

Kathleen Hartnett White, *Chairman*  
Larry R. Soward, *Commissioner*  
Glenn Shankle, *Executive Director*



TEXAS COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

September 12, 2006

VIA HAND DELIVERY

Ms. LaDonna Castañuela, Chief Clerk  
Office of Chief Clerk  
Texas Commission on Environmental Quality MC 105  
P.O. Box. 13087  
Austin, TX 78711-3087

RE: Petition to Suspend and Revoke TCEQ Permit No. WQ0004674000;  
TCEQ Docket No. 2006-0324-SLG

Dear Ms. Castañuela:

Enclosed for filing in the above styled application is the original and eleven copies of:  
"Executive Director's Response Petition to Suspend and Revoke."

If you have any questions or comments, please call me at 239-0455. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "John E. Williams".

John E. Williams, Staff Attorney  
Environmental Law Division MC 173

Enclosures

RECEIVED  
MAY 15 1964  
DIRECTOR'S OFFICE

UNITED STATES DEPARTMENT OF AGRICULTURE

WASHINGTON, D. C. 20250

OFFICE OF THE DIRECTOR  
WASHINGTON, D. C. 20250

MEMORANDUM FOR THE DIRECTOR

FROM: [Illegible]

SUBJECT: [Illegible]

TCEQ Docket No. 2006-0324-SLG

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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CHIEF CLERK'S OFFICE

Petition to  
**SUSPEND AND REVOKE**  
TCEQ Permit No. WQ0004674000

submitted by  
**BARBARA HOFFMAN,**  
**ALFRED and BELITA HOFFMAN, and**  
**KENNETH WITTE**

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§

Before the  
**TEXAS COMMISSION ON**  
**ENVIRONMENTAL QUALITY**

**EXECUTIVE DIRECTOR'S RESPONSE TO PETITION TO SUSPEND AND REVOKE**

**I. Introduction**

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this Response to a Petition to Suspend and Revoke (Response) TCEQ Permit Number WQ0004674000 issued to Synagro of Texas-CDR, Inc. (Synagro), filed by Barbara Hoffman, Alfred and Belita Hoffman, and Kenneth Witte (Petitioners).

**II. Description of the Facility**

Synagro of Texas CDR, Inc., was issued a TCEQ permit that authorizes the beneficial land application of wastewater treatment plant sewage sludge on 271.81 acres at a rate not to exceed 8.3 tons per acre per year on Fields 1 - 4. The land application site is located adjacent to the west side of Farm-to-Market Road 194 and Highway 90, approximately 4.5 miles west of the City of Eagle Lake in Colorado County, Texas. The permit does not authorize any discharge of pollutants into water in the state. The land application site is located in the drainage area of the Colorado River Below Smithville in Segment No. 1402 of the Colorado River Basin. The land application site is owned by the Duncan Family Trust and is informally referred to as the "Duncan Ranch 4" site.

**III. Procedural Background**

Synagro first applied for this permit on August 21, 2003, and the application was declared administratively complete on August 29, 2003. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published on September 11, 2003, in the *Banner Press* of Columbus, county seat of Colorado County. The TCEQ Executive Director completed the technical review of the application on April 26, 2004, and prepared a draft permit. The Notice of Application and Preliminary Decision for a Water Quality Permit and the Notice of Public Meeting were published on May 20, 2004 in the *Banner Press*. A public meeting was held on June 21, 2004, in Eagle Lake, Texas, at which time the public comment period closed. The Executive Director's Response to Public Comment was filed November 9, 2004, and the period for requesting reconsideration or a contested case hearing ended December 10, 2004.

The Commission considered hearing requests on February 9, 2005, granted the hearing requests of Danny Novak, Betty and James H. Hoffman, James W. Hoffman, and Sharon Witte (Protestants), and referred three issues to the State Office of Administrative Hearings after first referring the matter to the Commission's Alternative Dispute Resolution staff for mediation.

