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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

**APPLICANT SOUTHERN CRUSHED CONCRETE, INC.'S
REPLY TO JOINT MOTION TO REOPEN THE RECORD**

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

Applicant Southern Crushed Concrete, Inc. ("SCC") files this Reply to the Joint Motion to Reopen the Record. For the reasons set forth below, the U.S. Environmental Protection Agency's ("EPA's") decision to revise the National Ambient Air Quality Standard ("NAAQS") for particulate matter less than 2.5 microns ("PM_{2.5}") does not merit the reopening of this proceeding.

In accordance with current Texas Commission on Environmental Quality ("TCEQ") and EPA policy, SCC has satisfied its obligation to demonstrate compliance with the PM_{2.5} NAAQS in this matter through its compliance demonstration for particulate matter less than 10 microns ("PM₁₀"), using the PM₁₀ demonstration as a "surrogate." A decision to reopen the record based on the revised PM_{2.5} NAAQS would be inconsistent with the Commission's Final Orders in the *Sandy Creek* and *Frontier Materials* matters, as well as the Commission's November 15, 2006 decision in the *KBDJ, L.P.* matter, in which the Commission confirmed that a permit applicant's demonstration of compliance with the PM₁₀ NAAQS satisfies the applicant's obligations with regard to PM_{2.5}. Permit applicants are not currently required to submit

modeling that demonstrates compliance with the PM_{2.5} NAAQS levels; under that policy, reopening the record in this matter would serve no purpose.

Reopening the record in this matter would also subject the applicant to a “moving target” with respect to permitting standards, inconsistent with prior agency practice and policy. Commission practice is to evaluate an application under the standards in-place at the time an application is declared administratively complete, and the revised 24-hour PM_{2.5} standard will become effective *more than three years* after the Applicant’s pending application was declared administratively complete.

Moreover, the record in this proceeding overwhelmingly supports approval of SCC’s pending relocation request, whether it is evaluated under the current PM_{2.5} NAAQS or the revisions to the PM_{2.5} NAAQS effective December 16, 2006. Given the extensive evidence in the record regarding PM_{2.5} impacts from the Applicant’s proposed operations, as well as a Proposal for Decision that evaluates the potential impacts of PM_{2.5} *without* strictly adhering to the current NAAQS, there is no basis for returning this matter to the State Office of Administrative Hearings (“SOAH”).

Applicant requests that the Commission deny the Motion to Reopen the Record and decide this matter based on the evidence developed during the hearing on the merits and made part of the record, which closed December 2, 2005.

BACKGROUND

Applicant in this matter seeks authorization from the Texas Commission on Environmental Quality (“TCEQ”) to change the location of an already-permitted portable concrete crushing facility. Applicant filed the pending application for change of location in

*October 2003.*¹ The application was declared administratively complete and Applicant published the Notice of Application and Intent to Obtain Permit on October 23, 2003.²

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 contested case hearing.³ The Commission's Interim Order specified a maximum duration of the hearing of six months from the first day of the preliminary hearing to the issuance of the proposal for decision and recommended order from SOAH.⁴ The preliminary hearing was held on December 16, 2004.⁵ The hearing on the merits, originally scheduled to take place in April 2005, was continued three times at the request of the Protestants and eventually took place on September 19-21, 2005.⁶

During the hearing on the merits in this matter, the Applicant presented *extensive* evidence regarding the potential impacts of PM_{2.5}. While not required by the Air Permits Division or Commission policy, the Applicant presented full dispersion modeling of PM_{2.5} impacts, and the Protestants in this matter advocated holding the application to PM_{2.5} standards that are significantly lower than the current *and* future-effective PM_{2.5} NAAQS. Applicant is confident that the record in this matter contains more evidence, and the Proposal for Decision contains more analysis, of PM_{2.5} than any other permit proceeding that has come before the Commission. The record in this matter closed on December 2, 2005.⁷

¹ 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.

² *Proposal for Decision and Order*, Proposed Finding of Fact No. 2.

³ 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).

⁴ *Id.* at 4.

⁵ *Proposal for Decision and Order*, at 3.

⁶ *Proposal for Decision and Order*, at 4.

⁷ *Proposal for Decision and Order*, at 4.

Administrative Law Judge Craig R. Bennett issued his proposal for decision and order on January 31, 2006. In the proposal for decision, Judge Bennett finds that emissions of PM_{2.5} from the Applicant's proposed operations will not have an adverse effect on the health or welfare of the requesters.⁸

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."⁹ 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 Agenda, the Commissioners indefinitely continued this matter.

