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Cause No. 03-11-00277-CV

IN THE COURT OF APPEALS
FOR THE THIRD JUDICIAL DISTRICT
AUSTIN, TEXAS

NORTHEAST NEIGHBORS COALITION
and TJFA, L.P.,
Appellants,

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY and
BFI WASTE SYSTEMS OF NORTH AMERICA, INC.,
Appellees.

On Appeal from the 126th District Court of Travis County, Texas
Hon. John K. Dietz, Judge Presiding
Trial Court No. D-1-GN-09-004113

REPLY BRIEF OF APPELLANT NORTHEAST NEIGHBORS COALITION

James A. Hemphill
GRAVES, DOUGHERTY, HEARON & MOODY, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701
(512) 480-5762 phone
(512) 536-9907 fax
jhemphill@ghdm.com

ATTORNEYS FOR APPELLANT
NORTHEAST NEIGHBORS COALITION
September 10, 2012

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I. TCEQ and BFI Rely on the Quantity of the Evidence Presented, Without Acknowledging that the Content of BFI's Evidence Did Not Substantively Contradict the Neighbors' Testimony on Land Use Issues.

NNC characterized its first Issue Presented as "Does the 'substantial evidence' standard of review require examination of the actual content of evidence?" because in the district court, both BFI and TCEQ focused on the sheer *quantity* of evidence presented by BFI during the contested case hearing. The implicit assumption behind this focus was that a large quantity of evidence *must* satisfy the "substantial evidence" standard, as long as that evidence relates somehow to the topic on which it was offered.

In response to this issue, BFI answers that "[o]f course" the actual content of the evidence must be reviewed. BFI Br. at 12. But the remainder of BFI's brief, as well as TCEQ's, continues to focus on bulk rather than substance. BFI comes close to explicitly admitting this, touting the "abundance of evidence" it presented at the hearing, *id.* at 10, and even (wrongly) suggesting that NNC's statement that BFI offered "a large quantity of evidence" must be a concession that "substantial evidence" exists, *id.* at 10 n.34. It is no such thing, and BFI's claim only serves to reinforce why its overall approach in this matter is faulty.

A. The neighbors' testimony regarding odors and other negative impacts on surrounding land use was uncontroverted in its particulars, and was found credible by the ALJ.

BFI repeatedly attacks the credibility of the neighbors' testimony on odors and other land use issues. For example, it calls some of the testimony "misleading" and claims it "does not seem credible" (BFI Br. at 7), and argues that the ALJ evaluated

witness credibility in granting BFI's application (*id.* at 8), implying that the ALJ found the neighbors lacking in credibility. BFI also claims that the neighbors' testimony regarding odors was controverted (*id.* at 12).

But the ALJ himself did *not* disbelieve the neighbors' testimony regarding odors; instead, he specifically found the testimony to be credible.[1] Further, the particulars of the neighbors' testimony were *not* in fact disputed. Neither BFI nor TCEQ cite any testimony from any witness that disputed the actual content of the neighbors' testimony. In other words, no witness presented by any party disputed that Joyce Best made repeated complaints about the landfill and eventually moved away due to the lack of response to those complaints (NNC Br. at 3-4), or that Evelyn Remmert has repeatedly been disturbed by noise from the landfill (*id.* at 5), or that Ms. Best filed dozens of odor complaints but eventually stopped due to frustration about continuing problems (*id.* at 11-12), or that several neighbors characterized landfill odors as worse in 2007-08 than in earlier years (*id.* at 14-15).

Apparently BFI's allegation that the neighbors' testimony was controverted is a reference to BFI's own, mostly expert, testimony regarding land use issues. None of that testimony took issue with the specifics of the neighbors' testimony. BFI's proffered testimony certainly cannot be squared with the evidence presented by the neighbors and found credible by the ALJ. As shown in NNC's initial brief, and as further explained below, careful examination of the *substance* (or lack thereof) of BFI's voluminous

[1] PFD at 48-49.

testimony shows that the testimony does not constitute substantial evidence in support of the TCEQ order.

B. BFI's land use evidence was fatally flawed and does not support the TCEQ's decision to grant BFI's permit amendment application.

Much of the briefing of BFI and TCEQ is devoted to summarizing the testimony of BFI's land use-related experts and other witnesses. The testimony of each witness had fundamental flaws.

Dr. Libicki. In its initial brief, NNC demonstrated that BFI's odor expert, Dr. Libicki, reached conclusions that were in conflict with testimony from landfill neighbors that was substantively unrebutted, and that Dr. Libicki did not conduct sufficient investigation to conclude that the odor testimony from the neighbors was either mistaken or untrue.[2] Rather than responding directly to NNC's argument, BFI merely restates Dr. Libicki's testimony.[3] She had no basis to dispute that the neighbors' testimony regarding serious, sustained odor problems were accurate and truthful.

