

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

June 29, 2009

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CHIEF CLERKS OFFICE  
TEXAS COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Les Trobman, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

**VIA FACSIMILE: (512)239-5533**

Re: SOAH Docket No. 582-08-2178; TCEQ Docket No. 2007-1774-MSW; In Re:  
Application of BFI Waste Systems of North America, LLC, for Type I MSW  
Permit No. 1447A

Dear Mr. Trobman:

These are my recommendations concerning the exceptions that the parties have filed to my Proposal for Decision (PFD) in the above case, which is now pending before the Commission.

## **Hours of Operation**

I recommend that the Commission sustain, in part, BFI Waste Systems of North America, LLC's (BFI's) and the Executive Director's (ED's) exceptions to my proposal to change the permit to restrict BFI's hours of operation. I do not agree with all of their points, but I do agree with the ED that I mistakenly assigned the burden of proof on this issue to BFI. When the burden of proof is properly assigned to Office of Public Interest Counsel (OPIC), which advocates the change in the hours of operation, the evidence is insufficient to support a change.

As noted in the PFD, BFI is currently authorized to operate 24 hours per day, seven days per week. That is consistent with the operating hours for other landfills in Travis County and with industry practices. Despite its broader authorization, the BFI Facility is closed from 3:00 p.m. on Saturday until 12:00 a.m. on Monday. It is open for 24 hours all other days.

In its exceptions, BFI argues that I *sua sponte* raised the question of whether its operating hours were appropriate, even though no party had raised it. That is incorrect. The Commission referred the issue of whether BFI's operating hours were appropriate. Moreover, as set out in the PFD, OPIC argued in its closing brief that BFI had failed to show its proposed hours of operation were appropriate and OPIC recommended that the Commission restrict BFI's operations to daylight hours. Assigning the burden of proof to BFI, I concluded in the PFD that BFI had failed to prove its case on this issue and recommended the default operating hours set out in the Commission's rules.

The ED argues that an applicant has no initial burden of proving that a deviation from the hours of operation set out in 30 TEX. ADMIN. CODE (TAC) § 330.118 is appropriate.<sup>1</sup> The ED describes a process of review under which an applicant has no burden on the point until the ED or the Commission becomes aware of information suggesting that the requested hours are inappropriate. Within the context of a contested case, the ED's interpretation would mean that another party has the burden of making a *prima facie* showing that the proposed hours are inappropriate before an applicant would have the burden of persuading the Commission that the proposed hours are suitable.

In essence, the ED is contending that I improperly assigned the burden of proof to BFI on the hours-of-operation issue. I do not agree that section 330.118 supports the ED's exception. The process the ED describes is not set out in section 330.118. However, I do agree with the heart of the ED's argument as applied to this case. Based on the applicable burden-of-proof rule, I now agree that I incorrectly assigned to BFI the burden of proof on the hours-of-operation issue.

The TCEQ's generally applicable burden-of-proof rule, 30 TAC § 80.17(a), states, "The burden of proof is on the moving party by a preponderance of the evidence, except as provided [elsewhere for certain kinds of cases]." No other rule addresses the burden of proof in a case like the current one.

As the applicant for a permit amendment, BFI is clearly the moving party on all permit provisions that it seeks to change or add in this case. Thus, under 30 TAC § 80.17(a), BFI has the burden of proof on those proposed changes and additions. However, BFI has not applied to change its hours of operation in this case. Accordingly, BFI is not the movant on the hours-of-operation issue, and section 80.17(a) does not assign to BFI the burden of proof on that issue.<sup>2</sup>

In writing the PFD, I mistakenly assigned the burden of proof to BFI on the hours-of-operation issue because, in his opening statement, BFI's attorney stated, "[W]e fully recognize that we have the burden of proof on the referred issues."<sup>3</sup> That was in accordance with section 80.17(a) for every other issue in the case. Did BFI through that opening statement agree to also carry the burden on the hours-of-operation issue? That fine point was not argued or even discussed during the hearing, and BFI's exceptions reflect its surprise that I assigned it that additional burden.

If BFI does not have the burden of proof on the hours-of-operation issue, who does? I now conclude that OPIC, the movant advocating a change in the hours of operation, has the burden of proving BFI's current hours are inappropriate. Mostly, OPIC claimed that BFI had not carried its burden, but OPIC also argued that the currently permitted hours are inappropriate. No other party made either argument during the hearing or in post-hearing briefs.

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<sup>1</sup> Section 330.118 was in place when BFI filed its application and remains applicable to BFI. It has since been replaced by 30 TAC § 330.135.

<sup>2</sup> Since this case does not concern an application for an initial permit or an amendment to an existing permit to set hours of operation different from those set out in the Commission's rules, I do not address the assignment of the burden of proof in those types of cases.

<sup>3</sup> Tr. p. 31.

