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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

HEARING ON WEDNESDAY, SEPTEMBER 9, 2009

AGENDA ITEM #1

PERMIT APPLICATION OF BFI WASTE SYSTEMS OF NORTH AMERICA, LLC

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

TRANSCRIBED ON
SEPTEMBER 11, 2009

A P P E A R A N C E S

1
2 **Mr. Buddy Garcia** - Chairman, Texas Commission on Environmental
Quality

3 **Mr. Carlos Rubinstein** - Commissioner, Texas Commission on
4 Environmental Quality

5 **Dr. Bryan Shaw** - Commissioner, Texas Commission on Environmental
Quality

6 **Mr. Les Trobman** - General Counsel, Texas Commission on Environmental
Quality

7 **Mr. William G. Newchurch** - Administrative Law Judge, State Office of
8 Administrative Hearings

9 **Mr. Paul Gosselink** - Attorney for Applicant, BFI

10 **Mr. Jim Blackburn** - Attorney for Northeast Neighbors Coalition

11 **Mr. J. D. Head** - Attorney for TJFA, L.P.

12 **Mr. Steve Shepherd** - Attorney for TCEQ Executive Director

13 **Ms. Amy Swanholm** - Attorney for TCEQ Office of Public Interest
Counsel (OPIC)

1 (TCEQ HEARING OF 9/9/09 - AGENDA ITEM #1 BEGINS)

2 **CHAIRMAN GARCIA:** The meeting of the Texas Commission on Environmental
3 Quality will come to order. With me this morning are Commissioner, Dr.
4 Bryan Shaw and Commissioner, Carlos Rubinstein. My name is Buddy Garcia.
5 I'd like to start this morning off by briefly giving Commissioner
6 Rubinstein an opportunity, welcome, and an opportunity to say a few words.
7 Congratulations on your appointment (begins speaking in Spanish) felicidades
8 y buena suerte. If you have any comments at this time, it would be
9 appropriate.

10 **COMMISSIONER RUBINSTEIN:** Thank you, Chairman and Commissioner Shaw. It's
11 a pleasure for me to be able to join you today. It's my first meeting as
12 Commissioner, and also I'm looking forward to a great working relationship
13 to do -- continue to do good for the State of Texas and to protect our
14 environment. Chairman, on a personal note (begins speaking in Spanish) es
15 un placer para mi seguir trabajandando con usted. Siempre ha sido muy
16 agradecido poder trabajar contigo y las cosas que tenemos hacer para mejorar
17 Texas.

18 **CHAIRMAN GARCIA:** (Answers in Spanish) El placer es mio.

19 **COMMISSIONER RUBINSTEIN:** Oh, for those of you that don't know Spanish,
20 what I've basically said is it's a pleasure for me to once again be able
21 to join the Chairman. Blas and I on the way up here talked that maybe we
22 could do part of it in Spanish. He said he'd be ready for it, as well.
23 (Laughter) Thank you very much.

24 **CHAIRMAN GARCIA:** Commissioner Shaw.

25 **COMMISSIONER SHAW:** Let me also add my welcome, and, and express my
excitement of working with you. I know that the professionalism, and
your depth and breadth of knowledge within the agency and the environment

1 will serve this agency and this State well. I look forward to working
2 with you in the future, congratulations. My translation was slightly
3 off from what, what it was, but I'll work on my Spanish.

4 **CHAIRMAN GARCIA:** As we all should. Anyway, let's get to business.
5 We'll proceed to Item number 1, Mr. Trobman.

6 **LES TROBMAN:** That's correct. Item number 1 is Administrative Law Judge's
7 Proposal for Decision and Proposed Order concerning the application of BFI
8 Waste Systems of North America, LLC for a major amendment to vertically
9 expand its Type I MSW landfill. For the record, this morning here Judge
10 Newchurch will present this matter, lay it out with no time constraints,
11 followed by Mr. Gosselink on behalf of the Applicant. Mr. Blackburn, on
12 behalf of neighbors uh, Northeast Neighbors Coalition and Mr. Head
13 on behalf of TJFA, and ten minutes per party with Mr. Blackburn and Mr.
14 Head splitting theirs. And also I think Paul Terrill is here for the
15 record, and is available for questions at the appropriate time. And
16 with that the persons who did sign in, their signatures and presence will
17 be noted in today's proceedings. Judge.

18 **JUDGE NEWCHURCH:** Good morning, Commissioners. My name is Bill Newchurch
19 for the record. And I'm the Administrative Law Judge who presided over
20 this case, and prepared the Proposal for Decision before you. You referred
21 this application to SOAH with a long list of issues for us to consider, and
22 I won't try to address each of them. I'll summarize by saying that on every
23 issue that I found that BFI had the burden of proof, I found that it carried
24 its burden of proof. And so that would indicate that-- implicitly that the
25 permit should be granted, though you didn't specifically ask me that. There

1 are two points I'd like to concentrate on and devote a little bit of time
2 to.

3 And the first one is probably the dominant issue in the case, and
4 certainly the dominant issue for all of the people who are in the room
5 today. And that's whether or not this facility is compatible with the
6 surrounding land uses, land uses in the area. To consider that, the Health
7 and Safety Code directs, provides that the Commission may, not that
8 it's required to, but it may upon the showing of good cause, deny a permit
9 for considerations of land use. And I'm paraphrasing a little bit, but
10 that's the gist of it. There is at least one other statute that refers to
11 the Commission holding a hearing on compatibility of land uses. So, usually
12 people speak about compatibility of land uses when discussing this issue.
13 There is a rule that the Commission has adopted that talks about land use,
14 and it lays out a long list of things to consider in determining whether or
15 not the land use is compatible with other land uses in the area.

16 I also looked at the definition, the general definition of
17 compatibility, which is not defined in your rules. And the general
18 definition is, the gist of it is things go together. They're compatible
19 if they go together, so I took that into account. And I ultimately found
20 that this facility, as proposed with the amendment is compatible with land
21 uses in the area.