Mediation was partly successful. Betty and James H. Hoffman, James W. Hoffman, and Sharon Witte settled with Synagro and withdrew their hearing requests. Only Danny Novak refused to settle. A preliminary hearing was held on June 20, 2005. Mr. Novak did not appear at the preliminary hearing. Synagro and settling Protestants filed a Joint Motion to Dismiss, which was granted by the Administrative Law Judge on June 28, 2005. The draft permit was changed in accordance with the settlement agreement. The application was posted on the Executive Director's uncontested agenda on July 19, 2005, and the permit was signed and issued on August 3, 2005. Notice of the Executive Director's action was mailed August 8, 2005. The deadline for filing a motion to overturn was August 31, 2005.

Danny Novak filed a Motion to Overturn the Executive Director's action on August 30, 2005. Mr. Novak's Motion was overruled by operation of law on September 27, 2005.

This application was subject to House Bill 801 (76th Legislature, 1999) during the period of time when the original application was pending before the Commission, that is, between August 21, 2003, and September 27, 2005.

The current Petition to Suspend and Revoke (Petition) was filed February 16, 2006. Synagro filed responses to the Petition on February 24 and March 7, 2006, and the Petitioners filed a reply on March 16, 2006. House Bill 801 does not apply to this Petition.

Synagro filed an application for a minor amendment to this permit on March 3, 2006. The application seeks to reduce the application rate for Field 3 to 8.12 tons per acre per year. The application rate for Fields 1, 2, and 4 would remain unchanged. The Executive Director will not act on this minor amendment application until the merits of this Petition are finally determined by the Commission.

#### **IV. Basis and Standard for Review**

"A person affected by the issuance of a permit or other order of the Commission may initiate proceedings for the revocation or suspension by forwarding a petition to the Executive Director to be filed with the Commission." 30 TAC § 305.66(d). The General Counsel is aware of only two occasions before this when petitions to suspend and revoke were submitted by persons affected by the issuance of a permit, and both of those were resolved by the parties and never reached the Commission for a decision. Therefore, this is a matter of first impression for the Commission to decide.

"A permit . . . may be suspended or revoked for good cause at any time by order of the Commission after opportunity for a public hearing is given." 30 TAC § 305.66(a). Therefore, the options for the Commission are to deny the current Petition or to refer the matter to the State Office of Administrative Hearings to develop findings of fact and conclusions of law on the matter.

Good cause for suspension or revocation includes: "the permittee's failure in the application or hearing process to disclose fully all relevant facts, or the permittee's misrepresentation of relevant

facts at any time;” or “a determination that the permitted activity endangers human health or safety or the environment to such an extent that permit termination is necessary to prevent further harm.” 30 TAC §§ 306.66(a)(4) & (5) respectively. These are the two grounds cited by the Petitioners in the current Petition.

In permitting actions, when an application is pending before the Commission, the burden of persuasion or proof always falls on the applicant. In enforcement actions, the burden of persuasion or proof falls on the Executive Director when the Executive Director initiates the enforcement action. 30 TAC § 80.17(d). In all other instances, the burden of proof is on the moving party by a preponderance of the evidence. 30 TAC § 80.17(a).

A petition to suspend or revoke does not arise during the pendency of an application before the Commission, but rather comes after the issuance of the permit is final. However, the Executive Director has not petitioned the Commission to suspend or revoke this permit, rather, the petition originates from an affected person.

It is the Executive Director’s considered opinion that the burden of persuasion or proof in this instance falls on the moving parties or Petitioners; that simply raising relevant or material issues (the standard used under House Bill 801), by itself, is not sufficient grounds for the Commission to refer this matter to SOAH for a contested case. Rather, the moving parties or Petitioners must produce evidence equivalent to summary judgment evidence proving that they are entitled to a contested case hearing on the suspension or revocation as a matter of law. That is what the burden of persuasion or proof must mean in this context.

Chapter 305 of TCEQ’s rules does not define “affected person” in the context of a petition to suspend or revoke. By analogy, Section 55.203, based on Texas Water Code § 5.115 defines “affected person” as “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application” (emphasis added). Texas Health and Safety Code § 361.121(c) broadens the definition of “affected person” in § 5.115 of the Water Code. Essentially, any person who owns “land within one-quarter mile of a sludge land application site and who lives on that land is an affected person” for purposes of that application.

