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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 28, 2009

VIA HAND DELIVERY

Ms. LaDonna Castañuela, Chief Clerk
Office of Chief Clerk
Texas Commission on Environmental Quality MC 105
P.O. Box 13087
Austin, TX 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 MAY 28 PM 3:59
CHIEF CLERKS OFFICE

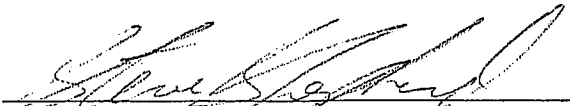
RE: SOAH Docket No. 582-08-2178
TCEQ Docket No. 2007-1774-MSW
*Application of BFI Waste Systems of North America, LLC. for a Major Permit
Amendment to the Existing Type I Municipal Solid Waste Landfill in Travis County,
Permit No. 1447A*

Dear Ms. Castañuela:

Enclosed for filing, please find an original and eight (8) copies of the **Executive Director's Exceptions To Proposal For Decision and Order**. Please file-stamp the original and the copies and return one copy to me.

If you have any questions or comments, please call me at (512) 239-0464. Thank you for your assistance in this matter.

Sincerely,


Steven Shepherd, Staff Attorney
Environmental Law Division, MC 173

Enclosures

cc: Mailing list (attached)

The Hon. William G. Newchurch (*Via e-mail and fax*)
Administrative Law Judge
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AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: BFI WASTE SYSTEMS OF NORTH AMERICA INC
SOAH DOCKET NUMBER: 582-08-2178
REFERRING AGENCY CASE: 2007-1774-MSW

STATE OFFICE OF ADMINISTRATIVE
HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ WILLIAM G. NEWCHURCH

REPRESENTATIVE / ADDRESS

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xc: Docket Clerk, State Office of Administrative Hearings

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

2009 MAY 28 PM 3: 59

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

**EXECUTIVE DIRECTOR'S EXCEPTIONS TO
PROPOSAL FOR DECISION AND ORDER**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) respectfully submits these exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision and Order in the above-referenced matter. The ED generally agrees with the ALJ's recommendations except his interpretation of the rule governing operating hours. In addition to addressing operating hours, the ED has included a list of what appear to be relatively minor inadvertent errors in the PFD and Order.

Operating Hours

Issue X is whether the landfill's operating hours are appropriate. BFI proposes to retain the operating hours authorized in its existing permit of 24 hours per day, seven days a week, and the ED included the requested operating hours in the Draft Permit. The ALJ recommends restricting the operating hours to the "norm" or "standard" hours provided in the rule. Rule 30 TAC § 330.118(a) provides that the waste acceptance hours of a municipal solid waste 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 for the facility. It also provides that transportation of materials and heavy equipment operation

must not be conducted between the hours of 9:00 p.m. to 5:00 a.m., unless otherwise approved in the authorization for the facility.

The ALJ interprets this rule to prescribe the operating hours designated in the rule as the standard or norm, and that the evidence does not support the proposed deviation from the rule. The ALJ's proposed Finding of Fact number 286 states: "[T]he evidence fails to show that it is appropriate for the Landfill's operational hours to be different from those generally prescribed by the Commission's rules." The ALJ's position appears to be that BFI had the initial burden to prove that it should be authorized to exceed the hours identified in the rule, and that BFI failed to sustain that burden.

The ED interprets this rule differently. The ED understands this rule to mean that applicants can propose any hours without providing justification in an application to exceed the hours designated in the rule, and that the Commission may restrict the hours based on considering potential impacts on the community and applicants' need for the proposed hours. Under the ED's interpretation and practice, applicants have not been required to include justification in applications to exceed the operating hours specified in the rule. If the ED or Commission becomes aware of information during the permitting process that raises concerns related to the requested operating hours, the burden may then shift to the applicant to justify the request.

The ED does not necessarily disagree with the ALJ's position that the operating hours should be restricted in this case based on considering the evidence admitted in the hearing. The ED does want to note that adopting the ALJ's interpretation would result in a significant change in how operating hours are approved in applications for new facilities and amendments for existing facilities. The ED's interpretation is based on

TCEQ's 2004 MSW rulemaking which included adopting amendments to 30 TAC §330.118(a). In that rulemaking, the Commission received comments requesting that language be added to require "...that a variance from the operating hours designated in the rule should only be granted on a showing of good cause...." The Commission declined to make the change, because adding a requirement to show good cause would not have added any objective criteria for making a determination. The Commission decided that it would continue to make these decisions on a case-by-case basis considering the potential impact on surrounding communities. See 29 Tex. Reg. 11070 (November 26, 2004) (attached). Considering the discussion in the preamble, the ED interprets the rule to mean that applicants can request operating hours that exceed the hours designated in the rule, and that the Commission will approve those hours unless the Commission is aware of information to justify restricting the proposed hours.

