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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 21, 2006

The Honorable Craig Bennett
Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711-3025

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2006 FEB 21 PM 4:16
CHIEF CLERKS OFFICE

RE: Southern Crushed Concrete, Inc.
SOAH Docket No. 582-05-1040; TCEQ Docket No. 2004-0839-AIR

Dear Judge Bennett:

Enclosed for filing is the Public Interest Counsel's Exceptions to the Proposed Order and the Proposal for Decision in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary Alice C. McKaughan".

Mary Alice C. McKaughan
Public Interest Counsel

cc: Mailing List

Enclosure

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

IN THE MATTER OF THE REQUEST OF
SOUTHERN CRUSHED CONCRETE, INC.
TO RELOCATE A PORTABLE ROCK
CRUSHER PURSUANT TO
AIR PERMIT NO. 40072

§ BEFORE THE
§ TEXAS COMMISSION
§ ON ENVIRONMENTAL QUALITY
§
§

CHIEF CLERK'S OFFICE

2004 FEB 21 11 41 16

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
EXCEPTIONS TO THE PROPOSED ORDER AND THE PROPOSAL FOR DECISION**

TO THE HONORABLE CRAIG R. BENNETT ADMINISTRATIVE LAW JUDGE:

COMES NOW, the Office of Public Interest Counsel ("OPIC") of the Texas Commission On Environmental Quality ("TCEQ" or "the Commission") and submits the following exceptions to the proposal for decision ("PFD") and Proposed Order ("Order") of Administrative Law Judge ("ALJ").

I. Introduction

Applicant, Southern Crushed Concrete, Inc. ("Applicant" or "SCC") has applied to the TCEQ to relocate one of its portable concrete crushing facilities ("Facility") onto a 58-acre tract at 2350 Bellfort Avenue in Houston, Texas ("288 Site"). The Facility will process used concrete from highway construction and demolition debris into gravel at rates of 200 tons per hour ("TPH") and 400,000 tons per year ("TPY").¹ The TCEQ received over fourteen hundred (1,400) timely contested case hearing requests and one (1) request for reconsideration on the Application. On September 29, 2004, the Commission determined that the City of Houston, Citizens Against Southern Crushed Concrete ("CASCC"), and Texas Pipe & Supply Co., Inc. ("Texas Pipe"), were

¹Prefiled Direct Testimony of Applicant Witness James R. Miller, Jr. ("Miller"), Applicant's Exhibit 51, Page 2, Line 7-27; See also, *ED's Response To Comments*, page 1.

all “affected persons” and granted their requests for a contested case hearing and referred the Application to the State Office of Administrative Hearings (“SOAH”).² The Commission limited the scope of the hearing to the following issues:

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 emission’s calculations are accurate?;
5. Is a stockpile limitation necessary and are stockpile emissions adequately addressed in the permit conditions?; and,
6. Whether or not the record keeping requirements set forth in the draft permit are sufficient to enable enforcement.³

At SOAH, Applicant, OPIC, the City of Houston, Harris County, Citizens Against Southern Crushed Concrete, and Texas Pipe & Supply Co., Inc., were all designated as parties. Applicant and Protestants all timely pre-filed testimony. An evidentiary hearing on the application was held on Monday, September 19, 2005 through Wednesday, September 21, 2005 in Houston, Texas. The ALJ issued his PFD on January 31, 2006. In his PFD the ALJ recommends that the Application be granted because, “the operation of the facility will not create a nuisance, does not present a risk of adverse health effects, and will not have an adverse effect on air quality.”⁴ OPIC excepts to and disagrees with this conclusion.

²Tex. Natural Resource Conservation Comm’n, An Interim Order Concerning the *Application by Southern Crushed Concrete to Authorize the Relocation of a Portable Rock Crushing Facility*, TCEQ Docket No. 2004-0839-AIR (Oct. 04, 2004) Page. 1.

³ Id. at page 2.

⁴ Please see the ALJ’s PFD at page 1.