22 And my analysis went this way. First of all, there is no specific
23 legal prohibition on the facility being in this location. Your rules
24 talk about considering zoning. There is no zoning prohibition on this
25 type of facility at this location.

1 The other things that the rules direct you to look at are other
2 surrounding land uses in the area. Well, this landfill facility has been
3 the dominant land use in the immediate area for decades. Not only has this
4 facility been permitted since the 80s, there is an adjacent facility
5 that has been permitted for longer than that. In fact, there was a Travis
6 County facility that was there for many, many years before that. And I
7 forget the exact date, but it goes back many decades. So, there is a
8 history of this type of land use in the area. The immediate surrounding
9 area is largely open, and there is no evidence, or really any significant
10 argument, that it's incompatible with those open land uses, that they
11 can't go together.

12 There is an industrial facility owned by Applied Materials that's
13 directly across the road from the facility. And it's been there for quite
14 a period of time, as well. Looking at the bigger circle moving out
15 from the facility, this part of the Austin area has grown more rapidly than
16 any other sector of the Austin area. It's, it's a percentage increase that
17 is the most rapidly growing area in the entire Austin area.

18 There are many different kinds of uses that have occurred. Most
19 of them have begun to occur, other than the agricultural uses, have begun
20 to occur since the facility's been there. There is significant residential
21 development relatively nearby. And it was built after the facility went
22 into, went into operation. That's the Harris Branch subdivision. And many
23 of the folks who participated and opposed this facility live in Harris
24 Branch, and I dare say a lot of the people here today are from Harris
25 Branch.

1 So, but in any event, though there might be displeasure with this
2 facility, the Harris Branch development occurred while this facility was
3 there and in operation. There are other things that the rules specifically
4 call to be looked at, or it seemed appropriate to look at, things like one
5 of them is consideration of wells within 500 feet. And I won't go into
6 depth about it, but there was other evidence that generally looks at the
7 impact, or the possibility of an impact on ground water, and that evidence
8 showed that there would be no such impact. So, wells within 500 feet
9 doesn't seem to be a consideration that would warrant a denial.

10 I talked about growth trends. There is also consideration of
11 things that are important to people, but maybe not as quantifiable.
12 Things like visual impact. The facility is landscaped as it's closed,
13 as portions, sections of it are closed. There was even testimony from a
14 person with an aesthetic design background who talked about how it will
15 be contoured when it's finally closed, and even seeded to create a pleasing
16 landscape. Granted, that's a while down the -- it's a ways away that it
17 would actually be closed.

18 There was a lot of concern about buzzards in the area. And in fact,
19 there was a bird expert who testified. And he was the only one with any
20 real expertise, who testified that buzzards are feeders on carrion. They
21 don't feed on waste materials. They feed on dead animals. There's
22 been a lot of effort at the facility to make sure those types of dead
23 animals are not accessible to buzzards. And there's no real indicator that
24 the buzzards, though they are there, are there because of the landfill.
25 They seem to be there because there are perching opportunities there.

1 There are roosting places for them on power lines and structures.

2 (Laughter from audience).

3 There was a lot of discussion about Travis County and the CAPCOG,
4 which is the Capital Area of Council of Governments and it's initial
5 determination that there may be some incompatibility. They were
6 careful in making that initial determination and said that they were
7 convinced that it would be compatible if it were closed by a date certain.
8 And the date is -- I'm trying to find it -- it is November 1st, 2015. And
9 the Applicant has agreed in many different forums with some of the
10 parties in these cases. It's also agreed to a permit condition. It's even
11 agreed to restrictions in the deed records that it will close the facility
12 by that date certain, that it will not engage in any other kinds of
13 waste handling activities at the facility beyond that date certain.

14 There were representations in the hearing that that was the only solid
15 waste permit that's ever been proposed to be issued with a date certain for
16 closure. I'm not completely sure that that's true, but I can tell you this,
17 I've been doing this a long time, and I cannot remember one. I'm not aware
18 of any facility that's ever had a certain date for closure.

19 There was discussion about odors and trash that's windblown, mud
20 on roads, and other concerns. You have more specific rules that address
21 every one of those. And I'll summarize by saying that the evidence showed,
22 and convinced me, that all of those things were under appropriate and
23 intense and very reasonable control. It's not to say that there's
24 never an odor. That would be incorrect and unrealistic. It's not to say
25 that no item of windblown trash ever blows off the facility. That, too,

1 would be virtually impossible, but it is under tight control. There are
2 facilities for washing mud off of trucks to make sure that it's not spread
3 all over the adjacent roads. So, that type of concern is also addressed in
4 detail.

5 And so when I put all this together, my best judgment was that
6 it was compatible with the land uses in the area, that it did go along
7 with them. That it has gone along with them, that other land uses have
8 developed over the years that the facility has been in operation. So, it
9 was not an either/or situation. They were able to be built while the
10 landfill was there. And so, my recommendation is that you not deny the
11 permit for that reason.

12 There's one other issue I'd like to address, and this has to do with
13 operational hours. This has gone several ways since the hearing. My
14 initial recommendation to you in the PFD was that you have a set rule
15 nowadays that says, "These are the hours of operation." And they may be
16 deviated from. And the way I read that was this is a presumptive standard,
17 deviations are allowed, and it's not quite clear what the basis for those
18 deviations are. When is it appropriate, and when is it not appropriate?
19 There's lots of different opinions and arguments on that. My initial take
20 on that in the PFD was the Applicant had the burden of proof. It had the
21 burden of proving that there should be a deviation from that standard.

22 In the exceptions, BFI accepted that and said we should keep our 24-
23 hours a day operational hours that we have in our current permit. And the
24 Executive Director agreed with that. And they made several different
25 arguments, but the gist of the ED's argument to me seemed to be well,

1 the one I focused on was BFI doesn't have the burden of proof on this
2 issue. And the Executive Director didn't see it exactly the way I saw it,
3 but when I thought it through, it seemed to me that you have a general
4 burden of proof rule. And it says the Movant in any matter has the burden
5 of proof, unless something more specific is applicable.

