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June 5, 2009

*Via Facsimile: (512) 259-3311  
& Federal Express*

LaDonna Castañuela  
Texas Commission on Environmental Quality  
Office of Chief Clerk, MC-105  
12100 Park 35 Circle  
Austin, Texas 78753

Re: TCEQ DOCKET NO. 2007-1774-MSW; SOAH DOCKET NO. 582-08-2178;  
Application of BFI Waste Systems of North America, Inc. Permit No. 1447A

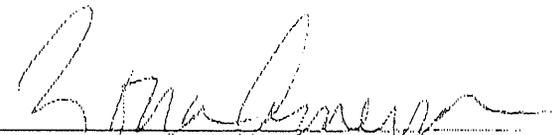
Dear Ms. Castañuela:

Pursuant to Administrative Law Judge William G. Newchurch's May 8, 2009 correspondence and Proposal for Decision (PFD) issued in the above referenced matter, enclosed are an original and seven copies of Protestant Northeast Neighbors Coalition's Response to Exceptions to the PFD. All parties of record have been copied pursuant to the Certificate of Service attached to the document.

Thank you for your assistance. Should you have any questions, please feel free to call me at (713) 524-1012.

Sincerely,

BLACKBURN CARTER, P.C.

by   
Zona Amerson, Legal Assistant

Enclosure

c: See Certificate of Service

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

2009 JUN -5 AM 11: 52

CHIEF CLERKS OFFICE

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

**NORTHEAST NEIGHBORS COALITION'S RESPONSE TO EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION AND ORDER**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COME NOW Northeast Neighbors Coalition and aligned Parties (collectively "NNC") and file this Response to Exceptions filed by the Applicant, BFI Waste Systems of North America, LLC ("Applicant" or "BFI"), and the Executive Director of the Texas Commission on Environmental Quality ("ED"). NNC continues to respectfully request that this permit application for Type I MSW Permit No. 1447A be denied. However, in filing this Response, we respectfully request that the position of the Applicant, to retain operating hours 24/7, be rejected, and that the ED support the Administrative Law Judge's ("ALJ") recommendation that the operating hours be adjusted.

The ALJ has proposed that:

The waste acceptance hours may be anytime 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.

If the permit application is issued, we respectfully request that the above provision be included and we respectfully request that the ED support this inclusion.

As the ED noted, referred issue X is "whether the landfill's operating hours are appropriate." The Applicant claims that no one raised this issue during the hearing. However, as the ALJ noted in the PFD, the OPIC raised the issue in closing arguments claiming that BFI did not carry its burden of proving that its current schedule is appropriate. Even though the citizens and members of NNC did not directly bring up the issue of limiting operating hours, through their testimony about nuisance concerns such as noise and odor, they most definitely did raise the issue.

Additionally, Mr. Guernsey of the City of Austin suggested the operations of the landfill be limited to daylight hours. According to the PFD, Dr. Libicki, the Applicant's own expert, generally agreed that most of the odor complaints concerning the BFI facility were for the evening hours. Again according to the PFD, Dr. Libicki noted that the pattern of odor complaints is typical in 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>1</sup>

Of special interest to NNC, are the testimonies by the citizen witnesses. Consider the following excerpts from testimony by Ms. Joyce Best, Ms. Marcelina Cook, Ms. Evelyn Rimmert, 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?**

**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.<sup>2</sup>

<sup>1</sup> TR at 530, as quoted in the PFD at 111-112.

<sup>2</sup> NNC Exh. BEST-1 at 5, L 30; 6, L 3.

\* \* \* \* \*

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. . . .<sup>3</sup>

\* \* \* \* \*

EVELYN RUMMERT

**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.<sup>4</sup>

\* \* \* \* \*

MARK MCAFFEE

**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.<sup>5</sup>

According to the Applicant's Exhibit JW-4, virtually all of the residential land use within one mile of Sunset Farms is single-family. As of July 30, 2008, there were an estimated 1,387 residential units built within one mile of the landfill, the majority of which are in the Harris

<sup>3</sup> NNC Exh. MCO-1 at 2, // 6-10.

<sup>4</sup> NNC Exh. ER-1 at 7, // 8-15.

<sup>5</sup> NNC Exh. MM-1 at 3, // 24-29.

Branch Subdivision east of Sunset Farms.<sup>6</sup> Again according to JW-4, PA22, which is the northeast area of the city, has grown from 1990 to 2000 by 133.2%.<sup>7</sup> Additionally, Bluebonnet Trail Elementary School is approximately 2,035 feet north of the Sunset Farms permit boundary and a licensed daycare center, The Children's Courtyard, is approximately 650 feet east of the Sunset Farms permit boundary. The Barr Mansion, a listed historic structure, is approximately 4,740 feet west of the Sunset Farms permit boundary.<sup>8</sup> Although NNC disagrees that this permit proposed expansion is a compatible land use with the surrounding neighborhoods, having the hours limited to those suggested by the ALJ will go a way toward making this land use somewhat less incompatible.

We note that the Preamble to §330.118 rulemaking provided by the ED contains significant information regarding limiting the operational hours of a landfill. Specifically, the Commission has jurisdiction to regulate those activities inherent to managing waste that have the potential to be a nuisance to neighbors.<sup>9</sup> This would include such issues as noise, odor, dust and lights, which were raised by the citizens in their testimony in this BFI case.

With regard to the 7 a.m. to 7 p.m. operating hours, the Preamble notes that these hours are used because they include the time when most people are likely to be out of their residences at work or social activities. . . . waste facility operations outside of these hours are more likely to disturb people in residential areas.<sup>10</sup> We agree with the Preamble that the "adopted rule is a reasonable exercise of the commission's responsibility to protect the community around municipal solid waste facilities."<sup>11</sup> If ever there was a community that has suffered impacts from

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<sup>6</sup> Exh. JW-4 at 4.

<sup>7</sup> Exh. JW-4 at 5.

<sup>8</sup> Exh. JW-4 at 7.

<sup>9</sup> 29 TEX. REG. 11069 (Nov. 26, 2004).

<sup>10</sup> *Id.*

<sup>11</sup> 29 TEX. REG. 11070 (Nov. 26, 2004).

their landfill neighbors, it is this one. These suggested hours are "reasonable restrictions" for protecting these neighbors.<sup>12</sup>

In sum, NNC respectfully requests that the Texas Commission on Environmental Quality afford the community surrounding this landfill protection by denying BFI's permit application for Type I MSW Permit No. 1447A. However, if the TCEQ is inclined to grant this permit, NNC requests that at a minimum some relief be afforded the community surrounding this landfill by adopting the hours of operation recommended by the ALJ.

Respectfully submitted,

BLACKBURN CARTER, P.C.

by Mary W. Carter

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<sup>12</sup> *Id.*

CERTIFICATE OF SERVICE

On this 5th day of June, 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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BLACKBURN CARTER, P.C.

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No. of Pages Including the Cover Sheet: 8

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