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Attorneys at Law

July 25, 2011

VIA e-FILING

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

Re: TCEQ Docket No. 2011-0935-MSW; Application by Micro Dirt, Inc.
d/b/a Texas Organic Recovery Proposed MSW Permit No. 2361

Dear Ms. Chao:

Attached to this e-Filing is Requestors' Reply to Responses to Hearing Requests which we respectfully request be filed among the other papers in the above-referenced proceeding.

A copy of the attachment is being forwarded to all parties of interest as set forth below. Thank you for your assistance in this matter.

Very truly yours,

FRITZ, BYRNE, HEAD & HARRISON, PLLC

By: J. D. Head /@
J. D. Head

JDH/amd
Enclosure
cc: See, Certificate of Service



TCEQ DOCKET NO. 2011-0935-MSW

APPLICATION BY MICRO DIRT, INC.	§	BEFORE THE
d/b/a TEXAS ORGANIC RECOVERY	§	TEXAS COMMISSION ON
PROPOSED MSW PERMIT NO. 2361	§	ENVIRONMENTAL QUALITY

REQUESTORS' REPLY TO RESPONSES TO HEARING REQUESTS

COMES NOW, 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"), all represented by the undersigned legal counsel, and files this their Reply to Responses to Hearing Requests on the application of Micro Dirt, Inc. d/b/a Texas Organic Recovery ("Micro Dirt" or "Applicant") for Texas Commission on Environmental Quality ("TCEQ") proposed MSW Permit No. 2361.

A. Reply to Executive Director's Response to Hearing Requests

The Executive Director correctly recommends to the Commissioners that the Requestors complied with the requirements of 30 T.A.C. §§ 55.201(c) and (d). Furthermore, the Executive Director correctly recommends to the Commissioners that the Requestors are affected persons under 30 T.A.C. § 55.203. The Executive Director recommends that the Commission refer nineteen (19) issues to the State Office of Administrative Hearings ("SOAH") for a contested case proceeding. However, the Executive Director recommended that the Commission not refer as an issue to SOAH whether the facility will create adverse air quality impacts. Requestors respectfully disagree with the Executive Director. Requestors believe that the issue of whether the facility will create adverse air quality impacts is an issue that should be referred to SOAH. First, this issue was raised by the Requestors in timely filed comments provided to the TCEQ. Secondly, while it is accurate that 30 T.A.C. § 332.8(e) provides that a composting operation is entitled to an air quality

standard permit if certain requirements are met, Requestors would re-emphasize that the application does not contain the requisite information that the facility would qualify for an air quality standard permit. Because the facility would not be authorized to operate without either a standard air quality permit for composting or an individual air quality permit, Requestors have a right to investigate, in a contested case hearing, whether the Applicant meets the requirements for a standard permit. Whether the Applicant has the necessary equipment and protocols in place to qualify for a standard permit is relevant and material to the Commission's decision to issue or deny this permit.

Requestors do not object to the Executive Director's recommendation that noise nuisance not be a referred issue to SOAH.

B. Requestors' Reply to Response of the Office of Public Interest Counsel

Requestors agree with the Office of Public Interest Counsel's ("OPIC") finding that all of the Requestors are affected persons in accordance with 30 T.A.C. § 55.203. While Requestors agree with the issues recommended for referral by OPIC, Requestors would urge the Commission to adopt the nineteen issues recommended for referral by the Executive Director, plus the air quality issue, as a more exhaustive and precise listing. Furthermore, due to the numerous issues expected to be referred to SOAH, Requestors agree with OPIC that the maximum expected duration of the hearing on this application would be one year from the first date of the preliminary hearing until the proposal for decision is issued.

C. Requestors' Reply to Applicant's Response to Hearing Requests

Contrary to the Executive Director and OPIC, Applicant, in its response, asserts that none of the Requestors are an affected person because they did not set forth the specific elements the Commissioners must consider under 30 T.A.C. § 55.203. This is incorrect. A person requesting

a contested case hearing must set forth the information required by 30 T.A.C. §§ 55.201(c) and (d). The Requestors, as acknowledged by OPIC and the Executive Director, complied with all of the requisites of §§ 55.201(c) and (d). The Commissioners utilize § 55.203 to make a determination of an affected person, however, a hearing request is not required to track the language of § 55.203(c).

