Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*

Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 11, 2011

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

Re: **MICRO DIRT, INC. DBA TEXAS ORGANIC RECOVERY**
TCEQ DOCKET NO. 2011-0935-MSW

Dear Ms. Chao:

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

Sincerely,

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2011-0935-MSW

IN THE MATTER OF THE APPLICATION BY MICRO DIRT, INC., D.B.A. TEXAS ORGANIC RECOVERY FOR MSW PERMIT NO. 2361	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO 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 Requests for Hearing in the above-referenced matter and respectfully shows the following.

I. Introduction

A. Description of Facility

Micro Dirt, Inc., D.B.A. Texas Organic Recovery (Micro Dirt or Applicant) has applied to the TCEQ for a new permit that will authorize operation of a Type V liquid waste processing and compost facility on an area of 15.23 acres located at 15500 Goforth Road, Creedmoor, Texas 78610.

B. Procedural Background

The application for a new permit was received on May 13, 2009. An Administrative Notice of Deficiency (NOD) was issued on June 1, 2009, and the application was declared administratively complete on July 6, 2009. The Notice of Receipt of Application and Intent to Obtain Permit was published in English on November 10, 2009, in the *Austin American-Statesman* and in Spanish on July 16, 2009, in the *¡Ahora Sí!* Spanish Newspaper, Travis County, Texas. The ED issued its

First Technical NOD on August, 28, 2009, and Applicant submitted a response to the NOD on January 25, 2010. The ED issued its Second Technical NOD on March 22, 2010, and Applicant submitted a response to the NOD on May 18, 2010. A public meeting was held on September 2, 2010. Applicant published notice of the public meeting on August, 12, 2010, August 19, 2010, and August 26, 2010, in the *Austin American-Statesman* and in the *¡Ahora Si!* Spanish Newspaper, Travis County, Texas.

The ED completed the technical review of the application on October 18, 2010, and prepared a draft permit. The Notice of Application and Preliminary Decision was published in English on November 5, 2010, in the *Austin American-Statesman* and in Spanish on November 11, 2010, in the *¡Ahora Si!* Spanish Newspaper, Travis County, Texas. A second public meeting was held on February 22, 2011. Applicant published notice of the public meeting on February, 3, 2011, February 10, 2011, and February 17, 2011, in the *Austin American-Statesman* and in the *¡Ahora Si!* Spanish Newspaper, Travis County, Texas. The Executive Director's Decision and Response to Comments was mailed May 13, 2011. The hearing request period ended June 13, 2011. A timely filed hearing request was submitted by H. Philip Whitworth, Jr., Ann Whitworth Messer, Julie Moore, Juli Phillips, M.D. Thomson, representing the Thomson Family Limited Partnership, Joe Gunn, Dorothy Gunn, Jay Gunn and Corinna Gunn (Requestors) on June 13, 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 H. Philip Whitworth, Jr., Ann Whitworth Messer, Julie Moore, Juli Phillips, M.D. Thomson, representing the Thomson Family Limited

Partnership, Joe Gunn, Dorothy Gunn, Jay Gunn and Corinna Gunn be approved, and that the matter be referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

II. Requests for Hearing

A. Applicable Law

This application was declared administratively complete on July 6, 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).

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. H. Philip Whitworth, Ann Whitworth Messer, Julie Moore, and Juli Phillips

The Office of the Chief Clerk received a timely filed hearing request on behalf of H. Philip Whitworth, Jr., Ann Whitworth Messer, Julie Moore, and Juli Phillips raising concerns relating to the proposed facility's potential adverse impacts on groundwater and surface water, traffic, odor and noise nuisance conditions, vectors, and air pollution. These requestors are also concerned about Applicant's compliance record. These interests are protected by the law under which the application will be considered.

H. Philip Whitworth, Jr., Ann Whitworth Messer, and Julie Moore own a tract of land consisting of approximately 223 acres located within one mile of the proposed facility as demonstrated in Attachment 1 of the request. Juli Phillips resides on this property. Given the proximity of this property to Applicant's facility, OPIC finds that a reasonable relationship exists between the interests claimed and the activity regulated. Therefore, OPIC finds that each of these requestors are affected persons in accordance with 30 TAC § 55.203, and recommends that their hearing requests be granted.

