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July 20, 2007

## BY HAND DELIVERY

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

Re: TCEQ Docket No. 2004-0839-AIR; SOAH Docket No. 582-05-1040;  
*Application by Southern Crushed Concrete, Inc. to Change the Location of a  
Concrete Crushing Facility in Harris County*

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced and numbered proceeding please find and original and twelve (12) copies of Applicant Southern Crushed Concrete, Inc.'s Brief regarding the New City of Houston Concrete Crushing Ordinance. Please return one file-stamped copy with the messenger.

Thank you for your attention to this matter. If you have any questions concerning this filing, please do not hesitate to contact me.

Sincerely,



Derek R. McDonald

Enclosures

cc: The Honorable Craig R. Bennett (via hand delivery)  
Martina Cartwright (via electronic and U.S. mail)  
Iona McAvoy (via electronic and U.S. mail)  
Snehal Patel (via electronic and U.S. mail)  
Mary Alice McKaughan (via electronic and U.S. mail)  
Brad Patterson (via electronic and U.S. mail)

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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

APPLICATION BY SOUTHERN  
CRUSHED CONCRETE, INC., TO  
CHANGE THE LOCATION OF A  
CONCRETE CRUSHING FACILITY IN  
HARRIS COUNTY

§ BEFORE THE STATE OFFICE  
§  
§ OF  
§ ADMINISTRATIVE HEARINGS  
§

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
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**APPLICANT SOUTHERN CRUSHED CONCRETE, INC.'S  
BRIEF REGARDING THE NEW CITY OF HOUSTON  
CONCRETE CRUSHING ORDINANCE**

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TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Applicant Southern Crushed Concrete, Inc. ("SCC") files this brief regarding the concrete crushing ordinance recently adopted by the City of Houston ("City of Houston Ordinance"), as requested by the General Counsel for the Texas Commission on Environmental Quality ("TCEQ" or "Commission") on June 29, 2007. For the reasons set forth below, the patently unlawful City of Houston Ordinance should have no impact on the Commission's consideration of SCC's application.

There is no place for the consideration of a municipal ordinance in the issuance of an air quality permit under the Texas Clean Air Act ("TCAA") or TCEQ rules. That alone should be determinative of any question regarding the City of Houston Ordinance: it has no role in this proceeding. While other programs call for local ordinances or regulations to be considered in the permitting process, the TCAA and TCEQ rules do not make compliance with local ordinances a required demonstration, or even a consideration, in air permitting. Moreover, to the extent that the City of Houston Ordinance conflicts with Texas law and TCEQ rules by establishing inconsistent and more-restrictive location requirements for concrete crushing facilities, the City of Houston Ordinance is unlawful under the TCAA. Application of the new location requirements in the City of Houston Ordinance is also prohibited by the Texas Local Government Code, which directs municipalities to consider permit applications solely on the basis of regulations in effect at the time the initial permit application for a project is filed.

The City of Houston Ordinance is not a consideration in this matter, and will not prevent SCC from conducting the operations that it seeks to authorize through the pending application. SCC respectfully urges the Commission to set this matter for an upcoming Agenda, and to adopt Administrative Law Judge Craig R. Bennett's Proposed Order and approve SCC's change of location request, subject to the additional permit conditions set forth in the Proposed Order.

## BACKGROUND

SCC seeks authorization from the TCEQ to change the location of an already-permitted portable concrete crushing facility to property that SCC owns in Houston, near the intersection of Bellfort Avenue and State Highway 288 ("the 288 Yard"). Applicant filed the pending application for change of location in October 2003.<sup>1</sup> Assisting the TCEQ Air Permits Division's technical review of SCC's application, the City of Houston's Bureau of Air Quality Control ("BAQC") conducted a site review for SCC's proposed 288 Yard operations in November 2003. The City of Houston BAQC, as shown on the Investigation Report attached as Exhibit 1, categorized the proposed 288 Yard operations as having "low" hazard potential and "low" nuisance potential based upon its site review.<sup>2</sup>

Following completion of the TCEQ Air Permits Division's technical review, and in response to requests for contested case hearing, the Commissioners in October 2004 referred the Applicant's change of location request to the State Office of Administrative Hearings ("SOAH") for a six-month contested case hearing.<sup>3</sup> The City of Houston, despite the BAQC's earlier site review of the 288 Yard, sought and was granted party status in this matter, and actively participated in the contested case hearing. The preliminary hearing was held on December 16, 2004.<sup>4</sup> The hearing on the merits, originally scheduled to take place in April

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<sup>1</sup> SOAH Docket No. 582-05-1040; TCEQ Docket No. 2004-0839-AIR; *Application by Southern Crushed Concrete, Inc. to Change the Location of a Concrete Crushing Facility in Harris County ("Proposal for Decision and Order")*, Proposed Finding of Fact No. 1.

<sup>2</sup> Applicant's Ex. 20, at 4 (City of Houston BAQC Investigation Report).

<sup>3</sup> TCEQ Docket No. 2004-0839-AIR; *An Interim Order concerning the application by Southern Crushed Concrete to authorize the relocation of a portable rock crushing facility* (Oct. 4, 2004) (the Commission's Interim Order specified a maximum duration of six months from the start of the preliminary hearing to the issuance of the proposal for decision and recommended order).

<sup>4</sup> *Proposal for Decision and Order*, at 3.

2005, was continued three times at the request of the Protestants and eventually took place on September 19-21, 2005.<sup>5</sup> The record in this matter closed on December 2, 2005.<sup>6</sup>

Judge Bennett issued his proposal for decision and order on January 31, 2006. In the proposal for decision, Judge Bennett finds that emissions from the Applicant's proposed operations will not have an adverse effect on the health or welfare of the requesters, and recommends issuance of a permit authorizing SCC's change of location, subject to certain additional permit conditions set forth in the Proposed Order.

This matter was originally scheduled for the Commissioners' Agenda on May 17, 2006. On May 10, 2006, the General Counsel of the TCEQ continued this matter until June 28, 2006 and requested briefing from the Executive Director regarding the Applicant's emissions calculation and modeling. On May 26, 2005, the Executive Director filed a brief supporting the accuracy of the Applicant's emissions calculations and modeling. The Executive Director's brief concludes that "the Applicant's emissions calculations and modeling are consistent with agency practice and/or guidelines."<sup>7</sup> The Commissioners heard Judge Bennett's presentation of his proposed decision and order and the parties' oral argument on June 28, 2006, and continued the matter until August 9, 2006. At the August 9, 2006 Agenda, the Commissioners indefinitely continued this matter.

On May 9, 2007, during the continuance of this matter and over three years after SCC filed the pending change-of-location request, the City of Houston adopted new Ordinance No. 2007-545, the Ordinance on which the Commission's General Counsel has requested briefing. A copy of the City of Houston Ordinance is attached as Exhibit 2. The new Ordinance (titled "Concrete Crushing Sites") has an effective date of October 1, 2007,<sup>8</sup> and will be a division of the City of Houston's Air Pollution ordinances in Article VI of Chapter 21 of the City

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<sup>5</sup> *Proposal for Decision and Order*, at 4.

<sup>6</sup> *Id.* The Commission has not reopened the record in this matter. The briefs filed in response to the General Counsel's June 29, 2007 request regarding the City of Houston Ordinance should not be considered part of the record, and SCC objects to the reopening of the record in this matter. The City of Houston Ordinance, which is not a factor in the Commission's consideration of SCC's application for an air quality permit, does not affect a "fundamental ground of decision" reflected in Judge Bennett's findings of fact and conclusions of law. See *Lake Medina Conservation Society, Inc. v. TNRCC*, 980 S.W.2d 511, 519 (Tex. App.—Austin 1998, pet. denied).

<sup>7</sup> SOAH Docket No. 582-05-1040; TCEQ Docket No. 2004-0839-AIR; *Executive Director's Response to OGC Letter of May 10, 2006* at p. 5 (May 26, 2006).

<sup>8</sup> City of Houston, Texas, Ordinance No. 2007-545, Section 5, states that the City of Houston Ordinance shall take effect at 12:01 a.m. on October 1, 2007.

of Houston Code of Ordinances. The City of Houston Ordinance establishes a permitting program for concrete crushing operations. As explained in greater detail below, however, the City of Houston Ordinance conditions the issuance of its concrete crushing permits on criteria that are inconsistent with the TCAA and TCEQ rules. In that regard, the City of Houston Ordinance is unlawful and unenforceable.

This brief addresses three issues: (1) the status of a municipal air quality ordinance like the City of Houston Ordinance in an air quality permit proceeding before the TCEQ; (2) the manner in which the City of Houston Ordinance is facially unlawful under the TCAA; and (3) how application of the location requirements of City of Houston Ordinance to SCC's pending application is prohibited by uniformity-of-requirements principles of Texas law. The Commission should disregard the City of Houston Ordinance in this matter.

## **ARGUMENT**

### **I. There is No Basis for Consideration of the City of Houston Ordinance under the Texas Clean Air Act or TCEQ Rules**

SCC's pending application seeks authorization from the TCEQ to change the location of a currently permitted portable concrete crushing facility under the TCAA and 30 TEX. ADMIN. CODE ("TAC") Chapter 116, *Control of Air Pollution by Permits for New Construction or Modification*. Neither the TCAA nor TCEQ rules in Chapter 116 allow for the consideration of a municipal air quality ordinance as part of the TCEQ's determination whether to grant an application for a permit.