In the letter noticing the briefing schedule for this matter, the General Counsel specifically determined that any previously filed responses or replies would be treated as timely and distributed to the Commissioners for their consideration. Therefore facts alleged in the Petition, Synagro’s responses to the Petition, Synagro’s request for a minor amendment to the permit, and the Petitioners’ reply to Synagro’s responses may be considered in briefing the Commissioners.

#### **V. Analysis of the Petition, Responses, and Replies Already Filed**

According to the Petition to Suspend or Revoke, Barbara Hoffman lives at 1051 Hoffman Road, Eagle Lake, Texas, which is alleged to be within one-quarter mile of the permitted land application site; Alfred and Belita Hoffman live at 1001 Hoffman Road, Eagle Lake, Texas, which is alleged to be directly across the road and within fifty feet of the permitted land application site, and Kenneth Witte lives at 1146 Pecan Valley road, Eagle Lake, Texas, which is alleged to be one-half mile from the permitted land application site.

Based on the analogous provisions in Texas Health and Safety Code § 361.121(c) for permit applications pending before the Commission, the Executive Director concludes that Barbara Hoffman and Alfred and Belita Hoffman are affected persons, and that Kenneth Witte is not an affected person.

The Petitioners specifically cite 30 TAC §§ 305.66(a)(4) and (5) as grounds for their Petition to Suspend or Revoke. As such, the Petition presents two questions for the Commission's consideration:

1. Did Synagro fail in the application or hearing process to disclose fully all relevant facts, or did Synagro misrepresent relevant facts at any time?

2. Does the permitted activity endanger human health or safety or the environment to such an extent that permit termination is necessary to prevent further harm?

In addition, Petitioners allege other "violations" constituting cause for suspension or revocation, but fail to explain how those alleged violations support the regulatory framework of 30 TAC §§ 305.66(a)(4) and (5) as grounds for their Petition. As such, these allegations present a third question for the Commission's consideration:

3. Do other alleged violations constitute cause for suspension or revocation?

1. Did Synagro fail in the application or hearing process to disclose fully all relevant facts, or did Synagro misrepresent relevant facts at any time?

The Petition belies its own claims relating to this basis for suspension or revocation. The Petition admits that this permit was mediated prior to the discovery of the information that forms the basis of this Petition. The Petition refers to two other Synagro permits that led to the discovery of the problem that forms the basis of the current Petition. The problem that forms the basis of the current Petition is a reporting error by the laboratory that analyzed soil samples and recommended sludge application rates. Those two other permits are TCEQ Permit No. WQ0004672000 (TCEQ Docket No. 2005-0070-SLG), also known as the Duncan Ranch 2 site, and TCEQ Permit No. WQ0004671000 (TCEQ Docket No. 2005-0180-SLG), also known as the Duncan Ranch 1 site.

Based on filings with the Chief Clerk in those other two permit application hearings, the Executive Director understands that both Synagro and the Petitioners discovered the problem that forms the basis of this Petition during the discovery process in the Duncan Ranch 2 case during or about December 2005. Synagro came forward and informed the Executive Director in early January 2006 when it submitted its Reply to Exceptions to the Proposal for Decision in the Duncan Ranch 1 case and requested that the Commission remand that case to SOAH for further hearings on the proper application rate. Synagro further explained to the Executive Director that the problem affected four pending permit applications and three final, issued permits. The Executive Director conducted its own review of all Synagro permits, past and present, and confirmed that the problem with laboratory error is confined to those seven pending or issued permits.<sup>1</sup>

<sup>1</sup> The present status of the 7 Synagro permits or permit applications affected by the laboratory error: Permit No. WQ0004590000, a.k.a. Roy Wright 1, Colorado County.

Permit issued in 2003, no comments, no hearing requests.

Synagro has applied for a minor amendment.

Petition to Suspend or Revoke received.

