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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 28, 2011

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

Re: **SYNAGRO OF TEXAS-CDR, INC.**
TCEQ DOCKET NO. 2010-0651-IWD

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Request for Reconsideration and Requests for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2010-0651-IWD

**IN THE MATTER OF THE
APPLICATION BY SYNAGRO OF
TEXAS-CDR, INC. FOR TPDES
PERMIT NO WQ0004887000**

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
REQUEST FOR RECONSIDERATION AND REQUESTS FOR HEARING**

To the Honorable Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Request for Reconsideration and Requests for Hearing in the above-referenced matter and respectfully shows the following.

I. Introduction

A. Description of Facility

Synagro of Texas-CDR, Inc. (Synagro or Applicant) has applied to the TCEQ for a new permit that will authorize the land application of Class B wastewater treatment sewage sludge at a rate not to exceed 10.62 dry tons per year on Field 1, 6.14 dry tons per acre on Field 2, and 10.16 dry tons per acre per year on Field 3. The land application fields are located on a total of 137.7 acres within the 189.68 acre site. The draft permit does not authorize the discharge of pollutants in water in the State. The land application site will be located approximately 7 miles east of Austin Bergstrom International Airport off Highway 71, south of the intersection of Richard Drive and Highway 71, in Travis County, Texas 78617. The land application site is located in the drainage area of the Colorado River Below Town Lake in Segment No. 1428 of the Colorado River Basin.

B. Procedural Background

The application for a new permit was received on April 3, 2009, and declared administratively complete on May 19, 2009. The original Notice of Receipt and Intent to Obtain a Beneficial Land Use Permit (NORI) was published on June 17, 2009 in the *Austin-American Statesman*. A Notice of Public Meeting was published on September 1, 2009 in the *Austin-American Statesman* and the public meeting was held on October 1, 2009 in Del Valle, Texas. The original Notice of Application and Preliminary Decision (NAPD) for a Land Application Permit was published on December 23, 2009 in the *Austin-American Statesman*. The original comment period ended on January 22, 2010. The original Executive Director's Decision and Response to Comments was mailed March 23, 2010. A timely filed hearing request was submitted by David E. and Victoria T. Rogers on June 29, 2009.

Because Applicant failed to publish alternative language notice, Applicant was required to publish a Combined Notice of Receipt of Application and Intent to Obtain a Beneficial Land Use Permit and Notice of Application and Preliminary Decision for Land Application of Sewage Sludge on September 21, 2010 in the *Austin-American Statesman* and on September 23, 2010 in *iahora si!*. The second comment period ended on October 25, 2010. An amended Executive Director's Decision and Response to Comments was mailed December 30, 2010. The deadline for requesting a hearing was January 31, 2011. An additional hearing request was filed by Steven Manilla on behalf of the Travis County Commissioners Court on January 28, 2011.

Based on the information submitted in the request and a review of the information available in the Chief Clerk's file on this application, OPIC recommends that the hearings requests of David E. and Victoria T. Rogers be denied, that the hearing

request of the Travis County Commissioners Court be approved, and that the matter be referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing. If the Rogers file a timely hearing request clarifying their relationship to the church and how they would likely be impacted by the regulated activity, OPIC may reconsider its recommendation.

II. Request for Reconsideration

A. Applicable Law

Because the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Texas Water Code Chapter 5, Subchapter M, Environmental Permitting Procedures, §§5.551 to 5.556, added by Acts 1999, 76th Leg., ch 1350 (commonly known as "House Bill 801"). House Bill 801 created a procedural mechanism whereby, following the executive director's technical review and consideration of comments, a person may file a request for reconsideration or a request for contested case hearing, or both. The request for reconsideration in particular allows the Commission to review and reconsider the executive director's decision on an application. TEXAS WATER CODE §5.556; 30 TEXAS ADMINISTRATIVE CODE ("TAC") §55.201(e).

Any person may file a request for reconsideration of the executive director's decision. 30 TAC 55.201(e). The request for reconsideration must state the reasons why the Executive Director's decision should be reconsidered. 30 TAC 55.201(e). Responses to requests for reconsideration should address the issues raised in the request. 30 TAC §55.209(f).

