

SOAH DOCKET NO. 582-05-1040
TCEQ DOCKET NO. 2004-0839-AIR

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APPLICATION BY SOUTHERN § BEFORE THE STATE OFFICE
CRUSHED CONCRETE, INC., TO §
CHANGE THE LOCATION OF A § OF
CONCRETE CRUSHING FACILITY IN §
HARRIS COUNTY § ADMINISTRATIVE HEARINGS

**JOINT MOTION TO REOPEN THE RECORD TO REEVALUATE SOUTHERN
CRUSHED CONCRETE INC.'S PROPOSED APPLICATION BASED ON
EPA'S NEW PM_{2.5} NATIONAL AMBIENT AIR QUALITY STANDARDS**

COME NOW, Harris County, City of Houston, Citizens Against Southern Crushed Concrete, Inc., and Texas Pipe and Supply Company, Ltd., and file its joint motion to request that the Commission order the Administrative Law Judge (ALJ) to reopen the record to admit the EPA's new PM_{2.5} National Ambient Air Quality Standards (NAAQS), which were issued on September 21, 2006, into the record. The parties would respectfully show the following:

Legal Authority to Reopen Record

Under 30 Tex. Admin. Code § 80.265, the Commission, on the motion of any party or on its own motion, may order the ALJ to reopen the record for further proceedings on specific issues in dispute. Additionally, numerous courts in Texas have upheld this concept. Texas courts have stated that "[t]he motion to reopen proceedings for further hearing was a matter addressed to the discretion of the administrative agency,"¹ that "[i]t is equally well settled that an agency has the right to reopen a matter and enter a different order upon a showing of changed circumstances."² and that, "[t]he question of whether to reopen an administrative record to allow additional evidence is one addressed to the discretion of the administrative body."³

¹ *R.R. Comm'n v. Herrin Transp. Co.*, 262 S.W.2d 426, 428 (Tex. Civ. App.—Austin 1953, no pet.). The court also states that "ordinarily the question to be determined on an application to reopen any proceeding is whether an injustice has been done and whether upon a further hearing a different result will probably be reached." *Id.*

² *South Tex. Indus. Servs., Inc. v. Tex. Dep't of Water Res.*, 573 S.W.2d 302, 304 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.).

³ *City of El Paso v. Public Util. Comm'n*, 609 S.W.2d 574, 578 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.). See *City of San Antonio v. Texas Dep't of Health*, 738 S.W.2d 52, 54 (Tex. App.—Austin 1987, writ denied).

**Showing of Changed Circumstance – New Particulate Matter (PM) Standards Issued
September 21, 2006**

On September 21, 2006, the EPA issued its final rule lowering the 24 hour PM_{2.5} NAAQS to 35 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) down from 65 $\mu\text{g}/\text{m}^3$.⁴ The EPA revised these standards to “provide increased protection against health effects associated with short-term exposure (including premature mortality and increased hospital admissions and emergency visits)”⁵

The last review of particulate matter air quality criteria and standards was completed in 1997 with notice of a final decision to revise the existing standards published in the Federal Register on July 18, 1997.⁶ In that revision, the EPA established two new PM_{2.5} standards: an annual standard of 15 $\mu\text{g}/\text{m}^3$ and a 24-hour standard of 65 $\mu\text{g}/\text{m}^3$.⁷ At the same time, in 1997, EPA also published its plans for the current periodic review of the PM NAAQS including a review of the 1997 PM_{2.5} standards. A Criteria Document, over 2,000 pages long, was developed with contributions from a number of scientists in a wide variety of scientific disciplines.⁸ Then, prior to the completion of the Criteria Document, in March 2003, a consent decree was issued resolving a lawsuit filed in March 2003 alleging that EPA had failed to perform its mandatory duty of completing the current review once every five years to determine where revisions to the standards are appropriate.⁹ The consent decree required that the proposed and final rulemaking concerning its review of PM NAAQS be completed no later than December 20, 2005, and September 26, 2006, respectively.¹⁰

The resulting rulemaking proposed in January 2006 and now finalized in September 2006 states that:

“Since the last review, a large number of new time-series studies of the relationship between short-term exposure to PM, including PM_{2.5}, and mortality have been published, including several multi-city studies This body of evidence includes hundreds of

⁴ Environmental Protection Agency EPA-HQ-OAR-2001-0017, National Ambient Air Quality Standards for Particulate Matter Final Rule (Sept. 21, 2006) (to be codified at 40 C.F.R. 50).

⁵ *Id.* at 4; See National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 2,620 (proposed Jan. 17, 2006).

⁶ HC-Ex at 1-4.

⁷ National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (proposed July 18, 1997) (at 40 C.F.R. 50).