Counsel for Harris County filed the Joint Motion to Reopen the Record on September 25, 2006, based upon the EPA's decision to adopt a revised PM_{2.5} NAAQS for the 24-hour averaging period. (As part of the same rule package, EPA has decided not to adopt any revisions to the annual PM_{2.5} NAAQS.) The revised 24-hour PM_{2.5} NAAQS will become effective on December 16, 2006¹⁰ — over three years after the Applicant's pending application was declared administratively complete.

ARGUMENT

⁸ *Proposal for Decision and Order*, Proposed Finding of Fact No. 60.

⁹ 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).

¹⁰ The revisions become effective 60 days after the October 17, 2006 publication in the *Federal Register*. See 71 *Fed. Reg.* 61143 (Oct. 17, 2006).

I. A Decision to Reopen the Record Should be Limited to “Extraordinary Circumstances”

While an agency has the authority to reopen the evidentiary record in a contested case hearing, that authority is “reserved for a variety of extraordinary circumstances.” *Lake Medina Conservation Society, Inc. v. TNRCC*, 980 S.W.2d 511, 518-519 (Tex. App.—Austin 1998, pet. denied) (holding that the TNRCC did not abuse its discretion in declining to reopen the evidentiary record in a water supply permitting matter). In the *Medina Conservation Society* case, the court upheld the TNRCC’s refusal to reopen the record because the Commission could conclude that the changed circumstances “did not affect the fundamental ground of decision reflected in the findings of fact and conclusions of law.” *Id.* at 519. As stated below, the current level of the 24-hour PM_{2.5} NAAQS is not a “fundamental ground of decision” in Judge Bennett’s Proposal for Decision and Order. As such, consistent with the Commission’s actions in the *Medina Conservation Society* matter, the Commission should decline to reopen the record in this matter.

II. The Circumstances Do Not Merit Reopening the Record in this Matter

A. The Applicant Is Not Required to Demonstrate Compliance with the PM_{2.5} NAAQS

The Commission should not direct SOAH to reopen the record in this matter based on changes to a standard for which, under current TCEQ and EPA policy, no modeling demonstration is required.

Applicant’s modeling in this matter demonstrates compliance with the PM₁₀ NAAQS.¹¹ EPA and TCEQ consider a demonstration of compliance with the PM₁₀ NAAQS sufficient for demonstrating compliance with the PM_{2.5} NAAQS: the PM₁₀ demonstration is

¹¹ *Proposal for Decision and Order*, Proposed Finding of Fact No. 59.

accepted as a “surrogate” for demonstrating compliance with the PM_{2.5} NAAQS.¹² The Commission confirmed the PM₁₀-as-surrogate policy on November 15, 2006, in its consideration of the *KBDJ, L.P.* matter.¹³ The Commission’s decision in *KBDJ, L.P.* is consistent with its May 2006 Final Order in the *Sandy Creek* matter.¹⁴ The *Sandy Creek* Order concludes, consistent with a prior Commission decision in the 2002 *Frontier Materials* matter,¹⁵ that “[a] demonstration of compliance with the PM₁₀ NAAQS suffices to demonstrate compliance with the PM_{2.5} NAAQS.”¹⁶

TCEQ policy is identical to EPA policy on this issue. EPA’s Environmental Appeals Board in August 2006 issued an opinion in a Prevention of Significant Deterioration (“PSD”) appeal in which it affirmed EPA’s PM₁₀-as-surrogate policy and upheld the Illinois Environmental Protection Agency’s decision to use a PM₁₀ modeling demonstration as a surrogate for PM_{2.5}.¹⁷ While the PM_{2.5} NAAQS has been established, EPA has not completed a number of aspects of implementing the standard, and at this time there remain significant difficulties in the estimation, monitoring and data collection for PM_{2.5}. Current EPA and TCEQ policy regarding the use of PM₁₀ demonstrations as a surrogate reflect the obstacles to making a PM_{2.5} demonstration.

¹² Applicant’s Ex. 23, at 17 (TCEQ Guidance Document No. RG-25, *Air Quality Modeling Guidelines*); Applicant’s Ex. 34, at 1 (EPA, *Interim Implementation of New Source Review Requirements for PM_{2.5}*).

¹³ TCEQ Docket No. 2004-1774-AIR; SOAH Docket No. 582-05-4493; *Consideration of the Administrative Law Judge’s Proposal for Decision and Order regarding the application of KBDJ, L.P. for an Air Quality Permit No. 55480 to construct and operate a rock crusher in Hays County, Texas* (Nov. 15, 2006).

