

TCEQ DOCKET NO. 2013-1488-SLG

IN THE MATTER OF THE	§	BEFORE THE TEXAS
APPLICATION OF GORDON	§	
CLIFFORD SWENSON FOR TCEQ	§	COMMISSION ON
REGISTRATION NO. 710926	§	
	§	ENVIRONMENTAL QUALITY

**RESPONSE OF GORDON CLIFFORD SWENSON
TO MOTION TO OVERTURN THE EXECUTIVE DIRECTOR’S ISSUANCE OF
REGISTRATION**

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

COMES NOW Mr. Gordon Clifford Swenson (“Mr. Swenson” or the “Applicant”) and files this Response to the Motion to Overturn (“MTO”) filed by the James D. Story and Amy Story, Jim L. Story and Joanne Story (Story Ranch Ltd.), Los Senderos Ranch, Ltd. (Steen Family, Colina Ventosa Ltd), Eddie Moore, Cal Taylor, Evergreen Underground Water Conservation District, City of Nixon, and George and Maria Blanch (collectively, the “Movants”) in response to the Executive Director’s decision to approve a Domestic Septic Registration authorizing the land application of septage on Mr. Swenson’s farm located in Wilson County (the “Registration”), and respectfully state the following:

**I.
INTRODUCTION & BACKGROUND**

The Executive Director reviewed and approved the application for a registration to apply septage for beneficial use as fertilizer on Mr. Swenson’s farm. These types of land application authorizations are not uncommon. The Commission has previously approved the use of septage or sludge as fertilizer on agricultural land for many farms

across Texas. In fact, the Commission has authorized land application of septage at 50 facilities, Class B sludge on 85 farms, and water treatment plant sludge at 135 facilities.

What makes this situation different is Movants' apparent desire to end the land application process for all farms in Texas. While Movants may have issues with the current regulatory or statutory framework for issuing registrations for land application, there is nothing in or about the MTO that merits consideration or action by the Commission. If Movants wish to revise the rules governing land application in Texas, then Movants should file a petition for rulemaking with the Commission.

II. SUMMARY OF MOVANTS' ARGUMENTS

In the MTO, Movants make five regulatory arguments, which generally complain about provisions within the Registration. These complaints relate to standardized practices, procedures, or best management practices that the Commission has already approved and incorporated into all land application authorizations issued in Texas. Three additional complaints express concerns with items in the initial application that the Applicant updated or revised before the Executive Director declared the application administratively or technically complete. All of these issues were resolved prior to mailing of notice.

A. MANAGEMENT OF ON-SITE STORMWATER

The Movants are mistaken on whether there are provisions in the Registration to prevent stormwater runoff. The proposed application meets all federal and State requirements, and the Executive Director has included multiple best management practices to prevent stormwater runoff within the Registration that he issues to Mr.

Swenson. As the Commission has already determined through its review of prior applications, the land application of septage in accordance with Commission-approved best management practices poses no risk for stormwater runoff from the site.

The Registration includes an application rate that is exceptionally low, which prevents ponding on the surface or runoff from the site. Applied material infiltrates immediately due to the extremely low application rate. Keep in mind that land-applied septage is 98% water, and the exceptionally low application rate equates to approximate 1/4" of water over a 48-hour period.

The Executive Director has included other Commission-approved best management practices within the language of the Registration to prevent stormwater runoff, including a prohibition on applying material during rainfall events or within 24 hours of rainfall events. In accordance with other Commission-approved best management practices, the Registration prohibits the application of material where permeable surface soils are less than two-feet thick, on water-saturated soils, or upon any land with slopes in excess of eight percent. The Registration also requires that the site have an adequate cover crop to ensure that applied material does not runoff the site. Furthermore, the Registration includes extensive buffer zones, with the purpose of collecting any material that rainfall could potentially carry off-site. These provisions are the same as required for all land application programs of the TCEQ, including land application of waste from Confined Animal Feeding Operations as well as other domestic wastewater sources. This Registration includes all of the Commission's best management practices for the protection of surface water runoff.

B. APPLICATION RATE

The Executive Director included two different application rates within the Registration: one based upon a maximum annual application rate and a second based upon a maximum application rate over a 48-hour period. The Applicant must comply with whichever is more restrictive.

Movants misunderstand or intentionally try to confuse the Commission regarding the applicability of these two different application rates. The application rates are not minimums, as Movants claim, but, rather, maximum amounts that may be applied during two different and specific time periods. The maximum annual application rate under the Commission's rules, on an annual basis, is 76,923 gallons per acre per year. If the annual application rate was the only limitation on the Applicant, as allowed under the Commission's rules, then the Applicant could apply all 76,923 gallons on any acre in any one day. However, to minimize further the possibility of any runoff from the site, the Applicant agreed to limit the amount of material that he could apply at any one time, beyond State and federal regulatory requirements. The application rates, as the Executive Director adopted as part of the Registration, include an additional maximum 48-hour application rate that further limits spreading of material to 6,800 gals per acre over any 48-hour period. The inclusion within the Registration of a maximum 48-hour application rate is more restrictive than required by Commission rule.