#### **A. Texas Clean Air Act**

The Texas Clean Air Act establishes the requirements that a permit applicant must meet to qualify for a preconstruction air quality permit under Texas law. The key considerations are found in TCAA § 382.0518, *Preconstruction Permit*, which provides that the Commission shall grant a permit if it finds (1) that the proposed facility will employ best available control technology ("BACT") and (2) that the emissions from the proposed facility will be protective of human health and the environment.<sup>9</sup> Section 382.0518 also allows the Commission to consider

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<sup>9</sup> TEX. HEALTH & SAFETY CODE § 382.0518(b).

an applicant's compliance history in considering the issuance, amendment or renewal of a permit.<sup>10</sup>

The other statutory considerations for preconstruction permit issuance are found in TCAA § 382.0515, *Application for Permit*, which establishes the required contents of a preconstruction permit application<sup>11</sup>; TCAA § 382.0516, *Notice to State Senator and Representative*<sup>12</sup>; and TCAA § 382.056, *Notice of Intent to Obtain Permit or Permit Review; Hearing*, which establishes the public notice and contested case hearing requirements for preconstruction permits.<sup>13</sup> In addition, because SCC's pending application seeks authorization to change the location of a portable concrete crushing facility, the application must satisfy TCAA § 382.065, *Certain Locations for Operating Concrete Crushing Facility Prohibited*.<sup>14</sup> Section 382.065 prohibits the operation of a concrete crushing facility within 440 yards (1320 feet) of a building in use as a single or multifamily residence, school or place of worship at the time the application is filed with the Commission.<sup>15</sup> (Judge Bennett's Proposed Order includes a finding of fact that SCC's proposed 288 Yard operations will satisfy this statutory requirement.<sup>16</sup>)

Importantly, the TCAA makes no provision for the consideration of a municipal air quality ordinance or other form of local regulation in establishing the criteria for issuance of an air quality permit by the Commission. Consistent with the preemption provision described below, the TCAA reflects the Texas legislature's clear intent to prevent local air quality ordinances from impacting the Commission's authority to issue preconstruction permits under Chapter 116.

## **B. TCEQ Rules**

The TCEQ's preconstruction permitting rules in Chapter 116 consolidate the various requirements for issuance of an air quality permit into one section, 30 TAC § 116.111. Section 116.111 provides:

- (a) In order to be granted a permit, amendment, or special permit amendment, the application must include:

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<sup>10</sup> *Id.* § 382.0518(c).

<sup>11</sup> *Id.* § 382.0515.

<sup>12</sup> *Id.* § 382.0516.

<sup>13</sup> *Id.* § 382.056.

<sup>14</sup> *Id.* § 382.065.

<sup>15</sup> *Id.* § 382.065(a).

<sup>16</sup> *Proposal for Decision and Order*, Proposed Finding of Fact No. 23.

(1) a completed Form PI-1 General Application signed by an authorized representative of the applicant. All additional support information specified on the form must be provided before the application is complete;

(2) information which demonstrates that emissions from the facility, including any associated dockside vessel emissions, meet all of the following.

(A) Protection of public health and welfare.

(i) The emissions from the proposed facility will comply with all rules and regulations of the commission and with the intent of the TCAA, including protection of the health and property of the public.

(ii) For issuance of a permit for construction or modification of any facility within 3,000 feet of an elementary, junior high/middle, or senior high school, the commission shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility may have on the individuals attending the school(s).

(B) Measurement of emissions. The proposed facility will have provisions for measuring the emission of significant air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Natural Resource Conservation Commission (TNRCC) Sampling Procedures Manual."

(C) Best available control technology (BACT). The proposed facility will utilize BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility.

(D) New Source Performance Standards (NSPS). The emissions from the proposed facility will meet the requirements of any applicable NSPS as listed under Title 40 Code of Federal Regulations (CFR) Part 60, promulgated by the EPA under FCAA, §111, as amended.

(E) National Emission Standards for Hazardous Air Pollutants (NESHAP). The emissions from the proposed facility will meet the requirements of any applicable NESHAP, as listed under 40 CFR Part 61, promulgated by EPA under FCAA, §112, as amended.

(F) NESHAP for source categories. The emissions from the proposed facility will meet the requirements of any applicable maximum achievable control technology standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA §112, 40 CFR 63)).

(G) Performance demonstration. The proposed facility will achieve the performance specified in the permit application. The applicant may be required to submit additional engineering data after a permit has been issued in order to demonstrate further that the proposed facility will achieve the performance specified in the permit application. In addition, dispersion modeling, monitoring, or stack testing may be required.

(H) Nonattainment review. If the proposed facility is located in a nonattainment area, it shall comply with all applicable requirements in this chapter concerning nonattainment review.

(I) Prevention of Significant Deterioration (PSD) review. If the proposed facility is located in an attainment area, it shall comply with all applicable requirements in this chapter concerning PSD review.

(J) Air dispersion modeling. Computerized air dispersion modeling may be required by the executive director to determine air quality impacts from a proposed new facility or source modification. In determining whether to issue, or in conducting a review of, a permit application for a shipbuilding or ship repair operation, the commission will not require and may not consider air dispersion modeling results predicting ambient concentrations of non-criteria air contaminants over coastal waters of the state. The commission shall determine compliance with non-criteria ambient air contaminant standards and guidelines at land-based off-property locations.

(K) Hazardous air pollutants. Affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) for hazardous air pollutants shall comply with all applicable requirements under Subchapter C of this chapter (relating to Hazardous Air Pollutants; Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

(L) Mass cap and trade allowances. If subject to Chapter 101, Subchapter H, Division 3, of this title (relating to Mass Emissions Cap and Trade Program), the proposed facility, group of facilities, or account must obtain allowances to operate.

(b) In order to be granted a permit, amendment, or special permit amendment, the owner or operator must comply with the following notice requirements.

(1) Applications declared administratively complete before September 1, 1999, are subject to the requirements of Chapter 116, Subchapter B, Division 3 (relating to Public Notification and Comment Procedures).

(2) Applications declared administratively complete on or after September 1, 1999, are subject to the requirements of Chapter 39 of this title (relating to Public Notice) and Chapter 55 of this title (relating to Request for Reconsideration and Contested Case Hearings; Public Comment). Upon request by the owner or operator of a facility which previously has received a permit or special permit from the commission, the executive director or designated representative may exempt the relocation of such facility from the provisions in Chapter 39 of this title if there is no indication that the operation of the facility at the proposed new location will significantly affect ambient air quality and no indication that operation of the facility at the proposed new location will cause a condition of air pollution.<sup>17</sup>

Compliance with a municipal ordinance is not one of the demonstrations required for issuance of a permit under Chapter 116.

The location requirements that apply to concrete crushing facilities (along with other source categories that are subject to location requirements) are found in 30 TAC § 116.112. The regulatory location requirement for concrete crushers is identical to that in the TCAA: “[a] concrete crushing facility must not be operated within 440 yards of any building in use as a

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<sup>17</sup> 30 TAC § 116.111.

single or multi-family residence, school, or place of worship at the time the application for the initial authorization for the operation of that facility is filed with the Commission.”<sup>18</sup>

As in the TCAA, there is no place for consideration of a local ordinance in determining whether to issue an air quality permit under Chapter 116. This reflects a conscious decision by both the Texas legislature and the TCEQ to exclude such ordinances from consideration in air quality permitting; by contrast, the Texas Solid Waste Disposal Act and the TCEQ rules that govern permitting for industrial solid and hazardous waste disposal facilities explicitly provide local government siting authority<sup>19</sup> and condition the issuance of a permit for a disposal facility on the proposed facility complying with local requirements.<sup>20</sup> Where a municipal or other local ordinance is to be considered in determining whether the Commission should issue a permit, the requirement to consider such an ordinance is clearly stated in TCEQ’s rules.

As explained below, the City of Houston Ordinance, to the extent that it is inconsistent with the TCAA and TCEQ rules governing concrete crushing operations, is unlawful. Even if it were not unlawful, however, the existence of such an ordinance is not a factor in the Commission’s determination whether to issue an air quality permit under the TCAA and Chapter 116 of the TCEQ’s rules. The City of Houston Ordinance has no role in the current proceeding, and the consideration of the City of Houston Ordinance in the issuance of a TCEQ air quality permit would constitute an abuse of discretion.<sup>21</sup>

## **II. The Location Requirements for Concrete Crushing Operations in the City of Houston Ordinance are Unlawful**

The Texas Constitution and the TCAA grant municipalities like the City of Houston the power to enact and enforce ordinances, provided the ordinance is consistent with the

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<sup>18</sup> 30 TAC § 116.112(b)(2).

<sup>19</sup> See TEXAS HEALTH & SAFETY CODE § 361.162 (county authority) & 361.166 (municipal authority).

<sup>20</sup> See 30 TAC § 305.50(a)(2) (*Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order*) (“The information provided must be sufficiently detailed and complete to allow the executive director to ascertain whether the facility will be constructed and operated in compliance with all pertinent state and local air, water, public health, and solid waste statutes.”).

<sup>21</sup> *TSP Development, Ltd. v. TNRCC*, 16 S.W.3d 148, 153 (Tex. App.—Austin 2000, no pet.) (holding that the Commission’s consideration of a local ordinance adopted after a permit application had been filed, when the consideration of that ordinance was prohibited under the uniformity-of-law provision then codified at § 481.143(a) of the Texas Government Code, was an abuse of discretion).

TCAA and TCEQ rules. The City of Houston Ordinance at issue in this matter is facially unlawful, due to its clear inconsistency with the TCAA and TCEQ rules.

**A. State and Local Authority under the Texas Law**

**1. The Texas Constitution**

The Texas Constitution grants broad authority to cities with populations of 5,000 or more (known as “home-rule cities”) to enact ordinances, but provides that no ordinance “shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.”<sup>22</sup> The Texas Supreme Court has repeatedly held that, if the Legislature decides to preempt this broad authority by statute, then it must do so with “unmistakable clarity.”<sup>23</sup>

**2. TCAA**

**a. Authority Granted to TCEQ**

Subsection B of the TCAA lists the powers and duties of the TCEQ with respect to air quality.<sup>24</sup> Section 382.011 provides the following:

- (a) The commission shall:
  - (1) administer this chapter;
  - (2) establish the level of quality to be maintained in the state’s air; and
  - (3) control the quality of the state’s air.