¹⁴ SOAH Docket No. 582-05-5612; TCEQ Docket No. 2005-0781-AIR; *Application of Sandy Creek Energy Associates, L.P. for Air Quality Flexible Permit No. 70861; PSD Permit No. PSD-TX-1039*; Final Order, Finding of Fact No. 67 (May 25, 2006) (“*Sandy Creek Final Order*”) (“Both EPA and TCEQ accept demonstration of compliance with the PM₁₀ NAAQS as a surrogate for demonstration of compliance with the PM_{2.5} NAAQS.”).

¹⁵ SOAH Docket No. 582-01-2303; TNRCC Docket Nos. 1999-1526-AIR & 2000-1462-AIR; *Application of Frontier Materials Concrete for Permit by Rule No. 43288*; Final Order, Finding of Fact No. 32 (Jan. 28, 2002).

¹⁶ *Sandy Creek Final Order*, Conclusion of Law No. 8.

¹⁷ *In re Prairie State Generating Co.*, PSD Appeal No. 05-05, slip op. at 123-131 (EAB Aug. 24, 2006), 13 E.A.D. ___; see also *In re BP Cherry Point*, PSD Appeal No. 05-01, slip op. at 17-23 (EAB June 21, 2005), 12 E.A.D. ___.

In this matter, despite Commission policy that PM_{2.5} NAAQS modeling is not required, Applicant conducted PM_{2.5} modeling for purposes of the contested case hearing, to further demonstrate that the project will be protective of human health and the environment. That modeling demonstrated both that the projected maximum property-line impacts fell below the current NAAQS *and* that PM_{2.5} emissions from the Applicant's proposed operations would be protective.

Applicant's modeling demonstrates compliance with the current PM_{2.5} NAAQS. Applicant's modeling also demonstrates compliance with the current PM₁₀ NAAQS. It would be inconsistent for the Commission to require the reopening of the record in this matter to evaluate the future-effective 24-hour PM_{2.5} NAAQS when, in the *KBDJ, L.P.* and *Sandy Creek* matters, the Commission has held that PM_{2.5} NAAQS modeling is not required if an applicant presents modeling that demonstrates compliance with the PM₁₀ NAAQS.

B. An Application that was Administratively Complete in October 2003 Should Not Be Evaluated Under the Future-Effective 24-Hour PM_{2.5} NAAQS

Even if a demonstration of compliance with the PM_{2.5} NAAQS were required in this matter, the Applicant should *not* be required to demonstrate compliance with the 24-hour PM_{2.5} NAAQS revision that will become effective in December 2006. Review of the pending application under the future-effective PM_{2.5} NAAQS would be contrary to longstanding agency policy and practice and inconsistent with Texas law.

As stated earlier, the application that is the subject of this matter was declared administratively complete in October 2003.¹⁸ The revised PM_{2.5} NAAQS will not be effective until December 16, 2006 — more than three years after the application was declared administratively complete.

¹⁸ *Proposal for Decision and Order*, Proposed Finding of Fact No. 2.

TCEQ rules and Air Permits Division guidance establish a longstanding practice of determining the applicability of regulatory requirements to an application based on the date that an application is administratively complete. TCEQ's air permitting regulations routinely base regulatory applicability for an application on the date of administrative completeness.¹⁹ Similarly, in the *Mirant Parker, LLC* matter in 2002, the Commission upheld the agency practice of making best available control technology ("BACT") determinations at the time that an application is submitted.²⁰ As in *Mirant Parker, LLC*, the Applicant in this matter should not be held to a "moving target" in the application process.

Texas case law is consistent with the practice of reviewing a permit application under the substantive rules in effect at the time that the application was administratively complete. In 1983, the Austin Court of Appeals addressed a case in which the Texas Department of Health had made a *procedural* change to application requirements while a landfill application pending.²¹ It was undisputed that one required element of a landfill application was not in the application when filed. While the application was under review, the rule was amended to eliminate the requirement that the written confirmation be included in an application.²² One dispute between the parties related to whether the written confirmation was a necessary element of the application. The Court of Appeals held that the amended rule governed the application, but only because it was a *procedural* change to permit application requirements:

With respect to procedural statutes, it is settled law that the legislature may make changes applicable to future steps in pending

¹⁹ See, e.g., 30 TAC § 116.111(b) (determining the applicability of certain public notice requirements based on the date that an application is administratively complete); 30 TAC § 116.180(b) (effective until January 31, 2006) (determining the applicability of regulations in 30 TAC Chapter 116, Subchapter B based on the date that an application is declared administratively complete).