6 In this case, BFI is moving for an amendment to its application,
7 to its permit. It's asking for changes to its current permit, but it's not
8 proposing a change in the hours of operation. It's proposing -- it's silent
9 on that. It's saying we're going to keep to same hours of operation we've
10 always been authorized to. We're not advocating a change. My analysis was,
11 well, who else is the Movant? Who's asking for a change? And the only
12 party who specifically asked for a change during the hearing was the Office
13 of Public Interest Counsel. So, in my response to exceptions, I said,
14 "Okay, if OPIC is the Movant, they've got the burden of proof. What's the
15 proof that there should be a change from this 24-hours a day authorization?"
16 And I really couldn't find that there was sufficient proof to do that.

17 So, I've analyzed it two ways. If BFI has the burden of proof, I found
18 it didn't meet the standard. If someone other than BFI, and the only one
19 that was advocating it in the hearing was OPIC, if they have the burden of
20 proof, they haven't proven it. So, in the absence -- if, if OPIC has
21 the burden of proof, no change has been shown. BFI comes back in a response
22 to my Response to the Exceptions and says, "We don't want to be a test case.
23 We don't know if we -- maybe arguably we don't have the burden of proof,
24 but we don't want to be at the courthouse arguing for years to come about
25 whether we do." And it says that it thinks it's proven its point.

1 It's proven that the existing operational hours should be retained.

2 My initial analysis disagreed with that. I've gone back and forth
3 and back and forth, and at this point I think I'm just ready to be quiet and
4 let y'all consider that on your own without making a further recommendation.

5 So, to summarize, I recommend that you sustain the exceptions
6 concerning the hours of operation. And I've recommended specific changes
7 to the Proposed Order that would implement that. The Executive Director
8 also made what I've called editorial exceptions. I got a comma in the wrong
9 place, I misspelled a word, that sort of thing. And I recommend that you
10 sustain all those. And the other objections were things that were addressed
11 very specifically in the PFD. And I recommend that you go ahead and
12 overrule those, the rest of those exceptions. And that's all I have for
13 you. And of course, I'll be happy to try and answer any questions you have.

14 **CHAIRMAN GARCIA:** Thank you, Judge. Any questions of Judge Newchurch at
15 this time? Commissioner Shaw.

16 **COMMISSIONER SHAW:** During the hearing with regard to the hours of operation
17 was there any evidence put on during the hearing itself other than the
18 Applicant proposing in its application those hours, and then OPIC in its
19 closing remarks suggesting that those hours be modified?

20 **JUDGE NEWCHURCH:** You know, BFI argues in its Response to my Exceptions
21 letter that there was. But I addressed that in the initial PFD. And I just
22 found that there wasn't really any evidence on that point. There
23 was basically a "We've always done it this way." I guess there was a little
24 bit of evidence, and the evidence is this, other facilities in Travis
25 County are all authorized to be open for 24-hours a day.

1 **COMMISSIONER SHAW:** Did the Protestants present any evidence during the
2 hearing on that matter?

3 **JUDGE NEWCHURCH:** I do not recall them presenting any evidence on that
4 matter. Other than things that are -- they were arguing another point and
5 you sort of could infer them. Things like they argued that at night
6 there might be lights at the facility, and that's an unpleasant condition
7 to those who live nearby, that there's bright lights there. So, you can
8 kind of confer that well, if there was -- that kind of suggests that it
9 should be closed at night and those lights wouldn't be there. It doesn't
10 necessarily mean they wouldn't be there. It -- you know the lights could
11 still be on at night. It's not necessarily tied to operating. So that's
12 the only evidence that's sort of related to it that comes from the
13 Protestants that I can recall.

14 **COMMISSIONER SHAW:** Thank you.

15 **JUDGE NEWCHURCH:** Okay.

16 **CHAIRMAN GARCIA:** Any other questions of the Judge at this time? I'd like
17 to remind everyone and ask for your indulgence. This is a legal proceeding,
18 and that you respect this as a legal proceeding. So, if y'all could put
19 your signs down. I appreciate y'all being here, and it's just not
20 the forum for the signs, but I appreciate y'all's interest and your
21 point is well taken. We'll move on. And if you could keep the outbursts
22 too to yourself, thanks.

23 **LES TROBMAN:** We have Mr. Gosselink here on behalf of the Applicant, who
24 as the moving party has ten minutes, and may save some time for rebuttal.

25 **PAUL GOSSELINK:** Thank you, Mr. Chairman, Commissioners, General Counsel.

1 I'd like to provide you with some background on how BFI has approached this
2 nine-year permitting process. BFI has made every effort to listen to and
3 resolve the complaints of its neighbors, the City, the County, and the COG.
4 The effort has resulted in a very unique application. It is the only
5 application that we are aware of where the Applicant is seeking a permit
6 for a specific term of years, rather than a life of site permit. As a
7 result of extensive negotiations with the City, the COG, and the County,
8 BFI has agreed to stop accepting waste on November 1st, 2015. That date is
9 only six years away, and is only four years more than the projected closure
10 date on our existing permit. We think that four years is the shortest site
11 life ever applied for.

12 In addition, BFI is committed to never seek any additional capacity,
13 to never locate a transfer station; to significantly enhance erosion and
14 sedimentation controls; to impose truck traffic restrictions; to not re-
15 circulate leachate; to not use alternate daily cover, and to paint the
16 landfill. By that I mean by planting grasses and wildflowers, according
17 to the City of Austin.