As to this Application, there was some evidence that impacts from the existing landfill may be greater at night when people are at home, and that impacts may be lessened by restricting operations at night. The ED notes that the issue of restricting operating hours was not a focus of hearing, and that there is limited evidence in the record to support approving the requested hours or to support restricting the requested hours. The ED is interested in considering the exceptions filed by the parties before making a final recommendation on this issue.

Errors and Recommended Changes

There appear to be several minor errors in the PFD and Order. The ED's comments will focus on the Order, but there are a few provisions in the PFD which are

noted to avoid confusion as follows:

- Line 2 of Page 27, the word "vertical" should be "lateral" to reflect that BFI decided not to expand laterally;
- Line 7 of Page 40, the heading (iv) One Well is in Detection Monitoring should be changed to reflect that detection monitoring is the initial monitoring stage, and that one well is in "assessment" monitoring which is the next stage after a significant change is detected; and
- Line 23 of Page 113, the reference to "current" rule 30 TAC § 330.118(a) should be changed by deleting the word "current", because it is not the current rule and it is the rule which applies to this Application.

Comments on the ALJ's proposed Order include:

- Findings of Fact Nos. 16 and 19 on Page 3, the reference to the notice including information specified in 30 TAC § 39.11 should be changed to refer to 30 TAC § 39.411 which applies to applications that are declared administratively complete on or after September 1, 1999 (see 30 TAC §§ 39.1 and 39.403 for applicability);
- Finding of Fact No. 22 on Page 4, the reference to providing notice to persons specified in 30 TAC § 39.13 should be changed to refer to 30 TAC § 39.413 which applies to applications that are declared administratively complete on or after September 1, 1999 (see 30 TAC §§ 39.1 and 39.403 for applicability);
- Finding of Fact No. 35 on Page 7, the word "in" should be deleted from the fourth line;

- Finding of Fact No. 104(b)(ii), line 1 on Page 17, the word "bales" should be changed to "piles";
- Conclusion of Law No. 2 on Page 49, the reference to 30 TAC §§ 39.5 and 39.101 should be changed to refer to 30 TAC §§ 39.405 and 39.501 respectively, which apply to applications that are declared administratively complete on or after September 1, 1999;
- Conclusion of Law No. 4 on Page 49, the date March 22, 2006, should be changed to reflect that the 2006 Revisions to Chapter 330 became effective March 27, 2006; and
- Order provision No. 2 on Page 58, if the Commission decides to restrict the operating hours, it should not adopt Response No. 25 of the RTC which states that the Commission is not aware of information to justify restricting the operating hours.

CONCLUSION

The ED recommends making the changes to the ALJ's Order listed above. Based on reviewing the Application and considering all of the evidence and arguments, the ED concludes that all regulatory requirements for an MSW landfill expansion have been met. Therefore, the ED stands by the preliminary decision to issue the MSW permit amendment. The ED agrees with the ALJ that it may be appropriate to restrict the operating hours, and the ED plans to make a specific recommendation on what operating hours are appropriate after considering any exceptions filed by the parties.

Respectfully Submitted,

TEXAS COMMISSION
ON ENVIRONMENTAL QUALITY

Mark Vickery, P.G.
Executive Director

Robert Martinez,
Division Director
Environmental Law Division

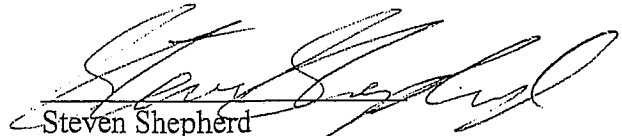


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CERTIFICATE OF SERVICE

I certify that on May 28, 2009, the foregoing was sent by e-mail, first-class mail, agency mail, or facsimile to all persons on the attached mailing list.



Steven Shepherd
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person is supposed to "inspect" each load. Similarly, the commenters asked if the qualified attendant can be the same person as the spotter or equipment operator.

Response

The commission agrees with some of these commenters, and the rule has been changed to reflect that the person monitoring incoming loads of waste material should be a trained staff person and should observe each load. The person responsible for observing each load can be a person already on staff such as an equipment operator. It is possible that existing staff could continue to perform existing responsibilities and this additional function.