\* \* \*

- (c) The commission has the powers necessary or convenient to carry out its responsibilities.<sup>25</sup>

The TCAA broadly grants the TCEQ power to control the quality of the State’s air, and requires issuance of a permit from the Commission prior to construction of a facility that may emit air contaminants.<sup>26</sup>

<sup>22</sup> TEX. CONST. art. XI, § 5; see also *Dallas Merchant’s and Concessionaire’s Ass’n v. City of Dallas*, 852 S.W.2d 489, 490-491 (Tex. 1993).

<sup>23</sup> See *City of Sweetwater v. Geron*, 380 S.W.2d 550, 552 (Tex. 1964); *Lower Colorado River Auth. v. City of San Marcus*, 523 S.W.2d 641, 645 (Tex. 1975); *Dallas Merchant’s and Concessionaire’s Ass’n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993); *Quick v. City of Austin*, 7 S.W.3d 109, (Tex. 1997); *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002).

<sup>24</sup> See TEX. HEALTH & SAFETY CODE §§ 382.011-041.

<sup>25</sup> *Id.* § 382.011.

**b. Municipal Authority**

Subchapter E of the TCAA outlines the authority of local governments with regard to air quality.<sup>27</sup> Local government are granted the power to inspect, make recommendations to the TCEQ, and execute cooperation agreements with the TCEQ and other local governments related to air quality management.<sup>28</sup> In addition, TCAA § 382.113 affords municipalities the authority to enact ordinances related to air pollution, as follows:

(a) Subject to Section 381.002,<sup>29</sup> a municipality has the powers and rights as are otherwise vested by law in the municipality to:

(1) abate a nuisance; and

(2) enact and enforce an ordinance for the control and abatement of air pollution, or any other ordinance, not inconsistent with this chapter or the commission's rules or orders.

(b) An ordinance enacted by a municipality must be consistent with this chapter and the commission's rules and orders and may not make unlawful a condition or act approved or authorized under this chapter or the commission's rules or orders.<sup>30</sup>

Under the TCAA, a municipality may only adopt an ordinance that is consistent with the TCAA and TCEQ rules. Moreover, that municipal ordinance may not make unlawful an operation that is lawful under the TCAA and TCEQ rules.

**3. Office of the Attorney General: Opinion No. M-257**

On July 12, 1968, the Office of the Texas Attorney General issued an opinion responding to various inquiries submitted by the Texas Air Control Board ("TACB") regarding the effect of the TCAA on the air pollution control authority of local governments.<sup>31</sup> A copy of the opinion is attached as Exhibit 3. Among the inquiries was a question asking if a city ordinance can be more restrictive than the TCAA, or the rules adopted pursuant thereto. With regard to the TCAA, the Attorney General stated,

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<sup>26</sup> *Id.* § 382.0518(a).

<sup>27</sup> *See id.* §§ 382.111-115.

<sup>28</sup> *Id.*

<sup>29</sup> The referenced Section 381.002 was repealed by the Texas Legislature in 1991 and related to the organization of the Texas Air Control Board.

<sup>30</sup> TEX. HEALTH & SAFETY CODE § 382.113 (emphasis added).

<sup>31</sup> Op. Tex. Att'y Gen. No. M-257 (1968).

[w]hen read as a whole, [the TCAA] evidences the clear intent of the Legislature to set a standard for permissible and non-permissible air pollution on a state-wide basis. This thus becomes the public policy of the state. There is no authority whatever given by the statute for a local government . . . to vary from this standard.<sup>32</sup>

In responding to the specific inquiry regarding a municipal ordinance, the Attorney General quoted the TCAA provision that is currently codified at TCAA § 382.113(b) and ruled:

when the State of Texas, acting through its Texas Air Control Board, has entered the field, a city ordinance cannot be less restrictive or more restrictive than the state law, rule or regulation as to air pollution.<sup>33</sup>

The Attorney General's opinion reinforces the unmistakable preemption of the TCAA and the prohibition under Texas law of any municipal air pollution ordinance that is inconsistent with the rules promulgated by the TCEQ. With regard to the location of concrete crushing operations, TCEQ has "entered the field"; the City of Houston Ordinance cannot be less or more restrictive than the TCAA and TCEQ rule.

**B. The Location Requirements in the City of Houston Ordinance are Facially Unlawful**

**1. Location Requirements for Permit Issuance under the City of Houston Ordinance**

The City of Houston Ordinance establishes a permitting requirement for "all sites where crushing operations are performed," and prohibits operation within the City of Houston unless the City has issued a permit for the site.<sup>34</sup> The City of Houston Ordinance further requires that all "new operations,"<sup>35</sup> as well as any expansion of an existing operation, must meet the location requirements of § 21-170. Section 21-170 states:

The director shall not issue a permit for a new operation or the expansion of any existing operation:

- (1) On a lot, tract or parcel of land where the crushing operation or expansion of the site for crushing is prohibited, expressly or impliedly, by unexpired deed restrictions or covenants running with the land contained or incorporated by reference in a properly recorded map, plat,

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<sup>32</sup> *Id.* at p.1 (emphasis in original).

<sup>33</sup> *Id.* at p.5.

<sup>34</sup> City of Houston Ordinance §§ 21-168, 21-169.

<sup>35</sup> "New operation" is defined as "a site that does not have a valid permit issued by the Texas Commission on Environmental Quality to perform crushing on or before May 9, 2007." *Id.* § 21-167.

replat, declaration, deed, judgment or other instrument filed in the county real property records, map records, or deed records.

(2) In any designated area that is a residential area or contains a child care facility, hospital, nursing home, place of worship, public park, school, or crushing site.<sup>36</sup>

“Designated area” is a defined term under the City of Houston Ordinance, and is key to understanding the new ordinance’s location requirements. The “designated area” is “an area determined by creating a closed curve with a radius of 1500 feet from the property line of each site where crushing operations are located. Each tract that is wholly or partially located within the area so created shall be part of the designated area.”<sup>37</sup>

Under the City of Houston Ordinance, no permit will be issued for any new crushing operation (and thus operation will be prohibited) if (1) the property line of the tract on which crushing will take place is within 1500 feet of any part of a “residential area,”<sup>38</sup> or (2) the property line of the tract on which crushing will take place is within 1500 feet of the property line of a tract that contains a child care facility, hospital, nursing home, place of worship, public park, school, or crushing site.

## **2. Evaluation of the City of Houston Ordinance under the Texas Constitution and the Texas Clean Air Act**

The City of Houston Ordinance exceeds the City of Houston’s authority under Article XI, Section 5 of the Texas Constitution and TCAA § 382.113 because it is inconsistent with the TCAA and would make unlawful the operation of a concrete crushing facility that satisfies all TCAA and TCEQ requirements.

### **a. The City of Houston Ordinance is Inconsistent with the Texas Clean Air Act and TCEQ Rules**

The City of Houston Ordinance is inconsistent with the TCAA because it attempts to expand the limited authority granted to the City of Houston in the TCAA. The TCAA provides that the TCEQ will administer the TCAA, establish the level of quality to be maintained

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<sup>36</sup> *Id.* § 21-170.

<sup>37</sup> *Id.* § 21-167.

<sup>38</sup> “Residential area” is vaguely defined as “an area 50 percent or more of which consists of tracts that are wholly or partially subject to residential restrictions or are used for residential purposes. Tracts that are multi-family residential shall be treated as a residential tract.” *Id.*

in the state's air, and control the quality of the state's air.<sup>39</sup> The TCAA also defines the authority of local government in the area of air quality, including the power to inspect, make recommendations to the TCEQ, and execute cooperation agreements with the TCEQ and other local governments related to air quality management.<sup>40</sup>

With unmistakable clarity, however, the Texas legislature has limited the authority of local governments in the air quality field. Although the TCAA provides that a municipality may "enact and enforce an ordinance for the control and abatement of air pollution, or any other ordinance, not inconsistent with this chapter or the commission's rules or orders,"<sup>41</sup> this provision must be interpreted in light of the limited authority granted to local governments in the statute. It is in this context that the Attorney General concluded that a municipal ordinance "cannot be less restrictive or more restrictive than the state law, rule or regulation as to air pollution."<sup>42</sup>

The location requirements of the City of Houston Ordinance use a different distance than that established in the TCAA and TCEQ rules, measure that distance in a manner that is inconsistent than that required by the TCEQ rules, and base the location requirements on different land uses than those identified in the TCAA and TCEQ rules. Any one of the three is sufficient to render the City of Houston unlawful and unenforceable:

- **Distance used for location requirement.** The TCAA and TCEQ rules establish a 440-yard (1320-foot) distance requirement from the designated receptors for the operation of concrete crushing facilities.<sup>43</sup> By contrast, the distance requirement established in the City of Houston Ordinance is 1500 feet.<sup>44</sup>
- **Measurement of distance between crushing operation and designated receptor.** The contrast between TCEQ rules and the City of Houston location requirements is exaggerated by the methodology specified in the City of Houston Ordinance for determining compliance with the location requirement. TCEQ rules state that "[t]he measurement of distances shall be taken from the point on

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<sup>39</sup> See TEX. HEALTH & SAFETY CODE § 382.011(a).

<sup>40</sup> See *id.* §§ 382.111-115.

<sup>41</sup> *Id.* § 382.113(a)(2).

<sup>42</sup> Op. Tex. Att'y Gen. No. M-257 at p.5 (1968).

<sup>43</sup> TEX. HEALTH & SAFETY CODE § 382.065(a); 30 TAC § 116.112(b)(2).

<sup>44</sup> City of Houston Ordinance § 21-167 (definition of "designated area").

the concrete crushing facility nearest to the residence, school, or place of worship to the point on the building in use as a residence, school, or place of worship that is nearest the concrete crushing facility.”<sup>45</sup> The measurement is made between a point on the concrete crushing facility<sup>46</sup> and an off-property building. By contrast, the City of Houston Ordinance would measure the distance from the property line of the tract upon which the concrete crushing facility is located to the property line of the tract that contains one of the ordinance’s designated land uses.<sup>47</sup> For projects like SCC’s application to locate a crusher at the 288 Yard — a 58-acre tract, of which SCC intends to use approximately 15 acres for crushing operations and storage, with the remaining 43 acres of the tract as buffer<sup>48</sup> — the measurement methodology required by the City of Houston Ordinance would actually penalize applicants that plan to locate their operations on large tracts with significant buffer.