18 BFI agreed to all of these improvements and conditions, as well as
19 others in order to be responsive to the concerns raised, and to give it
20 just enough time to look for another place in this market place. As a
21 result, CAPCOG issued a letter of conformance. The County agreed not to
22 oppose. The City -- the City and BFI entered into a formal written
23 agreement. The City and County participated in this hearing solely for
24 the purpose of ensuring that this agreement was enforced. That left TJFA
25 and NNC as protesting parties. As I'm sure you're aware, this is the

1 fourth landfill application in TDSL's market place where TJFA has
2 purchased property nearby in order to oppose an expansion.

3 I think that the finding the ALJ made in the PFD summarizes what he
4 saw going on. Let me read it. "The ALJ fully agrees with BFI that TJFA
5 is an affiliate of its competitors, TDS and TDSL. He also finds that
6 TJFA's participation in this case was a transparent attempt by Mr. Gregory
7 to delay, complicate, increase the cost of, and with luck, defeat BFI's
8 application so as to gain a business edge on BFI."

9 TJFA supplied all of the technical experts for the Protestants. The
10 ALJ found their geotechnical and geologic testimony unpersuasive, noting
11 that much of it "made no sense" and that it was "junk science," and that
12 there was no reasonable and intellectually honest basis for it. These are
13 very, these are very harsh findings.

14 He noted that TJFA's expert's drainage conclusion was consistent with
15 all the other experts in the case, that the proposed landfill expansion
16 would not significantly alter natural drainage conditions.

17 A few of the issues were essentially uncontested, and the Protestants
18 offered little or no evidence on those issues. Operating hours was one of
19 them. After a ten-day hearing, and very extensive post-hearing briefing,
20 Judge Newchurch properly concluded that BFI had prevailed on all twenty-six
21 issues. I'd like to reserve the rest of my time for rebuttal.

22 **CHAIRMAN GARCIA:** Any questions at this time? Thank you.

23 **LES TROBMAN:** Uh, Mr. Blackburn?

24 **JIM BLACKBURN:** Thank you. Good morning, Commissioners. Welcome,
25 Commissioner Rubinstein. I'm Jim Blackburn, and I represent the Northeast

1 Neighbors' Coalition. And if I may, I'd just like to ask you to raise your
2 hands if you're with the Northeast Neighbors' Coalition. Don't say anything,
3 just raise your hands. Just to give you an idea that there is concern in
4 the neighborhood, the people have come out this morning. They have been
5 with us. They have been supportive throughout this, and they're concerned.
6 Now, we're here asking for denial of this permit. Clearly, Mr. -- Judge
7 Newchurch ruled against us in that regard, but we think he's wrong in
8 several respects.

9 First of all, I want to talk a bit about this issue of operating hours.
10 We did not concentrate on operating hours because we feel like the landfill
11 is incompatible, period. Our testimony was citizen testimony about effects.
12 We testified about noise problems. We testified about odor problems. We
13 testified about problems that come from the operation of the landfill in a
14 broad, general sense. Many of those occur at night. Ms. Remmert was
15 specific to that point that the noise at night was a problem. There was
16 testimony about odors oftentimes being worse at night. Nighttime is an
17 issue. We didn't emphasize it. We didn't make the argument about operating
18 hours because we were frankly making a larger argument. We think it was
19 incompatible, period. We think it should be denied. There is no basis in
20 Texas, a place that is not land short, to keep permitting again and again
21 and again, an incompatible land use in an area that is identified as the
22 number one development zone, the desired development zone for Austin. Now,
23 Austin made a strategic decision to settle. They had that right. We
24 objected to their settlement. We object to this permit on the basis that
25 it's incompatible.

1 Incompatibility is oftentimes in the eye of the beholder. What I
2 can tell you is Brad Dugas, the owner, or the operator of the landfill
3 came in, and he apologized for the problems that had occurred in the past.
4 He apologized. At the time he's coming before you asking for permission,
5 he apologized for how bad it's been in the past. Now, I would suggest the
6 time to apologize is when you start your operation. You keep it on the
7 up-and-up from the beginning.

8 I have no doubt that BFI can do a better job than they did at this
9 landfill, but these neighbors were subjected for many years to horrific
10 conditions, to the point that the Applicant's operator apologized to start
11 the proceeding off. Every person who wants a permit from you will come in
12 and go, "I'm really sorry about how bad we did in the past, but I promise
13 now that I need a new permit, I'll do better." That's not right. You need
14 to stand for something different than an apology when you're seeking a new
15 permit. That's what we got in this situation. They've done better in the
16 last couple of years. That application has been on file for the last couple
17 of years. When there was no application on file, this was a very, very bad
18 site, and it has led among others one of our key protestants among others,
19 to leave -- to move out of the residential area.

20 Now, drainage is another issue. BFI pulled a sneaky maneuver, and
21 it's something that you need to stop is my recommendation. BFI got a
22 modification. You have simplified the procedure for changing landfills.
23 They got a mod. The mod had a set of plans with it that identified a
24 certain runoff coming onto, or coming off to the west of the site. That
25 mod allowed so many CFS based on a certain design. What BFI built was

1 different than what that mod said. BFI tripled the runoff with what they
2 constructed. Then they come into this proceeding and maintain that triple
3 rate, and say we didn't change anything because it was the way we built it.
4 There was a bait-and-switch there. They tripled the runoff by building
5 different than the plans, and then asked all of us to go along with it.
6 That's wrong. I would suggest to you it's illegal, and I think if you go
7 along with it, you will be justifying the taking of property next-door.
8 The tripling of runoff goes onto Mr. Evan Williams' property. That tripling
9 of runoff is essentially a ratification by the TCEQ that it's okay to take
10 someone's private property without paying for it. That is wrong. The
11 evidence is clear on that. I made it through cross-examination. It's not
12 the best way to do it. I did it the only way I could with the resources I
13 had available, and I have no doubt that in court that will stand up. I
14 suggest at the least you remand on that issue.