Mr. Dugas. BFI's regional manager, Brad Dugas, simply testified as to his subjective, unsupported belief that the neighbors who complained about odors (and who the ALJ found credible) were "opposed to the landfill's existence and expansion" and that BFI has "not been able to verify" the odor complaints (again, despite the ALJ's

[2] NNC Br. at 8-10, 29-30.

[3] BFI Br. at 25-30.

finding that the complaints were credible).[4] This is *no* evidence to support land use compatibility regarding odors, let alone substantial evidence.

The TCEQ's "odor strike force." The TCEQ monitored odors in the area of the landfill for one week in December of 2002 and detected several instances of odors, albeit none that the TCEQ categorized as "capable of causing health effects … highly objectionable, or [the type that] can impact the intended use of a property."[5] BFI touts this as substantial evidence that odors are no longer a problem at the landfill, but it simply does not support this conclusion. On its face – even assuming the "strike force's" method of categorizing odors was reasonable – a one-week study from 2002 is *no* evidence to rebut the neighbors' testimony that odor problems were ongoing and continued to exist even as of the time of the hearing in January of 2009.

The single instance of another TCEQ odor investigation. BFI also points to a single instance (other than the one-week 2002 "strike force") in which the TCEQ investigated *one* odor complaint.[6] Again, this simply does not contradict the substantial evidence presented by neighbors regarding ongoing odor problems, including testimony from multiple witnesses that they stopped reporting odor problems to the TCEQ either out of frustration, or because a TCEQ representative discouraged them from filing odor complaints.

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[4] BFI Br. at 27-28. BFI characterizes Mr. Dugas's testimony as "not challenged." *Id.* at 28. The clear implication of Mr. Dugas's subjective opinion is that he believed the neighbors were untruthful in their odor complaints and testimony, but the ALJ disagreed and found the neighbors credible.

[5] BFI Br. at 28 (citing PFD at 51).

[6] BFI Br. at 29.

Messrs. Worrall and Heimsath. BFI maintains that the testimony of its hired land use experts, John Worrall and Charles Heimsath, support a finding of compatibility.[7] As NNC showed in its initial brief, both of these experts premised their opinions on faulty bases. Mr. Worrall testified that residential development around a pre-existing landfill is presumptive evidence of compatibility,[8] and Mr. Heimsath similarly accepted growth in the region as nearly *prima facie* evidence of land use compatibility.[9] Neither expert adequately considered, or even spoke with, landfill neighbors.

The evidence relied upon by BFI, taken either individually or collectively, does not amount to substantial evidence to support the TCEQ's finding of land use compatibility.

BFI also cites the ALJ's finding that "other evidence" indicates odor problems "have declined in recent years."[10] NNC has shown, in its initial brief and above, that this alleged "other evidence" does not constitute substantial evidence to support the TCEQ's land use compatibility findings. Further, even if odor problems have declined – a proposition with which NNC does not agree and which is not supported by substantial

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[7] BFI Br. at 16-19.

[8] NNC Br. at 6-7 (citing and quoting Worrall testimony). BFI's brief mischaracterizes NNC's argument, and then compounds the error by criticizing the mischaracterized argument. BFI contends that NNC claimed Mr. Worrall testified that he used a "per se rule" that if a landfill is a pre-existing use, then it is compatible with surrounding land uses. BFI Br. at 33. What NNC actually (and accurately) argued is that Mr. Worrall "*in effect*" employed a per se rule – in other words, that the *practical effect* of Mr. Worrall's admitted assumption of compatibility is a presumption that pre-existing landfills are compatible with surrounding land use. NNC Br. at 31. NNC plainly quoted and cited Mr. Worrall's testimony that forms the basis of this accurate characterization. *Id.* at 6-7.

[9] NNC Br. at 7 (citing and quoting Heimsath testimony).

[10] BFI Br. at 24.

evidence – that is still insufficient to constitute evidence that recent odor problems do not prove land use incompatibility.

Even though the ALJ found the neighbors' complaints credible, he recommended granting BFI's application (as BFI points out) because "the legal standard is compatibility," and he could not conclude "that a landfill is incompatible with a nearby residential area or business if it will ever be heard, smelled, seen, or noticed."[11] But the neighbors' testimony went far beyond merely "noticing" or "smelling" the landfill. They testified without contradiction as to severe and serious disruptions caused by the facility, and their testimony was specifically found to be credible.

