

Kathleen Hartnett White, *Chairman*  
Larry R. Soward, *Commissioner*  
H. S. Buddy Garcia, *Commissioner*  
Glenn Shankle, *Executive Director*



TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

2007 AUG -6 PM 4:39

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY CHIEF CLERKS OFFICE

*Protecting Texas by Reducing and Preventing Pollution*

August 6, 2007

VIA HAND DELIVERY

Ms. LaDonna Castañuela, Chief Clerk  
Office of Chief Clerk  
Texas Commission on Environmental Quality MC 105  
P.O. Box. 13087  
Austin, TX 78711-3087

RE: Application of Synagro of Texas-CDR, Inc., for TCEQ Permit No. WQ0004671000;  
SOAH Docket No. 582-05-5610; TCEQ Docket No. 2005-0180-SLG

Dear Ms. Castañuela:

Enclosed for filing in the above styled application and docket numbers find the original and eleven copies of "Executive Director's Reply to Exceptions to the Proposal for Decision and Proposed Order."

If you have any questions or comments, please call me at 239-0455. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "John E. Williams".

John E. Williams, Staff Attorney  
Environmental Law Division MC 173

Enclosures

Kathleen Hartnett White, *Chairman*  
Larry R. Soward, *Commissioner*  
H. S. Buddy Garcia, *Commissioner*  
Glenn Shankle, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 6, 2007

Hon. Carol Wood, Administrative Law Judge  
State Office of Administrative Hearings  
P.O. Box 13025  
Austin, TX 78711-3025

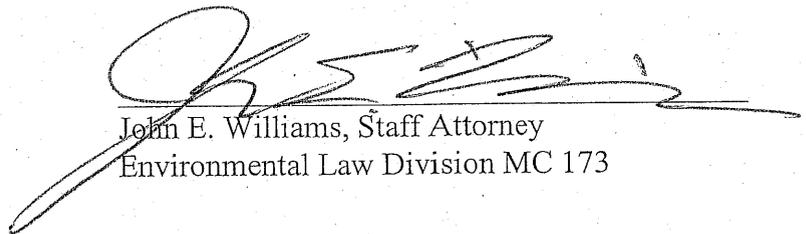
RE: Application of Synagro of Texas-CDR, Inc., for TCEQ Permit No. WQ0004671000;  
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Dear Judge Wood:

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John E. Williams, Staff Attorney  
Environmental Law Division MC 173

Enclosures

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Application by  
SYNAGRO OF TEXAS-CDR, INC.,  
for TCEQ Permit No. WQ0004671000

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§

Before the  
TEXAS COMMISSION  
ENVIRONMENTAL QUALITY  
CHIEF CLERKS OFFICE

**EXECUTIVE DIRECTOR'S REPLY to EXCEPTIONS to the PROPOSAL FOR  
DECISION and PROPOSED ORDER**

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this reply to exceptions to the Administrative Law Judge's Proposal for Decision (PFD) and Proposed Order.

Protestants, Brett and Phyllis Hudman, filed Exceptions to the Proposal for Decision. Two of their Exceptions directly challenged how the TCEQ and the Executive Director review applications—the Executive Director replies to those two Exceptions. All other Protestant Exceptions challenged the Applicant or the application—the Executive Director will not comment on those Exceptions since the Applicant bears the burden of proof and persuasion on those issues.

**Protestant Exception II. The Application Now Before the Commission Should Be Subject to  
TCEQ Rules as Effective in June of 2006**

Protestants argue that the application was never administratively complete until June of 2006.

They rely on Texas Health and Safety Code § 361.068(a):

(a) A permit application is administratively complete when:

(1) a complete permit application form and the report and fees required to be submitted with a permit application have been submitted to the commission; . . .

Protestants conveniently ignore the remainder of § 361.068 in its entirety, beginning with the

final word completing § 361.068(a)(1):

... and

(2) the permit application is ready for technical review in accordance with the rules of the commission.

