

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

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

NORTHEAST NEIGHBORS COALITION’S MOTION FOR REHEARING

TO THE HONORABLE COMMISSIONERS, TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

COMES NOW Northeast Neighbors Coalition and aligned Parties (collectively “NNC”) in the above referenced contested case hearing and pursuant to 30 T.A.C. §80.272, respectfully files this Motion for Rehearing. NNC requests a rehearing in the decision by the Texas Commission on Environmental Quality (“Commission or TCEQ”) relating to the permit application by BFI Waste Systems of North America, LLC (“BFI or Applicant”) for a Major Amendment to Type I MSW Permit No. MSW 1447A. NNC’s motion focuses on three issues: (1) land use compatibility and nuisance, (2) operating hours, and (3) drainage and flooding.

I. LAND USE COMPATIBILITY AND NUISANCE ISSUES

The Commission, in its Order issued September 14, 2009, (“Order”) found that this existing landfill is compatible with surrounding land uses, and the proposed expansion is also compatible with land use in the surrounding area. (Findings of Fact 367, 370). NNC disagrees. Because this is an operating landfill seeking an amendment to expand, we have a history of nuisance issues that have plagued the surrounding neighborhoods for years. These nuisance issues add to the incompatibility of the landfill to coexist with these neighbors, and we discuss these issues together.

Land use compatibility is an issue separately identified in the TCEQ rules from the technical requirements for a landfill application. Specifically, 30 T.A.C. § 305.66(c) provides:

"The Commission may for good cause, deny, amend, revoke or suspend, . . . any permit it issues or has authority to issue for a solid waste storage processing or disposal facility for good cause for reasons pertaining to public health, air or water pollution, land use, or for violations of the Texas Solid Waste Disposal Act or any other applicable laws or rules controlling the management of solid waste." (emphasis added)

According to the TCEQ rules, a permit application is required to address the issue of land use in its submittal to the TCEQ.

Land Use. A primary concern is that the use of any land for a municipal solid waste site not adversely impact human health or the environment. The impact of a site upon a city, community, group of property owners, or individuals shall be considered in terms of compatibility of land use, zoning in the vicinity, community growth patterns, and other factors associated with the public interest. To assist the executive director in evaluating the impact of the site on a surrounding area, the applicant shall provide the following:

- A. Zoning at the site and in the vicinity. . .;
- B. Character of surrounding land uses within one mile of the proposed facility;
- C. Growth trends of the nearest community with directions of major development;
- D. Proximity to residences and other uses . . . within one mile of the proposed facility. . .; and
- E. Description and discussion of all known wells within 500 feet of the proposed site.¹

Additionally, technical requirements in Part III of the application require that the "applicant shall consider criteria that in the selection of a site and design of a facility will provide for the safeguarding of the health, welfare, and physical property of the people and the

¹ 30 T.A.C. § 330.53(b)(8).

environment through consideration of geology, soil conditions, drainage, land use, zoning, adequacy of access roads and highways, and other considerations as the specific site dictates."²

Nuisance is also an issue of concern. Inasmuch as this BFI facility is an existing landfill, its past operations should be considered in making this permit decision. Nuisance conditions created by operations are also a factor in determining land use compatibility. TCEQ Rules state as follows:

“In addition to the requirements of section 330.4 of this title (relating to permit required), a person may not cause, suffer, allow or permit the collection, storage, transportation, processing or disposal of municipal solid waste or the use or operation of a solid waste facility to store, process or dispose of solid waste. . . in violation of the Texas Solid Waste Disposal Act, or any regulations, rules, permit, license, order of the commission or in such a manner so as to cause:

- . . .
2. The creation and maintenance of a nuisance.”³

Additional requirements in the TCEQ Rules identify:

Control of windblown solid waste and litter:

The working face must be maintained and operated in a manner to control windblown solid waste. Windblown material and litter must be collected and properly managed in accordance with paragraph 1 and 2 of this section to control unhealthy, unsafe, or unsightly conditions.

1. Windblown waste and litter at the working face must be controlled by using engineering methods or measures . . .
2. Litter scattered throughout the site, along fences and access roads, and at the gate must be picked up once a day on the days the facility is in operation and properly managed. The site operating plan must specify the means for complying with this requirement.⁴

² 30 T.A.C. § 330.54(4).