²⁰ SOAH Docket No. 582-00-1045; TNRCC Docket No. 2000-0346-AIR; *Application of Mirant Parker, LLC for Permit Nos. 40619 and PSD-Texas-933*; Final Order, Finding of Fact No. 33 and Conclusion of Law No. 8 (Jan. 7, 2002).

²¹ *Texas Dep't of Health v. Long*, 659 S.W.2d 158 (Tex. App.—Austin 1983, no writ).

²² *Long*, 659 S.W.2d at 160.

cases. This principle of law rests upon the premise that no litigant has a vested right in a procedural remedy. The same legal principles should govern changes in administrative rules which are procedural in nature. We have no difficulty in concluding that agency requirements for inclusion, or not, of items in an application for a landfill are procedural in nature.²³

While Texas precedent will allow a pending application to be reviewed under amended regulations, this principle is limited to changes in procedural requirements. The future-effective change to the 24-hour PM_{2.5} NAAQS should not govern the pending application.

C. Judge Bennett's Conclusion that the Emissions from Applicant's Proposed Operations (including PM_{2.5}) Will Be Protective Did Not Rely on the Current 24-Hour PM_{2.5} NAAQS

The future-effective change to the 24-hour NAAQS for PM_{2.5} will not change the protectiveness of the Applicant's proposed operations. Moreover, for the purposes of determining whether to reopen the record in this matter, the level at which the 24-hour PM_{2.5} NAAQS is established *was not* the sole basis for Judge Bennett's conclusions with regard to PM_{2.5}.

At the hearing on the merits and the briefing in this matter, the protestants sought that the application be held to PM_{2.5} standards significantly lower than both the current PM_{2.5} NAAQS *and* the revised 24-hour PM_{2.5} NAAQS that will become effective in December 2006. As noted in Judge Bennett's PFD, Harris County's expert witness toxicologist took the position that adverse health effects could potentially occur from PM_{2.5} at levels greater than 12 µg/m³ (annual) and 25 µg/m³ (24-hour).²⁴ Based on the evidence presented at the hearing, however, Judge Bennett determined that emissions of PM_{2.5} from the Applicant's proposed operations will not result in an adverse impact on air quality or human health.

²³ Long, 659 S.W.2d at 160 (citations omitted).

²⁴ Proposal for Decision and Order, at 22-23.

It is clear from Judge Bennett's Proposal for Decision and Order and his presentation of the proposal at the June 28, 2006 Commissioners' Agenda, however, that his conclusion regarding the potential for adverse health effects from emissions of PM_{2.5} was not based strictly on a comparison of modeling results to the current PM_{2.5} NAAQS. The Proposal for Decision states:

At the outset it is important to note that all experts agree that emissions from the facility are not expected to exceed the existing NAAQS for PM_{2.5} or PM₁₀. If the Commission chooses to conclude that compliance with the existing NAAQS is sufficient to ensure no adverse health effects, then no further analysis is necessary.

*However, if the Commission concludes that additional analysis would be appropriate, the ALJ still finds that expected PM_{2.5} emissions from the facility are not likely to cause adverse health effects to people living within a mile of it.*²⁵

Judge Bennett unequivocally states that his conclusion regarding the potential impacts of PM_{2.5} is not solely based on the level at which the PM_{2.5} NAAQS is currently established. The Proposal for Decision's conclusions regarding the potential for adverse health effects from PM_{2.5} *are not* limited to a comparison of the Applicant's modeled impacts to the current PM_{2.5} NAAQS.

The nature of the particulate matter emissions from Applicant's operations was central to Judge Bennett's analysis. Judge Bennett found that "[t]he majority of emissions from the facility will consist of materials that can be classified as crustal in nature."²⁶ Judge Bennett also found that "[p]articulate matter consisting of crustal materials is less associated with health risks than particulate matter consisting of combustion or aerosol constituents."²⁷ The preamble to the adoption of the future-effective PM_{2.5} NAAQS discusses a series of epidemiological

²⁵ *Proposal for Decision and Order*, at 25 (emphasis added).

²⁶ *Proposal for Decision and Order*, Proposed Finding of Fact No. 60.f.