OPIC offered no direct-case evidence to show that the current hours are inappropriate. In its closing argument, OPIC did cite testimony from Austin's witness Greg Guernsey recommending that operations be limited to daylight hours to lessen the landfill's impact on the existing and proposed residential uses and adjacent civic uses.<sup>4</sup> As BFI argues in its exceptions, however, Mr. Guernsey's position was conclusory. He did not support it with any significant analysis or facts concerning nighttime operations, other than to generally indicate concerns about lighting, presumably at night.<sup>5</sup> Similarly, Austin witness Joe Word generally referred to lighting as an incompatibility factor.<sup>6</sup> OPIC alluded to, but did not specifically cite, testimony by fact witnesses concerning the inconveniences associated with nighttime operations. Along those lines, however, Northeast Neighbors Coalition's (NNC's) witness Evelyn Remmert stated that she occasionally heard back-up horns from the Landfill in her home at night.<sup>7</sup>

As discussed in the PFD, there is no evidence that BFI has ever even been cited for a noise or excess-lighting violation. Nor is there evidence that the noise or light is extreme, even if legal. Given that, I see no basis for concluding that BFI's nighttime operations are inappropriate.

OPIC did not cite it, but in the PFD, I discuss the testimony by BFI's witness Dr. Shari Libicki that most of the odor complaints concerning the BFI facility were for the evening hours. She noted that pattern of odor complaints is typical. She explained that more people are at home at night to notice and complain about odors and winds tend to be slower at night, presumably meaning that odors are not dissipated as well at night as during the day.<sup>8</sup> I concluded that there was too little evidence concerning the pattern of evening trips to know whether ceasing operations at night would significantly reduce odor. Moreover, I concluded in the PFD that BFI's Application includes adequate provisions to control odors.

There is no evidence of any kind showing that BFI's weekend operations during the day are inappropriate.<sup>9</sup>

Travis County's witness John White testified that any decrease in BFI's hours of operation would decrease waste acceptance rates such that the Landfill's capacity would not be reached by the agreed November 1, 2015, closure date.<sup>10</sup> BFI argues that this shows that its hours of operation are not inappropriate and a restriction on those hours would deprive it of the benefit of the bargain that it struck when it agreed to close by that date certain.

Based on the above, I cannot conclude that OPIC's operating at night and on the weekends is inappropriate. I recommend that the ED's operating-hours exceptions and BFI's

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<sup>4</sup> Austin Ex. 1, p. 3; Tr. 2077.

<sup>5</sup> Tr. 2070 and 2088.

<sup>6</sup> Tr. 2139.

<sup>7</sup> NNC Ex. ER-1, p. 7; Tr. 1981 and 2002.

<sup>8</sup> Tr. 530 *et seq.*

<sup>9</sup> In its exceptions, BFI alleges facts concerning its nighttime and weekend operations, but there is no evidence to support these, as reflected in BFI's lack of citations to the record.

<sup>10</sup> Travis County Ex. 4, p. 14.

exceptions to Finding of Fact (FOF) No. 286 and Conclusions of Law Nos. (COLs) 7, 55, and 68 be sustained, in part, and that FOF 286 and COLs 7, 55, and 68 be amended as follows:

286. The evidence fails to show that ~~it is appropriate for the Landfill's operational hours are inappropriate to be different from those generally prescribed by the Commission's rules. The operational hours for the Landfill should be those generally prescribed by the Commission's rules.~~

7. The burden of proof was on the Applicant, in accordance with 30 TEX. ADMIN. CODE § 80.17(a), to the extent it sought to amend its permit. BFI met its burden with respect to all referred issues ~~except the proposed hours of operation on which it had the burden of proof.~~

55. The operating hours proposed in the Application have not been shown inappropriate.

68. Pursuant to the authority of, and in accordance with applicable laws and regulations, the attached Permit should be granted ~~with the following change in Section III. A. on page 4:~~

#### A. Days and Hours of Operation

~~The facility is authorized to operate and accept waste 24 hours per day, seven days per week. 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.~~

### **Editorial Exceptions**

I recommend that the Commission sustain the ED's exceptions to and correct typographical and other minor errors in FOFs 16, 19, 22, 35, and 104(b)(ii) and COL 4. The ED, BFI, and TJFA, L.P. (TJFA) also note similar minor errors in the text of my PFD, which I acknowledge and apologize for but see no need to address in detail here.<sup>11</sup>

### **Land Use Compatibility**

I recommend that the Commission overrule all of the land-use-compatibility exceptions filed by NNC, TJFA, and OPIC. NNC argues that the Commission's decision in the *Spring-Cypress Landfill* case<sup>12</sup> sets precedent that should be followed in this case to determine land use compatibility. However, it seems to me that the Commission's decision in that case and the PFD in this differ due to very different facts judged by the same standard rather than the application of a different standard. The other exceptions restate arguments considered and rejected in the PFD.

### **Other Exceptions**

I recommend that all of the other exceptions be overruled. With minor variations, they reurge arguments previously raised and addressed in the PFD.

Sincerely,



William G. Newchurch  
Administrative Law Judge

WGN:nl  
Enclosures  
cc: Mailing List

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<sup>11</sup> For example, TJFA correctly notes that the evidentiary citation given in footnote 265 of the PFD does not support the statement, "BFI has chosen to designate all 32 wells in the monitoring system as downgradient, point of compliance wells because that designation provides an enhanced layer of environmental protection." However, the statement is supported by other evidence at Tr. 777 and 787-788.

<sup>12</sup> *Application of BMFS, Inc., for Permit No. MSW-2249*, TNRCC Docket No. 96-1634-MSW, SOAH Docket No. 582-96-1760, Order Denying (Mar. 23, 1998).

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**STYLE/CASE:** BFI WASTE SYSTEMS OF NORTH AMERICA INC

**SOAH DOCKET NUMBER:** 582-08-2178

**REFERRING AGENCY CASE:** 2007-1774-MSW

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HEARINGS**

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