⁸ HC-Ex 3; see HC-28 at 8, lines 16-36.

⁹ HC-Ex 4 at 1-7.

¹⁰ *Id.*

studies conducted in many countries around the world using various indicators of fine particles.”¹¹

Based on this, the EPA has found that “in general . . . the effect estimates for associations between mortality and short-term exposure to PM_{2.5} are positive and a number are statistically significant, particularly when focusing on the results of studies with greater precision.”¹² In the judgment of the EPA Administrator, this intensive evaluation of the scientific evidence has provided an adequate basis for regulatory decision making at this time.¹³

In the accompanying fact sheet published with the Final Rule, the EPA stated that “[s]cientific studies have found an association between exposure to particulate matter and significant health problems, including: aggravated asthma; chronic bronchitis; reduced lung function; irregular heartbeat; heart attack; and premature death in people with heart and lung disease.”¹⁴ EPA’s assessment concluded that “standards should be strengthened to better protect the public from health effects associated with short-term fine particulate exposure.”¹⁵ And finally, the EPA estimated that the benefits associated with this rule will result in a reduction of:

- (1) 2,500 premature deaths in people with heart and lung disease;
- (2) 2,600 cases of chronic bronchitis;
- (3) 5,000 nonfatal heart attacks;
- (4) 1,630 hospital admissions for cardiovascular or respiratory symptoms;
- (5) 1,200 emergency room visits for asthma;
- (6) 7,300 cases of acute bronchitis;
- (7) 97,000 cases of upper and lower respiratory symptoms;
- (8) 51,000 cases of aggravated asthma;
- (9) 350,000 days when people miss work or school; and
- (10) 2 million days when people must restrict their activities because of particle pollution-related symptoms.¹⁶

Relying on its assessment of a significantly expanded body of scientific information, “EPA has substantially strengthened the primary 24-hour fine particle standard, lowering it from the current level of 65 micrograms per cubic meter to 35.”¹⁷ This latest revision has direct bearing on this permitting case because TCEQ rules state: “[t]he National Primary and

¹¹ National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 2,620 at 2,625 (proposed Jan. 17, 2006) at 2,629.

¹² *Id.*

¹³ *Id.* at 2,626.

¹⁴ EPA Fact Sheet Final Revision to the National Ambient Air Quality Standards for Particulate Pollution Summary of Action at 1; http://epa.gov/pm/pdfs/20060921_factsheet.pdf.

¹⁵ *Id.*

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 2.

Secondary Ambient Air Quality Standards as promulgated pursuant to section 109 of the Federal Clean Air Act, as amended, will be enforced throughout all parts of Texas.”¹⁸

A Different Result Reached When Revised NAAQS Standards are Applied to the Applicant’s Proposed Facility

In the case at hand, the Applicant is attempting to relocate a previously permitted concrete crusher to the Sunnyside Community in Houston, Texas, and it is important to reopen the record because upon consideration of this new evidence, a different decision would be reached than one proposed by the ALJ.

After concerns were raised about health effects from the increased emissions in a community that already has a significant amount of industrial activity, the Commission referred the matter to State Office of Administrative Hearings (SOAH) for a contested case hearing. In referring this matter to SOAH, the Commission identified the following six issues to be addressed in the hearing:

- 1) Would operation of the facility have an adverse effect on the health of the requesters who live within one mile of the facility?
- 2) Would operation of the facility adversely affect the ability of the requesters to use and enjoy their property or cause damage to the requester’s property?
- 3) Would operation of the facility have an adverse effect on air quality?
- 4) Whether or not Applicant’s emissions calculations and modeling are accurate?
- 5) Is a stockpile limitation necessary and are stockpiles emissions adequately addressed in the permit conditions?
- 6) Whether or not the recordkeeping requirements set forth in the draft permit are sufficient to enable enforcement?¹⁹

The record includes a great deal of evidence as to the accuracy of emissions calculations and modeling, and health impacts from particulate matter proposed to be emitted from the facility. Harris County submitted new scientific evidence into the record concerning health effects of PM_{2.5} including the Air Quality Criteria Document for Particulate Matter²⁰ and the Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information (Staff Paper) prepared by EPA’s Office of Air Quality Planning and Standards (OAQPS) with the attached recommendations of Clean Air Scientific Advisory Committee (CASAC) of EPA’s Science Advisory Board which recommended

¹⁸ 30 Tex. Admin. Code § 101.21.

¹⁹ A-Ex 11.