- **Land uses that trigger the location requirement.** The TCAA and TCEQ rules identify three structures in establishing the location requirements for a concrete crushing operation: residence, school, and place of worship.<sup>49</sup> In addition to school, place of worship and the vaguely defined “residential area” (not “residence”), the City of Houston Ordinance identifies hospitals, public parks and crushing sites as land uses that must be evaluated in applying the ordinance’s location requirements.<sup>50</sup>

In all three of the above aspects, the location restrictions of the City of Houston Ordinance are facially inconsistent with Texas law and TCEQ rules, and their application would make the City of Houston Ordinance more restrictive than Texas law and TCEQ rules. As a result, the location restrictions in the City of Houston Ordinance are illegal under TCAA § 382.113.

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<sup>45</sup> 30 TAC § 116.112(b)(2)(A).

<sup>46</sup> TCEQ rules define “facility” as “[a] discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment.” 30 TAC § 116.10(6). The tract or property upon which a stationary source is located is not a “facility.”

<sup>47</sup> See City of Houston Ordinance § 21-167 (definition of “designated area”).

<sup>48</sup> Applicant’s Ex. 51, at 12:5-6 (J. Miller); 1 Tr. 120:8-21 (J. Miller).

<sup>49</sup> TEX. HEALTH & SAFETY CODE § 382.065(a); 30 TAC § 116.112(b)(2).

<sup>50</sup> City of Houston Ordinance § 21-170(2).

**b. The City of Houston Ordinance would Make Unlawful an Act that is Authorized under the Texas Clean Air Act and TCEQ Rules**

By prohibiting operation of a new concrete crushing operation without a City-issued permit, and conditioning permit issuance on compliance with location requirements that inconsistent with and are more restrictive than those established in the TCAA and TCEQ rules, the City of Houston Ordinance would make unlawful the operation of concrete crushing facilities that satisfy all requirements for lawful operation under the TCAA and TCEQ rules.

Examples illustrate how enforcement of the City of Houston Ordinance would make unlawful an act that is authorized under the TCAA and TCEQ rules. While the TCAA and TCEQ rules would allow (assuming satisfaction of other requirements) the operation of a concrete crusher that is located 1400 feet from the nearest place of worship, such operation would be prohibited under the City of Houston Ordinance. Likewise, the City of Houston Ordinance would prohibit operation of a crusher that is located more than 440 yards from the nearest school, residence, or place of worship (*i.e.*, in compliance with the location requirements of the TCAA and TCEQ rules), if the property boundary of the crushing site is located within 1500 feet of the closest boundary of a public park, or the tract upon which a hospital is located.

To the extent that the location requirements established in the City of Houston Ordinance would prohibit operation of a concrete crushing facility that meets the location requirements of the TCAA and TCEQ rules, the City's location requirements are unlawful and unenforceable. The City of Houston Ordinance cannot be enforced in a manner that would deny issuance of a permit to a proposed crushing operation that satisfies the statutory and regulatory requirements established under the TCAA.

**III. Enforcement of the Location Requirements in the City of Houston Ordinance would Violate Local Government Code Principles regarding Uniformity of Requirements**

In addition to being unenforceable as an unlawful ordinance under TCAA § 382.113, the enforcement of the location restrictions included in the City of Houston Ordinance is prohibited by the "Uniformity of Requirements" law of Chapter 245 of the Texas Local Government Code.

**A. Uniformity of Requirements in the Issuance of Local Permits**

The Texas Local Government Code governs political subdivisions of the State, including municipalities.<sup>51</sup> Chapter 245 of the Local Government Code is titled *Issuance of Local Permits*. The uniformity-of-requirements law is found in Chapter 245 of the Local Government Code, and governs the actions of any “regulatory agency” of a political subdivision of the State.<sup>52</sup> The City of Houston’s Department of Health and Human Services, which is charged with implementing the City of Houston Ordinance, is such an agency. The uniformity-of-requirements law provides, in relevant part:

(a) Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time:

(1) the original application for the permit is filed for review for any purpose, including review for administrative completeness . . . .

\* \* \*

(b) If a series of permits is required for a project, the orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the original application for the first permit in that series is filed shall be the sole basis for consideration of all subsequent permits required for the completion of the project. All permits required for the project are considered to be a single series of permits. . . .<sup>53</sup>

The uniformity-of-requirements law was adopted by the Texas legislature to protect applicants for permits<sup>54</sup> in the event that a political subdivision’s regulatory body changes the conditions for permit issuance following the filing of a permit application. Under Local Government Code § 245.002, a municipality must consider an application based on the regulations in effect at the time an applicant files the initial permit application for a project.

<sup>51</sup> See TEX. LOCAL GOV’T CODE § 245.001(2).

<sup>52</sup> *Id.* §§ 245.002(a); 245.001(4).

<sup>53</sup> *Id.* § 245.002(a)&(b).

<sup>54</sup> “Permit” is defined as “a license, certificate, approval, registration, consent, permit, contract or other agreement for construction related to, or provision of, service from a water or wastewater utility owned, operated, or controlled by a regulatory agency, or other form of authorization required by law, rule, regulation, order, or ordinance that a person must obtain to perform an action or initiate, continue, or complete a project for which the permit is sought.” *Id.* § 245.001(1).

**B. The Uniformity-of-Requirements Law Precludes the Application of the City of Houston Ordinance Location Requirements to SCC's 288 Yard Project**

The uniformity-of-requirements law will preclude the City of Houston from applying the City of Houston Ordinance location requirements in a manner that would deny SCC a permit to operate at the 288 Yard. The law applies on a “project” basis, and defines a project as “an endeavor over which a regulatory agency exerts its jurisdiction and for which one or more permits are required to initiate, continue, or complete the endeavor.”<sup>55</sup> Under the uniformity-of-requirements law, the requirements in effect as of the date of filing the first permit application for a project serve as the basis for consideration of all subsequent permits.<sup>56</sup>

SCC's proposed concrete crushing operation at the 288 Yard is a “project” as the term is used in Local Government Code Chapter 245. Multiple permits are required for the 288 Yard project, from both State and local authorities — such as the TCEQ air quality permit that is the subject of this matter, City of Houston Fire Protection Permits, and, should the new program become effective, permits under the City of Houston Ordinance.

The City of Houston Ordinance was adopted on May 9, 2007, and the new City permitting and location requirements have an effective date of October 1, 2007.<sup>57</sup> These requirements will take effect nearly four years after SCC filed the pending application for TCEQ authorization of its operations at the 288 Yard. Moreover, SCC has already applied for and been issued multiple other permits by the City of Houston, all prior to the effective date of the City of Houston Ordinance. Attached as Exhibit 4 are copies of three separate permits issued to SCC for its 288 Yard operations by the City of Houston Fire Department Section on May 1, 2007: Permit No. 06039076/3869385-m3 (Motor Vehicle Fuel Dispensing); Permit No. 06039076/3869384-f7 (Fuel Storage/Use); and Permit No. 06039076/3869386-h3 (Hot-Work Operations). SCC has filed applications for 288 Yard project permits with both the TCEQ — an application that has been processed with the assistance of the City of Houston's Bureau of Air Quality Control — and the City of Houston Fire Department prior to the effective date of the City of Houston Ordinance.

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<sup>55</sup> *Id.* § 245.001(3).

<sup>56</sup> *See id.* § 245.002(b) (quoted above).

<sup>57</sup> City of Houston Ordinance § 5.

Application of the uniformity-of-requirements law will prevent the application of the new City of Houston Ordinance location requirements to SCC's 288 Yard project. The new location requirements included in the City of Houston Ordinance were adopted, and will become effective, after SCC has filed a number of applications for the permits required for the 288 Yard project. Under Local Government Code § 245.002(b), the "orders, regulations, ordinances, rules or other properly adopted requirements" that were in-effect at the time that SCC filed its initial application for the 288 Yard project "shall be the sole basis for consideration of all subsequent permits required for the project."<sup>58</sup> The new location restrictions of the City of Houston Ordinance are not yet effective, and will not apply to SCC's proposed 288 Yard operations under the Texas Local Government Code.

### CONCLUSION

The City of Houston Ordinance is not a consideration in the Commission's determination whether to authorize SCC's request to change the location of a portable concrete crushing facility. Neither the TCAA nor TCEQ rules direct the Commission to consider the effect of a municipal ordinance for the issuance of an air quality permit. The Commission cannot deny the issuance of a permit based on an ordinance that has no role in the Commission's consideration of the application.<sup>59</sup>

Moreover, to the extent that the City of Houston Ordinance conditions the issuance of a City concrete crushing permit on location requirements that are inconsistent with (and more stringent than) the location requirements of the TCAA and TCEQ rules, the Ordinance is patently unlawful and unenforceable. And even if the City of Houston Ordinance location requirements were not unlawful, application of those new location requirements to SCC's 288 Yard project is prohibited by the uniformity-of-requirements law of the Texas Local Government Code.

The Commission should not delay further its consideration of SCC's pending application and cannot, based on speculation as to the outcome of any future proceeding in which the City of Houston might seek to enforce its new ordinance, assume that the Commission's

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<sup>58</sup> TEX. LOCAL GOV'T CODE § 245.001(2).

<sup>59</sup> See *TSP Development, Ltd. v. TNRCC*, 16 S.W.3d at 148 (basing a Commission permitting decision on an inapplicable local ordinance is an abuse of discretion).

consideration of SCC's application would be a wasteful or useless act.<sup>60</sup> SCC respectfully requests that the Commissioners set this long-delayed matter for Agenda, at which the full Commission can adopt a Final Order based on the record in this matter and Administrative Law Judge Craig R. Bennett's Proposal for Decision and Order.

Respectfully submitted,

BAKER BOTTS, L.L.P.

By:



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ATTORNEYS FOR THE APPLICANT  
SOUTHERN CRUSHED CONCRETE, INC.