Curiously, Applicant challenges the Requestors to provide additional information on their status as an affected person. Applicant states that it will object to any additional information as untimely and in the alternative would request the Commission to give Micro Dirt an opportunity to respond to any new information. 30 T.A.C. § 55.209, as well as the TCEQ June 29, 2011 letter to all concerned persons relating to the hearing request, clearly sets out that the Applicant, the Executive Director, and OPIC are accorded the right to respond to hearing requests. Furthermore, persons who have filed timely hearing requests may file a formal written reply to these responses on or before July 25, 2011. The attachment to the June 29, 2011 TCEQ letter explaining procedures concerning requests for reconsideration and requests for contested case hearing states as follows:

The requester may then file a reply to the responses at least 9 days before the meeting. This is the requester's opportunity to address any deficiencies in the request that have been identified by TCEQ staff or the applicant. The requesters must submit any information he or she wishes the commissioners to consider (ex: maps or diagrams showing requester's location relative to the applicant's proposed activities) by this deadline.

In summary, a process has been established by TCEQ rules and guidance in the notice letter which clearly allows a requestor to supplement its hearing request. Any supplementation would not be considered untimely and there is no provision for an applicant to respond to the reply.

While the Requestors clearly have established they are affected persons with respect to the Micro Dirt proposed permit and do not acknowledge a deficiency in the hearing request, Requestors would take this opportunity to expand on its initial request. Contrary to the assertions of Micro Dirt, the Requestors are impacted in ways different than the general public. Members of the Thomson Family Limited Partnership in visiting their property on Goforth Road have, during prior grease trap operations of Micro Dirt, been subjected to noisome odors and excessive flies directly related to grease trap operations of Micro Dirt. As property owners adjacent to the Micro Dirt facility, the Thomson Family Limited Partnership has a property right not to be subjected to foul odors and excessive flies from operations of a TCEQ authorized facility. Juli Phillips, the tenant of Mr. Whitworth, Ms. Messer and Ms. Moore, property owners in the immediate vicinity of the Micro Dirt facility, has been subjected to foul odors incident to prior grease trap operations of the Micro Dirt facility. As property owners and tenants, these Requestors have a property interest in not being subjected to foul odors from a TCEQ authorized facility. The Gunn families, owners and residents within one mile of the Micro Dirt facility, have been subjected, in the past, to foul odors incident to the Micro Dirt operations utilizing grease trap waste. All the Gunn family members have resided on the property during grease trap waste processing operations at Micro Dirt. The Gunn families have a property interest in not being subjected to foul odors from a TCEQ authorized operation. All the Requestors have been in the past and will be again subject to nuisance conditions if the permit is issued. They are all impacted in ways different from the general public due to proximity to the Micro Dirt facility.

Inasmuch as the enforcement action regarding illegal acceptance of grease trap waste was commenced in 2008 and almost three years later there still has not been a formal resolution of the

matter, the notion that the Requestors will be protected by TCEQ enforcement actions against Micro Dirt if nuisance conditions, or other permit violations, occur is questionable.

Micro Dirt, in its response to hearing requests, has misinterpreted the Court's holding in *Collins v. Texas Natural Resource and Conservation Commission*, 94 S.W.3d 876, (Tex.App.–Austin, 2002, no writ). The Court rejected Collins appeal on affected person's status with respect to odors because under the CAFO rules, due to distance limitations, no contested case hearing was available. Moreover, regarding groundwater contamination, there was undisputed evidence that no waste could emit from the ponds and enter Collins groundwater. The *Collins* ruling was based on substantial evidence, which is not available to the determination of party status in this case inasmuch as this is not an APA contested case proceeding. See, *City of Waco v. Texas Commission on Environmental Quality*, 2010 Tex.App.–LEXIS 7692*25 (Tex.App.–Austin, September 17, 2010, no pet.). Finally, Micro Dirt misinterprets both cases in stating in its response that there is an "actual harm" standard to qualify as an affected person. With respect to establishing personal justiciable interest, the standard is "potential harm." See, *City of Waco* at *14.

Respectfully submitted this 25th day of July, 2011.

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JOE GUNN, DOROTHY GUNN, JAY GUNN and
CORINNA GUNN

CERTIFICATE OF SERVICE

By my signature above, I hereby certify that a true and correct copy of the foregoing document was served on this 25th day of July, 2011, via U.S. First Class mail to the following:

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