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August 6, 2007

Ms. LaDonna Castañuela
TCEQ
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

CHIEF CLERKS OFFICE

2007 AUG - 6 PM 4:40

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: In the matter of the Application By Synagro of Texas-CDR, Inc., for TCEQ Permit No. WQ0004671000, before the Texas Commission on Environmental Quality, SOAH Docket No. 582-05-5610, TCEQ Docket No. 2005-0180-SLG

Dear Ms. Castañuela:

Enclosed please find an original and eleven copies of Protestants' Reply to the Executive Director's Exceptions to Proposal for Decision. Please call if you have any questions.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,



Eric Allmon

CC: Service List
SOAH

TCEQ Docket No. 2005-0180-SLG
SOAH Docket No. 582-05-5610

APPLICATION BY SYNAGRO OF
TEXAS-CDR, INC., FOR TCEQ
PERMIT NO. WQ0004671000

§ BEFORE THE TEXAS
§ COMMISSION ON
§ ENVIRONMENTAL QUALITY
§

CHIEF CLERKS OFFICE

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**PROTESTANTS' REPLY TO THE EXECUTIVE DIRECTOR'S
EXCEPTIONS TO PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSION:

In the case of the application by Synagro of Texas-CDR, Inc., for TCEQ Permit No. WQ004671000, Protestants Brett and Phyllis Hudman (Protestants) file this, their Reply to the Executive Director's Exceptions to the Proposal for Decision and Proposed Order.

I. Summary

In 2003, Synagro of Texas-CDR, Inc. (Synagro or Applicant) filed an application for a permit authorizing the land application of wastewater treatment plant sludge. After an initial hearing in 2005, it was made clear that the Applicant had failed to appropriately calculate the agronomic load rates. For this reason, the Commission remanded the application back to SOAH,

for additional evidence on the new agronomic loading rate calculations, and impact, if any, of the new calculations and agronomic rates on the surface water runoff from the Applicant's facility and whether such runoff will impact or affect fishing and wildlife ponds on adjacent property.¹

On remand, Applicant submitted amendments to its application, significantly altering the proposed activities and calculations contained in the application.

The contested case hearing conducted on this amended application took place January 22

¹TCEQ Interim Order, dated April 28, 2006. The wording of the issue presented in Protestant's Exceptions was incorrect.

- January 24, 2007. The proposal for decision determined that the Applicant properly calculated its new agronomic loading rates and that they indicate that there was no adverse impact on Protestants' fishing and wildlife ponds from surface water runoff from Applicant's facility.

On July 23, 2007, the Executive Director (ED) filed Exceptions to the Proposal for Decision, asking that the Commission adopt the Proposal for Decision (PFD).

II. THE EXECUTIVE DIRECTOR APPLIES THE WRONG LAW

The ED's position assumes that the proper law applicable to the application is that in effect prior to September of 2003.² This ignores both the blatant incompleteness of the application on that date, and the drastic changes to the application that were made in June of 2006. Excerpts from the original agronomic rate calculations are presented in Attachment A to this brief. Step 2 of these calculations involved subtracting the amount of nitrogen in the soil from the amount of nitrogen the crops would need in order to arrive at the amount of nitrogen still needed. As shown in the attached copies, Synagro in its initial application simply ignored the requirement to perform this calculation. Without this information, its application was neither administratively nor technically complete in September of 2003.

Had Synagro simply provided information to complete these blanks during the second hearing, and recalculated its rates based on the new information, it could perhaps argue that the application now before the commission is reasonably related to that prior application. In fact, in Synagro's Motion for Remand presented to the Commission in April of 2006, Synagro indicated

² Protestant notes that the delay of the permitting process is attributable to Applicant's Motion for Remand at the Commission, and a Subsequent Motion for Continuance filed by Applicant during the second hearing in order to provide Synagro additional time to find rebuttal witnesses after receiving Protestant's pre-filed materials.

that this was exactly its intent, stating, "All of the data required to develop a more precise agronomic loading rate is included in the application and the ALJ will only need to take evidence related to the correction in the calculation."³ As discussed in Protestant's Exceptions, however, during the second hearing Synagro not only presented extensive amounts of new data which in many cases replaced previous data, but also altered the proposed means of operation, and substantially increased the proposed yield goals. Then, after receiving Protestant's pre-filed materials in the second hearing, Applicant obtained a continuance in order to employ an additional expert to develop a new hydrology analysis for its rebuttal case that had never been presented in its original application, the original hearing, before the Commission, in its June 2006 materials, or in pre-filed materials submitted during the second hearing. Thus, the application and supporting materials that is returning to the Commission after a second hearing can hardly be considered the same application submitted by Synagro in August of 2003, or even the same application as that considered by the Commission in April of 2006.