(b) Once a determination that an application is administratively complete has been made **and the permit application has become the subject of a contested case** under Section 2001.003, Government Code:

(1) **the commission may not revoke the determination that an application is administratively or technically complete;**

(2) the commission may request additional information from the applicant only if the information is necessary to clarify, modify, or supplement previously submitted material provided that all parties may engage in discovery against all other parties, as provided by applicable law; and

(3) **a request for additional information does not render the application incomplete.**

(c) Subsection (b) does not:

(1) preclude an informal disposition of a contested case by stipulation, agreed settlement, consent order, or default; or

(2) restrict the right of any party to conduct discovery against any applicable party under other law. [emphasis added]

By this statute, a determination of administrative or technical completeness, once made and declared, is irrevocable. Applicants have a due process right to know the rules and procedures under which their applications will be judged. Once the contested case process has begun, the Commission may not change the rules and laws that will affect its decision on an application. This statute makes that crystal clear.

Many environmental laws in Texas are tied to dates of administrative completeness—besides the 2003 amendment to Texas Health and Safety Code § 361.121 governing land application of sewage sludge (and this permit application), there was also House Bill 801 amending the public participation process for environmental permitting in Subchapter M of Texas Water Code Chapter 5 in 1999. The Legislature has long recognized that tying the effective date of a bill to the date that

an application is determined to be administratively complete is a clear and convenient means of providing due process to all parties, putting everyone on clear notice as to what statutes and rules will be used to evaluate an application throughout the process.

It is important to note that the prohibition against a reversal of the determination of administrative completeness in § 361.068(b) is absolute. Once an application becomes a contested case, any changes to the application or to the draft permit are trial amendments, subject to complete discovery by all parties at trial and subject to overview and approval or rejection by the Administrative Law Judge and, ultimately, by the Commission.

In this specific case, the application by Synagro of Texas-CDR, Inc., for Permit No. WQ0004671000 was declared to be administratively complete on August 29, 2003, and declared to be technically complete on January 29, 2004. The Commission considered hearing requests at agenda on March 23, 2005, and referred the matter to the State Office of Administrative Hearings (SOAH). The preliminary hearing was held July 5, 2005, a PFD was submitted to the Commission on December 21, 2005, and the Commission was prepared to consider that PFD on April 12, 2006.

By remanding this matter to SOAH on April 12, 2006, the Commission reopened the record for **further proceedings on the original contested case**. This is in compliance with 30 TAC § 80.265, that directs that “[T]he commission, on the motion of any party or on its own motion, may order the judge to **reopen the record for further proceedings** on specific issues in dispute.” [emphasis added] The Commission did not order the Administrative Law Judge or the parties to start over with a new application.

The Executive Director also points out that the material submitted by Synagro on June 8, 2006, is technical, involving calculations ultimately leading to the final maximum sludge application

rate that the draft permit will allow. It has nothing to do with the initial administrative review of an application that looks primarily at things such as signatures, notarizations, maps, mailing addresses for adjacent landowners, payment of fees, etc. The technical nature of the material submitted by Synagro on June 8, 2006, is the responsibility of the Executive Director's technical review team to evaluate. The technical review team has the specialized qualifications, training, and experience to review the complex calculations ultimately leading to the maximum sludge application rates to incorporate into the draft permit. That is why the Executive Director uses two teams to review permit applications.

The Executive Director recommends that the Commission approve the Administrative Law Judge's decision to apply the statutes and rules in effect on August 29, 2003, the date this application was determined to be administratively complete, to this application.

**Protestant Exception III. TCEQ Has Employed an Application Form That Defies the Laws of Chemistry, Rendering Issuance of the Permit Arbitrary and Capricious**

Protestants argue that calculations of the quantity of the organic nitrogen per ton in the sludge to be applied are fundamentally flawed, that this flaw is an error not subject to scientific uncertainty or debate, that the application form is not a rule and therefore not binding, and that if it is held to be binding then the application form is a rule that violates the Administrative Procedure Act requirements for rulemaking rendering any such holding arbitrary and capricious.

