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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
2008 FEB 11 PM 3:41  
CHIEF CLERKS OFFICE

February 11, 2008

LaDonna Castanuela, Chief Clerk  
Office of the Chief Clerk, MC105  
Texas Commission on Environmental Quality  
12100 Park 35 Circle, Bldg. F  
Austin, Texas 78753

*Via Facsimile (512) 239-3311 and Via  
First-Class Mail*

**RE:** SOAH Docket No. 582-06-0839; TCEQ Docket No. 2005-1510-MSW; Proposed Permit No. 2320; *Application of Roy Eugene Donaldson II for a Permit to Authorize Texas Organic Recovery to Compost Municipal Sewage Sludge, Septage, and Grease Trap Waste.*

Dear Ms. Castanuela:

Regarding the above-referenced docket, please find enclosed **Applicant's Reply to Protestants' Exceptions to Initial Proposal for Decision**. The original and 12 copies are being mailed. Please file and return a file-marked copy to this office; a self-addressed, stamped envelope will be enclosed.

Thank you for your time and assistance. If you should have any questions, please do not hesitate to call.

Very truly yours,

Jennifer L. Washington, CP  
Paralegal

Enclosures

cc: Honorable Cassandra J. Church  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> Street, Suite 502  
Austin, TX 78701  
*Via Fax: (512) 475-4994 and Via CM/RRR*

SOAH DOCKET NO. 582-06-0839  
TCEQ DOCKET NO. 2005-1510-MSW14  
PROPOSED PERMIT NO. 2320

APR 14 4 40 PM '05  
CHIEF CLERKS OFFICE

COPY

APPLICATION OF ROY EUGENE	§	BEFORE THE STATE OFFICE
DONALDSON II FOR A PERMIT TO	§	
AUTHORIZE TEXAS ORGANIC	§	
RECOVERY TO COMPOST	§	OF
MUNICIPAL SEWAGE SLUDGE,	§	
SEPTAGE, AND GREASE TRAP	§	
WASTE	§	ADMINISTRATIVE HEARINGS

**APPLICANT'S REPLY to PROTESTANTS' EXCEPTIONS  
TO THE PROPOSAL FOR DECISION**

**What the actual numbers show: the liner under the composting area surpasses the minimum requirements of the TCEQ's rules.**

In this case, *actual testing* was done on the composting area which shows that it far surpasses the lining requirements of the TCEQ's rules which are found at 30 TAC §§332.47(6)(C)(i)(I). This rule generally requires the liner to be protected by a layer of material (e.g., dirt) to protect it from the operations going on above and to have a liquid limit of more than 30%, a plasticity index of greater than 15, and have more than 30% passing a No. 200 sieve, resulting in a barrier with a hydraulic conductivity of  $1 \times 10^{-7}$ .

Ultimately, five tests have been performed on the 400 x 450 ft/ 180,000 sq. ft. composting area (of which the windrow take up about 2 acres, or 87,120 sq. ft.), or about one test per 36,000 square feet. Without exception the liner beneath the actual composting area far surpasses the TCEQ's minimum permeability requirements.

Tests were actually done on the liner under the compost area by HBC Engineering on July 6, 1998 (see application p. 79-80). These tests show that *at the worst*, the liner's liquidity limit was 66% (over twice the minimum requirement of 30% – see 30 TAC §§332.47(6)(C)(i)), the plasticity index was 49%, (over three times the minimum requirement of 15) and the percent passing a No. 200 sieve was 65% (over twice the minimum requirement of 30%), which result in permeability in the range of  $1 \times 10^{-8}$  to about  $1 \times 10^{-9}$  (see application p. 76-77)(or *10 times better* than the minimum requirement  $1 \times 10^{-7}$ ). These measurements all far surpass the minimum requirements for the liner set out by the rule.

In addition, Holt Engineering's Boring B4 (application at 168) – *the boring in the middle of the composing area* (see application at p. 164) – conducted on July 2, 2004, shows *at three feet*

a liquidity limit of 65% (again, the minimum requirement is 30% – see 30 TAC §§332.47(6)(C)(i)), a plasticity index of 44%, (minimum requirement is 15) and the percent passing a No. 200 sieve of 84.9% (minimum requirement is 30%), which result in again permeability in the range of  $1 \times 10^{-8}$  to about  $1 \times 10^{-9}$  or better (see application p. 76-77)(minimum requirement  $1 \times 10^{-7}$ ).

