

TCEQ REGISTRATION NO. 710926

APPLICATION BY	§	BEFORE THE
	§	TEXAS COMMISSION ON
GORDON CLIFFORD SWENSON	§	ENVIRONMENTAL QUALITY

MOTION TO OVERTURN EXECUTIVE DIRECTOR'S DECISION

TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COME NOW 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, and in accordance with 30 T.A.C. § 50.139, and 30 T.A.C. § 312.13(e), file this Motion to Overturn the Executive Director's Decision with regard to the Registration Application by Gordon Clifford Swenson (TCEQ Registration No. 710926). This Registration authorizes the beneficial land application of domestic septage. Mr. and Mrs. James D. Story and Mr. and Mrs. Jim L. Story, Los Senderos Ltd. (Steen Family, Colina Ventosa Ltd), Eddie Moore, Cal Taylor and the City of Nixon submitted comments in opposition to this registration application. Although the Evergreen Underground Water Conservation District did not submit formal comments, they are concerned about the potential for both chemical and pathogenic groundwater contamination by direct infiltration through existing waterwell boreholes, and through possible future oil and gas drilling activities. These parties respectfully request that the ED's decision to issue this Registration be overturned by the TCEQ.

I. BACKGROUND INFORMATION

According to the Application to Register a Site for the Beneficial Use of Domestic Septage, Registration No. 710926 was received by the Water Quality Applications team of the TCEQ on October 9, 2012.¹

Attachment B to the application, (the landowners property boundary map and information), indicates that property number 16677 (which is adjacent to the applicant's site) is the Story Ranch, Ltd. owned by Mr. and Mrs. Jim L. Story and James D. Story, and property number 63357 is owned by James D. Story. Both properties adjoin the proposed 400-acre site, and receive stormwater runoff from the applicant's site. Los Senderos Ranch Ltd. (Steen Family, Colina Ventosa Ltd), (18115) on the landowner list is also adjacent to the proposed site, and receives stormwater runoff from the Applicant's site. Eddie Moore's property (38356) on the landowner list is adjacent to the proposed site. Cal Taylor's property (16673) on the landowner list is adjacent to the proposed site. The City of Nixon is within 2 miles north of the site.

Jim L. and Joanne Story's address is Story Ranch, Ltd., 1140 Story Ranch Road, Nixon, Texas 78140-4130, and James D. and Amy Story's address is 120 Sunriver, Boerne, Texas 78006-6102. Los Senderos Ranch Ltd. (Steen Family, Colina Ventosa Ltd) address is c/o Lios J. Steen, 5621 Willers Way, Houston, Texas 77056. Eddie Moore's address is P. O. Box 597, Nixon, Texas 78140. Cal Taylor's address is 1623 CR 483, Nixon, Texas 78140. Evergreen Underground Water District's address is c/o Russell Labus, 110 Wyoming Blvd., Pleasanton, Texas 78064. George and Maria Blanch's address is P. O. Box 451, Nixon, Texas 78140.

¹ This application is for land application on 179.4 acres out of 401.63 acres. However, the land application area was increased to 298.3 acres out of 401.63 acres in the Response to a Notice of Deficiency received by the Water Quality Division November 6, 2012. We question why a Major Amendment was not submitted.

According to the Letter Notice dated July 26, 2013, the Executive Director (ED) has issued final approval of the domestic septage application which became effective July 19, 2013. According to the TCEQ's Response to Comments dated June 28, 2013, this approved Registration would authorize domestic septage at a rate not to exceed 76,923 gallons/acre/year to be applied on approximately 298.3 acres within approximately 401.63 acres of the applicant's property.

The Applicant's site is located on Wilson County Road 483, 8,900 feet south of the intersection of US Highway 97 and south Rancho Road in the City of Nixon, Wilson County, Texas 78140. According to the application received by the Water Quality Applications Team on October 9, 2012, residential septic tank waste (septage) will be land-applied to coastal bermuda grass field during the warm seasons and during the cool season, the field will be over-seeded with winter rye which will also be land applied with septage. The source of the septage will be local area residential septic systems as well as portable toilet waste. Mr. Gordon C. Swenson is the Applicant and owner of the beneficial land use area in this registration. The septage will be applied by truck using a distribution bar. The coastal bermuda grass will have two cuttings per year and will be over-seeded with winter rye during the winter months. Pathogens will be reduced by additional lime before land application and the reduction of vector attraction will be accomplished by raising the pH to greater than 12 by the addition of alkali for at least 30 minutes. 30 T.A.C. §§ 312.82, 312.83.

