

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

February 13, 2012

Bridget Bohac, 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. 2011-2316-IWD**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink that reads "Scott A. Humphrey".

Scott A. Humphrey, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2011-2316-IWD

**IN THE MATTER OF
THE APPLICATION OF
SYNAGRO OF TEXAS-
CDR, INC. FOR PERMIT
NO. WQ0004941000**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
REQUESTS FOR A CONTESTED CASE HEARING**

TO THE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY:

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

I. INTRODUCTION AND PROCEDURAL HISTORY

Synagro of Texas—CDR, Inc. (Synagro or Applicant) has applied to the TCEQ
for a new permit that would authorize the beneficial land application of Class B sewage
sludge at a rate not to exceed: 12 dry tons per acre per year on Fields 1, 2, 5 and 6; 9.34
dry tons per acre per year on Field 3; 11.65 dry tons per acre per year on Field 4; 5.56 dry
tons per acre per year on Field 10; and 8.34 dry tons per acre per year on Field 11. The
land application fields are located on a total of 635.06 acres within the 960 acre site. The
land application site is located at 510 Empedrado Drive, approximately 10 miles east of
the Austin-Bergstrom International Airport, at the intersection of highway 71 and
Empedrado Drive, in Bastrop and Travis Counties, Texas 78612. 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.

The TCEQ received the permit application on September 7, 2010, and the Executive Director (ED) of the TCEQ declared the application administratively complete on February 16, 2011. The Notice of Receipt of Application and Intent (NORI) to Obtain a Beneficial Land Use Permit was published in the Spanish newspaper *jahora si'* on March 10, 2011 and in the *Austin-American Statesman* on March 14, 2011. The Notice of Preliminary Decision (NAPD) for Land Application of Sewage Sludge Permit was published in the *Austin-American Statesman* on July 11, 2011 and in the Spanish newspaper *jahora si'* on July 14, 2011. The public comment period ended on August 15, 2011.

In response to the various notices, the TCEQ received four requests for a contested case hearing. OPIC recommends granting three of those requests and referring the matter to SOAH for a contested case hearing.

II. APPLICABLE LAW

As 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 Texas Water Code Section 5.556, added by Act 1999, 76th Leg., ch. 1350 (commonly known as "House Bill 801"). 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 TEXAS ADMIN. CODE (“TAC”) § 55.201(d).

Under 30 TAC Section 55.203(a), 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.” This justiciable interest does not include an interest common to the general public. *Id.* Relevant factors that will be 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, safety, and 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 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).

III. DISCUSSION

A. Determination of Affected Person Status

The TCEQ received timely hearing requests from the following: Charles & Kay Prather; George & Jennie Rohrbough; Aide A. Sustaita; and Robin Greenlee. Except for the hearing request filed by Robin Greenlee, OPIC recommends granting the hearing requests.

1. Charles & Kay Prather and George & Jennie Rohrbough

OPIC is considering the hearing requests filed by the Prathers and the Rohrboughs together because they are identical in content. They are concerned that all of their neighbors who should have received notice did not. They describe the neighborhood as one consisting of poor to middle-class families and express concern about wastewater treatment plant sludge in their backyards. They both state that the smell would be so strong that they would not be able to enjoy sitting outdoors. They also believe the plant would devalue their properties, bring in insects, pollute the land and the Colorado River, ruin businesses and make life unbearable. They further note that some residents rely on water wells. Finally, they assert that toxins produced by the sludge would be released in the air for humans and animals to breathe.

OPIC infers that both couples are asserting that they live very close to the proposed facility. A map provided by the ED shows that they live well within ¼ mile of the proposed facility. Issues raised such as nuisance odor impact on water wells, impact on the river and release of toxins into the air are interests protected by the law under which this application will be considered. A reasonable relationship exists between their interests and the activity to be regulated. The activity proposed by the Applicant will likely impact natural resources used by the protesting parties. Therefore, OPIC recommends the Commission find that the Prathers and Rohrboughs are affected persons entitled to a contested case hearing.