³ 30 T.A.C. § 330.5 (a)(2).

⁴ 30 T.A.C. § 330.120.

The site operating plan must have an odor management plan that addresses the sources of odors that includes general instructions to control odors or sources of odors. . . .⁵

Tracked mud and associated debris at the access to the facility on the public roadway must be removed at least once per day on days when mud and associated debris are being tracked onto the public roadway. . . .

Dust from onsite and other access roadways must not become a nuisance to surrounding areas. . . .

All onsite and other access roadways must be maintained in a clean and safe condition. Litter and any other debris must be picked up at least daily and taken to the working face. Access roadways must be regraded to minimize depressions, ruts and potholes . . .⁶

The facility owner or operator shall take steps to encourage the vehicles hauling waste to the facility are enclosed or provided with a tarpaulin net or other means to effectively secure the load in order to prevent the escape of any part of the load by blowing or spilling. . . . On days when the facility is in operation, the owner or operator shall be responsible for at least once per day cleanup of waste material spilled along and with the right-of-way of public access roads serving the facility for a distance of two miles in either direction from any entrances used for delivery of waste to the facility . . .⁷

NNC argues that a landfill in an urban setting has a high standard to meet in order to be compatible with its neighbors. Fact witnesses testified that the BFI Sunset Farms landfill has failed to be a good neighbor to the community and has failed to meet even the minimum standards required by TCEQ Rules listed above.

⁵ 30 T.A.C. § 330.125(b).

⁶ 30 T.A.C. § 330.127.

⁷ 30 T.A.C. § 330.123.

It is hard to imagine urban neighborhoods coexisting compatibly with a landfill as close as this one is. But more specifically, the following land uses could not be more incompatible with a landfill.

- Blue Trail Elementary School, located about 2,035 feet from the site;
- an historic site (the Barr Mansion), located approximately 4,740 feet from the site;
- a day care center (the Children’s Courtyard) located approximately 650 feet from the site,
- at least 1,387 existing residential units within one mile of the BFI facility;
- Recreational areas; Harris Branch Park, Waste Management Wildlife Habitat, Harris Branch Recreational Center and Pool;
- anticipated increased growth within one mile of the facility and “substantial residential growth” within a five-mile radius of the facility. (Finding of Fact 359)

Furthermore, the BFI site, as noted by the ALJ in the PFD, is located within Austin’s desired development zone. The Applicant’s experts, Mr. Worrell and Mr. Heimsath both concluded that the area in which the landfill is located in is the fastest growing sector in Austin.⁸ From this information, they both concluded that the presence of the landfill was not an issue in growth of the surrounding area. It is certainly possible, as several of the NNC witnesses testified, that a factor in the area growth was the belief that both of the landfills (Waste Management and BFI) would be closed by 2010. Furthermore, the only expert witnesses that could be considered “neutral” in this proceeding, the City of Austin witnesses Mr. Gregory Guernsey and Mr. Joe Word, testified that the landfill and expansion are not compatible with single family residences and indeed Mr. Guernsey specifically identified the Harris Branch neighborhood as being impacted. As a general proposition Mr. Guernsey said that an operating

⁸ PFD at 100.

landfill and single-family residential or any residential would not be compatible.⁹ Mr. Guernsey had suggested that operations be limited to daylight hours, truck traffic be limited to Giles Road and the closure date for the landfill be moved up or at least be limited to a specific date in the near future to provide certainty to the adjacent property owners.¹⁰

Those concerns were still his recommendations even after the Rule 11 Agreement was reached between BFI and the City of Austin. Having a date certain for closure in 2015 mitigates his concern about a specific date in the near future, but he clearly states that it does not necessarily completely eliminate the concern, it just mitigates it.¹¹ Mr. Guernsey is clear that as a general proposition an operating landfill is not compatible with single-family residential area.¹² Truck traffic, noise, lighting, and odors are not compatible with residential development.