²⁰ HC-Ex 3.

lowering the PM_{2.5} NAAQS.²¹ However, the ALJ still found that “[e]missions less than the NAAQS are presumed to be protective of public health;”²² that the NAAQS is the proper standard for evaluating potential adverse health impacts associated with emissions of PM_{2.5} from the proposed facility;”²³ that the different modeling performed by all expert witnesses in the case predict that emissions of PM_{2.5} from the proposed facility, when added to the PM_{2.5} ambient background concentrations, will not cause maximum ground level concentrations to exceed 65 µg/m³ averaged over any 24-hour period;”²⁴ and that “[e]missions of PM_{2.5} from operation of the proposed facility will not cause adverse health to people living within one mile of the facility.”²⁵

Utilizing this logic, emissions that exceed the NAAQS are presumed not to be protective of public health. As such, the 1997 NAAQS relied on by the ALJ are no longer the most current standards and the ALJ’s Proposal for Decision needs to take into account the latest NAAQS standards as revised on September 21, 2006. This new set of information is entirely relevant to the case because the Applicant’s own predicted 24-hour PM_{2.5} emissions of 36.1 µg/m³ and 44.1 µg/m³ exceed the new 24-hour PM_{2.5} emissions NAAQS of 35 µg/m³.²⁶ The following table compares all of the predicted emissions submitted by the Applicant’s expert Mr. Prince and Protestants’ expert, Mr. Hunt, to the new 24-hour PM_{2.5} NAAQS.

²¹ HC-Ex 4.

²² ALJ’s Proposed Order at 7.

²³ *Id.* at 12.

²⁴ *Id.*

²⁵ *Id.* at 12.

²⁶ HC-Ex. 30 and 31. Mr. Prince has testified that both these numbers are conservative and demonstrate compliance. Tr. at 583-585. *See* Tr. at 225, lines 2-6. The ALJ also acknowledges this in his Proposal for Decision. The ALJ states that:

For the purposes of his testimony in this case, Applicant’s expert actually calculates PM_{2.5} emissions from the facility as being 11.7 µg/m³ annually and 36.1 µg/m³ for the 24-hour averaging period. But, during his deposition and at the hearing, he conceded that the figures of 14.0 µg/m³ annually and 44.1 µg/m³ for the 24-hour µg/m³ averaging period would be reasonable based upon using different background concentrations. ALJ’s Proposal for Decision, Footnote 41, at 23.

TABLE 1: 24-HOUR PM_{2.5} EMISSIONS CALCULATIONS²⁷

Model	Total 24-hour PM_{2.5} Concentration	24-hour PM_{2.5} NAAQS
Hunt Results (P-Ex 9)	47.4 µg/m³	35 µg/m ³
Prince Results A (HC-Ex 30)	36.1 µg/m³	35 µg/m ³
Prince Results B (HC-Ex 31)	44.1 µg/m³	35 µg/m ³

*Concentrations in bold exceed the 24 hour PM_{2.5} NAAQS.

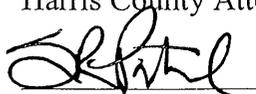
As can be seen from the table above, none of the experts' modeling shows compliance with the new 24-hour PM_{2.5} NAAQS. Based on the ALJ's reliance on NAAQS standards to make a determination of whether PM_{2.5} emissions from this facility would endanger public health,²⁸ there is a clear need to reopen the record to consider this new set of NAAQS standards because consideration of this new evidence would undoubtedly produce a different result than one proposed by the ALJ.

Conclusion

The Commission clearly has the authority under 30 Tex. Admin. Code § 80.265 and Texas case law to reopen the matter. Based on this, and as justice requires it, Harris County, City of Houston, Citizens Against Southern Crushed Concrete, Inc., and Texas Pipe and Supply Company, Ltd., request that the Commission order the ALJ to reopen the record to reevaluate the health effects associated with Southern Crushed Concrete's application in light of the changed circumstances with the recently revised EPA NAAQS for PM_{2.5} and its impact on the evidence in the record regarding PM_{2.5} emissions from the proposed facility. Consideration of the new PM_{2.5} NAAQS is necessary to fully assess the issues of health impacts and air quality submitted by the Commission for the ALJ to address.

Respectfully submitted,

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²⁷ This table represents calculations by the experts using the unpaved road factor.

²⁸ Tex. Health & Safety Code § 382.0518(b); 30 Tex. Admin. Code § 101.21.

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CERTIFICATE OF SERVICE
SOAH DOCKET NO. 582-05-1040
TCEQ Docket No. 2004-0839-AIR

I, Snehal R. Patel, do hereby certify that on September 25, 2006, true and correct copies of the foregoing "Joint Motion to Reopen the Record to Reevaluate Southern Crushed Concrete's Proposed Application Based on EPA's New PM_{2.5} National Ambient Air Quality Standards" in the above-docketed proceeding were sent via facsimile and First Class Mail to the persons listed on the attached mailing list.



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