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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 12, 2009

The Honorable William G. Newchurch
Administrative Law Judge
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

RE: **BFI WASTE SYSTEMS OF NORTH AMERICA, INC.**
SOAH DOCKET NO. 582-08-2178
TCEQ DOCKET NO. 2007-1774-MSW

Dear Judge Newchurch:

Enclosed for filing is the Public Interest Counsel's Closing Arguments in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Christina Mann".

Christina Mann, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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

IN THE MATTER OF THE
APPLICATION OF BFI WASTE
SYSTEMS OF NORTH AMERICA,
LLC FOR MSW PERMIT NO. 1447A

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BEFORE THE
STATE OFFICE OF
ADMINISTRATIVE HEARINGS

THE OFFICE OF PUBLIC INTEREST COUNSEL'S
CLOSING ARGUMENTS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE WILLIAM NEWCHURCH:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Closing Argument in the above-referenced matter.

Procedural Background

BFI Waste Systems of North America, LLC (BFI or Applicant) submitted an application for a major permit amendment to TCEQ on January 20, 2006, to authorize a vertical expansion of the existing Type I municipal solid waste landfill facility in Travis County, Texas. The current BFI landfill facility has a total capacity of 27,703,735 cubic yards (waste and daily cover) and final maximum elevation of 720 feet mean sea level (msl) and encompasses approximately 349.4 acres (approximately 251.5 acres are designated for waste disposal). The amendment would authorize the applicant to expand the landfill vertically by 75 feet to a new final maximum elevation of 795 feet msl, and increase landfill capacity by 10,630,000 cubic yards, to a total of 38,333,735 cubic yards (waste and daily cover). The expanded facility would continue to be authorized to accept municipal solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including household garbage, putrescible wastes, rubbish, ashes, brush, street cleanings, dead animals, construction-

demolition waste, and yard waste. The facility may also accept regulated asbestos-containing material from municipal sources, Class 1 industrial nonhazardous solid waste that is considered Class 1 only because of asbestos content, Class 2 industrial nonhazardous solid waste, Class 3 industrial nonhazardous solid waste, and certain special wastes identified in Part IV of the application.

The facility is located in Travis County, Texas, approximately three quarters of a mile north of the intersection of Giles Road and U.S. Highway 290. The address of the facility entrance is 9912 Giles Road.

The Executive Director (ED) declared the application administratively complete on January 31, 2006¹ and completed the technical review and draft permit of the application on March 21, 2007. The Commission considered the hearing requests on February 27, 2008 and referred 26 issues for a contested case hearing to the State Office of Administrative Hearings (SOAH). A preliminary hearing was held in Austin, Texas on May 8, 2008. The hearing on the merits was held January 20-January 30, 2009.

Issues Analysis

OPIC provides analysis related to the following referred issues: operating hours; protection of groundwater as it relates to expansion over pre-subtitle D area; odor control; adequacy of the buffer zone and screening; and land use compatibility.

Protection of groundwater as it relates to expansion over pre-subtitle D area

BFI is not installing a separatory liner between the old pre-Subtitle D area and the planned vertical expansion.² Mr. Ray Shull, expert witness for BFI, testified that BFI's

¹ Because this application is subject to the rules in effect at the time the application was declared administratively complete, all discussions of the 30 TAC Chapter 330 rules refers to the rules which expired March 27, 2006.

² See Transcript, page 78, Lines 14-17. Cross examination of Ray Shull, January 20, 2009.

consulting engineers “didn’t determine that there was a technical need”³ for a separatory liner, even though the new TCEQ landfill rules related to vertical expansions would require an applicant such as BFI to place a separatory liner between the old waste in the pre-Subtitle D cell and the new waste.⁴ There is no leachate collection system⁴ in the pre-Subtitle D sections of the landfill. However, the preponderance of the evidence does not suggest that BFI failed to meet its technical requirements under the rules applicable to this application. Rather it suggests that BFI is subject to less protective rules than would currently be required. There is no evidence that the clay composite cells have failed or will fail. Unfortunately, it is difficult to know about the failure of liners beneath tons of waste until sufficient time has elapsed so that a monitoring well would detect the excursion.