While Protestants believe that exempting Synagro's new application from new law is a violation of the Administrative Procedures Act under these circumstances, Protestants also believe that it is simply inequitable to allow an applicant to submit an application which all parties agree was deficient as of September of 2003, but allow the applicant to avoid legal requirements that took effect less than two weeks after submittal of this deficient application when the applicant is also allowed to spend four years transforming, supplementing, and replacing both what is being requested, and the material used to support that request. If Applicant wants the benefit of prior law, it should be required to stand on its prior application. If

³ Synagro's Motion to Remand to SOAH, filed January 30, 2006, at p. 3.

Applicant wants the benefit of its current, and dramatically altered, application materials, it should be required to meet the requirements of current law. To allow otherwise encourages the submittal of poorly-prepared "placeholder" applications whenever TCEQ rules are changed, which an Applicant knows to be deficient but which Applicant also knows it will be allowed to use in order to undermine TCEQ's efforts to update its regulatory approaches. This not only makes it difficult for TCEQ to modernize its regulations, but also results in the additional expenditure of State resources required to consider inadequate applications, as exemplified in this case itself. TCEQ should not encourage such behavior.

It is important also to note that while Applicant may claim its new application is more protective, this has not been shown to be true. The ALJ's original PFD relied in part on the assumption that sludge will be incorporated to prevent runoff. Applicant's new application does not similarly require this practice. Furthermore, **the yield goals in the previous application were in the range of 4 tons per acre. The yield goals in the new application are in the range of 6 tons per acre.** Thus, while Synagro may be proposing a lower initial rate of application, it is in fact asking to be allowed to calculate its application rate in each subsequent year on an assumption of 50% additional crop growth in comparison to its 2003 application. Because Synagro has not been required to disclose how this recalculation will be performed, as it would be required to disclose under rules in place since September of 2003, it is impossible to conclude that this change will not result in a significantly higher annual application rate under the new application in comparison to the previous application. As such, regardless of any other change in its application, the changes to the application made during the second hearing should be considered an amendment to the permit application.

If the application is subject to the proper rules, then a certified nutrient management plan is required to be submitted as part of the permitting process. This has not been provided, so the application must be denied.

III. THE EXECUTIVE DIRECTOR IGNORES SIGNIFICANT DEFICIENCIES IN THE APPLICATION

The ED ignores the many deficiencies in the application that were discussed in Protestant's Exceptions. Not least among these is the improper calculation of agronomic rates based on the ED's uncontrovertedly flawed application form. In correspondence with Protestant's agronomy expert, Bruce Wiland, ED staff informed Mr. Wiland that although he was correct that the form contained a technical error, Applicants should still follow the form to be "legally correct." This blind adherence to a process simply because it is embodied in an application form, even when that form is known to be wrong, is arbitrary and capricious. ED staff should endeavor to correct such errors, not take the position put forth by the ED during the hearing that the ED is required to ignore these types of errors.⁴

Other technical errors contained in the Application have been reviewed in Protestant's Exceptions, and will not be repeated here.

⁴ Testimony of Paul Askenasy, p. 427, l. 13 - 19.

VII. CONCLUSION AND PRAYER

For the reasons given above, Protestants Bret and Phyllis Hudman respectfully pray that the Commission reject the ALJ's proposal for decision and deny the application of Synagro of Texas-CDR, Inc., for sludge application permit No. WQ0004671000.