2. The Thomson Family Limited Partnership

The Office of the Chief Clerk received a timely filed hearing request on behalf of the Thomson Family Limited Partnership raising concerns relating to the proposed facility's potential adverse impacts on groundwater and surface water, noise and odor nuisance, traffic, vectors, inclusion of prohibited substances in the feed stock, pre-processed or

processed materials, and air pollution. The requestor is also concerned about Applicant's compliance record and the adequacy of financial assurance for closure. Aside from the issue of traffic concerns, these are interests protected by the law under which the application will be considered.

The Thomson Family Limited Partnership owns approximately 176 acres directly adjacent to the facility, as evidenced in Attachment 2 of the request. Given the proximity of this property to Applicant's facility, OPIC finds that a reasonable relationship exists between the interests claimed and the activity regulated. Therefore, OPIC finds that the Thomson Family Limited Partnership is an affected person in accordance with 30 TAC § 55.203, and recommends that its hearing request be granted.

3. Mr. and Mrs. Joe Gunn and Mr. and Mrs. Jay Gunn

The office the chief clerk received a timely filed hearing request filed on behalf of Mr. and Mrs. Joe Gunn and Mr. and Mrs. Jay Gunn. These requestors raise concerns relating to odor and noise nuisance, vectors, contamination of ground and surface water, and traffic. These requestors are also concerned about the Applicant's compliance record.

The request indicates that Mr. Joe Gunn and Mrs. Dorothy Gunn live within one mile of the facility property boundary. Mr. Jay Gunn and Mrs. Corinna Gunn own the property where Mr. Joe Gunn and Mrs. Dorothy Gunn reside plus an adjoining tract, all within one mile of the proposed facility. Given the proximity of this property to the Applicant's facility, OPIC finds that a reasonable relationship exists between the interests claimed and the activity regulated. Therefore, OPIC finds that each of these requestors is

an affected person in accordance with 30 TAC § 55.203, and recommends that their hearing requests be granted.

C. Issues Raised in the Hearing Request

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

1. Whether the proposed activity will adversely affect water quality.
2. Whether the subsurface and groundwater investigation report was conducted properly.
3. Whether Applicant has sufficient financial assurance for closure.
4. Whether Applicant has developed an adequate fire protection plan.
5. Whether the Commission should deny the permit due to Applicant's unacceptable compliance history.
6. Whether the proposed activity will create nuisance noise.
7. Whether the proposed activity will create nuisance odors and vectors.
8. Whether the proposed activity will adversely affect traffic and the roadways.
9. Whether the proposed activity will adversely affect air quality.
10. Whether the proposed facility will accept unauthorized materials.
11. Whether the proposed operations will comply with end-use product testing and standards.

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 Requestors 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). All of the issues raised by the Requestors are issues of fact.

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.*

All of the issues raised by the Requestors, with the exception of nuisance noise, are material and relevant to the Commission's decision on this application.

The proposed permit must comply with 30 TAC § 330.207(a), requiring Applicant to demonstrate that "liquids resulting from the operation of solid waste facilities...will not cause surface water or groundwater pollution." The facility must also comply with the management practices and investigation reports requirements outlined in 30 TAC Chapter 332 intended to protect ground and surface water.[1]

[1] See 30 TAC § 332.47(6)(C) (relating to groundwater protection plan for composting operations); 30 TAC § 332.47(6)(C)(i) (relating to liner requirements for composting operations); 30 TAC § 332.47(6)(C)(ii) (relating to groundwater sampling requirements and monitor well construction specifications for composting operations); 30 TAC § 332.47(6)(A)(relating to surface water protection plan, surface water drainage, and leachate containment facilities requirements for composting operations); 30 TAC § 332.47(6)(B) (relating to groundwater and subsurface investigation reports for composting operations).