C. STOCK TANK

As the TCEQ staff confirmed during their site visits, the third surface water feature shown on the USGS map does not exist. The USGS map for this area was flown in 1961, and revised in 1987. During the time of Mr. Swenson's ownership of the

property, the stock tank, the alleged surface water feature that Movants mention, has not existed. More important, it is common agricultural practice to eliminate small stock tanks to increase field production areas. Movants are again trying to throw up anything to see if something sticks. As the Commission knows, there is not any requirement to obtain a 404 Permit from the Corps of Engineers for the installation or removal of an incidental, off-channel stock tank on private property. Furthermore, a 404 permit is not relevant to whether the Executive Director issued a land application registration in accordance with Commission rules.

D. GROUNDWATER DETERMINATION

Despite Movants' claim otherwise, a determination of groundwater is included in the application file. The NRCS USDA Custom Soil Resource Report for Wilson County, Texas - Swenson BFU Site includes a "Depth to Water Table" finding for each and every soil type at the site. The depth to groundwater for each of the low permeability soil types is "More than 80 inches."

Furthermore, Movants falsely claim that a determination of a high groundwater table is required by Section 312.44(g) of Title 30 of the Texas Administrative Code (the "Commission's rules." Section 312.44 (g) states, in its entirety, the following:

(g) Groundwater protection measures.

(1) A seasonal high groundwater table must be not less than three feet below the treatment zone for soils with moderate or slower permeability (less than two inches per hour).

(2) A seasonal high groundwater table must be not less than four feet below the treatment zone for soils with moderately rapid or rapid permeability (greater than two inches per hour and less than 20 inches per hour).

(3) Seasonal generally refers to a groundwater table that may be perched on a less permeable soil or geologic unit and fluctuates with seasonal climatic variation or that occurs in a soil or geologic unit as a variation in saturation due to seasonal climatic conditions and is identified as such in a published soil survey report or similar document.

(4) Application of sludge to land having soils with greater permeability and with higher groundwater tables will be considered on a case-by-case basis, after consideration of soil pH, metal loadings onto the soil, soil buffering capacity, or other protective measures to prevent groundwater contamination.

Clearly, there is not any regulatory requirement for a finding of groundwater depth. Simply put, the only requirement is that the groundwater be at least three feet below the treatment zone for soil with moderate to slow permeability. As shown in the NRCS USDA Custom Soil Resource Report for Wilson County, Texas - Swenson BFU Site, the groundwater is more than 3 feet from the treatment zone -- the ground surface for a land application site.

Furthermore, Mr. Swenson submitted all soil testing as required by the Executive Director's application for a registration. All soil profiles were provided, as required by the Executive Director. None of these soil profiles indicated the presence of high groundwater.

E. MAPS

The TxDOT Highway Map does show the location of the site; however, the boundary of the site may be drawn to the wrong scale. Keep in mind that the purpose of this map is to allow the Commission's field staff to locate the property for a field investigation, not for notice purposes. Staff members from the San Antonio Regional Office have made two separate site investigations using this map. Even staff members from the Commission's Austin Office, unfamiliar with the area, were able to locate the

site. Also, the file includes more than 15 additional maps that accurately depict the location and extent of the project site, which include the boundary of the property drawn to the proper scale. At best, the scale issue on one map is harmless error.

Moreover, there cannot be any legitimate claim that the adjacent landowners did not have notice. The Chief Clerk sent each landowner a mailed notice, which included a detailed description of the location of the proposed facility. The Commission received 494 public meeting requests and over 736 comments. News articles regarding the application and the public meeting were published in both local newspapers as well as being reported by local television news. As evidenced by the number of response and the Chief Clerk's mailing of notice to all adjacent property owners, all were given constructive and actual notice of the application.

Regarding the FEMA Map, that map shows the floodplain elevation for the tributary of Elm Creek adjacent to the property at 320 feet above MSL. The USGS map included in the application shows that the limits of the 320-foot elevation mark, and therefore the floodplain, are well within the Commission-required buffer zone around the tributary. The application includes more than sufficient information to show the Commission's technical staff the extent of the floodplain of the tributary of Elm Creek. The information shows that the floodplain does not lie beyond the designated buffer zone.