Finally, Mr. Guernsey made it clear that the conditions may be mitigated but mitigate does not mean compatible. It means it just has less impact than it would have had otherwise and his testimony is empathic, “I would say that the landfill is not compatible with residential.”¹³ And he is specifically concerned about the compatibility of the Harris Branch Development, even after the Rule 11 or the Settlement Agreement mitigated any concerns. In other words there was still an incompatible land use situation between Harris Branch single-family residential and the BFI landfill.¹⁴ In the following excerpts of additional testimony, incompatibility of this landfill with the surrounding neighborhoods is described.

⁹ TR at 2072.

¹⁰ TR at 2077;Ex. COA-1, p.3, ll. 17-21.

¹¹ TR at 2078.

¹² TR at 2088.

¹³ TR at 2096.

¹⁴ TR at 2125.

1. WILLIAMS LTD. PROPERTY

Mr. Evan Williams testified that he has been unable to find users for the Williams Ltd. tract, which is across the street slightly to the west and south of the BFI landfill. The Judge relied on Applicant witness Mr. Heimsath's opinion that the tract lacked infrastructure such as water, wastewater and roads and that was the reason for problems with development rather than incompatibility with the landfill.¹⁵ Mr. John Wilkins' tract, which is within ¼ mile of the landfill, also has not been able to be developed. In Mr. Wilkins' case, the property fronts on two roads and there is at least infrastructure for water, but the judge did not discuss this discrepancy or incompatibility.

2. VISUAL IMPACT

BFI's witness Donna Carter, who testified that the two tier design of the landfill would soften any visual impact of the vertical expansion, admitted, however, that her assessment of visual compatibility only applied after the landfill was closed. While the plan to "paint" the landfill with native grasses and wildflowers upon closure is a laudable goal, it does not help the neighborhood in the intervening six long years assuming the landfill does close in 2015.

3. BUZZARDS

Based on Applicant witness Dr. William Southern's testimony that BFI's bird control plan has prevented vultures from feeding at and frequenting the landfill, the ALJ concluded that buzzards are not in the area due to BFI's landfill.¹⁶ Citizen after citizen testified that he or she had seen buzzards hovering over the BFI landfill. Pictures were presented as exhibits showing

¹⁵ PFD at 101.

¹⁶ PFD at 104.

the buzzards. While the Judge agreed that the citizen witnesses were credible,¹⁷ he dismissed their testimony in favor of hired experts.

4. GAS AND ODORS

BFI claims that the landfill gas and odor controls in place and proposed, satisfy the regulatory requirements and those controls are working effectively to control landfill gas and odor.¹⁸ The Applicant's witness, Dr. Libicki, testified that the GCCS is effective in controlling gas related odors and will continue to be effective in connection with the vertical expansion. She also testified that the Odor Control Plan in the SOP satisfies the regulations and is effective in controlling odor from landfill gas and other sources.¹⁹ Dr. Libicki lacks credibility as an expert witness on odor control for this facility. While she may have satisfactory credentials for some projects, she testified that the total amount of time she had spent at this landfill "on the ground" was three hours. As noted in NNC's Closing Argument, the citizen witnesses testified that although the odors have lessened in terms of number of incidents, the severity of the odor is unchanged, and the interference with citizens' daily lives is also unchanged. It was shocking to read BFI's assertion "by late 2002 or early 2003, the odor problem was completely under control."²⁰ This assertion is completely contrary to the facts as reported by people who live there and experience the odors on a daily basis, and is another example of BFI not being a compatible neighbor.

II. OPERATING HOURS

In the PFD, the Administrative Law Judge ("ALJ") recommended that the permit be granted with the following change in Section III.A.

¹⁷ PFD at 4-8.

¹⁸ BFI Closing Argument at 49.

¹⁹ BFI Closing Argument at 50-51.

²⁰ BFI Closing Argument at 50.

A. Days and Hours of Operation

The waste acceptance hours of the facility may be any time between the hours of 7:00 a.m. and 7:00 p.m., Monday through Friday. Waste acceptance hours within the 7:00 a.m. to 7:00 p.m. weekday span do not require other specific approval. Transportation of materials and heavy equipment operation must not be conducted between the hours of 9:00 p.m. to 5:00 a.m. Operating hours for other activities do not require specific approval. The Commission's regional offices may allow additional temporary waste acceptance or operating hours to address disasters, other emergency situations, or other unforeseen circumstances that could result in the disruption of waste management services in the area. The facility must record in the site operating record the dates, times, and duration when any alternative operating hours are utilized. PFD p. 113.