Furthermore, Holt Engineering's Boring B6 (application at 170) – *the boring in where the of the composting area ties into that of the retention pond* (see application at p. 164) – conducted on July 2, 2004, shows *at two feet* a liquidity limit of 115% (again, the minimum requirement is 30% – see 30 TAC §§332.47(6)(C)(i)), a plasticity index of 86%, (minimum requirement is 15) and the percent passing a No. 200 sieve of 48% (minimum requirement is 30%), which again result in permeability in the range of  $1 \times 10^{-8}$  to about  $1 \times 10^{-9}$  or better (see application p. 76-77)(minimum requirement  $1 \times 10^{-7}$ ). At *four feet*, the liquidity limit was 92%; the plasticity index was 67%; and the percent passing a No. 200 sieve was 86.9%. These measurements again result in permeability in the range of  $1 \times 10^{-8}$  to about  $1 \times 10^{-9}$  or better (see application p. 76-77)(minimum requirement  $1 \times 10^{-7}$ ).

A comparison of the boring report at p. 164 with the site plan on p. 81 shows that the other borings *were around the perimeter of the composting area*. The fact that these borings don't have the same numbers as close to the surface (but show similar impermeability 5-6 feet, such as B2); or don't numbers at all (B1 by the driveway to the office and the holding tanks) is irrelevant. In any event, the facility is constructed on top of the Taylor-Navarro geological formation, which is essentially an impermeable layer of clay, tens or scores of feet deep.

The fact that further information was not retained by the applicant suggests – but only in hindsight – that they should have kept more records, although at the time there was no expectation that they would have to re-certify a location that had already been approved. But there is no escaping the uncontested and incontestable facts – the hard numbers scientifically measured – which show without exception that the liner beneath the actual composting area far surpasses the TCEQ's minimum permeability requirements.

Finally, note that the permit (which the Applicant will have to comply with upon issuance) requires the installation of an impermeable liner in the processing area if one is not already there, and Applicant is willing to test and reconstruct if necessary any portion of the liner under the composting area in order to meet the requirements of the rules and as required the draft permit. Thus, scientific evidence adduced in the case shows that the composting area's liner meets the TCEQ's permeability requirements, allowing the ALJ to recommend that the permit be granted. However, if concern remains about the liner, the ALJs should recommend that the permit's being granted be conditioned on additional testing and reconstruction as necessary of the liner.

**Information “missing” from the geologic report does not affect the facility's compliance TCEQ rules enacted to protect groundwater.**

Protestants continue to argue that the application is fatally flawed because it supposedly is missing some information usually sought in the hydrologic report. But they are misleadingly

substituting rules for *protecting* groundwater (found at 30 TAC 332.45(2) "Protection of Groundwater" and incorporating by reference 30 TAC 332.47(6)(C) "Groundwater Protection Plan" ) with rules for *educating* the Executive Director about the location of the site (found at 30 TAC 332.47(6)(B) "Hydrologic/Geologic Report" which are NOT incorporated by reference in 30 TAC 332.45(2) ("Protection of Groundwater").

However, as noted previously, the TCEQ is well acquainted with the geology and hydrology of this locale, which has been extensively mapped and surveyed, not least by virtue of the extensive work done with the landfill just five miles away upon which Mr. Chandler was one of the consulting experts.

Furthermore, Protestants continue to complain about the depth of the borings and the lack of the 300 foot boring despite the fact that it was demonstrated that the boring plan submitted was sealed 2/16/2004 and was developed under older TCEQ rules adopted 9/1/2003, which at the time provided that "the executive director may approve different boring depths if the site specific conditions justify variances." This is what occurred in this case, as the application was declared technically complete and was approved with the boring plan submitted.