B. Discussion

A timely request for reconsideration of the Executive Director's (ED) decision was filed by Steven Manilla on behalf of the Travis County Commissioners Court (the Court). For the reasons discussed below, OPIC recommends that the Commission deny the pending request for reconsideration.

The court requests reconsideration of the ED's decision because of concerns relating to potential land use conflicts, health and safety impacts on nearby residents, negative impacts on air and water quality, nuisance odors, flooding, and conflicts with adopted ordinances.

Although we are sympathetic to the issues raised by the Court concerning the proposed application, without further development of the record demonstrating why the draft permit does not provide sufficient protections to address these issues, OPIC cannot recommend denial of the permit at this time. We note, however, that OPIC does recommend that the relevant and material issues raised by the County be referred to the State Office of Administrative Hearings (SOAH) by virtue of the hearing request submitted by the Court, addressed below.

III. Requests for Hearing

A. Applicable Law

This application was declared administratively complete on May 19, 2009. Because the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TEX. WATER CODE (TWC) § 5.556).

Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of the application. 30 TEX. ADMIN. CODE (TAC) § 55.201(d).

An "affected person" is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." 30 TAC § 55.203(a). This justiciable interest does not include an interest common to the general public. *Id.* Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.203(b). Relevant factors considered in determining whether a person is affected include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

In addition, Texas Health & Safety Code §361.121(c) and 30TAC §312.13(b)(3)(B) specify that, in the case of a Class B Sludge Permit Application, an owner of land located within one-quarter mile of the proposed land application unit and lives on that land is an affected person. Individuals who do not own land within one-quarter mile of the proposed land application site are not excluded from being considered affected persons.

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application. 30 TAC § 55.211(c).

Accordingly, responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or of law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

30 TAC § 55.209(e).

B. Determination of Affected Person Status

1. David E. and Victoria T. Rogers

The Office of the Chief Clerk received a timely filed hearing request from David E. and Victoria T. Rogers. The Rogers raise concerns regarding potential nuisance odors,

economic impact on the community, and proximity of the facility to schools, residences, and the Garfield Haynie Chapel United Methodist Church. While sympathetic to the Rogers' concerns, OPIC concludes that the requestors are not affected persons due to the relative distance of their residence from the application site.

The Executive Director has produced a map associated with this application that indicates that the Rogers' home is located over a mile away from the proposed application site. While landowners residing within a quarter mile of the proposed application site are automatic parties, other landowners are not precluded from demonstrating that they have a personal justiciable interest. Although the Rogers have expressed material and relevant concerns about potential nuisance conditions and negative impacts to human health at the Garfield Haynie Chapel United Methodist Church, they have not established the nature of their relationship with the church or the likelihood that the regulated activity will personally impact them by virtue of that relationship. As it stands, the concerns raised regarding proximity of the application area to the church, schools, and residences, as well as any potential economic impacts to the area, are interests that are indistinguishable from the concerns of the general public and not properly referable to the State Office of Administrative Hearings (SOAH). OPIC therefore cannot recommend that the Rogers be determined affected persons. If the Rogers file a timely reply clarifying their relationship to the church and how they would likely be impacted by the regulated activity, OPIC may reconsider its recommendation.

2. The Travis County Commissioners Court

Steven Manilla submitted a hearing request on behalf of the Travis County Commissioners Court (the Court) on January 28, 2011, stating the Court's objections to

the proposed application activities. The Court is concerned about land use conflicts, potential health and safety impacts on nearby residents, negative impacts on air and water quality, nuisance odors, and flooding. Additionally, the Court contends that the proposed facility would violate Chapters 62 and 64 of the Travis County Code and therefore cannot be granted under Health and Safety Code §364.012(f). The Court also advocates that the Commission hold a hearing on the applicability of §§361.069 and 361.089.

As the chief policy-making and administrative branch of Travis County government, the Court is a governmental entity with authority under state law over, and an interest in, the issues concerning land use and potential impacts on human health and the environment relevant to the application. 30 TAC §§ 55.203(b), 55.203(c)(6). Additionally, under Texas Health and Safety Code §364.011, a commissioners court by rule may regulate solid waste collection, handling, storage, and disposal in areas of the county not in a municipality of the extraterritorial jurisdiction of a municipality. For these reasons, OPIC finds that the Travis County Commissioners Court is an affected person under applicable law.