At issue is the following expression from TCEQ's application form for the beneficial application of sewage sludge to land for agricultural purposes, found in Appendix A (Agronomic

Rate Calculations), Part 1 (Sewage Sludge Application Rate), Step 3 (Calculate the Plant Available Nitrogen (PAN) Provided by the Sludge), substep 3A:

$$\text{Organic Nitrogen} = \text{Total N} - (\text{NH}_4\text{-N}) - (\text{NO}_3\text{-N})$$

This expression is part of the methodology for calculating the amount of nitrogen in the sludge sample available for plant use. It can be read: "Organic nitrogen in the sludge available for plant use is equal to the total nitrogen found in the sludge sample (Total N) minus the amount of ammonia-nitrogen found in the sludge sample (NH<sub>4</sub>-N) minus the amount of nitrate-nitrogen found in the sludge sample (NO<sub>3</sub>-N)."

Protestants argue that TCEQ allowed the Applicant to substitute Total Kjeldahl Nitrogen (TKN) because of a "parenthetical on the application form." Far from being a "parenthetical," "Total Nitrogen" is clearly defined on the application form as "nitrogen determined by Kjeldahl digestion," or, elsewhere, as "determined by the Kjeldahl procedure."

Total Nitrogen has consistently been defined prior to, during, and after the submittal of this application to mean TKN for all applications to apply sludge beneficially to land for agricultural purposes. It is only the Protestants who, upon seeing the term "Total Nitrogen" interpret it differently than the directions for filling out an application for a TCEQ permit.

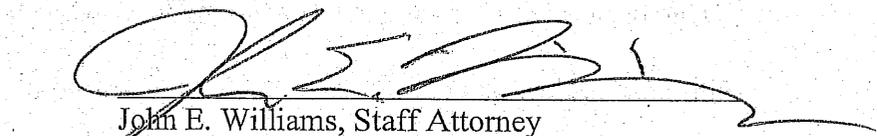
TCEQ has long been aware of the difference between the Total N as others might interpret that term outside of the context of a permit application and TKN. Because of that awareness, TCEQ decided many years ago to overcompensate in estimating the amount of Plant-Available Nitrogen (PAN) in the soil that is subtracted from the PAN in the sludge. The difference in the estimate of soil PAN is 8-10 times the difference in sludge PAN when TKN is substituted for Total N. In other words, if the difference in sludge PAN allows for an increased application of 0.26 tons/acre/year for

a particular field, the difference in the estimate of soil PAN requires a decrease of approximately 2.0 tons/acre/year for the same field.

The Executive Director's application form is far more conservative than the laws of chemistry claimed by the Protestants.

The Executive Director recommends that the Commission approve the Administrative Law Judge's Proposal for Decision and Proposed Order in this matter.

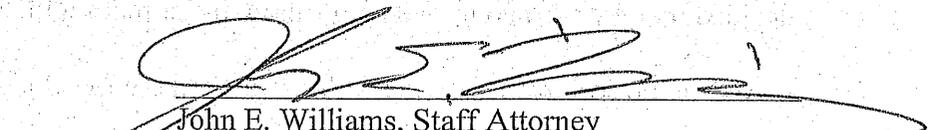
Respectfully submitted,



John E. Williams, Staff Attorney  
TCEQ Environmental Law Division  
State Bar No. 24004991  
Representing the Executive Director of the Texas  
Commission on Environmental Quality

**CERTIFICATE OF SERVICE**

I certify that on August 6, 2007, the original copy and eleven copies of the "Executive Director's Reply to Exceptions to the Proposal for Decision and Proposed Order" in the Application by Synagro of Texas-CDR, Inc., for TCEQ Permit No. WQ0004671000 was filed with the Chief Clerk and a copy was faxed and mailed to the attorneys representing the parties identified on the attached mailing list.



John E. Williams, Staff Attorney  
Environmental Law Division  
State Bar No. 24004991

Mailing List  
Synagro of Texas CDR, Inc.  
Permit No. WQ0004671000  
TCEQ Docket No. 2005-0180-SLG  
SOAH Docket No. 582-05-5610

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FOR THE STATE OFFICE OF  
ADMINISTRATIVE HEARINGS

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FOR THE CHIEF CLERK

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