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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 15, 2008

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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 MAY 15 PM 4:25
CHIEF CLERKS OFFICE

Re: **REDI-MIX LLC**
TCEQ DOCKET NOS. 2008-0208-MIS-U; 2008-0209-MIS-U; 2008-0210-MIS-U

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Appeal of Use Determinations in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

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TCEQ DOCKET NOS.

2008 MAY 15 PM 4: 25

2008-0208-MIS-U, 2008-0209-MIS-U, 2008-0210-MIS-U, 2008-0211-MIS-U

APPEAL OF EXECUTIVE DIRECTOR'S USE DETERMINATIONS REGARDING REDI-MIX LLC USE DETERMINATION NOS. 07-11103, 07-11104, 07-11121, 07-11122	§ § § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY	CHIEF CLERKS OFFICE
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**OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO APPEAL OF USE DETERMINATIONS**

To the members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the "Commission") files this response to the appeal of the Executive Director's (ED) use determinations regarding Redi-Mix LLC ("Redi-Mix").

I. Introduction

In October 2007, Redi-Mix submitted four Tier I use determination applications to the TCEQ. The four applications cover three separate concrete batch plants located in Collin and Denton Counties. For the Frisco Ready Mix plant located in Collin County, the TCEQ received two applications.¹ For the Prosper Ready Mix plant located in Collin County and the Alliance Ready Mix plant located in Denton County, Redi-Mix submitted one application for each. All four applications sought use determinations for environmental paving and land. Additionally, three of the four applications sought use determinations for the following equipment/property: dust collector; exhaust ductwork; weir pit system/wash out pit; storm water containment structures/waste water recycle system; and conveyances, pumps, sumps, tanks, basins. Two of the four applications also include baghouses in the description of property. For the first of the

¹ One application was submitted by Redi-Mix and the other by U.S. Concrete, Inc., but Redi-Mix's appeal states that Redi-Mix was incorrectly named U.S. Concrete, Inc. in Use Determination No. 07-11121.

two Frisco Ready Mix applications (Use Determination No. 07-11103), the ED made a positive use determination for 100% of the 1.65 acres of paving, and a negative determination for the land.² For the second Frisco Ready Mix application (Use Determination No. 07-11121), the ED made the following determination:

A positive use determination of 100% for the environmental paving, dust collector, baghouses, exhaust ductwork, stormwater containment structures/wastewater recycle systems, weir pit system/wash out pit, the land associated with the recycling basin and the weir pit system/wash out pit, and the conveyances, pumps, sumps, tanks, basins. A negative determination for the land associated with the environmental paving.³

For the Prosper Ready Mix plant (Use Determination No. 07-11104), the ED made the following determination:

A positive use determination for 100% of the paving, dust collectors with exhaust ductwork, stormwater containment and wastewater recycling system, weir pit system, and wash out pit, and the land associated with the stormwater containment structure/wastewater recycling system. A negative determination for the land associated with the environmental paving.⁴

Finally, the ED made the following determination for the Alliance Ready Mix plant (Use Determination No. 07-11122):

A positive use determination of 100% for the environmental paving, dust collector, baghouses, exhaust ductwork, stormwater containment structures/wastewater recycle systems, weir pit system/wash out pit, conveyances, pumps, sumps, tanks, and basin, and the land associated with the recycling basin and the weir pit system/wash out pit. A negative determination for the land associated with the paving.⁵

² ED's Use Determination No. 07-11103; Dec. 22, 2007.

³ ED's Use Determination No. 07-11121; Dec. 22, 2007.

⁴ ED's Use Determination No. 07-11104; Dec. 22, 2007.

⁵ ED's Use Determination No. 07-11122; Dec. 22, 2007.

II. Applicable Law

The applicable TCEQ rules concerning tax relief for property used for environmental protection are found in Title 30 of the Texas Administrative Code (TAC), Chapter 17. Parts of Chapter 17 were amended to be effective in February 2008. Because two of the applications were deemed administratively complete in October 2007, and two in December 2007, OPIC has considered Redi-Mix's appeal using the Chapter 17 rules in effect prior to February 2008.

Redi-Mix's applications were submitted as Tier I applications, and the ED agreed that they are Tier I applications. In 30 TAC § 17.2, a Tier I application is defined as an application which contains property that is on the Predetermined Equipment List (PEL) or that is necessary for the installation or operation of property located on the PEL. To obtain a positive use determination under 30 TAC § 17.4, the pollution control property must be used, constructed, acquired, or installed wholly or partly to meet or exceed laws, rules, or regulations adopted by any environmental protection agency of the United States, Texas, or a political subdivision of Texas, for the prevention, monitoring, control, or reduction of air, water, or land pollution. For land, §17.4(a)(2) additionally states that only the portion of the land that actually contains pollution control property is eligible for a positive use determination. According to 30 TAC §17.25, an applicant has 20 days to appeal a use determination issued by the ED.