Applicant must also demonstrate that they have secured sufficient financial assurance for closure;[2] an adequate fire protection plan;[3] will take sufficient measures to minimize nuisance odors and vectors;[4] will not adversely impact traffic;[5] will not adversely affect air quality;[6] and will not accept unauthorized materials or otherwise fail to comply with end-use product testing and standards.[7]

The Commission may consider the Applicant's compliance history under 30 TAC §60.3 when considering whether to issue a permit. Micro Dirt has a compliance history rating of 3.01 and a classification of "average." The Executive Director has indicated that Applicant's compliance history was not reduced due to the 123 loads of unauthorized grease trap waste allegedly accepted by Micro Dirt because the violations resulted in a Notice of Enforcement (NOE) rather than a Notice of Violation (NOV) and the violations have not been finally adjudicated. Nonetheless, Water Code §5.754(i) indicates that, "Notwithstanding any other provision of this code or the health and safety code relating to the granting of permits by the commission," the commission "shall deny an application for a permit where the applicant has an unacceptable compliance history based on violations constituting a recurring pattern of conduct that

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[2] See 30 TAC § 330.505 (relating to closing costs for processing units); 30 TAC § 332.47(9) (relating to closing costs for composting facilities.

[3] See 30 TAC § 332.47(7)(E) (relating to fire prevention and control plans for composting operations); 30 TAC § 330.221 (relating to fire protection standards for solid waste processing units).

[4] See 30 TAC § 330.63(d)(1)(A) & 330.209 (relating to nuisances such as odors and vectors for processing operations); 30 TAC § 332.8(e) & 332.47(7) (establishing odor control standards for composting facilities); 30 TAC § 332.47(7)(G) (relating to vector control for composting operations).

[5] See 30 TAC § 330.61(i)(1) (relating to availability and adequacy of roads used to access processing facility sites); 30 TAC § 332.47(5)(A) (relating to the availability and adequacy of roads used to access composting facilities); 30 TAC § 332.47(5)(C) (relating to impact of composting facilities on the area roadway system).

[6] See 30 TAC § 332.8 (8)(E) (relating to air quality requirements for composting facilities); 30 TAC §330.245 (relating to air pollution and ventilation controls for waste processing units).

[7] See 30 TAC § 332.4(10) relating to limitations and characterization of nonhazardous industrial waste for composting facilities); 30 TAC § 332.47(7)(A),(B), & (D) (relating to waste acceptance rules for composting facilities); 30 TAC § 330.203 (relating to waste identification requirements for composting facilities).

demonstrates a consistent disregard for the regulatory process."[8] The issue of compliance history is therefore relevant and material to the Commission's decision under this application and should be referred to SOAH.

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 proposed activity will adversely affect water quality.
2. Whether the subsurface and groundwater investigation report was conducted properly.
3. Whether Applicant has sufficient financial assurance for closure.
4. Whether Applicant has developed an adequate fire protection plan.
5. Whether the Commission should deny the permit due to Applicant's unacceptable compliance history.
6. Whether the proposed activity will create nuisance noise, odors, and vectors.
7. Whether the proposed activity will adversely affect traffic and the roadways.
8. Whether the proposed activity will adversely affect air quality.
9. Whether the proposed facility will accept unauthorized materials.
10. Whether the proposed operations will comply with end-use product testing and standards.

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

[8] See also 30 TAC §60.3(a)(3)(E).

expected duration of a hearing on this application would be one year from the first date of the preliminary hearing until the proposal for decision is issued.

III. Conclusion

OPIC finds that H. Philip Whitworth, Jr., Ann Whitworth Messer, Julie Moore, Juli Phillips, M.D. Thomson, representing the Thomson Family Limited Partnership, Joe Gunn, Dorothy Gunn, Jay Gunn and Corinna Gunn qualify as affected persons and recommends referring the matter to SOAH for an evidentiary hearing on the issues recommended above. OPIC further recommends a hearing duration of one year.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 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. 2011-0935-MSW

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