II. OPPOSITION TO REGISTRATION

Written comments in opposition to the registration were submitted by approximately 80 persons including Honorable John Kuempel, State Representative District 21, Floresville ISD,

Nixon-Smiley ISD, and City of Nixon. Oral comments were presented at a public meeting held March 28, 2013, and several people signed a petition in opposition.

Mr. James D. Story submitted several scientific articles in opposition to this Registration. For example the *Canadian Journal of Infectious Diseases* concluded that land application of sewage sludge has not been adequately evaluated, and it is unreasonable to expect rural residents to tolerate exposure to diseases in land, air and water. Similarly the Department of Soil and Water Science from the University of Arizona in Tucson found that pathogens can survive for years. Aquifers can become contaminated and organisms can travel significant distances. Pathogens can cause disease outbreak.

III. TCEQ REGULATIONS

“Domestic septage” is defined as either liquid or solid material removed from a septic tank, cesspool, portable toilet, Type III marine sanitation device, or similar treatment works that receives only domestic sewage. Domestic septage does not include liquid or solid material removed from a septic tank, cesspool or similar treatment works that receives either commercial wastewater or industrial wastewater and does not include grease removed from a grease trap. 30 T.A.C. § 312.8(26).

According to the TCEQ regulations, the annual application rate (AAR) for domestic septage applied to agricultural land, forest or a reclamation site shall be equal to or less than the annual application rate calculated using the equation: $AAR = N / 0.0026$, where AAR equals annual application rate in gallons per acre per 365-day period; N equals amount of nitrogen in pounds per acre per 365-day period netted by the crop or vegetation grown on the land. 30 T.A.C. § 312.43(c).

According to 30 T.A.C. § 312.44(h), sludge must be applied by a method and under conditions that prevent runoff of sewage sludge beyond the active application area and protect the quality of surface water and the soils in the unsaturated zones. All of these requirements are under the control of the applicant and operator as opposed to the TCEQ. We understand that multiple third-party transporters will be allowed to use this site. This is potentially a dangerous situation especially where the City of Nixon and the public drinking water supply is within 2 miles, and schools are also within 2 miles of the site. Even more specifically, the Story Ranch, the Story's other property, as well as Los Senderos Ltd. (Steen Family, Colina Ventosa Ltd), Cal Taylor and Eddie Moore properties are all adjacent to the site and vulnerable to runoff from the land application of domestic septage. There doesn't appear to be any control or oversight with this registration to the detriment of nearby landowners.

Nuisance controls are required under 30 T.A.C. § 312.449(j) and the site must be operated in a way to prevent public health nuisances and dust migration from the site and objectionable odors must also be controlled by the owner and operator of the site, again more problematic when multiple users are involved. Furthermore we understand the prevailing wind is from the south southeast directly toward the City of Nixon, adding to the problems with dust and odors.

IV. SPECIFIC COMMENTS TO THIS REGISTRATION

In addition to the comments above, the following are specific comments and issues we have with the Registration, the Application on which it was based, and the TCEQ Response to Public Comments regarding this project.

1. TCEQ Response to Comments

- a. In Response #1, the TCEQ states that “the septage may only be applied to land under conditions that prevent runoff beyond the active application area.”

However, there is nothing in the application or the registration that prevents runoff from leaving the active application area, e.g. if it were to rain shortly after septage had been applied.

