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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 20, 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: **MICRO DIRT, INC. D/B/A TEXAS ORGANIC RECOVERY**
TCEQ DOCKET NO. 2010-2063-MSW

Dear Ms. Castañuela:

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

Sincerely,


Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2010-2063-MSW

**IN THE MATTER OF THE MOTION § BEFORE THE TEXAS
TO OVERTURN FILED BY THOMSON §
FAMILY LIMITED PARTNERSHIP, §
H. PHILIP WHITWORTH, JR., ANN §
MESSER, AND JULIE MOORE § COMMISSION ON
CONCERNING GREASE TRAP WASTE §
PROCESSING REGISTRATION NO. §
43024 TO MICRO DIRT, INC. D/B/A §
TEXAS ORGANIC RECOVERY § ENVIRONMENTAL QUALITY**

***OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
MOTION TO OVERTURN***

**TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION
ON ENVIRONMENTAL QUALITY:**

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the Commission) responds to the above-captioned Motion to Overturn as follows:

I. INTRODUCTION

On or about August 7, 2009, Micro Dirt, Inc. dba Texas Organic Recovery (Micro Dirt or Applicant) submitted an application for Registration 43024 to the TCEQ seeking authorization to construct and operate a facility to store transfer, process and recover or recycle material from grease trap waste at a facility located in Travis County, Texas at 15500 Goforth Road, Creedmoore, Texas. The Executive Director (ED) issued two notices of deficiencies that Applicant addressed in subsequent revised applications

submitted January 12, 2010 and April 13, 2010. By letter dated December 2, 2010, the TCEQ notified Micro Dirt that its application had been approved. Registration No. 43024 became effective November 22, 2010.

On December 22, 2010, J.D. Head, on behalf of Thomson Family Limited Partnership, H. Philip Whitworth, Jr., Ann Messer, and Julie Moore (Movants), filed a motion to overturn the executive director's approval of Registration No. 43024, contending that Applicant had failed to demonstrate effective groundwater protection, sufficient financial assurance, adequate fire protection, and protective effluent requirements for composting. Furthermore, Movants contend that Applicant's compliance history demonstrates a general failure to adhere to TCEQ regulations related to acceptance of waste and should have been the basis for the denial.

OPIC has reviewed the relevant materials and recommends that the Commission deny the motion.

II. PROCEDURAL ISSUES

Title 30, Texas Administrative Code (TAC), Subchapter G, addresses authority delegated to the ED and specifies applications in which the ED may take action on behalf of the Commission. Where an application has not been formally contested, or is ineligible for formal challenge, Subchapter G contains a provision allowing the applicant, public interest counsel or other person the opportunity to file a motion to overturn the ED's action on an application.¹ A motion to overturn must be filed within

¹ 30 TAC §50.139.

23 days after notice of approval of the application has been mailed² unless general counsel, by written order, extends the period of time for filing motions.³

The TCEQ mailed Micro Dirt's approval letter on December 2, 2010. Movants timely filed their motion to overturn with the Commission on December 23, 2010, several days before the December 27, 2010 deadline. OPIC therefore finds that the Movants have the right to seek Commission review of the ED's issuance of this registration, in addition to any rights of judicial review.

III. MOTION

a. Groundwater Protection

On December 4, 1998, the TCEQ issued Micro Dirt Registration No. 42016, authorizing operation of a biosolids compost facility. The facility was allowed to store, process, and market materials from an operation accepting municipal sewer sludge, vegetative waste matter, and septage, grease trap, paper, brush, wood, and yard waste. Registration No. 42016 was granted pursuant to 30 TAC Chapter 332 and bound the Applicant to "the rules and orders of the Commission and laws of the State of Texas." All sections and attachments of the Site Development Plan submitted by Micro Dirt in its application were specifically incorporated by reference into the registration. Micro Dirt's application included a section entitled "Protection of Groundwater," indicating that the "results of tests conducted by HBC Engineering on the pond liner and soils underlying the compost area verify that the existing soils are adequately impermeable to

² 30 TAC §50.139(b).

³ 30 TAC §50.139(e).

prevent contamination of area groundwater.”⁴ Micro Dirt composted grease trap waste under Registration No. 42016 until the passage of Texas Health & Safety Code §361.428, requiring a permit for continued commercial composting of grease trap waste after September 3, 2003.

In January 2004, Micro Dirt applied for MSW Permit No. 2320. Movants protested the permit, and all were named parties in a resulting contested case hearing. At the conclusion of the hearing, the Administrative Law Judges found that Applicant was “unable to demonstrate that the existing *in situ* liner would be sufficient to protect groundwater under the Processing, Windrow, and Mixing areas”⁵ or that the proposed operation of the facility met the requirements of Texas Water Code Chapter 26 and 30 TAC §332.4(1) “to prevent the discharge of material to or the pollution of groundwater.”⁶ The Commission agreed and adopted findings of fact that which stated the record contained “insufficient evidence that the *in situ* clay liner extends throughout the Processing, Windrow, and Mixing areas,”⁷ and noted Applicant’s “failure to produce any evidence that the Applicant adopted an approved liner soils and liner quality control plan (SLQCP) approved by the ED, and submitted this data to the ED as a Soil and Liner Evaluation Report (SLER).”⁸

Movants argue that Micro Dirt’s representation that “the facility has an existing liner approved under its 1998 registration” in its application for Registration No. 43024 therefore constitutes a false statement warranting denial of the Registration. Movants also point out that Micro Dirt made the representation in its application materials that

⁴ “Registration Application for Texas Organic Recovery Compost Facility” at 14.

⁵ Proposal for Decision, at 25.

⁶ *Id.*

⁷ Order, Finding of Fact No. 78.