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<sup>60</sup> *See id.* ("We cannot now speculate as to the outcome of any future administrative or judicial proceeding in which Chambers County might seek to enforce its ordinance in the face of a Commission permit, should one ultimately be issued to TSP after proper consideration, authorizing a waste-disposal facility at the site requested by TSP. Consequently, we cannot assume that the Commission's further processing of TSP's application in the ordinary manner will be a wasteful and useless act.").

**CERTIFICATE OF SERVICE**

I hereby certify that on the 20th day of July, 2007, a true and correct copy of Applicant Southern Crushed Concrete, Inc.'s Brief regarding the City of Houston Ordinance was served on the following via electronic mail and U.S. mail:

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Representing Texas Pipe & Supply Co., Ltd.  
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Concrete

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Houston, Texas 77002  
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Fax: (713) 655-1612

*Via U.S. Mail only*



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Derek R. McDonald

**1**

AIR/94-0072-H/P

# City of Houston Bureau of Air Quality Control

## Investigation Report

### SOUTHERN CRUSHED CONCRETE INC

#### LOCKWOOD CRUSHING PLANT

RN100904838

Investigation # 254721

Incident #

Investigator: TIFFANY TRAN

Site Classification

MIN 0-15 FINS

PORTABLE ACCOUNT

Conducted: 11/10/2003 -- 11/10/2003

SIC Code: 1611

Program(s): AIR NEW SOURCE PERMITS

Investigation Type : Site Assessment

Location : 600 LOCKWOOD DR

Additional ID(s) : 940072H  
70136L001

Address : , ,

Activity Type : AIR POSI - Chapter 116 portable permit site rev

Principal(s) :

Role

Name

RESPONDENT

SOUTHERN CRUSHED CONCRETE INC

Contact(s) :

Role

Title

Name

Phone

Notified

REPRESENTATIVE

MR JIM MILLER

Work

(281) 987-8789

Regulated Entity Contact

REPRESENTATIVE

MR JIM MILLER

Fax

(281) 987-8791

Regulated Entity Mail Contact

REPRESENTATIVE

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Participated in Investigation

REPRESENTATIVE

MR JIM MILLER

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Work

(281) 987-8787

Work

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Fax

(281) 987-8791

Other Staff Member(s) :

Role

Name

SUPERVISOR

CUONG PHAM

QA REVIEWER

CUONG PHAM

#### Associated Check List

Checklist Name

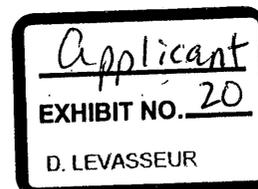
AIR INVESTIGATION TYPES FY04

AIR PERMIT SITE REVIEW

Unit Name

Bellfort yard rock crush

Bellfort yard rock crush



Investigation Comments :

We have reviewed the permit application (Permit No. 70136L001) of Southern Crushed Concrete Inc., proposed to be located at 2350 Bellfort Street, Houston. Our comments are as follows:

1. On November 10, 2003, Ms. Tiffany Tran of City of Houston/Bureau of Air Quality Control (BAQC) conducted a site review at Southern Crushed Concrete Inc., located at 2350 Bellfort Street. The investigator arrived the regulated entity at around 1:40 P.M. Mr. Jim Miller, Representative, was

11/10/03

Page 2 of 3

contacted and informed of the investigation objective.

2. Southern Crushed Concrete Inc. submitted the application for a change to new location at 2350 Belfort Street, Houston TX 77051. The projected start of construction date is December 1, 2003 and projected start of operation date is January 30, 2004. The proposed operation hours are Monday to Saturday from 7 A.M to 5 P.M, and the proposed production rates are 250,000 tons crushed concrete per year. In the application, the current location of facility is 5001 Gasmer St., Houston TX 77035, however, in Consolidate Compliance and Enforcement Data System (CCEDS), the regulated entity is appeared as Lockwood Crushing Plant at location of 600 Lockwood Dr. Mr. Miller was asked to submit a TCEQ Core Data Form associated with location change, but he refused to submit one. He stated that the regulated entity submitted Form PI-1, but is not required to submit a TCEQ Core Data Form.

3. During the drive-through, the investigator determined the distance from the Crushing Operations to the nearest property line is approximately 250 feet and to the nearest off-property receptor, Cement Coating Company, is around 900 feet. There are big concrete piles at the site, but no operation was observed.

4. The regulated entity is located on 60 acres of land in a mixed light industrial and commercial area. North of the regulated entity are vacant land, Belfort Street, and light industrial/commercial businesses. South of the regulated entity are vacant land and commercial businesses. West of the regulated entity are vacant land, tank farm, and railroad tracks. East of the regulated entity are vacant land, commercial businesses, and South 288 Freeway. There is no school located within 3000 feet radius of this regulated entity. Young, E.M. Elementary School is around 7000 feet from this regulated entity. Reed Parque Apartment complex is approximately 3000 feet from this regulated entity. God's Holy Temple Church is around 5300 feet from this regulated entity.

No Violations Associated to this Investigation

Signed *Uyarylan*  
Environmental Investigator

Date 11-13-03

Signed *Mike Mann*  
Supervisor

Date 11.13.03

**Attachments: (in order of final report submittal)**

- Enforcement Action Request (EAR)
- Maps, Plans, Sketches
- Letter to Facility (specify type) : \_\_\_\_\_
- Photographs
- Investigation Report
- Correspondence from the facility

11/10/03

Page 3 of 3

Sample Analysis Results

Manifests

NOR

Other (specify):

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# City of Houston Bureau of Air Quality Control

## AIR PERMIT SITE REVIEW Checklist

Unit Name : Bellfort yard rock crush

Investigation # :254721

Facility Name : LOCKWOOD CRUSHING PLANT

County : HARRIS

TCEQ Investigator : TIFFANY TRAN

Item No.	Description	Answer	Comments	Due Date
	Is the Application Packet complete?	NO	No TCEQ Core Data Form associated with location change was submitted.	
	What is the Nuisance/Odor Potential? (Low, Moderate or High)	YES	Low	
3	What is the Hazard Potential? (Low, Moderate or High)	YES	Low	
	Describe the surrounding land use:	YES	Mixed light industrial/commercial area	
5	Is there a school within 3000 feet? If yes, include school name and distance from unit.	NO		
	What is the distance to the nearest off-property receptor?	YES	Approximately 900 feet	
	What is the type of the nearest off-property receptor? (School, Residence or Other)	OTHER	Cement Coating Company	
	Describe the area around the nearest off-property receptor:	YES	Mixed light industrial/commercial area.	
	What is the distance from the unit to the nearest property line?	YES	Approximately 250 feet	
0	Based on the available information, can the Regulated Entity potentially meet all applicable requirements for the proposed activity at this site?	NOT EVALUATED		
1	Are there any general comments or discussion regarding this Site Review?	YES	See investigation comments.	

*Tiffany Tran* 11-12-03

# City of Houston Bureau of Air Quality Control

## QUALITY REVIEW - AIR Checklist

Unit Name : Bellfort yard rock crush

Investigation # :254721

Facility Name : LOCKWOOD CRUSHING PLANT

County : HARRIS

TCEQ Investigator : TIFFANY TRAN

Item No.	Description	Answer	Comments	Due Date
	Was the report/complaint submitted within established deadlines? If no, explain in the comments section.	YES		
	Did the report/complaint contain the appropriate forms (i.e. complaints, EAR, letter (i.e. NOV, General Compliance, referral, complaint response) and IOM if applicable)? If no, explain in comments section.	YES		
	Were all the appropriate checklists utilized in the investigation and all applicable sections of the current checklist accurately completed? If no, explain in comments.	YES		
4	Is each question on the checklist answered?	YES		
	Are sufficient comments provided to explain the answers?	YES		
6	Are answers accurate and do the answers demonstrate correct application of policy/procedures and regulation?	YES		
	Were violations cited correctly and supported with adequate documentation? If no, explain in comments.	NOT APPLICABLE		
	Were comments included where needed? If no, explain in comments.	YES		
	Comments?	YES	In the application, the rock crusher at 5001 Gasmer St. will be moved to 2350 Bellfort St., while in the RFC-Site Review, the Lockwood Crushing Plant (located at 600 Lockwood) will be moved to 2350 Bellfort.	
	Who performed the Quality Review for this investigation?	Mike Pham, P.E.	This report is acceptable.	

*Mike Pham*

11/13/03

2

City of Houston, Texas, Ordinance No. 2007-545

**AN ORDINANCE AMENDING ARTICLE VI OF CHAPTER 21 OF THE CODE OF ORDINANCES, HOUSTON, TEXAS, BY ADDING A NEW DIVISION 3 RELATING TO CONCRETE CRUSHING SITES; ESTABLISHING A SCHEDULE OF FEES FOR PERMITS ISSUED IN CONNECTION THEREWITH; CONTAINING FINDINGS AND OTHER PROVISIONS RELATING TO THE FOREGOING SUBJECT; PROVIDING FOR SEVERABILITY; AND DECLARING AN EMERGENCY.**

\* \* \* \* \*

**WHEREAS**, the City of Houston is a municipal corporation organized under the Constitution and the general and special laws of the State of Texas and exercises powers granted by the City's Charter and the provisions of Article XI, Section 5 of the Texas Constitution; and

**WHEREAS**, in the exercise of its lawful authority, the City may enact police power ordinances to promote and protect the health, safety, and welfare of the public; and

**WHEREAS**, permitting and registering concrete crushing sites will assist the Health Officer in locating and inspecting these sites; and

**WHEREAS**, the City Council finds that regulating the location of these sites in residential areas is necessary to protect the public health, safety and welfare of residents of the City; and

**WHEREAS**, the City Council finds that preventing the concentration of these sites is necessary to protect the public health, safety and welfare of residents of the City; and

**WHEREAS**, the City Council finds that these sites reasonably are expected to have a negative effect on residential property values and can affect other forms of land use, such as public parks, schools, child care facilities, hospitals, nursing homes and places of worship; and

**WHEREAS**, the City has conducted public meetings and has received comments on these issues; and

**WHEREAS**, the City Council finds that the Department of Health and Human Services has analyzed its costs of administering the program, taken into account the appropriate costs of the program, and related the costs to the types of permits issued by the City; and

**WHEREAS**, the City Council finds that the proposed permit fee is reasonably related to the cost of administering the program; **NOW, THEREFORE;**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON, TEXAS:**

**Section 1.** That the findings contained in the preamble of this Ordinance are determined to be true and correct and are hereby adopted as part of this Ordinance.