Since there is no leachate collection system in the cells, protection against leachate moving out of the landfill relies on the clay composite liner. While, OPIC recognizes that the rules do not require it, we remain concerned about current expansion over pre-Subtitle D cells and recommend that BFI install separatory liners in an effort to practice conservatism related to effectiveness of the existing clay liner and comply with the precautionary principle.⁵

Operating Hours

The Applicant did not meet its burden in establishing that the current 24 hours a day/ seven days a week operating hours are appropriate. In fact, the Applicant merely established that

³ Transcript, page 79, Lines 2-3. Cross examination of Ray Shull, January 20, 2009.

⁴ Transcript, page 78, Lines 18-23. Cross examination of Ray Shull, January 20, 2009.

⁵ The Precautionary Principle as drafted and finalized at a conference at the Wingspread Conference Center, Racine, Wisconsin, 23-25 January 1998: Where an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. <http://www.gdrc.org/u-gov/precaution-3.html> United Nations Environment Programme (UNEP) Principle 15 of the Rio Declaration on Environment and Development states: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>

the operating hours have not changed from the current permit to those requested in the application for the vertical expansion. Likewise, the ED did not evaluate whether the hours were appropriate.⁶

In contrast, Mr. Guernsey, expert witness for the City of Austin, recommends the hours of operation be restricted to daylight hours in order to mitigate the incompatibility of the landfill with the nearby residential land use.⁷ Combined with the fact witness testimony about the inconveniences associated with late night operations, the preponderance of the evidence suggests that 24/7 operations are not appropriate.

Odor Control

In addition to immediate surface control, odor control is achieved through proper maintenance and operation of the landfill gas collection system. Dr. Shari Libiki testified generally regarding BFI's odor control mechanisms, including misters and prohibitions against leachate recirculation, and the landfill gas collection system. However, her testimony also related to a perceived improvement in odor control correlated with a decrease in odor complaints. Or in the alternative, Dr. Libiki suggests that the significant odor event in 2002-2003 makes people more easily annoyed by odors in general and more likely to complain about less significant odors⁸ Dr. Libiki did not interview any residents⁹ OPIC finds little use in her testimony which suggests that residents are either not bothered by odors any longer because the number of complaints TCEQ fielded has declined, and the complaints that are being made are perhaps being made by an oversensitive subset of neighbors.

⁶ Transcript, page 2264, lines 1-9, cross examination of Arten Avakian,, January 30, 2009.

⁷ Transcript, page 2077, lines 13-15, cross examination of Gregory Guernsey, January 30, 2009

⁸ Transcript, pages 497-500, cross examination of Dr. Shari Libiki, January 21, 2009.

⁹ Transcript, page 490, Line 16, cross examination of Dr. Shari Libiki, January 21, 2009.

It is undisputed in the record that landfills will have generalized odors associated with them. In fact, Mr. Shull testified that even when the odors are investigated, it is difficult to identify the specific cause of odors.¹⁰ Odors will escape and neighbors will likely be impacted due to proximity, but it appears that BFI is instituting odor controls appropriate for a landfill of this size. Unfortunately, as discussed below, a landfill this size is not compatible with the surrounding residential land uses.

Adequacy of the buffer zone and screening

The preponderance of the evidence shows the Applicant's compliance with the 30 TAC §330.121 (b) requirements governing buffer zones and is supported by testimony from Mr. John Worrall, BFI's land use compatibility expert.¹¹ OPIC appreciates that BFI has some buffer zones extending well beyond the minimal 50 ft requirements and it appears that the buffer zones are operating as well as can be expected for a facility such a landfill. Similarly screening should improve under private contractual requirements. However, even a well screened landfill can be incompatible with surrounding land use as discussed below.

Land Use Compatibility

BFI and the Executive Director agree that the proposed expansion would be compatible with surrounding land uses. The City of Austin argues that because the landfill is closing at a relatively soon date certain (November 2015) that land use compatibility issues are sufficiently mitigated. OPIC disagrees. OPIC cannot find that the vertical expansion at this location is appropriate, given the overwhelming evidence of rapid and encouraged development in the immediate vicinity of the landfill location. OPIC is likewise not persuaded by Applicant's experts that opine that if a landfill merely operates as permitted that it is a compatible land use.