Comment

For §330.117(b), TXSWANA, WMTX, and Corpus Christi commented that despite all best efforts, prohibited waste is sometimes unloaded and it may not be possible to determine who is the responsible transporter or generator. In such a situation, the operator must assume responsibility for properly disposing of such waste and should be allowed to manage them until reasonable to properly dispose of them. TXSWANA commented that the rule should allow for these occasions and provide for the operator to assume that responsibility.

Response

The commission agrees with some of these commenters, and language has been added to §330.117(b) authorizing the facility's personnel to remove the unauthorized material and allow the waste to be otherwise properly managed by the facility.

Comment

For §330.117(b), AW commented that unauthorized waste cannot always be immediately removed; therefore, the rule should allow the site manager some flexibility in when to remove the waste, up to 24 hours after disposal.

Response

Although the requirement to remove the waste immediately has been retained, the phrase "otherwise properly managed by the landfill" has been added recognizing that some temporary storage may be appropriate before the waste is transported off site.

Comment

IESI commented that the requirement to immediately remove and dispose of improperly deposited waste should be subject to compliance with other laws and regulations (e.g., waste characterization).

Response

The commission agrees with the comment that the immediate removal and disposal of improperly deposited waste should be subject to compliance with other laws and regulations. The phrase "otherwise properly managed by the landfill" has been added to provide flexibility.

Comment

One individual questioned the meaning of the phrase "... the unloading of waste in unauthorized areas is prohibited." The individual also asked what point in time does a violation exist and requested that the word "immediately" be defined.

Response

In response to the question about the meaning of the phrase "... the unloading of waste in unauthorized areas is prohibited," the commission responds that there are areas of the site that are designated for unloading of waste and elsewhere would not be authorized to deposit waste. No changes have been made in response to this question.

In response to the question about what point in time does a violation exist, a case-by-case determination would have to be made by an inspector to determine whether a facility failed to remove such waste immediately. No changes have been made in response to this question.

In response to the question about what the word "immediately" means as it pertains to the requirement to remove waste deposited in an unauthorized area, the commission responds that the word takes on the plain meaning. No changes have been made in response to this question.

Comment

For §330.117(c), AW commented that the rule should prohibit the disposal of unauthorized waste instead of the unloading of this waste because it is not always possible to recognize the waste as unauthorized until after it is unloaded.

Response

The commission disagrees with this comment. The unloading of prohibited wastes at the municipal solid waste facility must not be allowed. This concept is not new and is in the existing rules. The site operating plan should include provisions to prevent unloading of these wastes. Many of the unauthorized waste materials, such as hazardous waste, should not be taken to the facility and certainly should not be allowed to be unloaded. It is the intent of the agency not to have unauthorized waste stored at a facility any longer than necessary prior to proper disposal. A means of enforcing the requirement through surcharges is given to the landfill by new rule language. No changes have been made in response to this comment.

§330.118. Facility Operating Hours.

Comment

Commenters, including those from TXSWANA, IESI, Corpus Christi, Allied Waste, Republic, Lubbock, WMTX, Cleburne, and NSWMA, stated that the amendments to operating hours were confusing and too restrictive. Some of these commenters requested that rules include operational flexibility to respond to events so as to assure environmental protection and compliance with regulations. Some of these commenters stated that the expanded specification of the operating hours limits the activities inherent in operating the facility, including activities outside of the commission's jurisdiction including noise and light. Some of these commenters stated that the commission should not attempt to specifically regulate the time periods in which all conceivable solid waste management activities will take place at landfills, and that regulating these activities may be inconsistent with the statutory directive that the commission's methods for solid waste control be practical and economically feasible. Some of these commenters stated that the standard operating hours of 7:00 a.m. to 7:00 p.m. should be expanded to better reflect the operating hours at existing facilities. The commenters stated that the five-day limit in §330.118(b) for alternative operating hours should be removed or expanded to allow alternative hours to be authorized as needed. Some of these commenters requested the commission define "waste management activities" and "heavy equipment," so facilities

will know what activities are restricted. SLUWCD commented that the operating hours for its landfill permit are 8:00 a.m. to 5:00 p.m., Monday through Friday; and 8:00 a.m. to 12:00 noon, Saturday, so nothing changes for its facility under the proposed rule, except it will have to do more paperwork. Some of these commenters indicated that the new hours of operation will restrict operations and cause air pollution because trucks will add traffic congestion during peak traffic times, trucks will queue up outside landfills, and it may be better to operate heavy equipment at night. Some of these commenters stated that the commission must balance nearby residents' needs with those of the larger community. Some of these commenters stated that restricting waste acceptance hours will result in more illegal disposal in unauthorized locations. Some of these commenters stated that §330.118(b) should be changed to include additional reasons for granting alternative operating hours, including emergencies, natural disasters, other unique weather events, or to prevent the disruption of solid waste management activities. Some of these commenters stated that periodic activities like liner construction or emergency response activities should not be restricted.

