

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 3, 2013

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: TERRA RENEWAL SERVICES, INC.
TCEQ DOCKET NO. 2013-0650-SLG**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

DOCKET NO. 2013-0650-SLG

TERRA RENEWAL SERVICES, INC. PROPOSED PERMIT NO. WQ0004989000	§ § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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**OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUEST AND
REQUESTS FOR RECONSIDERATION**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to the hearing request and requests for reconsideration in the above-referenced matter.

I. BACKGROUND

Terra Renewal Services, Inc. has applied to the TCEQ for a new permit to authorize the land application of wastewater treatment plant sewage sludge and water treatment plant sludge for beneficial use on 320.9 acres. The sludge land application site would be located at 476 Brookshire Street, approximately one mile north of the intersection of Highway 31 and Brookshire Street, northwest of Powell in Navarro County. The site would be located within the drainage basin of the Trinity River above Lake Livingston in Segment No. 0804 of the Trinity River Basin.

This application was received April 13, 2012 and declared administratively complete on June 14, 2012. On June 21, 2012, the first newspaper notice was published in the *Corsicana Daily Sun*. The second

newspaper notice was published November 20, 2012 in the same newspaper. The comment period closed December 20, 2012, and the Executive Director's (ED) Response to Comments (RTC) was mailed February 26, 2013. The deadline to file hearing requests and requests for reconsideration was March 28, 2013.

The TCEQ received a timely filed hearing request on behalf of Clay and Caleb Jackson. The TCEQ also received separate timely filed requests for reconsideration from Jana Hayes and Raymond Hayes. For the reasons stated herein, OPIC recommends the hearing request be granted and the requests for reconsideration be denied.

II. APPLICABLE LAW

Hearing Request

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under Title 30, Texas Administrative Code (TAC) § 55.201(d), a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely

affected by the proposed facility or activity in a manner not common to members of the general public;

- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

Under 30 TAC § 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. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to be considered in determining whether a person is affected. These factors 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.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;
- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

Request for Reconsideration

Any person may file a request for reconsideration of the ED's decision.¹

The request must be in writing and be filed with the TCEQ no later than 30 days after the TCEQ mails the ED's decision and RTC.² The request for reconsideration must expressly state that the person is requesting reconsideration of the ED's decision, and give reasons why the decision should be reconsidered.³ A response to a request for reconsideration should address the issues raised in the request.⁴

¹ 30 TAC § 55.201(e).

² *Id.*

³ *Id.*

⁴ 30 TAC § 55.209(f).

III. ANALYSIS OF HEARING REQUEST

A. Whether the requestor is an affected person

Clay Jackson and Caleb Jackson own two properties adjacent to the proposed land application site. The Jacksons are concerned that the proposed land application of sludge will cause odor and diminish their property values. They are also concerned that commercial waste delivery vehicles traveling county roads in the area will cause additional diminution of their property values.

An "affected person" has a personal justiciable interest which is affected by the application and not common to members of the general public.⁵ Given the proximity of the Jacksons' properties to the proposed sludge site, their odor concern is not common to the general public and qualifies as a personal justiciable interest. The proximity of the Jacksons' properties also increases the likelihood that the regulated activity will impact their use of the properties. Further, the Jacksons' interest in the avoidance of nuisance odor is an interest protected by the regulations applicable to this application.⁶ Finally, a reasonable relationship exists between the Jacksons' interest in the control of nuisance odor and the regulation of a land application sludge site.

⁵ See 30 TAC § 55.203(a).

⁶ See 30 TAC § 312.44(j).

After considering the definition of “affected person” in § 55.203(a) and the relevant factors provided in § 55.203(c), OPIC finds that Clay and Caleb Jackson qualify as affected persons in this matter.

B. Which issues raised in the hearing request are disputed

All of the issues raised in the hearing request are disputed.

C. Whether the dispute involves questions of fact or of law

All of the disputed issues involve questions of fact.

D. Whether the issues were raised during the public comment period

All of the issues were raised during the public comment period.

E. Whether the hearing request is based on issues raised solely in a public comment which has been withdrawn

The hearing request is not based on issues raised solely in a public comment which has been withdrawn.

F. Whether the issues are relevant and material to the decision on the application

Odor

The Jacksons have raised the issue of nuisance odor. Nuisance odor is addressed by TCEQ regulations concerning management practices at land application sites.⁷ This issue is therefore relevant and material to the Commission’s decision.

⁷ *Id.*

Property Value

The Jacksons have also raised the issue of diminished property value. The statutes which establish the TCEQ's jurisdiction do not give TCEQ the authority to consider the effect that permitting decisions may have on property value. This issue is therefore not relevant nor material to the Commission's decision.

IV. ANALYSIS OF REQUESTS FOR RECONSIDERATION

Jana Hayes and Raymond Hayes submitted separate but identical requests for reconsideration. The Hayes state that the permit does not comply with the 750 feet buffer zone requirement. They also state that the application of sludge will impact the pending development of property they own adjacent to the proposed site. The Hayes are concerned that the Terra application will reduce the market value of their properties for sale.

Compliance with buffer zone requirements is an issue which is relevant and material to the Commission's decision on this application. However, an evidentiary record on this issue would be necessary for OPIC to make a recommendation to the Commission as to whether the ED's decision should be reconsidered. At this time, an evidentiary record does not exist, and therefore, OPIC cannot recommend that the requests for reconsideration be granted. OPIC is recommending a contested case hearing in this matter,

and if a hearing is granted, Jana and Raymond Hayes could seek to be admitted as parties to the hearing.⁸

V. CONCLUSION

Having found that Clay and Caleb Jackson are affected persons and have timely raised a disputed issue of fact which is relevant and material to the Commission's decision on this application, OPIC respectfully recommends the Commission grant the Jacksons' hearing request.

We recommend the requests for reconsideration submitted by Jana and Raymond Hayes be denied.

OPIC further recommends the following issue be referred to the State Office of Administrative Hearings for a contested case hearing:

- *Whether the proposed sludge land application site will cause or contribute to nuisance odors?*

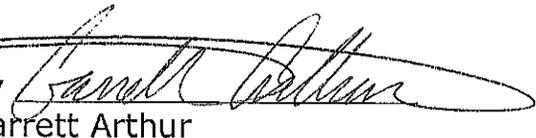
For the contested case hearing, OPIC recommends a duration of six months from the first day of the preliminary hearing to issuance of the proposal for decision.

⁸ See 30 TAC § 55.211(e).

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By



Garrett Arthur

Assistant Public Interest Counsel

State Bar No. 24006771

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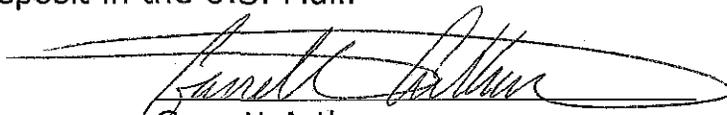
Austin, Texas 78711

(512) 239-5757

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2013, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.



Garrett Arthur

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