- b. In Response #1, the TCEQ states that “no authorization is given to discharge pollutants into water in the state.” It should be noted that there are numerous streams in the vicinity of this application area that receive storm water runoff from this 400-acre project site (see Attachment B to Domestic Septage Registration). There is nothing shown in the application or the registration for this project that would prevent stormwater runoff from leaving this project site, including that portion used for land application of domestic septage, and discharge into these streams, which are waters in the state.
- c. In Response #1, the TCEQ states that “the Applicant may only land apply such septage at a rate that is equal to the nitrogen requirement of plants being grown (i.e. the agronomic rate), thus ensuring that nutrients are fully utilized by plants and none are available for seepage into groundwater or surface water bodies.” However, the agronomic rate (AAR) that is established for this project is no greater than 76,923 gals/acre/year (which averages out to be approx. 422 gals/acre/48 hours). Under section C of the Special Provisions in the Registration, the Applicant is limited to land application of no more than 6,800 gals/acre/48 hours. This is more than 16 times the average AAR for any 48-hour period. Such an application would be greater than the nitrogen requirement of the plants being grown (i.e. Coastal Bermuda and Winter Rye), thus failing to ensure that nutrients are fully utilized by plants and therefore making some nutrients available for seepage into groundwater and/or surface water bodies, contrary to the statements by the TCEQ and its rules.
- d. In Response #1, the TCEQ states that “as with any material used in agriculture, it is likely that small amounts of these materials will be carried offsite during major rain events. However, the above limitations should provide sufficient protection for surrounding areas.” Furthermore, the TCEQ states that the “materials discharged during rain events should be no more harmful than other materials commonly used in agriculture.” These statements support the position that runoff will leave the application area(s) of this project, and acknowledge that there will be pollutants being discharged into waters in the state, both contrary to the requirements that this not be allowed to happen. There is no calculation or indication as to how much of these pollutants will leave the site and be discharged into the waters in the state. Clearly land application of domestic septage produces much larger quantities of nutrients/materials being applied to the land (over about 300 acres) than would normally be applied in typical agricultural activities. Domestic septage land application is NOT a typical agricultural activity, and no such activity produces this quantity and type of pollutants in such a concentration as the septage process as proposed herein.
- e. In Response #2, the TCEQ notes that Regulated Condition No. 10 requires the site operator to “prevent domestic septage from leaving the site.” However, as noted

above, there is acknowledgement that some domestic septage is expected to leave the site, and there is nothing in the application or the registration that indicates that this project has been designed to prevent such discharge.

2. Domestic Septage Registration

- a. The USGS topographical map, included as Attachment B to the Registration, shows numerous streams and other waters in the state that are in the vicinity of the proposed project site. In addition, there are two surface water bodies that are located within the project site, which are identified as being within a designated buffer zone on this map. There is a third surface water feature that is identified as “no longer exists” located within the area shown on this map as part of the application area. It is unclear how this surface water feature (i.e. a tributary stream to a tributary to Elm Creek, including a pond within this tributary stream) became non-existent, but presumably it was filled in, and, if so, then was such filling performed legally e.g. with the authority of or permit by the Corps of Engineers under Section 404 of the Clean Water Act.
- b. Attachment A is a General Highway Map that does not accurately depict the location nor the extent of the project site. See Exhibit A attached.

3. Original Application

- a. No seasonal high groundwater table was determined as required by 30 T.A.C. § 312.44(g).
- b. Under Section 5 – Soil Data, there is no “Depth to Groundwater” value provided, thus there is no information to be able to comply with 30 T.A.C. § 312.44(g).
- c. Under Section 5 – Soil Data, the soil depth is given as 65 inches for the 4 soil types shown to be located at the project site. However, there is no soil test/sample information provided in Attachment F (Soils Analysis Report) to show how these soil depths were derived or whether they actually represent the actual soil depths at this site.
- d. The Attachment C – TxDOT Highway Map – does not accurately depict the location nor the extent of the project site. See Exhibit A attached.
- e. Attachment D is a FEMA Floodplain Map that does not extend the computed floodplain for the tributary to Elm Creek beyond the Limits of Study for the FEMA analysis and into the project site boundary; thus, there is no information that reveals the extent of the actual floodplain of this tributary as it exists within the project site, which may lie potentially beyond the designated buffer zone and into the application area.

- f. The instructions for filling out the Application form include the following requirement:

REQUIRED MAPS

NEW AND MAJOR AMENDMENTS ONLY

1. Landowner Property Boundary Map and Information:

- a. Each application for a new (initial) registration or major amendment of a beneficial use registration requires that the applicant identify all landowners bordering the site. These persons are subsequently notified by mail of the application. **At a minimum show on a map both of the following:**

(1) The property boundaries of all contiguous land owned or under the control of the applicant and/or the landowner(s) (if multiple properties comprise the site or if the landowner(s) has multiple tracts that adjoin, the whole area must be shown).

(2) The boundaries of the adjoining properties (i.e., all sharing a property line or separated by only a road, railway, river, etc.). ...