Comments, including those from LK, Walsh Ranches, and TCE, generally stated that the rule should be more restrictive of activities that have the potential to be a nuisance to neighbors. Some of these commenters stated that "waste management activities" should include activities that can create nuisance conditions, including odor, noise, traffic congestion, dust, and lights. Some of these commenters stated that §330.118 would allow operations outside the permitted hours, but there is no requirement to document operations outside permitted hours. Some of these commenters stated that there should be a process that includes public input, and suggested a possible five-year review period. Some of these commenters stated that operating hours of landfills near residential areas should be restricted and that landfills should be required to abide by agreements made with neighborhood associations. Some of these commenters stated that a variance from the operating hours designated in the rule should only be granted on a showing of good cause. Some of these commenters stated that a 24-hour operation should not be authorized at a downtown landfill or in a populated area. Some of these commenters stated that the term "facility operating hours" is not used consistently in Subchapter F. An individual commented that the term "heavy equipment" should be defined, and that allowing the regional office to authorize emergency operating hours would be helpful.

Response

In regard to the rule being confusing and too restrictive, the commission has changed this rule to show that facility operating hours include waste acceptance hours, hours when materials may be transported on or off site, and hours when heavy equipment may operate. The rule has also been changed to indicate that transportation of materials and heavy equipment operation must not be conducted between the hours of 9:00 p.m. and 5:00 a.m., unless otherwise approved in the authorization for the facility, and that operating hours for other activities within the 9:00 p.m. to 5:00 a.m. weekday span do not require other specific approval. These changes provide operational flexibility in response to comments.

In regard to the commission regulating waste management activities and use of heavy equipment, the commission has jurisdiction to regulate those activities inherent to managing waste that have the potential to be a nuisance to neighbors. The rule has

been amended to limit regulation of facility operating hours to the activities identified in §330.118(a), and the term "conduct on-site waste management activities" has been deleted. The commission has not modified the rules to define heavy equipment at this time, because equipment varies for different facilities, and it is more appropriate to identify it on a permit-by-permit basis. The rule is not intended to restrict the use of lights at a facility. As to the statutory directive in Texas Health and Safety Code, §361.011(b), that the commission use practical and economically feasible methods to regulate the management of municipal solid waste, adopting and enforcing this rule is a reasonable exercise of the commission's powers and duties.

In regard to comments that the standard 7:00 a.m. to 7:00 p.m. operating hours allowed should be expanded to better reflect current industry standards, the rule has not been changed as to the standard hours allowed for waste acceptance. These hours are used because they include the times when most people are likely to be out of their residences at work or social activities. The standard operating hours for when materials may be transported on or off site, and when heavy equipment may operate have been adopted in consideration of comments requesting flexibility and extended operating hours. Waste facility operations outside of these hours are more likely to disturb people in residential areas.

In regard to requests to remove or expand the five-day limit in §330.118(b), related to the executive director approving alternative operating hours for special occasions, the commission has not changed this rule. It is reasonable to require facilities to anticipate most of these occasions, including holidays, and to provide notice to its neighbors by requesting those hours to be included in their permits. In addition, the limit of five days in subsection (b) does not limit authorizations for additional hours under subsection (c), related to disasters or emergencies, or under subsection (d), related to major repairs or construction.

In response to the comment from SLUWCD about it continuing to operate within the operating hours authorized in its existing permit, SLUWCD is correct that its existing authorization will remain in force. So even though the adopted standard operating hours do not include Saturday, SLUWCD can continue to operate under the hours authorized in its existing permit. As to SLUWCD's comment that it has to do more paperwork, recordkeeping has only been required to the extent it is needed to protect public health and the environment. No changes have been made in response to this comment.

As to comments that restricted operating hours can aggravate other problems like traffic congestion and air pollution, the commission has made some changes to the rule. The extended operating hours for when materials may be transported on or off site, and hours when heavy equipment may operate enables a facility to make full use of its waste acceptance hours. A facility can use those hours outside of its waste acceptance hours so it can be ready to receive waste upon opening the gates and can continue to receive waste up until closing its gate. In addition, the standard hours specified in the rule do not prevent facilities from requesting additional hours in its permit if needed to avoid traffic congestion or to protect air quality. No changes have been made in response to these comments.