**Section 2.** That Article VI of Chapter 21 of the Code of Ordinances, Houston, Texas, is hereby amended by adding a new Division 3, which shall read as follows:

**"DIVISION 3. CONCRETE CRUSHING SITES**

**Sec. 21-167. Definitions.**

As used in this division, the following words and terms shall have the meanings ascribed in this section, unless the context of their usage clearly indicates another meaning:

*Child care facility* has the meaning ascribed in section 28-222 of this Code.

*Crushing* means any fixed, portable, permanent or temporary operation where pressure is applied to concrete, whether new or used, to reduce the size of the original material so that it can be used or reused.

*Designated area* means an area determined by creating a closed curve with a radius of 1500 feet from the property line of each site where crushing operations are located. Each tract that is wholly

or partially located within the area so created shall be part of the designated area.

*Existing operation* means a site that has a valid permit issued by the Texas Commission on Environmental Quality to perform crushing on or before 5/9/07<sup>1</sup>.

*Expand or expansion* means an increase in:

- (1) The size of the tract on which a facility is located; or
- (2) Operations, including but not limited to hours of operation and amount of materials that may result in an increase in air emissions.

*Hospital* has the meaning ascribed in section 28-222 of this Code.

*Multi-family residential* has the meaning ascribed in section 28-222 of this Code.

*New operation* means a site that does not have a valid permit issued by the Texas Commission of Environmental Quality to perform crushing on or before 5/9/07<sup>2</sup>.

*Nursing home* has the meaning ascribed in section 28-222 of this Code.

*Permit* means a current and valid permit issued pursuant to this division to operate a site.

*Permittee* means a person who holds a permit under this division to operate a site, and includes any employee, agent, or independent contractor of the permittee.

*Place of worship* means one or more buildings, whether situated in the city or not, in which persons regularly assemble for religious worship intended primarily for purposes connected with such worship.

*Public park* has the meaning ascribed in section 28-121 of this Code.

1 Editor shall insert the date of passage and approval of this Ordinance.

2 Editor shall insert the date of passage and approval of this Ordinance.

*Residential* has the meaning ascribed in section 28-222 of this Code.

*Residential area* means an area 50 percent or more of which consists of tracts that are wholly or partially subject to residential restrictions or are used for residential purposes. Tracts that are multi-family residential shall be treated as a residential tract.

*School* has the meaning ascribed in section 28-222 of this Code.

*Site* means the tract and fixtures, including structures, appurtenances and stockpiles of raw materials and finished products, where crushing is done.

*Tract* means a contiguous parcel of property under common ownership.

**Sec. 21-168. Scope.**

Pursuant to this division, all sites where crushing operations are performed are required to obtain a permit. Existing operations, expansions of existing operations and new operations are required to follow the permit application procedures in section 21-171 of this Code. Expansions of existing operations and new operations shall meet the location requirements in section 21-170 of this Code. However, the location requirements in section 21-170, notice requirements set forth in section 21-174 and the hearing and appeal procedures set forth in section 21-175, all sections of this Code, shall not apply to existing operations or to temporary crushing operations located at demolition sites if the concrete is being crushed primarily for use at the demolition site.

**Sec. 21-169. Prohibited activities.**

It shall be unlawful for any person to:

- (1) Operate at a site within the city unless there is a permit for the site issued pursuant to this division;
- (2) Expand crushing operations unless a permit for the expansion has been issued pursuant to this division;
- (3) Operate at a site within the city in violation of any term of a permit issued pursuant to this division; and
- (4) Fail to post signs as provided herein.

**Sec. 21-170. Location requirements.**

The director shall not issue a permit for a new operation or the expansion of any existing operation:

- (1) On a lot, tract or parcel of land where the crushing operation or expansion of the site for crushing is prohibited, expressly or impliedly, by unexpired deed restrictions or covenants running with the land contained or incorporated by reference in a properly recorded map, plat, replat, declaration, deed, judgment or other instrument filed in the county real property records, map records or deed records.
- (2) In any designated area that is a residential area or contains a child care facility, hospital, nursing home, place of worship, public park, school or crushing site.

**Sec. 21-171. Applications.**

(a) An applicant may obtain a permit for an existing operation or new or expanded operation by submitting a permit application to the department in the time and manner prescribed by the director, along with the fee required by section 21-176 of this Code.

(b) An application shall not be considered complete unless accompanied by any drawings, descriptive data, emissions information, permit fees, ownership information, contact information, and other pertinent data that may be required by the director.

(c) The director shall notify the applicant when the application is complete.

(d) If any of the required documentation, data, reports or drawings contain any false, erroneous or misleading information known to the applicant, then any permit issued pursuant to that false, erroneous or misleading information shall be void with the same force and effect as if it had never been issued.

(e) On or before the thirtieth calendar day following the filing of the complete application, the director shall issue to the applicant a written notice of disapproval or preliminary approval of the permit. Any notice of disapproval of a permit application must include a written report explaining the reasons for disapproval. Any preliminary approval shall be subject to the hearing provisions of section 21-175 of this Code, and, if no request for hearing is timely filed thereunder, shall become a final approval on the business day

next following the close of the protest period. The issuance of a written notice to the applicant shall be complete upon the deposit of the properly addressed notice in the United States mail, first class postage paid.

**Sec. 21-172. Permits.**

Each permit shall specify and display on its face the following terms, which shall be the conditions under which the permittee is authorized to operate or expand the site:

- (1) Name of the permittee, address and contact information, including telephone number and e-mail;
- (2) Name of the owner of the site, if different from the permittee;
- (3) Operations authorized by the permit;
- (4) Location of the site;
- (5) Signage requirements, which shall include the information in section 21-174 of this Code, except that instead of the application number the permit number shall be listed; and
- (6) A statement that the permittee must comply with all applicable requirements of this division, including rules promulgated by the director hereunder.

**Sec. 21-173. Additional requirements.**

The director may develop rules to ensure that particulate matter originating on a site or as a result of the operations on the site do not create a nuisance. These rules may include dust-suppression techniques, maintenance of entrances and exits and physical barriers and similar practices and may be incorporated into site permits. A copy of the regulations shall be maintained in the director's office for inspection, and copies may be purchased at the fee prescribed by law.

**Sec. 21-174. Notice of pending application.**

- (a) The applicant must post and use reasonable efforts to maintain one or more signs at the location of the proposed site or existing site for which expansion is proposed for a minimum of 30 calendar days beginning no later than the sixth calendar day following the date of the filing of a

complete permit application with the department. Each sign shall be posted no more than 15 feet from the public right-of-way that is used as access to the site. A sign shall face each public right-of-way bordering the site and the lettering on each sign shall be legible from the public right of way. Each sign shall be a minimum of four by eight feet in size, with lettering that complies with specifications promulgated by the director. Each sign shall contain at a minimum the following items of information:

- (1) That this is the proposed location of a site or site expansion, with the type of operations identified;
- (2) The hours of operation and the type of material to be processed or stored;
- (3) The name, address and contact information for the applicant, including telephone number of the person who can provide information about the application;
- (4) The permit application number assigned to this project by the department; and
- (5) A contact telephone number of the department where information can be obtained about the application.

The applicant shall retain the sign or signs at the site as provided herein.

(b) If, in the opinion of the director, compliance with the requirements of this section is impracticable or insufficient to provide adequate notification of the pending permit application, the director may require additional signs to be erected at locations as he deems advisable.

(c) Written notice of the filing of each application for a permit shall be given to each property owner within the designated area surrounding the proposed site. Notice shall also be given to any civic organization, property owners association, or any other interested group with identifiable boundaries, provided that the organization, association or group is registered with the planning and development department in a manner prescribed by the director of that department. Notice to all owners of record and civic organizations registered with the planning and development department shall be deemed given if properly addressed and deposited in the United States mail, with first class postage paid. The required written notice shall be in a form prescribed by the director and shall be mailed no later than the tenth calendar day following the filing of the required completed application. The written notice shall include a map showing the location of the proposed site or site proposed to be expanded, the surrounding designated area and all other sites located within one square mile of the proposed site or expansion.

(d) Written notice shall be published by the applicant at least once in a daily newspaper of general circulation in the city not later than the seventh calendar day following the date of filing of a complete application. The notice shall be published in the section of the newspaper in which other legal notices are commonly published, and shall be headed with the following words (or their reasonable equivalent), in conspicuous type:

"NOTICE OF PROPOSED [TYPE OF SITE] [OPERATION OR EXPANSION]." The notice shall state the type of operations being proposed or expanded, describe the intended hours of operation of the site and the material that will be processed or stored at the site, and advise that additional information may be obtained by writing or calling the office of the chief of the bureau of air quality of the health and human services department.

(e) The 'written notice' required in subsection (d) above shall include at a minimum the following:

- (1) The name, address, and telephone number of the operator of the proposed or expanded site;
- (2) The name, address, and telephone number of the owner if different from the operator of the proposed or expanded site;
- (3) The location of the proposed site or site to be expanded including the street address (or nearest street intersection) and the name of the subdivision or survey if there is no recorded subdivision;
- (4) The proposed hours of operation of the site;
- (5) The types of material to be processed or stored at the site; and
- (6) That additional information may be obtained by writing or calling the office of the chief of the bureau of air quality.

(f) The applicant shall be responsible for paying all costs associated with the giving of notice under this division.