III. Analysis

While all four of the ED's use determinations are dated December 22, 2007, Redi-Mix's appeal states that the use determinations were not mailed until January 4, 2008, resulting in receipt by Redi-Mix on January 10, 2008. For purposes of this response, OPIC will assume the dates given by Redi-Mix are true. Using these dates, the appeal is timely under 30 TAC § 17.25.

In each of the use determination letters, the ED states a negative determination for the land associated with environmental paving, but offers no further explanation. However, in four identical letters, each dated December 12, 2007, the ED explained to Redi-Mix why he was making a negative determination for the land associated with environmental paving. The letters reference the requirement that the pollution control property must be used, constructed, acquired, or installed, and states that since land can be neither constructed nor installed, it must be either used or acquired for pollution control purposes. The letters also state the following policy concerning qualifying land:

Land may be eligible for a positive determination, but it is restricted to land that actually contains only pollution control property, or property that is used solely for pollution control purposes, or is property which was specifically purchased solely for pollution control purposes. Examples of the first condition include the actual square footage of land that contains a bag-house or scrubber. An example of the second condition is the land used for a stormwater or wastewater containment pond. An example of the third condition is the purchase of adjacent land which will be used solely for pollution control purposes. The land must have been acquired after January 1, 1994.⁶

The policy provides three options to qualify land for a positive use determination. The December 12th letters state that the first option is not available because Redi-Mix's production equipment and operations are located on the land. The second option is not available because Redi-Mix's production vehicles use the paved areas, and the third option is not available because the land was not purchased solely for pollution control purposes. Therefore, the ED concluded that the land listed in Redi-Mix's applications is not eligible for a positive use determination.

Redi-Mix asserts that the laws authorizing exemption for pollution control equipment do not require any specific degree of use. The appeal states that as long as the land is used in any way for pollution control purposes, regardless of the degree of such use, it is entitled to an exemption. Redi-Mix additionally states that because the paving at the three plants is necessary

⁶ TCEQ Draft Guidance Document "Property Tax Exemptions for Pollution Control Property", January 2008, p. 3.

to meet the provisions of the concrete batch plant permit by rule or standard permit, and the land for which an exemption was sought contains such paving, the land is being used to meet TCEQ rules and is therefore entitled to an exemption. This conclusion, according to Redi-Mix, has been consistently followed by TCEQ staff in the past.

The ED's policy regarding use determinations for land restricts eligibility to land that satisfies one of the following three conditions: (1) land that actually contains only pollution control property; (2) property that is used solely for pollution control purposes; or (3) property which was specifically purchased solely for pollution control purposes. Under 30 TAC §17.4(a), pollution control property must be "used, constructed, acquired, or installed", and only land that "actually contains pollution control property" is eligible for a positive use determination. It appears that the ED's policy is a reasonable interpretation of this rule.

According to section 3(E) of the concrete batch plant standard permit, dust emissions from all in-plant roads and traffic areas associated with the operation of the plant must be minimized at all times, and one of the allowable control methods is paving. Under the now repealed concrete batch plant permit by rule (30 TAC § 106.201), all permanent in-plant roads must be paved, and all batch trucks and material delivery trucks must remain on a paved surface when entering, conducting primary functions, and leaving the property. If Redi-Mix's plants are complying with the paving requirements of the standard permit or permit by rule, the paved land contains non-pollution control property such as production equipment, meaning that the land does not satisfy the first eligibility condition. Regarding the second condition, paved in-plant roads and work areas are used by production vehicles and therefore do not qualify as property used solely for pollution control purposes. Finally, the land underlying Redi-Mix's concrete

batch plants was clearly not purchased solely for pollution control purposes and therefore does not satisfy the third condition of the ED's policy.

A Tier I application is for property on the PEL. As stated previously, Redi-Mix's applications are Tier I applications. While environmental paving is on the PEL, the land underneath the paving is not. The absence of this type of land from the PEL provides further support for the ED's negative determinations.

IV. Conclusion

OPIC finds that the type of land in the Redi-Mix applications is not found on the PEL, and further, the land at issue is not pollution control property under the ED's policy regarding qualifying land. Therefore, OPIC supports the ED's negative use determinations for the land associated with environmental paving at each of the four Redi-Mix plants.

For the reasons stated herein, OPIC respectfully recommends the Commission deny Redi-Mix's appeal.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2008, the original and eleven true and correct copies of the foregoing document were filed with the TCEQ Chief Clerk, and copies were served to all parties listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.



Garrett Arthur

CHIEF CLERKS OFFICE

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