C. Issues Raised in the Hearing Request

The following issues have been raised in the Court's hearing request:

1. Whether the proposed activity will adversely affect water quality.
2. Whether the proposed activity will negatively impact the health of nearby residents.
3. Whether the proposed activity will create nuisance odors.
4. Whether the proposed activity will adversely affect air quality.
5. Whether the proposed activity will create a land use conflict.
6. Whether the proposed activity will result in flooding.
7. Whether the Commission is required to deny the proposed permit under Health and Safety Code §364.012(f).

8. Whether Texas Health and Safety Code §§361.069 and 361.089 are applicable to the proposed permit.

D. Issues Raised in the Comment Period

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A).

E. Disputed Issues

There is no agreement between the Court and the ED on the issues raised in the hearing request.

F. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. 30 TAC § 55.211(c)(2)(A).

The issues of whether the Commission is required to deny the proposed permit under Texas Health and Safety Code §364.012(f) and whether Texas Health and Safety Code §§361.069 and 361.089 are applicable to the proposed permit are issues of law. OPIC finds that the above-cited statutes do not apply to the proposed permit and the related issues raised by the Court should therefore not be referred to the State Office of Administrative Hearings.

Land application of sewage sludge for the purpose of beneficial use is excepted from the definition of “disposal.” 30 TAC §312.8(25). Land application of sewage sludge in a manner that complies with the requirements of 30 TAC, Chapter 312, Subchapter B, and does not exceed the agronomic need or rate for a cover crop, or any metal or toxic

constituent limitations that the cover crop may have, is considered “beneficial use.” 30 TAC §312.8(14).

In this instance, the Applicant will not be allowed to apply sludge at a rate that exceeds the nitrogen uptake rate of the plants being grown (the agronomic rate), and the proposed activity will therefore not constitute “disposal.” Because Texas Health and Safety Code §364.012 pertains only to county ordinances prohibiting the “disposal” of municipal and industrial solid waste, it is not applicable to the proposed permit. Texas Health and Safety Code §364.012(a). Likewise, Texas Health and Safety Code §§361.069 and 361.089 are governed by Texas Health and Safety Code §361.061, which restricts the scope of Texas Health and Safety Code, Chapter 361, Subchapter C, to permits relating to solid waste facilities that will “store, process, or dispose of solid waste.” None of these activities will be authorized under the proposed permit, therefore Texas Health and Safety Code §§361.069 and 361.089 are likewise inapplicable.

G. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission’s decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission’s decision to issue or deny this permit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–251 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are material . . . it is the substantive law’s identification of which facts are critical and which facts are irrelevant

that governs”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

The concerns raised by the Court relating to air quality, land use conflicts, and flooding do not fall under the Commission’s jurisdiction to maintain and protect water quality of the state, as implicitly authorized by the Texas Water Code, Chapter 26. These issues are not addressed by the substantive law governing this application and therefore cannot be considered relevant and material to the Commission’s decision. OPIC therefore finds that the issues of air quality, land use conflicts, and flooding are inappropriate for referral to the State Office of Administrative Hearings.

TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1. Furthermore, the proposed permit must comply with the management practices outline in 30 TAC §312.44 that are intended to protect ground and surface water, minimize nuisance conditions, and protect human health. Therefore, the issues of water quality, human health, and nuisance odors are relevant and material to the Commission’s decision on this application.

H. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

1. Whether the permitted activities will adversely impact water quality.
2. Whether the proposed activities will adversely impact human health.
3. Whether the proposed facility will create nuisance odors.

I. Maximum Expected Duration of Hearing

Commission Rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. Conclusion

OPIC recommends denying the pending request for reconsideration. OPIC also finds that David E. and Victoria T. Rogers do not qualify as affected persons because the permitted activities are unlikely to have an impact on the Rogers given the location of their residences relative to the facility and therefore recommends that their hearing requests be denied. If the Rogers file a timely hearing request clarifying their relationship to the church and how they would likely be impacted by the regulated activity, OPIC may reconsider its recommendation.

OPIC recommends granting the hearing request of the Travis County Commissioners Court on the issues referenced above and referring the matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing for a duration not to exceed nine months.

Respectfully submitted,

Blas J. Coy, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2011, 2011 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

Eli Martinez
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TCEQ DOCKET NO. 2010-0651-IWD

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