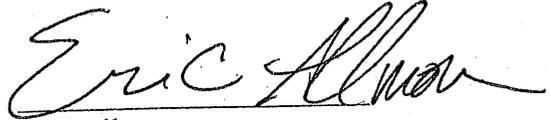
Respectfully Submitted,

Lowerre & Frederick
Attorneys at Law
44 East Ave., Suite 100
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(512) 469-6000 phone
(512) 482-9346 fax

By 
Eric Allmon
State Bar No. 24031819
Counsel for Bret and Phyllis Hudman

Certificate of Service

By my signature above, I, Eric Allmon, hereby certify that an original and eleven copies of the foregoing Protestants' Reply to Exceptions to the Proposal for Decision was delivered on this day, the 6th of August, 2007 to the Chief Clerk's Office of the TCEQ, and copies were also served by facsimile transmission and first class mail to the individuals listed below.


Eric Allmon

For the Applicant Synagro of Texas-CDR (via fax and mail):

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ATTACHMENT A

AGRONOMIC CALCULATIONS OF ORIGINAL APPLICATION

Step 2 - Soil Test Analysis and Fertilizer Recommendations

Note: Please include a fertilizer recommendation from the local County Extension Service for determining the nutrient needed by the specified crop(s).

Intended Crop(s): COMMON BERMUDA & NATIVE SEDGEGRASS USED FOR HEAVY GRAZING

Yield Goal (s): 4 TONS pH: 6.21

- | | |
|---|---------------|
| | N (lbs./acre) |
| A. Nutrient needed by crop for specific yield goal ** | |
| B. Nutrient available in soil [=2 x NO ₃ -N(ppm)(0-6" soil depth)+6 x NO ₃ -N(ppm)(6-24" soil depth)]** | 46 |
| C. Nutrient amount still needed [=Nutrient needed-Nutrient available]
(enter this amount in Step 4A.) | |

**Please provide the means of determining these values.
Refer to Lab Analysis of Certified Lab Company

Step 3 - Calculate the Plant Available Nitrogen (PAN) Provided by the Sludge

(Use the values for Total N, NH₄-N and NO₃-N from Step 1)

- | | |
|---|--------|
| A. Organic Nitrogen = Total N - (NH ₄ -N) - (NO ₃ -N) = 4.50 - 0.54 - 0.23 = 3.73 X 20 = 74.60
(Multiply the percent values in Appendix C for PAN) x 30% | 74.60 |
| | 0.30 |
| | 22.38 |
| B. Ammonium Nitrogen (NH ₄ -N) x V =
Use Volatization factor (V) = 0.5 if sludge is left on soil surface:
Use Volatization factor (V) = 1.0 if sludge is worked into soil. | + 5.40 |
| C. Nitrate Nitrogen (NO ₃ -N) = | + 4.60 |
| D. 3A + 3B + 3C = (enter this amount in Step 4B.) Total PAN | 32.380 |

Step 4 - Calculate Maximum Sludge Application Rate Based on Crop Nitrogen Needs (SAR_N)

- | | |
|--|---------------------|
| A. Enter the amount from Step 2. Nitrogen amount still needed. | 200 lbs/acre/year |
| B. Enter amount from Step 3D. Total PAN in sludge: | 32.380 lbs/ton |
| C. Sludge Application Rate (SAR _N) = A ÷ B = <u> </u> ÷ <u> </u> = | 6.18 tons/acre/year |

FIELD 1

Sample	Nitrates	Avg	Initial	Top Dress	Cuttings	lbs of N
16	24		50	50	3	200
17	24		50	50	3	200
18	30	46	50	50	3	200
19	72		50	50	3	200
20	82		50	50	3	200

Step 2 - Soil Test Analysis and Fertilizer Recommendations

Note: Please include a fertilizer recommendation from the local County Extension Service for determining the nutrient needed by the specified crop(s).