This provision is also found in Conclusion of Law No. 68 in the PFD.

The ALJ suggested the change based on testimony by Mr. Guernsey of the City of Austin, who suggested that the operations of the landfill should be limited to daylight hours which would lessen the impact on the existing and proposed residential uses and adjacent civic uses. Dr. Libicki, the Applicant's witness generally agreed that most of the odor complaints concerning the BFI facility were for the evening hours which is typical because more people are home at night to notice and complain about odor and winds.²¹ Furthermore, the ALJ found that the time is "ripe" to move to the standard set by the rule.²² The ALJ stated he "cannot find that BFI has shown that it is appropriate to operate its landfill 24 hours a day, 7 days a week."²³ (Emphasis added). In other words BFI did not meet its burden of proof on this issue as required by 30 T.A.C. § 80.17(a).

In a remarkable about face, the ALJ claimed that he mistakenly assigned the burden of proof on the issue of hours of operation to BFI, and determined the burden of proof was on OPIC. The Commission however, concluded, that the burden of proof was on the Applicant, in

²¹ PFD at 111-112.

²² PFD at 112.

²³ PFD at 113.

accordance with 30 T.A.C. § 80.17(a), and BFI met its burden with respect to all referred issues.
Conclusion of Law 7.

Referred issue No. X is whether the operating hours at the BFI landfill are appropriate. The Order issued by the TCEQ finds that “the evidence shows that the landfill’s operating hours are appropriate.” (Findings of Fact No. 286). The Commission also concluded that the operating hours proposed in the application are appropriate. (Conclusion of Law No. 55). Without the change recommended in the PFD, the current operating and waste acceptance hours are 24 hours per day Monday through Friday and from 12:00 a.m. to 3:00 p.m. on Saturdays. However the permit authorizes 24/7 operation if BFI chooses. These permitted hours subject the neighborhoods to extremely annoying and bothersome conditions of noise, odor, traffic, and lighting at night. Designating the operating hours between 7:00 a.m. to 7:00 p.m. Monday to Friday and prohibiting transportation of materials and heavy equipment between the hours of 9:00 p.m. to 5:00 a.m. would help the surrounding neighborhoods cope with this landfill’s expansion.

In the explanation of their changes to the ALJ’s PFD, the Commission stated as follows:

In the response to the ALJ’s June 29, 2009 letter regarding operating hours, the Commission adopted the ALJ’s conclusion that the Applicant’s existing and proposed 24 hour per day, seven day per week operating hours are appropriate for the Landfill. However, the Commission modified the ALJ’s underlying reasoning, finding instead that the Applicant bore the burden of proof on all issues in this matter and that it presented sufficient evidence to meet its burden on all issues referred to SOAH by the Commission. With regard to operating hours, the Commission determined that the evidence in the record supported a finding that BFI made a prima facie showing that its’ existing and proposed operating hours are appropriate and there was no contravening evidence offered by the Protestants in the record to warrant any changes to those hours. Thus, the Commission modified proposed Findings of Fact No. 286 and proposed Conclusion of Law Nos. 7 and 55 to reflect that the proposed operating hours for the facility are appropriate and that the Applicant bore the burden of proof on all issues referred to SOAH for hearing in this matter. ...

Texas Health and Safety Code § 361.0832 holds as follows:

(c) The commission may overturn an underlying finding of fact that serves as the basis for a decision in a contested case only if the commission finds that the finding was not supported by the great weight of the evidence.

(d) The commission may overturn a conclusion of law in a contested case only on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules.