15 With that, I will turn this over to J. D. Head. This is a bad
16 application. It needs to be denied.

17 **J. D. HEAD:** Commissioners, I am J. D. Head. I do represent TJFA. TJFA is
18 a freestanding legal entity that this Commission named as an affected person
19 to this proceeding. I think it's fair to say that TJFA's participation, and
20 the fact that Mr. Gregory is a limited partner, and Mr. Gregory has an
21 ownership in the general partner caused some concerns to the Judge. The
22 Judge indicated that the relationship between TJFA and the experts that work
23 for TJFA having past relationships with TDS and TDSL, which is another
24 landfill, which I don't represent. That called into question the
25 credibility of the witnesses. Matter of fact, the Judge indicated before

1 any evidence was admitted in this proceeding that he was prepared to take
2 the credibility of TJFA's experts with a boulder of salt before anything was
3 ever submitted. And Mr. Gosselink indicated that his assessment of the
4 experts of TJFA was harsh. And it certainly was some of the harshest
5 criticism I have seen. It's our position that these were professional
6 experts that have testified for years on both sides of the docket, and
7 have testified honestly and to the best of their ability based on the
8 information in the application itself.

9 I do want to address a couple of issues. One, TJFA does agree
10 with Mr. Blackburn from the land use perspective that it's not a compatible
11 land use. There -- the ALJ looked at whether this is in harmony, the
12 landfill is in harmony with the surrounding land use. And there was
13 evidence with regard to noise, odors, lights, traffic, sedimentation, and
14 flooding. A strong argument could be made those were not harmonious. The
15 City of Austin's witnesses, even taking into account the Rule 11 agreement
16 with regard to additional controls, did state that although it mitigated
17 their concerns, they still did not believe that the landfill was compatible
18 with residential development in the vicinity.

19 Another point I'd like to address is erosion control. The facility
20 has four, well it has six, but it has four sedimentation ponds. Those
21 sedimentation -- four of those sedimentation ponds have a 1/2-inch capture
22 volume, which is capable of basically catching 1.3-inches of rainfall. That
23 is in the opinion of our expert, Stephen Stecher, who used to work at the
24 City of Austin in the watershed. Those are undersized sedimentation ponds
25 and not capable of controlling sedimentation, and thus, negating a

1 surface water problem from runoff.

2 Yes, those 1/2-inch capture volume is in the City Code with regard to
3 development, but it was the testimony of Mr. Stecher that that was -- that
4 City Code was not meant for landfills per se. The only evidence taken from
5 BFI's own sampling of their storm water runoff, the one event that captured
6 a sample showed it a 1.3/4-inch rain that they exceeded the 100 TSS
7 benchmark for that out fall. So, with a 1.1/2-inch rainfall they did exceed
8 the benchmark. And although that's not technically a violation, it's
9 evidence that at least in some situations those sedimentation ponds are
10 undersized in order to deal with this issue. The TCEQ when they reviewed
11 the application, they acknowledged that they did no analysis with regard to
12 the water quality component of these sedimentation ponds. So, they didn't
13 look at the sedimentation ponds to ensure that they could capture sediment
14 from a large rainfall that could eventually go off site.

15 Now, Mr. Gosselink will tell you on his rebuttal that in 2004 there
16 was a large rain event. TCEQ came out and they didn't see any evidence of
17 any sedimentation leaving the site. The exceedance that I'm speaking of
18 occurred after the 2004-2005 event. These samples were taken in 2007, and
19 did show that there was, that in the view of our expert, the 1/2-inch
20 capture volume was not sufficient to retain sediment in a large rainfall.

21 **TCEQ CLERK:** That's time.

22 **J. D. HEAD:** Thank you.

23 **CHAIRMAN GARCIA:** Mr. Head, thank you on behalf of the folks you represent,
24 as well as Mr. Blackburn and all the folks that came out here today. I
25 appreciate y'all coming and, and, and making your points. Thank you all.

1 Do you have any questions right now of Mr. Head? Thank you.

2 **LES TROBMAN:** Mr. Shepherd.

3 **STEVE SHEPHERD:** Commissioners, I'm Steve Shepherd with the legal division
4 representing the Executive Director. With me are the permitting staff,
5 Arten Avakian and Matthew Udenenwu. Uh, we did have a lengthy two-week
6 hearing with Judge Newchurch on this item, and we'd like to thank him. And
7 we generally agree with all of the recommendations and conclusions that he
8 reached in the PFD.

9 We would like to address one of the issues being the operating hours
10 for the site just because it could impact our, our future processing of
11 applications. What the ALJ concluded in this case was that the --
12 this being an existing facility with existing improved operating hours,
13 that the Applicant was not the Movant when they filled in that these
14 were the operating hours, or the ones in this application, so the burden
15 started out on the Protestants to show that those somehow would interfere
16 with the community, and they should be restricted.

17 We reached the same conclusion, but the Executive Director got there
18 in a different manner. Just to explain the way we've been processing
19 requests for operating hours since 2004, we went through a rule making on the
20 site operating procedures for landfills, and specifically also on the
21 operating hours. It was the first time that we identified the different
22 types of activities, and that you had to be specific on when you would be
23 taking, accepting waste; when you'd be using heavy equipment; when you'd be
24 moving materials in and out of the gate that would likely impact the
25 community. And so we specified in the rules that for those things you have

1 to identify specifically what it is. It is the hours specified in the
2 rules, unless if otherwise approved. The way that we've implemented that is
3 if you requested other hours, we typically approve those hours, unless if we
4 are aware of some reason that that's gonna have a sufficient impact on the
5 community to warrant restricting those hours. There's language in that
6 adoption preamble from 2004 that discussed the idea of whether or not we
7 should include a provision in the rule about whether or not an applicant
8 requesting to exceed the hours stated in the rule should show good cause to
9 be able to exceed those hours. The Commission declined to do that, and just
10 left it at a case-by-case determination based on the hours can be restricted
11 if good cause is shown to restrict them.