Intended Crop(s): COMMON BERMUDA & NATIVE SEDGEGRASS USED FOR HEAVY GRAZING.
 Yield Goal (s): 4 TONS pH: 6.03 N (lbs./acre)

- A. Nutrient needed by crop for specific yield goal ** _____
- B. Nutrient available in soil [=2 x NO₃-N(ppm)(0-6" soil depth)+6 x NO₃-N(ppm)(6-24" soil depth)]** 13
- C. Nutrient amount still needed [=Nutrient needed-Nutrient available]
 (enter this amount in Step 4A.) _____

**Please provide the means of determining these values.
 Refer to Lab Analysis of Certified Lab Company

Step 3 - Calculate the Plant Available Nitrogen (PAN) Provided by the Sludge

(Use the values for Total N, NH₄-N and NO₃-N from Step 1)

- A. Organic Nitrogen = Total N - (NH₄-N) - (NO₃-N) = 4.50-0.54-0.23=3.73 X 20=74.60 74.60
 (Multiply the percent values in Appendix C for PAN) x 30% 0.30
22.38
- B. Ammonium Nitrogen (NH₄-N) x V= _____ + 5.40
 Use Volatization factor (V) = 0.5 if sludge is left on soil surface:
 Use Volatization factor (V) = 1.0 if sludge is worked into soil.
- C. Nitrate Nitrogen (NO₃-N) = _____ + 4.60
- D. 3A + 3B + 3C = (enter this amount in Step 4B.) Total PAN 32.380

Step 4 - Calculate Maximum Sludge Application Rate Based on Crop Nitrogen Needs (SAR_N)

- A. Enter the amount from Step 2. Nitrogen amount still needed. _____ 200 lbs/acre/year
- B. Enter amount from Step 3D. Total PAN in sludge: _____ 32.380 lbs/ton
- C. Sludge Application Rate (SAR_N) = A ÷ B = _____ ÷ _____ = 6.18 tons/acre/year

FIELD 2

Sample	Nitrates	Avg	Initial	Top Dress	Cuttings	lbs of N
4	8		50	50	3	200
5	8		50	50	3	200
6	14	13	50	50	3	200
	20		50	50	3	200

Step 2 - Soil Test Analysis and Fertilizer Recommendations

Note: Please include a fertilizer recommendation from the local County Extension Service for determining the nutrient needed by the specified crop(s).

Intended Crop(s): COMMON BERMUDA & NATIVE SEDGEGRASS USED FOR HEAVY GRAZING

Yield Goal (s): 4 TONS pH: 5.91 N (lbs./acre)

A. Nutrient needed by crop for specific yield goal ** _____

B. Nutrient available in soil [=2 x NO₃-N(ppm)(0-6" soil depth)+6 x NO₃-N(ppm)(6-24" soil depth)] 69

C. Nutrient amount still needed [=Nutrient needed-Nutrient available] _____
(enter this amount in Step 4A.)

**Please provide the means of determining these values.
Refer to Lab Analysis of Certified Lab Company

Step 3 - Calculate the Plant Available Nitrogen (PAN) Provided by the Sludge

(Use the values for Total N, NH₄-N and NO₃-N from Step 1)

A. Organic Nitrogen = Total N - (NH₄-N) - (NO₃-N) = 4.50 - 0.54 - 0.23 = 3.73 X 20 = 74.60 74.60
(Multiply the percent values in Appendix C for PAN) x 30% 0.30
22.38

B. Ammonium Nitrogen (NH₄-N) x V = _____ + 5.40
Use Volatization factor (V) = 0.5 if sludge is left on soil surface:
Volatization factor (V) = 1.0 if sludge is worked into soil.

C. Nitrate Nitrogen (NO₃-N) = _____ + 4.60

D. 3A + 3B + 3C = (enter this amount in Step 4B.) Total PAN 32.380

Step 4 - Calculate Maximum Sludge Application Rate Based on Crop Nitrogen Needs (SAR_N)

A. Enter the amount from Step 2. Nitrogen amount still needed. 200 lbs/acre/year

B. Enter amount from Step 3D. Total PAN in sludge: 32.380 lbs/ton

C. Sludge Application Rate (SAR_N) = A ÷ B = 6.18 tons/acre/year

FIELD 3

Sample	Nitrates	Avg	Initial	Top Dress	Cuttings	lbs of N
1	14		50	50	3	200
2	14		50	50	3	200
3	8		50	50	3	200
8	12		50	50	3	200
9	132		50	50	3	200
10	156	69	50	50	3	200
11	148		50	50	3	200
12	98		50	50	3	200
13	78		50	50	3	200
14	70		50	50	3	200
	24		50	50	3	200