NNC cannot imagine that the ALJ, who listened to and evaluated all the testimony, was incorrect when he asserted that he “cannot find that BFI has shown that it is appropriate to operate its landfill 24 hours a day, 7 days a week.”²⁴ The Commission’s determination that “the evidence in the record supported a finding that BFI made a prima facie showing that its existing and proposed operating hours are appropriate...” directly contradicts the ALJ’s PFD finding. Furthermore, in the June 29, 2009 letter from the ALJ to the TCEQ, the ALJ found “no basis for concluding that BFI’s nighttime hours are inappropriate”, and “there is no evidence showing BFI’s weekend operations during the day are inappropriate”. P. 3, Revised Findings of Fact 286, Revised Conclusion of Law 7, 55. In no way, is the Commission’s determination supported by the great weight of the evidence in accordance with Tex. Health & Safety Code §361.0832(c). Furthermore, the testimonies by the citizen witnesses speak to the same real life matters that Mr. Guernsey described when he suggested that operations should be restricted to daylight hours. These witnesses provided contravening evidence that operating the landfill at night is inappropriate. Consider the following excerpts from testimony by Ms. Joyce Best, Ms. Marcelina Cook, Ms. Evelyn Remmert, and Mr. Mark McAfee, related to noise in the evening or at night:

JOYCE BEST

Q: Could you describe the noise problem that you marked on Exhibit BEST-2?

²⁴ PFD at 113.

A: It was the back-up beeper. I specifically remember a time when my sister was staying with me and came and asked what was the beeping noise that woke her up during the night.²⁵

* * * * *

MARCELINA COOK

Q: What kind of concerns do you have about the Landfill?

A: My concerns are primarily odors which are worse in cold weather, sea gulls and buzzards, traffic including landfill trucks cutting through the neighborhoods, windblown trash and/or dust, noise especially late at night from the trucks. . . .²⁶

* * * * *

EVELYN REMMERT

Q: What about noise?

A: Noise is a major problem, depending upon the direction of the wind and the speed of the wind. When it is quiet and the air is heavy, you can hear the noise from the landfill very clearly.

Q: What is the noise source?

A: The source is the back-up horns. We hear them inside our home once or twice per week.

Q: Is there a time of day when you hear it more clearly?

A: Yes, usually at night.²⁷

* * * * *

MARK MCAFEE

Q: Are there other complaints about the site?

A: Yes, noise.

Q: What type of noise?

A: There is a grinding noise – the noise of gigantic heavy equipment. It seems to be coming from both landfills. I would characterize this as equipment noise. During the day it is drowned out a bit by general street noise, but it is pronounced at night.²⁸

III. DRAINAGE AND FLOODING

The Order finds that natural drainage patterns will not be significantly altered as a result of the proposed expansion (Finding of Fact 98) and concluded that BFI has demonstrated that natural drainage patterns will not be significantly altered as a result of the proposed Landfill

²⁵ NNC Exh. BEST-1 at 5, *l.* 30 – 6, *l.* 3.

²⁶ NNC Exh. MCO-1 at 2, *ll.* 6-10.

²⁷ NNC Exh. ER-1 at 7, *ll.* 8-15.

²⁸ NNC Exh. MM-1 at 3, *ll.* 24-29.

development as required by 30 T.A.C. § 330.56(f)(4)(A)(iv). (Conclusion of Law 10). (Referred Issue A). NNC disagrees. NNC’s concern stems from the real impact to Williams Ltd.’s property as well as from the violation of the TCEQ rules. This issue demonstrates that the rules are in place for a reason: to “safeguard the health, welfare and physical property of the people and to protect the environment...” Health & Safety Code § 361.002. In order to demonstrate that the natural drainage patterns will not be significantly altered, the Applicant, in this case BFI, must submit information that the peak flow, velocity and volume of surface water runoff leaving the site in the proposed condition will not be significantly increased from the natural predevelopment conditions.

As can readily be seen by the following chart of documents, BFI failed to demonstrate that the flows from the landfill to the west are not significantly altered by the expansion in violation of the TCEQ regulations. Please note in the following chart that the outfalls to the west are identified as “north” and “south” to avoid confusion because as the numbers of the outfalls changed although their location did not.