12 So, in this case we think that the Applicant met the initial burden,
13 which is just to state what hours you're requesting in accordance with the
14 rule. The Protestants in this case didn't provide sufficient evidence
15 to warrant restricting the hours. As the Protestant said a minute ago,
16 that wasn't the focus of the hearing. There were a few pieces of
17 information that you could infer that -- well that complaint was received
18 at night, so maybe that's a problem. But that wasn't the focus of the
19 hearing.

20 So, we recommend making changes. I believe the Applicant provided
21 some suggested changes to the conclusions of law and findings of fact,
22 specifically on the operating hours. That would change what was recommended
23 in the PFD, and the Executive Director would support those changes. And we
24 are available for any questions.

25 **CHAIRMAN GARCIA:** Any questions of staff at this time? Thank you very

1 much.

2 **LES TROBMAN:** Ms. Swanholm.

3 **AMY SWANHOLM:** Good morning, Chairman, Commissioners. I represent the
4 Office of Public Interest Counsel in this matter. Our presentation will
5 focus on two issues, land use compatibility and hours of operation. First,
6 land use compatibility. Despite the ALJ's well-reasoned PFD, OPIC still
7 argues that the landfill expansion is not compatible with surrounding land
8 use. First, although the proposed expansion is not precluded by existing
9 zoning, within one mile of the facility there are about 49 business
10 establishments, a school, and a daycare center. There are also 1,387
11 residences. The landfill is located within an area of Austin that saw a
12 growth rate of 133% between 1990 and 2000. The area within one mile of
13 the landfill is growing even faster. Between 2004 and 2008, 500 homes
14 were built within one mile of the facility, and there are more on the
15 horizon.

16 As BFI's own land use witnesses concluded, the landfill is located
17 in the fastest growing area of Austin. BFI witnesses also contend that
18 the robust growth in the area shows that the landfill is compatible with
19 surrounding land uses, but OPIC finds the credibility with other witness
20 statements, and finds that the area growth occurred despite the landfill's
21 presence.

22 As mentioned by other presenters, BFI has agreed to close the landfill
23 in 2015, and that this will mitigate the duration of the inherent land use
24 and compatibility, should the Commission decide to grant the permit. OPIC
25 still finds the land use expansion is incompatible with surrounding land

1 use though, and urges the Commission to make such a finding.

2 Should the Commission choose to grant the permit, OPIC urges the
3 Commission to reevaluate the ALJs reasoning regarding the operating hours of
4 the landfill. In the PFD, he concludes that BFI's only evidence put forth
5 to justify operational hours beyond the rule-established norm of 7 a.m. to
6 7 p.m., is that 24-hour 7-day-a-week operation is the industry standard.
7 As the ALJ correctly concluded in his PFD, this alone is not persuasive.
8 The ALJ later overruled his own decision on operating hours, choosing to
9 not follow a traditional burden of proof analysis.

10 OPIC, in it's closing arguments, simply pointed out that the Applicant
11 did not meet its prima facie case to show that the proposed operating hours
12 were appropriate. Had the Applicant specifically presented other evidence
13 during the hearing, such as longstanding delivery schedules or traffic and
14 logistical concerns, OPIC's conclusion on this issue may have been different.
15 But, in light of the evidence -- or excuse me, in light of the absence of
16 meaningful evidence from the Applicant, and ED's testimony that it did not
17 evaluate whether the current operating hours were appropriate, we concluded
18 that the Applicant had not met its burden.

19 OPIC also concluded that there was evidence presented by other parties
20 justifying limiting the operating hours to the rule-established norm. This
21 includes, as mentioned by the ALJ, testimony by Mr. Guernsey from the
22 City, nuisance complaints from citizens, and statements about nighttime
23 odors.

24 OPIC urges the Commission to follow the traditional burden shifting
25 analysis instead of the analysis put forth by the ALJ in his Replies to

1 Exceptions. Under 80.17, the Applicant has the burden of proof generally
2 as the moving party. The Applicant must also show that the draft permit
3 will enable it to comply with the MSW rules.

4 In addition to these general rules, the Applicant has the burden to
5 prove that the operating hours are appropriate, an issue referred by this
6 Commission to SOAH. If the Applicant meets this burden, then opposing
7 parties must produce contradicting or overriding evidence. Following this,
8 OPIC recommends that ALJ's -- the ALJ's findings of fact and conclusions of
9 law, as amended by his reply to exceptions, should be further amended to
10 reflect the traditional burden of proof analysis under 80.17.

11 Finally, in the case of a renewal or amendment application, if the
12 Applicant does not want to alter their operating hours, the current ED
13 policy does not require an applicant to submit any information regarding
14 operating hours even if they exceed the rule-established norm. This
15 interpretation of 330.118 effectively renders the 7-to-7 language
16 meaningless. If an applicant, excuse me -- if an Applicant requires
17 operating hours in excess of the rule-established norm, they should support
18 their need for extra operating hours regardless of whether there is a change
19 from their current operating hours. OPIC asks that the Commission take a
20 closer look at the ED's practice regarding this issue.

21 In conclusion, OPIC asks that the Commission deny the application
22 because the expansion is incompatible with the surrounding land use. But
23 should the Commission decide to grant the permit, OPIC urges the Commission
24 to reevaluate the ALJ's reasoning regarding his assignment of burden of
25 proof on the issue of operational hours. Thank you for your time, and I am

1 available to answer any questions you have.

2 **CHAIRMAN GARCIA:** Thank you. Any questions of Ms. Swanholm at this time?
3 Thank you very much.

4 **LES TROEMAN:** I would note that because of the reference to a
5 late filing, the Commission should be aware that late filings were not
6 distributed to the Commission, and therefore, not forwarded for
7 consideration. And we have Mr. Gosselink here with his remainder of
8 his time.

9 **PAUL GOSSELINK:** Mr. Chairman, before I begin may I ask my paralegal to hand
10 out some -- give you some handouts, please?

11 **CHAIRMAN GARCIA:** Any objection?

