding NNC's failure to disclose Ms. Cook as a person with knowledge and as a witness.

MCO-2

The Applicant objects to exhibit MCO-2 on the basis that the exhibit is hearsay and a violation of SOAH Order No. 1. We repeat that arguments made on behalf of Mr. Bentley, specifically including Rule 901, and in the alternative, we ask to admit MCO-2 as non-hearsay.

Her concerns are identified on page 2, lines 3 – 21 of her testimony. With regard to Ms. Cook’s testimony regarding her family’s illnesses, she does not allege that these illnesses, allergies and sinus problems are specifically caused by the landfill. However, she has concerns about the landfill, and as a lay witness she is able to present these concerns. As the Applicant knows, we are not presenting medical testimony regarding health effects arising from landfill activities.

JENNIFER WELLS

JWE-1

We repeat the argument made above for Mr. Andrews regarding NNC’s failure to disclose Ms. Wells as a person with knowledge and as a witness.

JWE-2

The Applicant objects to exhibit JWE-2 on the basis that the exhibit is hearsay and a violation of SOAH Order No. 1. We repeat that arguments made on behalf of Mr. Bentley, specifically including Rule 901, and in the alternative, we ask to admit JWE-2 as non-hearsay.

Ms. Wells identifies her concerns on page 2, lines 3 – 9 of her testimony.

BARBARA WINCHELL

BWI-1

We repeat the argument made above for Mr. Andrews regarding NNC’s failure to disclose Ms. Winchell as a person with knowledge and as a witness.

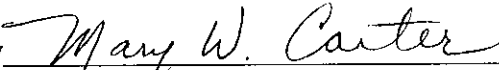
BWI-2

The Applicant objects to exhibit BWI-2 on the basis that the exhibit is hearsay and a violation of SOAH Order No. 1. We repeat that arguments made on behalf of Mr. Bentley, specifically including Rule 901, and in the alternative, we ask to admit BWI-2 as non-hearsay.

Her concerns are identified on page 2, lines 1-13 of her testimony.

Respectfully submitted,

BLACKBURN CARTER, P.C.

by 

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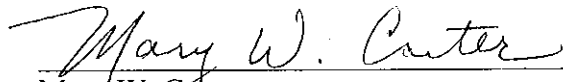
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CERTIFICATE OF SERVICE

On this 8th day of December, 2008, the undersigned hereby certifies that a true and correct copy of the foregoing instrument was served on all attorneys/parties of record as indicated below for each.



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