**The facility's proposed groundwater monitoring system has been vetted twice by the TCEQ and adequately complies with the TCEQ's groundwater protection rules**

The facility's groundwater monitor system is outlined in the application at pp. 29 (site plan); 48-1 - 48-2 (ground water monitoring system); and 184-192 (monitoring well construction details). Suggestion that these wells are insufficiently deep defies common sense: it is undisputed that there is no real groundwater in this locale apart from seasonal *shallow* perched water, and that the TCEQ's professional staff has determined after two lengthy reviews that the monitoring system is adequate. Wells 40+ feet deep serve no practical purpose in this locale and will provide no benefit for the increased cost. Once permitted and thus allowed to proceed with construction, the wells will be rebuilt or installed as necessary and as called for by the plans. However, it is a simple matter to make the wells deeper if it is suggested that that be a condition for granting the permit, and Texas Organic Recovery would be happy to do so.

Note that despite Protestant's complaints about the monitoring wells, Protestants' chief witness, Pierce Chandler, admits that if Texas Organic Recovery constructs its facility and operates it in accordance with the application, including the draft permit issued by the TCEQ, it will comply

with the relevant TCEQ rules.<sup>1</sup> OPIC makes a similar concession in its brief at 8, at least with regards to the liner system.

**Applicant cannot be subjected to requirements for prevention of the delivery of unauthorized and prohibited materials at the site beyond those in the TCEQ's rules.**

Protestants continue to argue that Applicant must do more than the TCEQ's rules require in order to prevent the delivery of unauthorized and prohibited materials at the site. But the applicable rule is 30 TAC § 332.45 (3), which sets as the minimum standard that "*As a minimum there shall be one employee on-site at all times inspecting each delivery of feedstock* to insure there is no unauthorized or prohibited material incorporated into the feedstock." The requirement is for no more than an *inspection*; there simply is no requirement for random sampling of the incoming materials, nor a requirement that there be a lab on site.

The TCEQ is very competent at setting out exactly what it means; for example, look at the extensive rules on end product testing (30 TAC 332.45(11)) that set out in excruciating detail what is required. As noted in earlier briefing, reading a requirement of random sampling and laboratory analysis into the rule will subject composting to greater scrutiny than is applied to waste streams going to the landfill, when the fact of the matter is that the rule understands there just aren't that many bad things in such significant concentrations to warrant such testing. Thus, all that's needed is a visual inspection to make sure that grease trap waste from the Texas Chili Parlour is what's coming in, as opposed to used motor oil from Jiffy Lube; this is easily done by visual and odor inspection.

Additional requirements are not in the rules, and the requirements suggested be applied defy both common sense and the policy supporting composting. Composting sites are no more required to verify the chemical composition of the waste stream feedstocks coming to their facilities than landfills taking household waster are.

It is also TCEQ's practice to date to require no more than visual inspection to prevent the delivery and application of unauthorized materials: of the three composting permits that the TCEQ was able to identify for TOR as having completed the permitting process, all three identify only visual inspection as the means to prevent delivery and application of unauthorized materials.<sup>2</sup>

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See, e.g., TR at 384-385.

<sup>1</sup>*Wholearth Organic Composting's Application to Modify Site Development Plan*, MSW Permit 2317 WWW No. 11477666, permit granted Dec. 22, 2006;

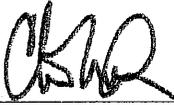
*J-V Dirt + Loam's Composting Facility's Application for Type V-RC Municipal Solid Waste Permit*, MSW Permit 2310, TCEQ Docket 2004-2120-MSW (permit granted Mar. 15, 2005);

Copies of these documents were attached as Exhibit 1 to Applicants Exceptions to the PFD. So, requiring Applicant to use methods other than visual inspection when the rules require nothing more, and where those composting permits the TCEQ has issued so far require nothing more than visual inspection, would be arbitrary and capricious.

For these reasons, Applicant respectfully requests the PFD be modified to recommend that the permit be granted, or granted on condition upon Applicant's testing and reconstructing as necessary the compost area liner and to further recommend that Applicant has in fact met the minimum requirements for preventing the delivery and application of unauthorized materials.

Respectfully submitted,

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By:   
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Christopher Malish  
State Bar No. 00791164  
ATTORNEYS FOR APPLICANT

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*Don Tol Compost Facility's Application for Type V-RC Municipal Solid Waste Permit, MSW Permit 2318, (permit granted Feb. 7, 2005).*

CERTIFICATE OF SERVICE

I hereby certify that a photocopy of the foregoing document was forwarded via fax and/or certified mail, return receipt requested, to the following on February 11, 2008:

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