12 **LES TROEMAN:** I assume this is in the record. The other parties have seen
13 them?

14 **PAUL GOSSELINK:** These are handouts of proposed conclusions of law
15 and findings of fact that I would like the Commission to consider. They
16 are contained in our Replies to Exceptions, which are in the record.

17 **LES TROEMAN:** Okay, go ahead.

18 **(LONG PAUSE - DISTRIBUTING HANDOUTS)**

19 **CHAIRMAN GARCIA:** Please continue.

20 **(SHORT PAUSE)**

21 **CHAIRMAN GARCIA:** Are you ready?

22 **PAUL GOSSELINK:** Yes.

23 **CHAIRMAN GARCIA:** Please continue.

24 **PAUL GOSSELINK:** How much time do I have?

25 **TCEQ CLERK:** Six minutes.

1 **PAUL GOSSELINK:** Six minutes. The evidence supports the ALJ's
2 determination that 24/7 operating hours are appropriate for this landfill.
3 The ALJ summarized his conclusion in his June 29th letter stating, "I see no
4 basis for concluding that BFI's nighttime operations are inappropriate."
5 And again where he stated, "There is no evidence of any kind showing that
6 BFI's weekend operations during the day are inappropriate." In short, the
7 ALJ found no evidence supporting reduced operating hours, and therefore,
8 concluded that the Protestants did not meet their burden of proof.

9 So, why are we here addressing this issue since we won? Well, the
10 ALJ's legal reasoning seems logical, and his conclusion gets to the correct
11 substantive result. The problem is we can't find any case precedent to
12 support shifting the burden of proof. So, we're concerned. And the reason
13 we're concerned is because we are concerned that the Protestants are going
14 to seize on this point on appeal. And we don't want to be a test case on a
15 case of first impression. So, we're suggesting that the Commission either
16 replace the conclusions and findings presently in the ALJ's PFD with the ones
17 I have handed you labeled "Applicant's Burden." Or better yet, that you
18 approach -- that you provide yourselves with something I'll call a "belts-
19 and-suspenders approach" and address both the ALJ's conclusions and the ones
20 I just gave you in a single set of findings and conclusions. This approach
21 is reflected in the second handout labeled "Alternative Findings."

22 We submit there is no question that the ALJ's substantive conclusion
23 regarding 24/7 hours is correct. The only question is how you issue the
24 order. BFI has taken the position that it has the burden of proof to put on
25 a prima facie case, much like OPIC suggests.

1 We believe, we believe that this means we had to put on enough initial
2 evidence to get over rebuttable presumption, which we did. Then the burden
3 of production shifts to the Protestants. As already noted, the Protestants
4 put on no evidence on this specific issue, therefore, BFI had nothing to
5 rebut, and had no obligation to put on additional evidence. But I want to
6 make clear that BFI did more than just put on a prima facie case. BFI's
7 case also met the traditional preponderance of the evidence burden under
8 any standard of review, but especially under the substantial evidence
9 standard of review, the standard under which this case could be appealed.

10 The types of evidence BFI put on included the fact that Sunset Farms
11 has always operated 24/7. This is all in the record. The ED has
12 independently approved BFI's request for 24/7 hours on three separate
13 occasions. That BFI has developed longstanding waste delivery schedules and
14 acceptance procedures based on the 24/7 schedule, and its customers rely
15 upon such schedules. That BFI's traffic studies show that 23% of its daily
16 volume occurs between 7 p.m. and 7 a.m. on weeknights. Much of this waste
17 would have to be accepted by one of BFI's competitors, including TDSL. The
18 24/7 hours are consistent with other Type I landfills in the County, and the
19 24/7 hours are consistent with industry practice. That was BFI's evidence.

20 In addition to BFI's evidence, the ED's evidence was that the ED's
21 witness testified that he was "unaware of any potential impacts that would
22 justify restricting the proposed 24/7 operating hours." And that "BFI's
23 application satisfied the provisions of the relevant rule."

24 Finally, Travis County's witness testified about the County's concern
25 that any decrease in hours of operation would decrease the waste

1 acceptance rates such that the landfill's capacity would not be reached by
2 November 1, 2015.

3 In addition to all of the reasons just listed, BFI submits that
4 it would be extraordinarily unfair to deprive BFI of the hard-earned benefit
5 of its bargain with the City, County, and COG. BFI negotiated a very
6 specific closure date of November 1, 2015. The closure date was not rounded
7 off to the end of the year, as you might typically expect. It was a
8 calculated date based on its 24/7 operating hours, 24/7 is not a problem for
9 the City, the County, or the COG.

10 BFI has also pointed to various policy reasons supporting issuance of
11 the 24/7 permit. These include allowing BFI to operate 24/7 will have the
12 benefit of reducing diesel emissions in hours that are not ozone producing.
13 Competitors in a local MSW market place should be permitted to operate
14 during similar hours to prevent unfair competitive advantage. And following
15 up on that point, TDSL would likely absorb some of BFI's volume, and would
16 thereby effectively be rewarded for TJFA's abuse of the permitting process
17 by gaining the business edge it sought.

18 Finally, on the issue of operating hours, for all of these reasons we
19 believe the compromised hours are not appropriate here. I believe I'm short
20 on time, but I would be happy to address that if you have questions.

21 Regarding drainage, the most significant rebuttal point and probably
22 the only one that needs to be pointed out is that every expert who testified
23 on this issue agreed that BFI's plan does not significantly alter natural
24 drainage patterns.

25 The second rebuttal point is that the Protestants cannot even agree

1 on how to argue this issue. On the one hand, NNC fully accepts the
2 methodology set out in guidance document RG417 that was used by the ED to
3 evaluate this process. Instead, what they do is they argue about facts and
4 calculations, and they even accused BFI of being sneaky. The ALJ listened
5 to all of that and found "there was no substance to these contentions."

6 **TCEQ CLERK:** That's time.