F. ADJACENT LAND OWNERSHIP AND OWNER IDENTIFICATION

Despite Movants misunderstanding, Mr. Swenson does not own three parcels of land adjacent to the site connected by private right-of-away under the control of Mr. Swenson. While Mr. Swenson does own another property in the area, this property is neither contiguous with nor adjacent to the land application site. Mr. Swenson's other

property is also not connected to the land application site via a private right-of-way. The other property is separated by more than 400 yards and on the opposite side of a county from the land application site, which is confirmed by the official records of the Wilson County Appraisal District that were submitted as part of the Application. The Executive Director's Water Quality Applications Team verified this information as part of their review process. Mr. Swenson does not own property adjacent to or contiguous with the land application site.

The Chief Clerk provided notice to each adjacent landowner, as shown and identified by the official records of the Wilson County Appraisal District. The Applicant gathered the requisite list of, and addresses for, the adjacent landowners from the records of the Wilson County Appraisal District on June 6, 2012. The Commission's Chief Clerk mailed a copy of the Notice of Receipt of an Application and Declaration of Administrative Completeness to the County Judge and to all adjacent landowners on November 21, 2012, and an Amended Noticed on November 30, 2012, which corrected the land application area to the proposed 298.3 acres.

G. OIL & GAS LEASE

Just like nearly every other parcel of land in South Texas these days, there is a new oil and gas lease that covers the property. However, the fact that a non-active lease covers the property does not impact the Registration in any way. The buffer zones of the Registration, as the buffer zones for every other Commission authorization, are not static. Rather, the buffer zones adjust as the use of the property changes. If, for example, a new water well is drilled on the property, then the Commission authorization, whether a permit or registration, requires the Applicant to provide an additional buffer zone around

the new water well. If Mr. Swenson is lucky enough to become a “shaleionaire” like so many of his neighbors, then, he too, will have to adjust the buffer zones around the drilling operation. This issue is a red herring of the brightest color.

H. APPLICATION AREA

The application, as originally filed and before the Executive Director declared it administratively or technically complete, identified 179 acres as the application area, which is the area of land under the center=pivot irrigation system. However, the Applicant proposed the land application of material beyond the reach of the center-pivot irrigation system. Subsequent filings with the Executive Director clarified that the total land application area was 298 acres. Most important, the Amended Notice of Receipt of an Application and Declaration of Administrative Completeness, which the Chief Clerk mailed to the County Judge and to adjacent landowners, correctly noted the total land application area as 298 acres.

III. CONCLUSION

The Commission has successfully and safely authorized the land application of sludge and septage in Texas for many years by including time-tested best management practices within the authorizations issued by the Commission. For Mr. Swenson’s Registration, the application met all legal requirements in connection with the Executive Directors review and approval of the Registration. While Movants may take issue with the best management practices that the Commission and the EPA have adopted for land application of sludge and septage, there is nothing in or about the MTO that merits further consideration or action by the Commission, and the MTO should be overruled by operation of law.

Respectfully submitted,

Randall B. Wilburn, Attorney at Law
State Bar No. 24033342
3000 South IH 35, Suite 150
Austin, Texas 78704
Telephone: (512) 535-1661
Telecopier: (512) 535-1678



Randall B. Wilburn

ATTORNEYS FOR APPLICANT

CERTIFICATE OF SERVICE

I certify that I have forwarded a true and correct copy of the foregoing Response of Gordon Clifford Swenson to the following, as indicated, on the 16th day of September 2013.

BLAS J. COY, JR.
TCEQ OFFICE OF PUBLIC COUNSEL, MC 103
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: 512-239-6363
Telecopier: 512-239-6377

Hand Delivery in Person or by Agent *Courier Receipted Delivery* *Telephonic Document Transfer*
 First Class Mail *Certified Mail, Return Receipt Requested No. __, Electronic Document Delivery X*

BRIDGET C. BOHAC,
TCEQ OFFICE OF THE CHIEF CLERK, MC 105
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: 512-239-3300
Telecopier: 512-239-3311

Hand Delivery in Person or by Agent *Courier Receipted Delivery* *Telephonic Document Transfer*
 First Class Mail *Certified Mail, Return Receipt Requested No. __, Electronic Document Delivery X*

STEFANIE SKOGEN
TCEQ ENVIRONMENTAL LAW DIVISION, MC 173
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: 512-239-0575
Telecopier: 512-239-0606

Hand Delivery in Person or by Agent *Courier Receipted Delivery* *Telephonic Document Transfer*
 First Class Mail *Certified Mail, Return Receipt Requested No. __, Electronic Document Delivery X*

MARY W. CARTER
BLACKBURN & CARTER
4709 Austin
Houston, Texas 77004
Telephone: 713-524-1012
Telecopier: 713-524-5165

Hand Delivery in Person or by Agent *Courier Receipted Delivery* *Telephonic Document Transfer*
 First Class Mail *Certified Mail, Return Receipt Requested No. __, Electronic Document Delivery X*



Randall B. Wilburn