¹⁰ Transcript, pages 183-184, Lines 19-25, 1-7, cross examination of Ray Shull, January 20, 2009.

¹¹ See Ex JW-1, prefiled testimony of John Worrall, page 34, lines 18-23.

It appears that the facts required for the analysis are not in dispute. No one questions the sufficiency of John Worrall's report prepared in accordance with 30 TAC §330.53. However, it is clear that parties disagree on the correct interpretation and use of the data. The Executive Director did not actually analyze the information. He presented no expert that testified on how a determination of land use compatibility occurred. Evidence supporting the ED's position was basically limited to a conclusory statement by Arten Avakian, ED staff, that "land use information submitted does not justify the commission denying the application based on the landfill being an incompatible land use."¹² Upon cross examination, Mr. Avakian explained that his review was merely to "confirm that the information was in the application." He furthered stated that did not in fact make an opinion on land use compatibility, rather just checked to see if all the required data was in the application.¹³

The applicant's witnesses appear to base their compatibility determination on the idea that since homes and parks and schools are being constructed in the area where BFI's site is already located, then by default BFI's site is compatible. John Worrall testified on behalf of the Applicant in support of the opinion that BFI's proposed expansion is compatible with surrounding land uses. Mr. Worrall explains that landfill uses predate nearly all other land uses in the area.¹⁴ He elaborates that the more than 89% of the residences within one mile of the landfill were constructed during after BFI began operation of the landfill.¹⁵ Finally, he notes that since BFI has agreed to cease operations by November 2015, the expansion only increases the

¹² Transcript, pages 2261-2262, cross examination of Arten Avakian, January 30, 2009.

¹³ See Transcript, page 2263, lines 3-8, cross examination of Arten Avakian, January 30, 2009.

¹⁴ See Ex JW-1, prefiled testimony of John Worrall, page 18, lines 10-11.

¹⁵ See Ex JW-1, prefiled testimony of John Worrall, page 18, lines 18-20.

life of the landfill for approximately 4 ½ years.¹⁶ When discussing growth trends of Austin, he again notes that the growth has occurred during the operation of the landfill.¹⁷

Both Mr. Worrall and Charles Heimsath seem to conclude that so long as the landfill is operating per its permit conditions, then it will always be a compatible land use.¹⁸ Mr. Heimsath goes further to opine that the only way a landfill might be an inconsistent land use would be if it were creating nuisance conditions.¹⁹

Mr. Heimsath provided testimony on growth trends within five miles of the landfill, and found that the area around the landfill included the fastest growing sector of the city of Austin for the years 1990-2000.²⁰ This growth continued past 2000 and Mr. Heimsath notes that homes increased in the Harris Branch subdivision from 412 in 2000 to 1152 currently, with space to build out an additional 70 homes.²¹ Likewise, Pioneer Crossing subdivision has developed about 1300 homes since development began there in 2002 and can add 1000 more homes.²² And also in existence now is the Colonial Place subdivision with 205 homes built since 2005.²³ Mr. Heimsath testifies that the fact that this substantial growth is occurring all around the landfill, reflects that the landfill is a compatible land use.²⁴

OPIC cannot agree that because the landfill was there first, then compatibility with surrounding land uses should be assumed. Land use compatibility analyses are used to determine whether it is appropriate to site a new landfill in a certain location, or to expand the capacity of

¹⁶ See Ex JW-1, prefiled testimony of John Worrall, pages 18-19, lines 21-22, 1-2

¹⁷ See Ex JW-1, prefiled testimony of John Worrall, page 20, line 16-20.

¹⁸ See Ex JW-1, prefiled testimony of John Worrall, page 25, lines 12-17.

¹⁹ Transcript, page 1201, lines 18-22, cross examination of Charles Heimsath, January 26, 2009.

²⁰ Transcript, pages 1194-1195, cross examination of Charles Heimsath, January 26, 2009.