**Sec. 21-175. Hearing; appeal.**

(a) If one or more persons who own property or reside within the designated area request a hearing regarding an application for a permit by submitting to the director a written request therefor that is received in the director's office on or before the fifteenth day following the latter of the date

of publication or mailing of notices as provided in section 21-174(c) of this Code, the director shall refer the matter to a hearing officer appointed by the director for a hearing with respect to whether the application meets the criteria specified in section 21-170 of this Code. The hearing officer shall promulgate rules for hearings. If a hearing is timely requested, the hearing officer shall conduct a hearing and shall make the determination whether the permit should be granted in accordance with this section. Otherwise, the director shall make that determination.

(b) In making a determination regarding the permit, the hearing officer or director shall consider whether the site complies with the requirements of section 21-170 of this Code and may not reasonably be expected to cause a nuisance.

(c) If the application is finally approved, the director shall issue the permit to the applicant.

(d) If an application is denied, the applicant shall be afforded a written notice of the reason for denial. There shall be no appeal from the denial of an application by the hearing officer pursuant to subsection (a) of this section. However, an applicant whose application is denied by the director shall be entitled to appeal the matter to the hearing officer by filing a written notice of appeal in the director's office within 15 days following the date that notice of the denial is mailed to the applicant. If an appeal is timely filed, the director shall cause the matter to be referred to the hearing officer, who shall conduct a hearing in accordance with this section. The hearing officer's determination shall be final.

#### **Sec. 21-176. Application fees.**

The director shall establish the application fee, which shall be approved by city council. Any site where there are facilities that are required to register under division 2 of article VI of this chapter is exempt from the payment of any permit application fee under this division.

#### **Sec. 21-177. Provisions cumulative.**

The provisions of this division are cumulative of all other requirements of this Code and other laws, including, without limitation, the Construction Code and the Fire Code, as well as all applicable state and federal laws and regulations. Compliance with this division does not excuse compliance with any other law, and permittees are additionally required to obtain any other permits, licenses, and authorizations required by law, including but not limited to permits, licenses, and authorizations that are required to be obtained from the city, the Texas Commission on Environmental Quality, the United States

Environmental Protection Agency or any other appropriate governmental agency.

**Sec. 21-178. Penalty; enforcement by city attorney; access to sites.**

(a) Violation of this division is unlawful and hereby declared to be a nuisance. Any person who violates any provision of this division shall be guilty of an offense and, upon conviction thereof, shall be punished by a fine of not less than \$500 or more than \$2000 for each violation. Each and every day that any violation continues shall constitute a separate offense and shall be punishable as such.

(b) In accordance with Section 217.042 of the Local Government Code, the city attorney is hereby authorized to file suit on behalf of the city in any court of competent jurisdiction to enjoin or abate a violation of this division. All authority granted to the city attorney under this division shall be exercised uniformly on behalf of and against all citizens and property in the city. This authorization shall be cumulative and in addition to any other civil or criminal penalty provisions. The city, acting through the city attorney or any other attorney representing the city, may file an action in a court of competent jurisdiction to recover damages from the owner or the agent of the owner of a facility in an amount adequate for the city to undertake any activity necessary to bring about compliance with this division.

(c) The city, acting through the city attorney or any other attorney representing the city, is hereby authorized to enter into agreements in lieu of litigation to achieve compliance with the terms, conditions and restrictions of any permit authorized under this division or the provisions of this division.

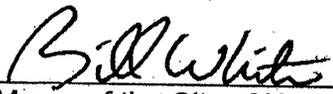
(d) When it is necessary to make an inspection to enforce the provisions of this division or to inspect or investigate conditions related to air quality, the health officer may enter a site at reasonable times to inspect or to perform the duties imposed by this division or to inspect or review records, reports, data, plans, or other documents relating to compliance with this division. If the site is occupied, credentials must be presented to the occupant and entry requested. If the site is unoccupied, the health official shall first make a reasonable effort to locate the owner or other person having charge or control of the site and request entry. If refused, the health official shall have recourse to the remedies provided by law to secure entry."

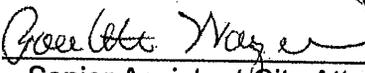
**Section 3.** That the City Council hereby approves the initial schedule of fees attached as Exhibit "A" hereto pursuant to Section 21-176 of the Code of Ordinances, Houston, Texas, as adopted by this Ordinance.

**Section 4.** That if any provision, section, subsection, sentence, clause or phrase of this Ordinance, or the application of same to any person or set of circumstances is for any reason held to be unconstitutional, void or invalid, the validity of the remaining portions of this Ordinance or their applicability to other persons or sets of circumstances shall not be affected thereby, it being the intent of the City Council in adopting this Ordinance that no portion hereof or provision or regulation contained herein shall become inoperative or fail by reason of any unconstitutionality, voidness or invalidity of any other portion hereof, and all provisions of this Ordinance are declared to be severable for that purpose.

**Section 5.** That there exists a public emergency requiring that this Ordinance be passed finally on the date of its introduction as requested in writing by the Mayor; therefore, this Ordinance shall be passed finally on such date and shall take effect at 12:01 a.m. on October 1, 2007.

PASSED AND APPROVED this 9th day of May, 2007.

  
\_\_\_\_\_  
Mayor of the City of Houston

Prepared by the Legal Dept.  <sup>DPAL</sup>  
PSW: April 27, 2007 Senior Assistant City Attorney   
Requested by Steven Williams, Director, Health and Human Services Department  
L.D. File No.0380700017001

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CAPTION PUBLISHED IN DAILY COURT  
REVIEW  
DATE: MAY 15 2007

AYE	NO	
✓		MAYOR WHITE
••••	••••	COUNCIL MEMBERS
✓		LAWRENCE
✓		JOHNSON
✓		CLUTTERBUCK
✓		EDWARDS
✓		WISEMAN
✓		KHAN
✓		HOLM
✓		GARCIA
✓		ALVARADO
✓		BROWN
✓		LOVELL
✓		GREEN
✓		BERRY
CAPTION	ADOPTED	

**EXHIBIT A**

**SCHEDULE OF PERMIT APPLICATION FEES**

**ARTICLE VI, CHAPTER 21, CITY OF HOUSTON CODE OF ORDINANCES**

**CONCRETE CRUSHING SITES**

Permit Application Fee:

\$500.00

3



THE ATTORNEY GENERAL  
OF TEXAS

RAWFORD C. MARTIN  
ATTORNEY GENERAL

AUSTIN, TEXAS 78711

July 12, 1968

*See M-614*

Hon. Charles R. Barden, P.E.  
Executive Secretary  
Texas Air Control Board  
1100 West 49th Street  
Austin, Texas 78756

Opinion No. M-257

Re: Effect of the Clean Air  
Act of Texas, 1967,  
(Article 4477-5 V.C.S.)  
on the air pollution  
control authority of local  
governments, and related  
questions.

Dear Mr. Barden:

Your request for an opinion relating to Article 4477-5, Vernon's Civil Statutes, has been received. Your first inquiry asks:

"Is a city empowered to contract with an owner of land located within the city's jurisdiction whereby the city can require the owner to meet higher air control standards than are set by the regulations of the Texas Air Control Board, whether under the Texas Clean Air Act, under Article 1175 (19), under its general contracting power, or under any other authority?"

When read as a whole, Article 4477-5 evidences the clear intent of the Legislature to set a standard for permissible and non-permissible air pollution on a state-wide basis. This thus becomes the public policy of the state. There is no authority whatever given by the statute for a local government, (as defined in Section 13(A), of Article 4477-5 V.C.S.), to vary from this standard. When the Clean Air Act of Texas, 1967, is read as a whole, local governments are given only power to make recommendations to the Texas Air Control Board concerning such standards, together with the authority to enforce state standards where the state has entered the field. While a city may ordain reasonable standards of air purity where there is no state rule, under Article 4477-5, the city, if it so desires, is required to seek a more rigid rule or standard from the Texas Air Control Board for its particular metropolitan area where the Board has acted and the city or town wants a more stringent rule. Counties may only enforce the Clean Air Act of

Hon. Charles R. Barden, page 2 (M-257)

Texas, 1967, or such rules as are adopted by the Texas Air Control Board pursuant thereto. Sec. 15(C), Article 4477-5. Cities may not pass any ordinance which conflicts with this state law, nor may they contract with a landowner for a more stringent standard of air purity than that expressly permitted by Article 4477-5, the public policy of the state. 40 Tex. Jur.2d, Municipal Corporations, page 110, Sec. 420. They cannot make contracts which will embarrass or control their legislative powers and duties in this respect. 38 Am. Jur. 181, Mun. Corps. Sec. 505.

The next four questions asked by you are as follows:

1.

"Is the governing body of a city-county health district established under Article 4447a empowered to enact an air pollution control ordinance or regulation and enforce it uniformly throughout the area of its jurisdiction, or is the health district limited to enforcement of the general prohibition against air pollution in the Clean Air Act of Texas and enforcement of the air control regulations established by the Texas Air Control Board?

2.

"Are a county and a city which enter into a cooperative agreement under Section 13(E) of the Texas Clean Air Act empowered to establish in the agreement, or by separate but uniform ordinances and Commissioners' Court orders, or by some other means, air pollution control standards for the areas over which the parties have jurisdiction, and to enforce them uniformly throughout such areas, or would the parties be limited to enforcement of the prohibition against air pollution in the Texas Clean Air Act and enforcement of the air control regulations established by the Texas Air Control Board?

3.

"If the governing body of a city-county health district is empowered to enact an air pollution control ordinance and enforce it uniformly throughout the area within the jurisdiction of the district, or if the parties to a city-county cooperative agreement entered into under Section 13(E) of the Texas Clean Air Act are empowered to provide for the establishment and uniform enforcement of air pollution control standards for the areas over which the parties have jurisdiction, may the ordinance or standards provide for more restrictive air pollution standards, criteria, levels, and emission limits than are established by regulations of the Texas Air Control Board?"

4.