2. Aide A. Sustaita

Ms. Sustaita states she lives about 800 feet from the proposed facility. She is most concerned about runoff of sludge onto her property. She also states that the stench would impact her health and render her unable to stay outdoors comfortably.

Both Ms. Sustaita's letter and the map provided by the ED demonstrate she is less than ¼ mile from the proposed facility. Her issues relating to runoff and nuisance odors are interests protected by the law under which this application will be considered. A reasonable relationship exists between her interests and the regulated activity. The activity proposed by the Applicant will likely impact the use of her natural resources. Therefore, OPIC recommends finding that Ms. Sustaita is an affected person entitled to a contested case hearing.

3. Robin Greenlee

Robin Greenlee lives across from the proposed site and is opposed to the location of the proposed facility. Robin does not agree that the permit should be issued.

Although Robin lives sufficiently close to the facility to be an affected person, OPIC cannot recommend granting the request for a contested case hearing because no issues that could be adjudicated in a contested case hearing have been raised in the hearing request letter. If Robin Greenlee were to provide issues of concern that could be adjudicated in a SOAH hearing, OPIC would reconsider its position.

C. Issues Raised in the Hearing Requests

The following issues have been raised in the hearing requests:

1. Will the proposed permit cause runoff onto private property?
2. Will the proposed permit cause nuisance odor problems or impact air quality?
3. Will the proposed permit cause contamination of water wells?
4. Has the Applicant complied with all relevant notice requirements?

There are references in the hearing requests regarding general location of the facility and property values. These issues will not be considered in the disposition of this permit application.

D. Issues raised in Comment Period

All of the issues raised in the hearing requests 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 requesters and the Applicant or Executive Director on the issues raised in the hearing requests. Regarding runoff, the ED asserts in his Response to Comments that Synagro would be required to apply sewage sludge uniformly to the surface of land under conditions that prevent runoff of sludge beyond the active application area. As to odor and air quality, the ED replies that TCEQ rules and

required management practices incorporated into the draft permit mandate the Applicant control nuisance odors, and those controls include buffer zone requirements. Concerning protection of water wells, the ED once again refers to buffer zone requirements and management practices, all of which are meant to be protective of nearby water wells. With respect to notice requirements, the ED described the procedural background in his response to comments and states that based on the information provided, the Applicant has complied with notice requirements.

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.¹ Issues related to runoff, nuisance odors and air quality impacts, impact on water wells and notice requirements are all appropriate question of fact for referral to SOAH.

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.² Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.³

¹ 30 TAC 55.211(c)(2)(A)

² 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.")

³ *Id.*

The proposed permit must comply with 30 TAC § 312.44(h) relating to uniform application to prevent runoff. The proposed permit must comply with 30 TAC § 312.44(j) relating to prevention of public health nuisances. The proposed permit must comply with 30 TAC § 312.44(c) which is intended to protect the public water wells. Finally, the proposed permit must comply with notice requirements set out in 30 TAC 312.13(b)(3) and other notice requirements prescribed by the TCEQ.

H. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact be referred to the State Office of Administrative Hearings for a contested case hearing:

1. Will the proposed permit cause runoff onto private property?
2. Will the proposed permit cause nuisance odor problems or impact air quality?
3. Will the proposed permit cause contamination of water wells?
4. Has the Applicant complied with all relevant notice requirements?

I. Maximum Expected Duration of Hearing

Commission Rule 30 TEX. ADMIN. CODE § 55.115(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 TEX. ADMIN. CODE § 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 that the hearing requests filed by the following persons with the above referenced issues be granted: Charles and Kay Prather; George and Jennie Rohrbough; and Aide A. Sustaita. OPIC recommends a hearing duration of nine months.

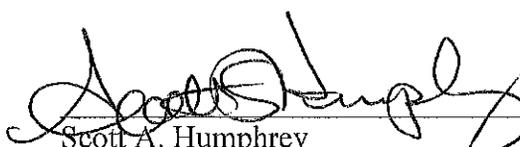
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2012 the original and seven true and correct copies of the Office of the foregoing were 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, other electronic transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Scott A. Humphrey

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TCEQ DOCKET NO. 2011-2316-IWD

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