Exhibit No.	Document	Existing Flow North	Existing Flow South	Proposed Flow North	Proposed Flow South
NNC-1	Submitted Permit MOD (5/2002)				
NNC-2	Existing Drainage Condition Figure 1 5/30/2002 (from NNC-1)	66 cfs	26 cfs		
NNC-3	Proposed Drainage Condition Figure 3 5/31/2002 (from NNC-1)			66 cfs	26 cfs
AM-32	Proposed Drainage Condition Figure 3 7/25/2002 [Accepted by TCEQ 10/22/02]			66 cfs	26 cfs
AM-33	Proposed Drainage Condition Figure 3 1/06/2006, Revised 3/1/2006			66 cfs	26 cfs
NNC-4 AM-16	Existing Drainage Condition Figure 6-3 5/08/2006 Bates No. 967 (from Amendment Application)	175.4 cfs	65.8 cfs		
NNC-5 AM-17	Proposed Drainage Condition Figure 6-4 5/08/2006 Bates No. 968 (from Amendment Application)			171.1 cfs	61.4 cfs

From the permit modification documents submitted (NNC-2), existing drainage conditions in 2002 show the existing flow from the north outfall at 66 cfs and the existing flow from the south outfall at 26 cfs. In the same submitted modification, the proposed drainage condition shows 66 cfs from the north outfall and 26 cfs from the south outfall.²⁹ The same conditions exist in the 2006 Modification.³⁰

Then along comes the amendment application which now shows an existing flow from the north outfall at 175.4 cfs and an existing flow from the south outfall at 65.8 cfs, a significant increase from the 2006 proposed flows from those two respective outfalls.³¹ NNC argues that the proposed condition in 2002-2006 should be the existing condition in 2008.³²

The solution developed as part of the 2002 MOD and maintained in the February 2006 MOD was an excellent engineering solution. **The problem is – the Applicant did not construct the drainage system as they represented that they would. At least to date, they have not constructed what was permitted in the MOD.** According to Mr. Mehevec, the northern tip of what is labeled as drainage area D-7 in the application (compares to DA-5 in the MOD) drains back to the south and runoff from this area exits the site at the northernmost outfall to the west. This is a change from the representation of the “proposed” conditions in the 2002 and 2006 MOD.

It is seldom that a protestant has the opportunity to corroborate testimony offered in the hearing through cross-examination with fact testimony that is from another perspective, yet totally consistent. That is what happened in this case. There is no question that a drainage problem currently exists to the west, due to BFI’s failure to construct the MOD as permitted.

²⁹ Exh. NNC-3; Exh. AM-32.

³⁰ Exh. AM-33.

³¹ Exh. NNC-4; Exh. AM-16.

³² Protestants Northeast Neighbors Coalition’s Closing Argument, p. 10; Reference to this document is hereinafter denoted as “NNC Closing Argument.”

Mr. Evan Williams, through a partnership - Williams, Ltd. - owns a 22-acre tract to the west of the landfill, and he testified about drainage problems that have existed on his land since the granting of the MOD.³³ If BFI had constructed the MOD as permitted, such problems would not have occurred because the flows would have been unchanged as represented in the proposed conditions of the MOD. In fact, the flows have been increased as shown in the existing conditions of the application.

What has been revealed is a violation of the MOD, or perhaps more kindly, a failure to build out the MOD as permitted. BFI represented that it would build the MOD in a certain way and at least to date has not. BFI should not be allowed under any concept of law or equity to modify their permitted modification in this amendment based upon the fact that they went out and discovered that they had not, at the time of the topographic survey, built it as proposed and permitted.

IV. CONCLUSION

Based on the real-life testimony of credible citizen witnesses, this landfill is incompatible with the surrounding neighborhoods. BFI failed to demonstrate that its operating hours are appropriate. Indeed, the evidence presented at the hearing demonstrates that BFI's operating hours are inappropriate. Flooding is already taking place on Williams, Ltd. property and this proposed expansion will exacerbate the drainage problems. NNC respectfully requests that a rehearing be granted to address these very important matters.

³³ Exh. EW-1 at 3.

Respectfully submitted,

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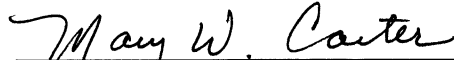
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CERTIFICATE OF SERVICE

On this 8th day of October, 2009, the undersigned hereby certifies that a true and correct copy of the foregoing instrument was served on all attorneys/parties of record as indicated below for each.



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