"If the governing body of a city-county health district or if the parties to a city-county cooperative agreement entered into under Section 13(E) of the Texas Clean Air Act are not empowered to enact an ordinance or establish standards on air pollution control enforceable uniformly throughout the areas over which they have jurisdiction, may the Texas Air Control Board adopt a special regulation for such areas under the procedures authorized in Sections 6(B) and 13(E) of the Texas Clean Air Act; and if so, are such local governments empowered to enforce the special regulation uniformly throughout the areas over which they have jurisdiction?"

The Texas Clean Air Act enforcement provisions permit actions by "local government" as defined in Section 13(A) of Article 4477-5, and such definition "means an incorporated city or town whether or not it has a home rule charter or a county whether or not it has a home rule charter." The power to ordain is given only to "an incorporated city or town". Section 15(B) Article 4477-5. A district created pursuant to a contract or a mutual agreement of a city and county under

the provisions of Article 4447a has no rule-making powers, nor has it the power to enforce either the State law or Texas Air Control Board rules (Art. 4477-5) or regulations, or to enforce ordinances made by a city or town. Even though it be assumed that Section 4 and Section 6 of the statute permit transfer of functions and discontinuance of the health department of a city or county, this bare authority provides no standards or guides which are necessary to support a grant of legislative authority. Clark v. Briscoe, 200 S.W.2d 674, (Tex.Civ.App. 1947, no writ). Such a health district could not enact ordinances or regulations, nor could it sue in court, since it is not a "local government" as defined by the Clean Air Act of Texas, 1967; consequently question 1 must be answered in the negative.

Turning to question 2, it is our opinion that ordinances enacted by a home rule city must be enforced through its own processes in the absence of more specific authority given to a county or district. Cities or counties may not by agreement enforce uniform rules or ordinances, but each must enforce the statute. A city ordinance must be enforced by the city.

As noted above, we have herein held that the governing body of a city-county health district is not empowered either to enact or to enforce air pollution ordinances. Therefore, in answer to the first part of question 3, a city-county health district could not provide for either more or less restrictive standards than those established by the Texas Air Control Board.

With reference to the second part of your question 3, asking if a city ordinance can be more restrictive than Article 4477-5, or rules adopted pursuant thereto, the Texas Air Control Board under Section 15(A) of Article 4477-5 is the "principal authority" in the state for setting standards regarding control of air pollution. Section 15(C), Article 4477-5 provides, in part, as follows:

"Any ordinance...shall be consistent with the provisions of the Act and the rules, regulations or orders of the board, and shall not make unlawful any condition or act permitted, approved or otherwise authorized pursuant to this Act, or the rules, regulations or orders of the board."

Thus, when the State of Texas, acting through its Texas Air Control Board, has entered the field, a city ordinance cannot be less restrictive or more restrictive than the state law, rule or regulation as to air pollution.

In answer to question 4, it is our opinion that the Texas Air Control Board can lawfully adopt rules or regulations or standards necessary to abate air pollution in a particular local area, but such would be reviewable by the courts as to reasonableness. Section 4(A), (5) and Section 6(B), Article 4477-5. Concerning enforcement of the Texas Air Control Board rules for such an area, we hold that a "local government" (a city or a county), is authorized to enforce the same as an agent of the state performing a governmental function. Walker v. City of Dallas, 278 S.W. 2d 215, (Tex.Civ.App., 1953, no writ).

In your final inquiry you ask:

"May a special regulation adopted by the Board of the type referred to in question 5 be either more restrictive or less restrictive than a general statewide regulation on the same subject if the special regulation otherwise is adopted in accordance with the procedures and meets the standards and guidelines specified in the Texas Clean Air Act (such as in Sections 4(A) (5) (b) and 6(B) of the Act)?"

The provisions of Sections 4(A), (5), and 6 of Article 4477-5 can be more lenient or more restrictive than a general or statewide rule or regulation, for under these sections many standards must be considered. Section 6(B) states, in part, as follows:

"A rule....adopted by the board may differ in its terms and provisions as between particular conditions, as between particular sources and as between particular areas of the state."

The Texas Air Control Board is required to consider the health and physical property of the people; whether the source of pollution has a social and economic value; the priority of

location in the area; and whether it is technically practicable and reasonable from an economic standpoint to eliminate air emission from a particular source. These broad considerations indicate that particular areas of the state may be classified in an industrial area for special treatment and in some instances those who choose to reside there must decide whether they will condone more pollution than they would encounter in a virgin area of Texas, where air emissions would be of no economic value to the community, state or nation. This function of the Texas Air Control Board requires a constant study, and re-study. Such a function is a continuing process of achieving economic stability coupled with air which is healthy and which, in most instances, is not offensive to the senses.

Section 1 of the Clean Air Act of Texas, 1967, makes it abundantly clear that "economic development of the state" and "operation of existing industries" are to be weighed with "health, general welfare and physical property of the people" in adoption by the Texas Air Control Board of ambient air criteria, or in controlling or abating air pollution. In practical effect, regulations over the state for air quality could not be the same or as strict in metropolitan areas of industrial production as regulations in an area which has no industry. All regulations and all orders of the Texas Air Control Board are subject to review as to reasonableness by a court and may be declared invalid if the Board has not considered the area and the real economics of its abatement action.

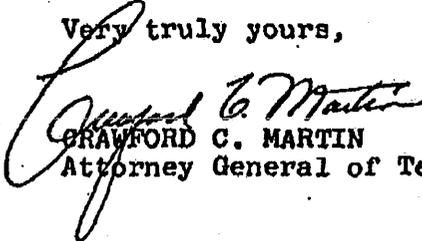
#### S U M M A R Y

The City may not contract with a landowner to require the landowner to meet higher air control standards than those set by the Texas Air Control Board or Article 4477-5, V.C.S. The Texas Air Control Board may lawfully adopt special rules, regulations or orders for areas of heavy air pollution but these rules are subject to court review as to reasonableness and abuse of discretion. Only cities, towns and counties acting as "local governments" may enforce the Clean

Hon. Charles R. Earden, Page 7 (M-257)

Air Act of Texas; and cities or towns  
may adopt local ordinances only so long  
as such conform to state law where the  
state has entered the field.

Very truly yours,

  
CRAWFORD C. MARTIN  
Attorney General of Texas

Prepared by Roger Tyler

APPROVED:

OPINION COMMITTEE

Hawthorne Phillips, Chairman  
Kerns Taylor, Co-Chairman  
James Swearingen  
Malcom Smith  
John Banks  
John Grace

A. J. CARUBBI, JR.  
Executive Assistant

**4**



# CITY OF HOUSTON

## Houston Fire Department Permit Section

1205 Dart, Houston, Texas 77007 713/247-8557

Permit : 06039076/3869385-m3

Customer: 00099371-FMO

Property Address

SOUTHERN CRUSHED CONCRETE  
MILLER, JAMES R  
14329 CHRISMAN RD  
HOUSTON

TX 77039

SOUTHERN CRUSHED CONCRETE  
2350 W BELLFORT ST  
HOUSTON

TX 77054

\*\*\*\*\* FIRE PREVENTION PERMIT \*\*\*\*\*

This permit applies only to property located within the jurisdiction of the City of Houston, Texas.

This permit is restricted to the property listed above and must be clearly posted at that location.

This permit applies only to the type of activity noted here in; other fire prevention permits may be required for other activities.

Be it understood that if the person who obtained this permit ceased to have control over the indicated property, this permit shall become invalid. A new permit will be required that shows the person who has control over the property.

This permit was issued and is valid between the dates shown below unless revoked for violation of the terms or conditions under which approval was made.

The issuance of this permit does not constitute approval by the City of Houston for the violation of any deed restriction, or any city, state and federal laws, regulations, or ordinances. Each holder and/or person acting under the authority of this permit is personally responsible for complying with deed restrictions and city, state, and federal laws relating to the activity contemplated by this permit.

Permit Type: m3 - FUEL DISPENSE

Activity : VF, FH, CW  
FUEL DISPENSE 1

Issued: 01-MAY-2007 Expires: 10-MAY-2008



# CITY OF HOUSTON

## Houston Fire Department Permit Section

1205 Dart, Houston, Texas 77007 713/247-8557

Permit : 06039076/3869384-f7

Customer: 00099371-FMO

Property Address

SOUTHERN CRUSHED CONCRETE  
MILLER, JAMES R  
14329 CHRISMAN RD  
HOUSTON

TX 77039

SOUTHERN CRUSHED CONCRETE  
2350 W BELLFORT ST  
HOUSTON

TX 77054

\*\*\*\*\* FIRE PREVENTION PERMIT \*\*\*\*\*

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Permit Type: f7 - FC STRG&USE GE

Activity : VF, FH, CW  
STORAGE/USE 1

Issued: 01-MAY-2007 Expires: 10-MAY-2008



# CITY OF HOUSTON

## Houston Fire Department Permit Section

1205 Dart, Houston, Texas 77007 713/247-8557

Customer: 00099371-FMO

SOUTHERN CRUSHED CONCRETE  
MILLER, JAMES R  
14329 CHRISMAN RD  
HOUSTON

TX 77039

Permit : 06039076/3869386-h3

Property Address

SOUTHERN CRUSHED CONCRETE  
2350 W BELLFORT ST  
HOUSTON

TX 77054

\*\*\*\*\* FIRE PREVENTION PERMIT \*\*\*\*\*

this permit applies only to property located within the jurisdiction of the City of Houston, Texas.

this permit is restricted to the property listed above and must be clearly posted at that location.

this permit applies only to the type of activity noted here in; other fire prevention permits may be required for other activities.

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This permit was issued and is valid between the dates shown below unless revoked for violation of the terms or conditions under which approval was made.

The issuance of this permit does not constitute approval by the City of Houston for the violation of any deed restriction, or any city, state and federal laws, regulations, or ordinances. Each holder and/or person acting under the authority of this permit is personally responsible for complying with deed restrictions and city, state, and federal laws relating to the activity contemplated by this permit.

Permit Type: h3 - HT WK OPNS-REN

Activity : VF, FH, CW  
CUTTING/WELD'G 1

Issued: 01-MAY-2007

Expires: 10-MAY-2008