The application and hearing process on the permit that is the subject of this Petition was complete upon issuance of the permit on August 3, 2005. The Petitioners do not allege any facts or evidence that Synagro failed to disclose all relevant facts during the application and hearing process on the permit that is the subject of this Petition. The Petitioners present no facts, evidence, or other support for their allegation that Synagro intentionally misrepresented relevant facts to the Executive Director, Commission, and other parties at the time those facts were presented.

The Executive Director concludes that Synagro did not fail in the application or hearing process to disclose fully all relevant facts, and did not intentionally misrepresent relevant facts at any time.

2. Does the permitted activity endanger human health or safety or the environment to such an extent that permit termination is necessary to prevent further harm?

In both of its original responses to the Petition, Synagro notes for the record that it has never land-applied sludge at this permitted site and has voluntarily pledged not to land-apply until such a time as the Executive Director is assured that the agronomic loading rates are appropriate. Since Synagro has never land applied sludge at this site, there has been no endangerment of human health or safety or the environment. Since Synagro has voluntarily pledged not to land-apply until the agronomic loading rates are correct and appropriate, harm to human health or safety or the environment cannot occur.

The Executive Director concludes the permitted activity has not occurred and no endangerment to human health or safety or the environment can occur.

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Permit No. WQ0004591000, a.k.a. Roy Wright 2, Colorado County.

Permit issued in 2003, no comments, no hearing requests.

Synagro has applied for a minor amendment; ED staff is reviewing the application.

Permit No. WQ0004671000, a.k.a. Duncan Ranch 1, Wharton County.

Commission referred to SOAH for contested case hearing.

PFD issued, set on Commission agenda.

Commission remanded back to SOAH for further hearings on a newly proposed application rate.

Hearing on the merits scheduled for October 4-5, 2006.

Permit No. WQ0004672000, a.k.a. Duncan Ranch 2, Wharton County.

Commission referred to SOAH for contested case hearing.

Synagro requested withdrawal with prejudice, SOAH ALJ remanded to ED.

ED dismissed application with prejudice.

Permit No. WQ0004674000, a.k.a. Duncan Ranch 4, Colorado County.

Subject of this Response.

Permit No. WQ0004722000, a.k.a. Maurice Prasatik, Colorado County.

Permit issued in 2005, no comments, no hearing requests.

Synagro has applied for a minor amendment; ED staff is reviewing the application.

Permit No. WQ0004723000, a.k.a. Lonnie Owers, Colorado County.

Commission referred to SOAH for contested case hearing.

Protestant and Synagro settled out of court before the preliminary hearing; Protestant withdrew.

SOAH ALJ remanded to ED.

Changes agreed to by the parties included correction of the laboratory error with a new application rate.

ED reviewed the new application rate and made changes to the Draft Permit.

Permit signed and issued June 22, 2006; no MTO filed by deadline of July 26, 2006.

3. Do other alleged violations constitute cause for suspension or revocation?

In their original Petition and their reply to Synagro's responses, Petitioners allege three other "violations" constituting cause for suspension or revocation, but fail to explain how these grounds fit into the regulatory framework of 30 TAC §§ 306.66(a)(4) & (5). These three other alleged violations are: (1) failure to submit a Nutrient Management Plan; (2) failure to submit a required minimum number of soil samples; and (3) and unrealistic yield goals for the proposed crop. The facts do not support the allegation of violations.

(1) A Nutrient Management Plan was not required for this facility under the law because it was administratively complete prior to September 1, 2003. A Nutrient Management Plan is required under Texas Health and Safety Code § 361.121(h)(4), but only for those applications to apply Class B sludge to a land application unit that were filed with the TCEQ on or after September 1, 2003, or that were filed before September 1, 2003, but not found administratively complete before that date.

Since the application for this permit was filed with the TCEQ on August 21, 2003, and found to be administratively complete on August 29, 2003, a Nutrient Management Plan was not required for this facility under the law.