⁸ Order, Finding of Fact No. 79.

the site has approximately 9 feet of gravelly clays over approximately 30 feet of an *in situ* natural clay liner. Movants argue that this statement is also false or misleading and warrants denial of Registration No. 43024. OPIC cannot agree. Although the existence and sufficiency of a natural liner at the proposed site was not established in prior proceedings on a different authorization, a liner is simply not relevant to the authorized activities under Registration No. 43024.

Section F of MSW registration No. 43024 indicates that the registrant is authorized to “operate the waste management units related to the processing, storage, and transfer of the waste authorized, which shall include eight 18,000 gallons tanks and the concrete spill and the concrete spill containment structure surrounding the tanks.” Importantly, any facility operations for units other than the tanks are authorized under MSW Registration No. 42016, approved in 1998. Registration No. 43024 specifically indicates that the units covered under Registration No. 42016 include “the on-site contaminated water surface impoundment utilized for secondary containment of the tanks and the *in situ* liner beneath all on-site units.” Furthermore, the Special Registration Provisions in Registration No. 43024 state that “the solid phase recovered from grease trap waste accepted under this registration shall not be composted on-site under the current Registration No. 42016.” Rather, the “registrant must obtain an MSW compost permit before the recovered solid phase of accepted grease trap waste or any other grease trap from other facilities may be composted on-site.”

The facilities proposed under Registration No. 43024 simply do not constitute a composting facility subject to 30 TAC Ch. 332 and its accompanying liner requirements. Although 30 TAC §33.207(a) directs that “all liquids resulting from the operation of

solid waste facilities shall be disposed of in a manner that will not cause surface water or groundwater pollution,” 30 TAC §330.207(b) appears to except storage tanks from Chapter 330 liner requirements.⁹ The basis of the Commission’s order denying Applicant’s MSW Permit No. 2320 was Micro Dirt’s inability to meet the requirements of Water Code ch. 26 and 30 TAC § 332.4(1) due to its failure to prove the existence or effectiveness of the *in situ* liner that allegedly exists on its site. Although the “approved” *in situ* liner may be of significant interest in relation to the now 13-year old Registration No. 42016, a liner is not a required element of Registration No. 43024 that is the subject of this motion. Furthermore, it is not clear that the characterization of the *in-situ* soils at the Applicant’s facilities as constituting an “ED approved” liner in its 1998 registration is clearly false: the ED did in fact approve Registration No. 42016 with its accompanying representations regarding impermeable soils. Although these soils proved insufficient to meet the burden of proof relating to groundwater protection in Micro Dirt’s application for Permit No. 2320, the ED did approve Registration No. 42016 in 1998.

b. Compliance History

Movants contend that the Executive Director did not properly consider Applicant’s compliance history in granting Registration No. 43024 in light of the citations issued to Micro Dirt in August 2008 for the illegal receipt of 123 loads of grease trap waste between July 15, 2008 and August 8, 2008. Additionally, Movants claim that “public documents reveal that Micro Dirt received grease trap waste November 9, 2009

⁹ 30 TAC §330.207(b).

from Round Rock Independent School District” and also received “grit trap waste from Travis County Municipal Utility District No. 4 on November 15, 2009.”

A review of Applicant’s Compliance History Report from the period between June 4, 1990 to June 7, 2010 reveals a 3.25 rating for Micro Dirt, Inc., generating an “average” classification. Texas Organic Recovery received a 3.01 rating, generating an “average by default” classification. Although enforcement actions are pending against Applicant, these actions are not yet resolved and therefore are not included in Applicant’s compliance history for purposes of Registration No. 43024.

c. Financial Assurance and Closure Requirements

Movants argue that Applicant is required to maintain financial assurance for its facility because of stockpiles of combustibles such as brush, wood, and yard waste. Movants explain that “Micro Dirt has not posted financial assurance for the combustible materials stockpiled on site pursuant to Registration No. 42016.” However, Registration No. 43024 only authorizes material from grease trap waste rather than the materials listed above, and the sufficiency of financial assurance for closure relating to Registration No. 42016 is not relevant to Registration No. 43024.

Similarly, Movants argue that Applicant has insufficient financial assurance to comply with 30 TAC §§330.459(d) & 330.505 applicable to recycling facilities that store combustible materials outdoors. OPIC cannot determine that grease trap waste authorized under Registration No. 43024 constitutes a “combustible material” subject to the above requirements, and defers to the Executive Director’s staff analysis on this issue.

d. Fire Protection

Movants contend that the Fire Protection Plan in the application should not have been approved because there is no evidence of “an adequate supply of water under pressure for firefighting in the retention pond.” Although sympathetic to this concern, without further information demonstrating the inadequacy of the Fire Protection Plan, OPIC cannot find that the ED clearly erred in approving Applicant’s Fire Protection Plan.

e. Effluent Requirements

Movants also claim that the ED erred in not requiring effluent testing to ensure the effluent is appropriate for composting purposes. Movants do not cite any rule or statute requiring effluent testing for Applicant’s operation, and OPIC therefore cannot agree that the ED erred in not requiring effluent monitoring.

IV. CONCLUSION

OPIC cannot find that the Executive Director erred in granting Registration No. 43024 because liner requirements are not applicable to this authorization, Applicant’s compliance history is currently classified as “average,” and OPIC cannot conclude from the available record that Micro Dirt is storing combustible materials outdoors and subject to the financial assurance and closure requirements of 30 TAC §§330.459(d) & 330.505, that fire protection is inadequate, or that effluent water quality parameters are required. OPIC therefore recommends that the Movants’ motion be denied.

Respectfully submitted,

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Public Interest Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2011 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Motion to Overturn 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, Inter-Agency Mail or by deposit in the U.S. Mail.

Eli Martinez
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