²¹ Transcript, page 1196, lines 12-25 cross examination of Charles Heimsath, January 26, 2009.

²² Transcript, page 1197, lines 1-18 cross examination of Charles Heimsath, January 26, 2009.

²³ Transcript, page 1197-1198, lines 20-25, 1-3, cross examination of Charles Heimsath, January 26, 2009.

²⁴ Transcript, page 1199, lines 11-15, cross examination of Charles Heimsath, January 26, 2009

an existing landfill, considering current and probably future conditions. To agree with the Applicant, there would no need to ever conduct a land use analysis for an amendment application.

The City of Austin (Austin) initially opposed this amendment application, until a special provision creating a date certain of November 1, 2015 for cessation of waste collection was added.²⁵ Gregory Guernsey, Austin's Director of Neighborhood Planning and Zoning, testified that many aspects of landfill operation are inconsistent with residential development including truck traffic, noise, lighting, and odors.²⁶ In addition, Mr. Guernsey recommends that operation be limited to daylight hours.²⁷ Finally, he testifies that even though BFI has mitigated some of the compatibility concerns, he disagrees that it is compatible with residential land uses.²⁸

Finally, local residents testified as fact witnesses on behalf of the Northeast Neighbors Coalition (NNC). Ms. Joyce Best testified that she had been affected by odors from the landfills over the years.²⁹ She further explained that she had been frustrated by the process of reporting odors.³⁰ She notes that odors were noticeable in the recent past from 2004-2006.³¹ Likewise, Evelyn Remmert testified that odor problems have remained constant.³² Other complaints include windblown waste, traffic and truck safety concerns, and operational noise. These all relate to whether operation of a large landfill is compatible with nearby residential uses.

OPIC finds that the Applicant did not demonstrate that expansion of the landfill will be compatible with surrounding land uses. The Applicant merely established that growth is rapidly

²⁵ Transcript, page 2046, opening statement of the City of Austin, January 30, 2009

²⁶ Transcript, page 2088, line 20, cross examination of Gregory Guernsey, January 30, 2009

²⁷ Transcript, page 2093, lines 15-16, cross examination of Gregory Guernsey, January 30, 2009

²⁸ Transcript, page 2096, lines 21-22, cross examination of Gregory Guernsey, January 30, 2009

²⁹ See Transcript, page 1952-1953, cross examination of Joyce Best, January 29, 2009

³⁰ See Transcript, page 1971, lines 17-25, cross examination of Joyce Best, January 29, 2009

³¹ See Transcript, page 1973, lines 7-10, cross examination of Joyce Best, January 29, 2009

³² See Transcript, page 1979, line 12, cross examination of Evelyn Remmert, January 29, 2009

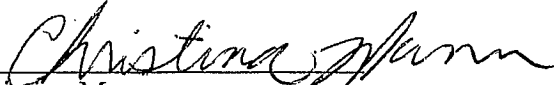
occurring and then assumed that if the landfill is operating properly, then land use is compatible since the landfill was there before much of the growth. BFI is asking for an amendment to expand operations, and current conditions must be considered. The record raises questions as to whether the current landfill operations are compatible with current residential growth and development in the surrounding neighborhoods. Certainly, expanded operations would be inconsistent with such uses. OPIC recognizes that these incompatible uses are only expected to extend to November 1, 2015, and then the landfill will be closed. Nevertheless, we find that the landfill will be incompatible in the meantime, and therefore must recommend a commensurate finding.

Conclusion

OPIC recommends the Administrative Law Judge (ALJ) find that BFI did not demonstrate by a preponderance of the evidence that the expansion of this landfill would be compatible with the surrounding residential land uses. OPIC also recommends finding that BFI failed to establish that the around-the-clock operating hours are appropriate. If the proposal for decision recommends granting the application, OPIC recommends requiring a separatory liner above the pre-Subtitle D cells and limiting the operating hours to daylight hours.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2009, the foregoing document was served to all persons listed on the attached mailing list via deposit in US mail, hand delivery or electronic mail.


Christina Mann

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