30 T.A.C. § 312.8 defines On-site as:

The same or contiguous property owned, controlled, or supervised by the same person. If the property is divided by public or private right-of-way, the access shall be by crossing the right-of-way or the right-of-way shall be under the control of the person.

It is our understanding that there are three Parcels owned by the Applicant Mr. Swenson, that are not identified in the application, nor were adjacent landowners notified. These parcels are connected by a private right-of-way under the control of the Applicant.

4. Oil and Gas Lease

There is an oil and gas lease executed January 17, 2011, and is still in effect, covering this 400-acre property which was not identified in the Registration Application, but was brought to the attention of the ED by Mr. James D. Story. The TCEQ response to this comment that the “Applicant is under a continuing duty to amend its application to reflect current conditions on the

site ..." is not adequate to protect the surrounding properties from contamination due to drilling activities. (Response to Comment 19).

5. Incorrect Application Area

We note that Attachment D to the Application, which includes the Flood Insurance Rate Map for Wilson County, Texas and incorporated areas, gives a diagram of the two proposed application areas: the north application area is identified as 107.0 acres and the south application area is identified as 72.4 acres or a total of 179.4 acres. According to the date stamp, this was part of the application received by the water quality applications team on October 9, 2012. Interestingly this is the same diagram attached to the Domestic Septage Registration Attachment B - USGS Topographic map showing the property boundary and the application areas. Therefore it is unclear where the authorized land application area of 298 acres is located rather than the 179 acres shown as being identical to the FEMA map diagram.

V. CONCLUSION

Based on the above comments regarding the deficiencies in the application, we respectfully request that the Executive Director's decision be overturned.

Respectfully submitted,

BLACKBURN CARTER, P.C.

by Mary W. Carter

JAMES B. BLACKBURN, JR.

TBN 02388500

MARY W. CARTER

TBN 03926300

4709 Austin

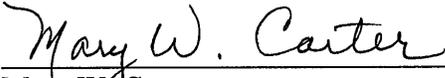
Houston, Texas 77004

713/524-1012 (Tel.)

713/524-5165 (Fax)

CERTIFICATE OF SERVICE

On this 16th day of August, 2013, the undersigned hereby certifies that a true and correct copy of the foregoing instrument was served on all attorneys/parties of record as indicated below.



Mary W. Carter

FOR THE CHIEF CLERK:

Bridget C. Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
12100 Park 35 Circle
Austin, Texas 78753
*Via TCEQ's Electronic Filing System and
Federal Express*

FOR THE EXECUTIVE DIRECTOR:

Brian Christian, Director
Texas Commission on Environmental Quality
Small Business and Environmental Assistance
Public Education Program, MC-108
P. O. Box 13087
Austin, Texas 78711-3087
Via facsimile: (512) 239-5678

Timothy J. Reidy, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P. O. Box 13087
Austin, Texas 78711-3087
Via facsimile: (512) 239-0606

Bijaya R. Chalise, Technical Staff
Texas Commission on Environmental Quality
Water Quality Division, MC-148
P. O. Box 13087
Austin, Texas 78711-3087
Via facsimile: (512) 239-4430

FOR PUBLIC INTEREST

COUNSEL:

Blas J. Coy, Jr., Attorney
Texas Commission on Environmental
Quality
Public Interest Counsel, MC-103
P. O. Box 13087
Austin, Texas 78711-3087
Via facsimile: (512) 239-6377

FOR THE APPLICANT:

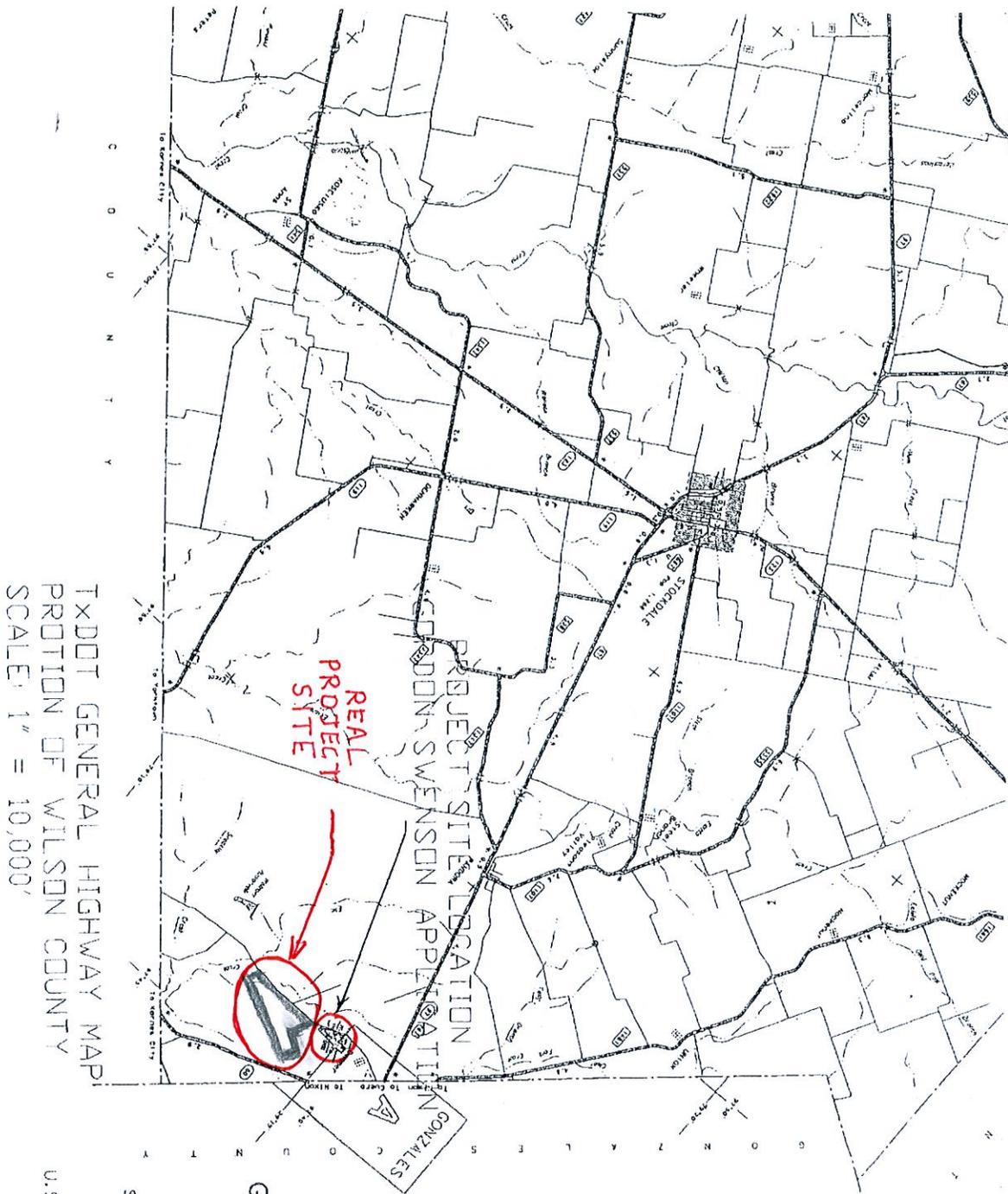
Donald G. Rauschuber, P.E.
DGRA, Inc.
P. O. Box 342707
Austin, Texas 78734
Via U.S. First Class Mail

Gordon Clifford Swenson
11407 Farm-to-Market Road 1625
Austin, Texas 78704
Via U.S. First Class Mail

Randall B. Wilburn, P.E.
3000 South IH 35, Suite 150
Austin, Texas 78704
Via U.S. First Class Mail

EXHIBIT A

Attachment A General Highway Map

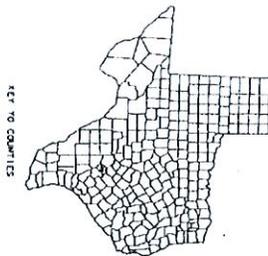


TXDOT GENERAL HIGHWAY MAP
 PORTION OF WILSON COUNTY
 SCALE: 1" = 10,000'



GENERAL HIGHWAY MAP WILSON COUNTY TEXAS

PREPARED BY THE
 STATE DEPARTMENT OF HIGHWAYS
 AND PUBLIC TRANSPORTATION
 TRANSPORTATION PLANNING DIVISION
 IN COOPERATION WITH THE
 U.S. DEPARTMENT OF TRANSPORTATION
 FEDERAL HIGHWAY ADMINISTRATION
 SCALE: 1" = 10,000'



1986
 1990 CENSUS FIGURES
 HIGHWAYS REVISED TO JULY 1, 1991