(2) The Petitioners cite Natural Resource Conservation Service (NRCS) requirements that the maximum field size for soil sampling in Texas be no larger than 40 acres. They allege these requirements are established "under Code 590" and "Texas NRCS Code 590 nutrient management practices." The NRCS is established under authority of 16 USC §§ 590a—590q-3 and 7 CFR Parts 600—661. "Code 590" refers to NRCS Conservation Practice Standards promulgated differently for each state: Code 590 consists of guidelines dealing with nutrient management, Code 633 consists of guidelines dealing with waste utilization, Code 313 consists of guidelines dealing with waste storage facilities, Code 393 consists of guidelines dealing with filter strips, Code 391A consists of guidelines dealing with riparian forest buffers, etc. They are guidelines and are not citations to the United States Code or the Code of Federal Regulations. "Code 590" in the Petition is not a citation to any statutory or regulatory requirement.

TCEQ rules require composite soil samples of 10 to 15 samples taken from points randomly distributed per every 80 acres or less of soil type or area being sampled. The TCEQ does not use NRCS guidelines for this type of authorization. 30 TAC § 312.11(d)(2)(B) & (C).

The permit defines four application fields consisting of 271.81 acres located within a 484-acre property, not the 396.63 acres alleged by the Petitioners. Only four composite samples needed to be submitted under the original application. Synagro submitted seven composite samples, as acknowledged by the Petitioners. The required minimum number of soil samples was submitted in the application.

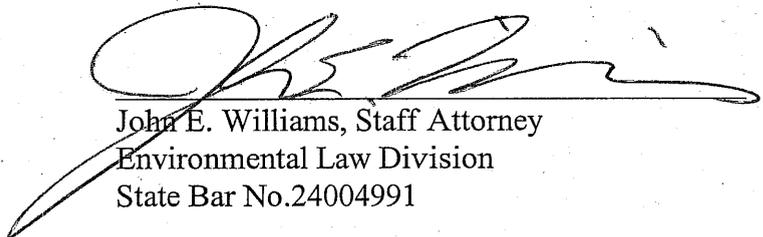
(3) Synagro proposed a yield goal of nine tons per acre in three cuttings for coastal Bermuda grown on the application fields. During the original review of the application, the Executive Director's agronomist noted that Synagro's proposal was high but still within acceptable range for that crop. Synagro's request of March 3, 2006, proposed a minor amendment to this permit, and the Petitioners' concerns about crop yield will be considered by the Executive Director when evaluating that minor amendment. No final action on Synagro's minor amendment will be made unless the current Petition to Suspend or Revoke is denied by the Commission. The Executive Director notes that the original Petition claims the yield goal of nine tons per acre is unrealistic, but offers no facts to support that allegation other than the statement that an optimistic yield goal is five tons per acre in

three cuttings. The Executive Director believes that the Petitioners' "optimistic yield goal" is low for that crop.

In summary, the Executive Director concludes that the Petitioners have not met their threshold burden of persuasion or proof that Synagro failed in the application or hearing process to disclose fully all relevant facts, or that Synagro misrepresented relevant facts at any time. The Executive Director concludes that the permitted activity has not yet endangered human health or safety or the environment, and that permit termination is not necessary to prevent further harm to human health or safety or the environment.

The Executive Director recommends that the Commission deny the Petition to Suspend or Revoke and that the Commission direct the Executive Director to process Synagro's minor amendment to this permit.

Respectfully submitted,

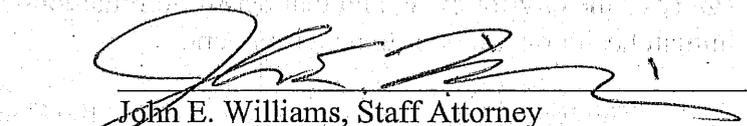


John E. Williams, Staff Attorney  
Environmental Law Division  
State Bar No. 24004991

Representing the Executive Director of the  
Texas Commission on Environmental Quality

**CERTIFICATE OF SERVICE**

I certify that on September 12, 2006, the original and eleven copies of the "Executive Director's Response to Petition to Suspend and Revoke" for Permit No. WQ0004674000 were filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk; and a complete copy was mailed to all persons on the attached mailing list.

  
John E. Williams, Staff Attorney  
Environmental Law Division  
State Bar No.24004991

Mailing List  
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Petition to Suspend and Revoke Permit No. WQ0004674000  
TCEQ Docket No. 2006-0324-SLG

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