Ultimately, the arguments presented by BFI and the TCEQ regarding land use demonstrate how Appellees view the "substantial evidence" standard. Both the landfill operator and the regulating agency believe that if a permit expansion applicant offers expert testimony on an issue and cites enough sources, it has carried its burden to produce substantial evidence – even if the expert spends almost no time investigating the actual conditions at the landfill, and even if the sources simply do not contradict the testimony of a dozen neighbors regarding continuous and systematic problems. This gives landfill operators a "bullet-proof" template of the type of evidence to present to ensure them an approval that is essentially insulated from review – *regardless of the nature of the countervailing testimony.* This is inconsistent with the established standard of substantial evidence review, which requires consideration of "the reliable and probative evidence in the record *as a whole*." *Sanchez v. Texas State Bd. of Medical Examiners*, 229 S.W.3d

[11] BFI Br. at 36-37 (quoting PFD).

498, 510 (Tex. App. – Austin 2007, no pet.) (citing cases) (emphasis added). When the *quality* of BFI's evidence is examined, it is apparent that the evidence is not sufficient to constitute "substantial evidence," even under the deferential standards applicable here.

II. BFI Did Not Carry its Burden on 24/7 Operating Hours.

The operating hours issue has had a somewhat unusual progression in this case. The ALJ's proposal for decision (PFD) recommended a finding that BFI had *not* carried its burden to show entitlement to 24/7 operations. The ALJ recommended that hours be restricted to the presumptive hours in the TCEQ rules of 7 a.m. to 7 p.m., Monday through Friday. He further observed that "[t]he ***only evidence*** that supports BFI's deviation from the 7-to-7 standard for waste acceptance hours is the fact that the industry standard is 24-7, which applies to other permitted landfills in Travis County. The ALJ does not find that very persuasive."[12] In an unusual about-face, the ALJ later wrote a letter changing his recommendation, on the ground that the burden of proof on operating hours was on protestants rather than BFI, because BFI's then-current operating hours were 24/7. The TCEQ granted BFI 24/7 operating hours, though on different grounds than those recommended by the ALJ; in its explanation of changes, the TCEQ found that BFI's request for 24/7 operations was supported by the record evidence – without setting forth in the explanation of change what that alleged evidence was.[13]

After hearing all the evidence first-hand, the ALJ found only *one* piece of evidence supporting 24/7 operations: local industry standards. That, of course, does not

[12] PFD at 112 (emphasis added).

[13] TCEQ Order at 57-58.

constitute substantial evidence. Apparently aware of this, BFI argues at length that the record contained other evidence supporting round-the-clock operations (contrary to the ALJ's finding). But much of the alleged evidence bullet-pointed by BFI at pages 38-39 of its brief simply cannot logically be considered as substantial evidence supporting 24/7 operations. Several of the items amount to no more than "the landfill has operated 24/7 in the past," which while accurate says nothing about whether *continued* 24/7 operations are warranted. The remainder of the bullet-point items amount to "the landfill complies with its permit"; if this were sufficient for 24/7 operations, then virtually *every* operating landfill could justify around-the-clock operations.

Both BFI and TCEQ argue that BFI's agreement to stop accepting waste in November of 2015 was based on BFI's assumption that the landfill would be full by then under 24/7 operations.[14] BFI made an agreement to close the landfill in order to stave off opposition from the City of Austin and Travis County to BFI's expansion plans. That agreement was *not* contingent upon BFI being granted 24/7 operations. BFI knew, when it made the agreement, that additional restrictions upon its operations could be imposed. The existence of the agreement is entirely irrelevant to whether BFI carried its burden of adducing substantial evidence that it was entitled to 24/7 operations.

BFI and TCEQ also argue that the protestants offered little evidence that 24/7 operations would be improper.[15] This is inaccurate; NNC detailed the relevant evidence

[14] BFI Br. at 40; TCEQ Br. at 27.

[15] BFI Br. at 37-38; TCEQ Br. at 27-28.

in its initial brief.[16] But the existence or non-existence of such evidence is *irrelevant* if the burden was on BFI (which it was) and if BFI failed to carry that burden (which it did, as the ALJ recognized before erring on the burden-of-proof issue in his post-PFD letter).

BFI did not adduce substantial evidence to justify continued 24/7 operations. The TCEQ's ruling otherwise should be vacated.

III. BFI Did Not Carry its Burden to Show No Significant Alteration of Natural Drainage Patterns.

BFI and TCEQ either misunderstand or misrepresent NNC's argument regarding drainage.[17] BFI attacks a strawman: the mistaken notion that NNC came up with a "novel theory" during the contested case hearing that proposes an "apples-to-oranges" comparison, and that NNC seeks a finding that natural drainage patterns are impermissibly altered in BFI's expansion. NNC does not propose the alleged comparison criticized by BFI, and never has. The upshot of NNC's argument is that important information was first revealed at the contested hearing – not in BFI's permit application, where it should have been disclosed – and that BFI's failure to timely disclose the information precluded the protestants from adequately evaluating BFI's drainage calculations.