²⁷ *Proposal for Decision and Order*, Proposed Finding of Fact No. 60.e.

studies regarding the impacts of fine particles. In describing EPA Staff's view of the studies in the Criteria Document for particulate matter, the preamble states — consistent with Judge Bennett's finding in this matter — “the Criteria Document found that these studies indicate that exposure to fine particles from combustion sources, but not crustal material, is associated with mortality.”²⁸

Judge Bennett did not limit his review of the potential health impacts of PM_{2.5} from the Applicant's proposed operations to an analysis of the current NAAQS. The fact that the Applicant's maximum predicted impacts of PM_{2.5} fall well below the current PM_{2.5} NAAQS²⁹ was only one factor in his decision, as explicitly stated in the Proposal for Decision. The adoption of a revision to the PM_{2.5} NAAQS that lowers the 24-hour standard to 35 µg/m³ does not change the fact that the emissions from Applicant's proposed operations will constitute material that is less associated with health risks than other forms of PM_{2.5}. Reopening the record in this matter will not result in different conclusions regarding the protectiveness of the Applicant's proposed operations.

CONCLUSION

There are no “extraordinary circumstances” in the present matter that merit reopening the evidentiary record. The current level of the 24-hour PM_{2.5} NAAQS was not the basis for Judge Bennett's determination that Applicant's proposed operations would be protective of human health and the environment. Moreover, a decision to reopen the record based on the revised 24-hour PM_{2.5} NAAQS would be inconsistent with current EPA policy, as well as the Commission's decisions in the *KBDJ, L.P.*, *Sandy Creek* and *Frontier Materials*

²⁸ 71 *Fed. Reg.* at 61162.

²⁹ Harris County refers to a “Prince Modeling Two” in its motion. The results identified as “Prince Modeling Two” are not modeling results presented by the Applicant as part of Direct Case, but are the results of modeling produced by Applicant's expert witness Tim Prince during discovery and are based on a key assumption that is different from the modeling results presented by the Applicant as part of its direct case. Applicant's PM_{2.5} modeling results are identified in Judge Bennett's Proposed Finding of Fact 60(c).

matters, in which the Commission affirmed that applicants who demonstrate compliance with the PM₁₀ NAAQS are not required to make a separate demonstration of compliance with the PM_{2.5} NAAQS. In addition, a review of the Applicant's change of location request under the revised 24-hour PM_{2.5} NAAQS, which will become effective more than three years after the application was declared administratively complete, is wholly inconsistent with prior agency policy.

Accordingly, Applicant respectfully requests that the Commissioners deny the Joint Motion to Reopen the Record and set this long-delayed matter for an upcoming 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: Derek R. McDonald by US v. Paman

Pamela M. Giblin
State Bar No. 07858000
Derek R. McDonald
State Bar No. 00786101
Whitney L. Swift
State Bar No. 00797531
1500 San Jacinto Center
98 San Jacinto Boulevard
Austin, Texas 78701
(512) 322-2500
(512) 322-2501 Fax

ATTORNEYS FOR THE APPLICANT
SOUTHERN CRUSHED CONCRETE, INC.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November, 2006, a true and correct copy of Applicant Southern Crushed Concrete, Inc.'s Reply to Joint Motion to Reopen the Record was served on the following via electronic mail and U.S. mail:

FOR THE PROTESTANTS:

Martina Cartwright
Attorney
3100 Cleburne Avenue
Houston, Texas 77004
Tel: (713) 313-1019
Fax: (713) 313-1191
Representing Texas Pipe & Supply Co., Ltd.
and Citizens Against Southern Crushed
Concrete

FOR THE PUBLIC INTEREST COUNSEL:

Mary Alice C. McKaughan
Office of Public Interest Counsel
Texas Commission on Environmental Quality
MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-6361
Fax: (512) 239-6377

FOR THE CITY OF HOUSTON:

Iona McAvoy
Sr. Assistant City Attorney
City of Houston
900 Bagby
Houston, Texas 77002
Tel: (713) 247-1152
Fax: (713) 247-1017

FOR THE EXECUTIVE DIRECTOR:

Brad Patterson
Staff Attorney
Texas Commission on Environmental Quality
MC-175
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606 or (512) 239-3434

FOR HARRIS COUNTY:

Snehal R. Patel
Attorney
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002
Tel: (713) 755-8284
Fax: (713) 755-2680

The Honorable Sheila Jackson Lee
1919 Smith Street, Suite 1180
Houston, Texas 77002
Tel: (713) 655-0050
Fax: (713) 655-1612

Via U.S. Mail only



Derek R. McDonald