In regard to comments that the commission must balance nearby residents' needs with those of the larger community for waste disposal, the commission is not authorized to consider the need for a municipal solid waste facility in deciding whether to issue a permit. The commission is authorized to consider

whether issuing a permit is incompatible with land use in the area. The adopted rule is a reasonable exercise of the commission's responsibility to protect the community around municipal solid waste facilities. No changes have been made in response to these comments.

In response to comments that restricting waste acceptance hours will result in more illegal disposal in unauthorized locations, the commission has not changed the rule. It is reasonable to have some limits on waste facility operating hours to protect communities in the area.

In regard to comments that additional reasons for granting alternative operating hours should be added and that periodic activities like liner construction or emergency response activities should not be restricted, the rules have been amended by adding subsection (c), related to disasters, emergencies, and other unforeseen circumstances that could result in the disruption of waste receipt. These additional provisions are expected to provide adequate mechanisms to manage the concerns expressed in these comments.

In regard to comments that the rule should be more restrictive of activities that have the potential to be a nuisance to neighbors, the commission has amended the rule to regulate the hours when materials may be transported on or off site and the hours when heavy equipment may operate. The amended rule provides reasonable restrictions for protecting neighbors from being affected by a facility.

In regard to documenting operations outside permitted operating hours, the rule has been changed by adding subsection (e), which requires the facility to record in the site operating record the dates and times when any alternate or additional operating hours are utilized.

In regard to comments that there should be a process that includes public input and a five-year review period as to authorized operating hours, the commission has not changed the rule. There is already an opportunity for public input in the permitting process, including the right to a hearing for a new permit or major amendment. The commission does not agree that a five-year review process is needed to reconsider authorized operating hours for a facility. The commission's authority to initiate a permit amendment and its enforcement authority can be used to remedy problems caused to a community related to excessive operating hours.

In regard to the comment that landfills should be required to abide by agreements made with neighborhood associations, the rule has not been changed. The provision in §330.111(b) that allows a facility to modify its permit to comply with these rules does not negate the limitation in §305.70(a) that restricts a facility's authority to change conditions in a permit that were incorporated in the permit as a result of negotiations between the applicant and interested persons. If the agreement with the neighborhood association is not incorporated in the permit, the commission does not have the authority to enforce the agreement.

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. Adding a requirement to show good cause would not add any objective criteria for making a determination. The commission will continue to make these decisions on a case-by-case basis considering the potential impact on surrounding communities. The commission can consider whether a facility is located in a residential area,

downtown area, or rural area under existing rules. No changes have been made in response to these comments.

In regard to comments that the term "facility operating hours" is not used consistently throughout Subchapter F, the commission has checked for these inconsistencies and concludes that the use is consistent. No changes have been made in response to these comments.

In regard to the comment that changing the rule to allow the regional office to authorize emergency operating hours will be helpful, the rule has been changed to provide this authority.

§330.119. Site Sign.

Comment

RMR and WMTX commented that this section is unclear and suggested that the language be rewritten.

Response

The commission agrees to some extent with the comment that the section is not clear. The rule has been modified to state that the facility sign must be readable from the facility entrance.

Comment

PRPC commented that posting someone's phone number is begging for prank calls, and would not serve the public in rural West Texas, and suggested using 9-1-1 or other means. IESI commented that a facility should be able to post the number for a 24-hour call service that can reach an authorized company representative instead of the number for a specific individual.

Response

In regard to the comment that posting someone's phone number on the site sign is begging for prank calls, the commission notes that the facility phone number is generally available to the public in the telephone book. The phone number could be a mobile phone issued to an on-call person or a phone number of a 24-hour response center that is responsible for relaying calls. The importance of a timely response to an after-hours emergency exceeds the desire to avoid prank calls. No changes were made in response to these comments.

§330.120. Control of Windblown Solid Waste and Litter.

Comment

Many commenters indicated that daily pickup of waste throughout the site is unreasonable. Once a pick-up crew leaves an area, more waste can blow back in. One commenter requested clarification of the intention of the rule.

Response

The daily pickup of waste throughout the site is a means to limit the availability of waste to be blown off site. The requirement to pick up waste daily does not mean that at any one point in time all waste will be picked up, but rather that the picking up of the waste will be an ongoing activity each day of operation. In reality, the operator should pick up litter as necessary, regardless of the frequency required. On the other hand, if there is no windblown waste, it is not necessary to have a litter collection crew patrol the area on a daily basis. No changes were made in response to these comments.

Comment

Wichita Falls questioned why is it necessary to pick up waste in drainage structures.