As set forth in NNC's initial brief, BFI engineers in the application here at issue submitted drainage calculations for two discharge points, Outfalls 4 and 5, that purported to show no material change between pre- and post-development conditions – that is, that

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[16] NNC Br. at 15-17.

[17] NNC has made the same argument consistently in the administrative proceedings and the district court, and previously has corrected Appellees' mischaracterizations.

the amount of stormwater discharged from the landfill at these two outfall points would be the same after the expansion as it was before the expansion. That is the analysis relied upon by BFI to show no significant alteration of natural drainage patterns. Taken on its face, it appears to do just that. This was the *only* analysis provided to the protestants before the hearing. This was the analysis that other experts agreed showed no significant alterations of natural drainage patterns.

The protestants discovered during the hearing that, in other documents not part of the application, BFI gave much different pre-development discharge amounts for these two points. These other documents date from both before and after the application at issue here. They show a significantly lower amount of discharge from these two points pre-development. Thus, if the other documents accurately set forth pre-development discharge, then the much larger post-development discharge in BFI's application would appear to show a significant alteration of drainage patterns.

BFI offered an explanation for the discrepancies only *after* they were uncovered by counsel for protestants. This testimony from BFI's expert – previously undisclosed, and unrebutted only because of BFI's failure to disclose the discrepancies before the hearing – is the *sole* basis for a conclusion that the discrepancies do not show a material alteration. The question then becomes whether the previously undisclosed explanation amounts to substantial evidence. Under these unique circumstances, NNC argues that the untested opinion testimony of BFI's expert witness cannot be considered "substantial evidence," and that the issue should be remanded to allow full exploration of the issue.

BFI flips the notions of notice and burden of proof on their heads by arguing it was the fault of the *protestants*, not of BFI, that BFI failed to disclose the existence of the discrepancies until they were uncovered by protestants' counsel. BFI faults protestants for not asking for a recess or taking other extraordinary measures to try to remedy BFI's concealment by having protestants' experts analyze the situation.[18] Under BFI's theory, an applicant can omit highly relevant material from its application and be safe from any consequences of concealment, even if the tactic is detected, unless the applicant's opponents ask for special relief. That type of gamesmanship is neither equitable nor sound policy, and in fact is contrary to the basic proposition that an applicant has the burden to include all relevant information in its application. NNC is entitled to an opportunity to meaningfully test the assertions of BFI's expert witness that purport to explain the drainage discrepancies.

The TCEQ wrongly argues that NNC "ignores" the explanations of BFI's drainage expert, Mr. Mehevec.[19] Not only did NNC discuss Mr. Mehevec's explanation in its initial brief, it also characterized the relevant drainage issue as: "whether BFI's witness, engineer Adam Mehevec, offered a sufficient explanation for the apparent anomalies."[20] Explicitly discussing and questioning Mr. Mehevec's explanation is the polar opposite of "ignoring" it. The TCEQ simply did not read, does not understand, or badly misstates NNC's briefing on this issue. In any event, the TCEQ offers no support for the

[18] BFI Br. at 48-49.

[19] TCEQ Br. at 29.

[20] NNC Br. at 34.

proposition that Mr. Mehevec's explanation should constitute "substantial evidence" under the circumstances of the case.

CONCLUSION AND PRAYER

For the reasons set forth in its initial brief and this reply brief, Appellant Northeast Neighbors Coalition respectfully prays that this Court vacate the permit issued by the Texas Commission on Environmental Quality to BFI, remand the matter to the TCEQ for further proceedings, and award Appellant all other relief to which it may show itself entitled.

Respectfully submitted,

/s/James A. Hemphill
James A. Hemphill
State Bar No. 00787674
GRAVES DOUGHERTY HEARON
& MOODY, PC
401 Congress Ave., Suite 2200
Austin, Texas 78701
512-480-5762
512-536-9907 (fax)

ATTORNEYS FOR APPELLANT
NORTHEAST NEIGHBORS COALITION

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on the following as indicated below, on this the 10th day of September, 2012.

Greg Abbott
C. Andrew Weber
David S. Morales
Barbara B. Deane
David Preister
Nancy E. Olinger
Office of Attorney General
Environmental Protection Section
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
via certified mail, return receipt requested
Courtesy copy *via* email:
nancy.olinger@oag.state.tx.us and cynthia.woelk@oag.state.tx.us

Paul G. Gosselink
Lloyd Gosselink Rochelle & Townsend, P.C.
P.O. Box 1725
Austin, Texas 78767
via certified mail, return receipt requested
Courtesy copy *via* email: pgosselink@lglawfirm.com

/s/ James A. Hemphill
James A. Hemphill