7 **PAUL GOSSELINK:** May I finish this or --

8 **CHAIRMAN GARCIA:** Just finish up.

9 **PAUL GOSSELINK:** Thank you.

10 **CHAIRMAN GARCIA:** Quickly.

11 **PAUL GOSSELINK:** TJFA on the other hand, argued that BFI and the ED should
12 have been -- should not have been allowed to use guidance document RG417.
13 The ALJ, on the other hand, found that the common technical understanding
14 of the term "natural" meant existing permitted conditions, and that was what
15 the argument was about. What do you compare the proposed conditions to? Do
16 you compare them to natural conditions before man? Or do you compare them to
17 the existing permitted conditions? Which is the only thing that makes sense,
18 which is what the guidance document memorialized what the ED found is
19 appropriate.

20 Finally, I point out on the event of an appeal on this issue, the
21 agency's interpretation will be given great weight.

22 **CHAIRMAN GARCIA:** Thank you. Any questions for Mr. Gosselink? Well, I
23 recognize that acceptable thresholds for this type of operation and permit
24 are not enough to many people in the room. You know what we look at is the
25 evidence in the record and when you meet the burden, and that is the basis

1 for us to determine as a Commission what's acceptable, and it's often very
2 compelling when there is growth in an area in spite of a variety of folks
3 that are already in the area. There is no zoning. The 83% of the property
4 within one mile of the landfill is classified as open or industrial. So,
5 that is something on the record that I think we have to consider, and we do
6 this on a case-by-case basis based on the facts.

7 Do my colleagues have any comments or questions at this time of anyone?
8 The Judge or the staff? Commissioner Shaw.

9 **COMMISSIONER SHAW:** Thank you, Chairman, Commissioner Rubinstein. It
10 appears I agree I think I understood you to say that with regard to the land
11 use compatibility, and frankly for the other issues that were vetted through
12 this hearing process, that the Applicant met the burden of proof that was
13 required. I think the issue that may need to be clarified, and I'm very
14 comfortable with, is with regard to the operating hours and the way we
15 arrive at our decision with regard to that component.

16 As I look at it, the -- I think it's important that we recognize that
17 the Applicant submitting an application or amendment of this nature where
18 we're having an increase in elevation does bear the burden of proof for the
19 entire package. That being said, I also look at the evidence that was
20 presented. And as I read through and I asked the ALJ, but actually my
21 understanding of the information as I reviewed for this was the only
22 evidence I could find that was presented was that by the Applicant talking
23 about their application about those things, that the Applicant today even
24 reiterated some of those with regard to the rationale behind the 24 hour 7
25 operating schedule. I saw no convincing evidence presented by the

1 Protestants to shift that burden back to the Applicant to prove up beyond
2 what was, again what was offered by the Protestants.

3 Therefore, I think the burden was with the Applicant, but I think
4 they met that burden in this, in this proceeding. Would we like to see a
5 more detailed presentation of that? Perhaps you know in future cases
6 we'd see that more clearly. However, had the Protestants presented evidence,
7 I think that would've been the natural outcome would have been
8 for the Applicant to rebut that evidence.

9 And so, again, in summary, I'm convinced that the Applicant met the
10 burden in this case.

11 **CHAIRMAN GARCIA:** Commissioner Rubinstein?

12 **COMMISSIONER RUBINSTEIN:** Just to concur that I do, as Commissioner Shaw
13 stated, I do also believe that in every aspect the Applicant holds the burden
14 of proof in every one of the topics that are covered in the application. I
15 think by clarifying that as you just did, it makes it clear for future
16 applicants that we will be holding them to account for meeting that burden,
17 which I do think they met.

18 **CHAIRMAN GARCIA:** Very well. If you have a motion, the Chair would
19 entertain one at this time.

20 **COMMISSIONER SHAW:** Mr. Chair and Commissioner Rubinstein, I move that we
21 adopt the ALJ's Proposed Order granting BFI's permit amendment with the
22 following changes: (a) we adopt the ED's proposed modifications to findings
23 of facts number 16, 19, 22, 35, and 104, and conclusions of laws numbers 2
24 and 4, as agreed to by the ALJ in his June 29th, 2009 letter; (b) regarding
25 operating hours from the ALJ's June 29, 2009 letter that we adopt the ALJ's

1 proposed modification to conclusion of law number 55, modify proposed
2 finding of fact number 286 to read, "The evidence shows that the landfill's
3 operating hours are appropriate." It would modify proposed conclusion of
4 law number 7 to state, "The burden of proof was on the Applicant in
5 accordance with 30 TAC 80.17(a), BFI met its burden with respect to all
6 referred issues." And we modify proposed conclusion of law number 55 to
7 state the operating hours proposed in the application are appropriate. That
8 we approve issuance of the ED's revised draft permit and the form attached
9 to the PFD, and we adopt the ED's response to comments pursuant to 30 TAC
10 section 50.117.

11 **COMMISSIONER RUBINSTEIN:** Second.

12 **CHAIRMAN GARCIA:** All in favor?

13 **COMMISSIONER SHAW:** Aye.

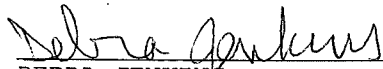
14 **COMMISSIONER RUBINSTEIN:** Aye.

15 (TCEQ HEARING OF 9/9/09 - AGENDA ITEM #1 ENDS)
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CERTIFICATE OF SERVICE

I, DEBRA JENKINS, do hereby certify that the above and foregoing transcript was prepared by me, to the best of my abilities, and is a true and accurate record of the conversations between the parties herein; that I am neither attorney nor counsel for, nor related to, nor employed by any of the parties hereto, nor financially interested in these matters; that the parties herein were not sworn, to my knowledge, by any authority; that the video link from which this transcript was prepared was recorded outside of my presence, and was provided to me for the purpose of preparing this transcript.

SIGNED this 17th day of September, 2009.


DEBRA JENKINS

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