II. Summary of OPIC's Exceptions to the PFD and the Order

OPIC concurs with the ALJ's conclusions that:

- (1) Applicant should be required to post signs at the 288 Yard indicating a speed limit of six miles per hour;⁵
- (2) Applicant should be required to wet sweep and vacuum entrance and exit roads daily;⁶
- (3) Applicant should be required to water all stockpiles at least twice daily except when there is measurable precipitation;⁷
- (4) Applicant should be required to maintain a log of all onsite waterings;⁸ and,
- (5) Stockpiles should not exceed 45 feet in height.⁹

OPIC excepts to the ALJ's findings that:

- (1) The unpaved emission factor is appropriate and more accurate than the paved road factor due to the expected speed of traffic at the Facility;¹⁰
- (2) The roads and traffic at the SCC site are not expected to match the conditions on which the paved road factor is based;¹¹
- (3) The most reliable modeling shows that the 1-hour and 3-hour property line standards for TSP will not be exceeded by the operation of the SCC facility;¹²

⁵ Please see the ALJ's PFD, Page 39.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Please see the ALJ's Proposed Findings of Fact ("FOF") #40, Page 7 & FOF #41, Page 7-8.

¹¹ FOF #40, Page 7.

¹² FOF #47, Page 9.

(4) Applicant selected the appropriate background monitor and used the appropriate background concentrations of PM10 and PM 2.5;¹³

(5) Operation of the Facility is not expected or likely to have an adverse effect on the use and enjoyment of requester's property or an adverse effect on requesters' air quality;¹⁴

(6) Operation of the Facility is not expected or likely to have an adverse effect on the health of requesters who reside within a mile of the Facility.¹⁵

III. Argument

Pursuant to 30 TEX. ADMIN. CODE ("TAC") §80.17, the burden is on the Applicant to prove its case by a preponderance of the evidence. OPIC agrees with the ALJ that the additional permit requirements identified by the ALJ should be imposed if SCC's Application is granted. However, OPIC disagrees with, and respectfully excepts to, the ALJ's holding that: the unpaved road factor should be used in the modeling; Facility emissions will not adversely affect air quality and requesters' use and enjoyment of their property; and, the Facility emissions will not have an adverse effect on the health of those requesters residing within a mile of the Facility. We continue to believe that Applicant has failed to meet its burden of proof in these crucial areas; therefore, OPIC respectfully recommends that this permit either be amended to bring it into compliance with the TCEQ rules or be denied.

¹³ FOF #52 at page 10.

¹⁴ Please see the ALJ's Proposed Conclusions of Law ("COL") #11, 12 & 16 at Page 20.

¹⁵ Please see the ALJ's Proposed Conclusions of Law ("COL") #10, Page 19 and FOF # 60 at page 12 and FOF #63 at page 14.

A. OPIC excepts to the ALJ's findings of fact and conclusions of law that it was appropriate for the Applicant to use the AP-42 unpaved road factor in calculating facility haul road emissions and then use the paved road factor controls.

As discussed in depth in OPIC's Closing Argument, which is attached hereto and incorporated herein by reference as Exhibit A, use of the unpaved road factor in modeling emissions from the site is not as accurate as using the paved road factor. Moreover, the ALJ relied heavily on the assumption that trucks traveling within the Facility will not exceed 10 mph in his analysis supporting the use of the unpaved road factor.¹⁶ As is admitted in the ALJ's PFD, the evidence presented by the Applicant at the contested case hearing that the trucks would travel under 6 mph at the site was not entirely credible because of the lack of a posted speed limit at the site.¹⁷ The ALJ seems to rely on Applicant's stated willingness to post a 6 mph posted speed limit at the site to solve this issue. However, the issue should be addressed based upon the application as filed, not as proposed to be modified by the ALJ. OPIC continues to assert that it is inconsistent for Applicant to apply the AP-42 factor for unpaved roads when it is obvious, and the ALJ agrees, that the internal roads of the facility are paved, then argue for the purposes of using the most favorable control factors that its internal roads are paved.¹⁸

B. OPIC excepts to the ALJ's findings of fact and conclusions of law that the TCEQ TSP ground level concentrations will not be exceeded based upon Applicant's modeling results that exclude haul road emissions in its short-term emissions calculations.

OPIC also continues to assert that though Applicant's calculations demonstrating that it's Facility emissions will not exceed the 1-hour and 3-hour property line standards for total suspended

¹⁶ Please see the PFD Page 8.

¹⁷ Please see the PFD at Page 8 Foot Note ("FN") #14.

¹⁸ Please see the PFD at page 12, FOF #45 and 48

solids (“TSP”) comply with TCEQ guidance, they do not comply with the TCEQ rules because the Applicant’s modeling does not include road emissions in its short-term emission calculations.¹⁹ As discussed in OPIC’s Closing Argument, the TCEQ rules set an allowable net ground level concentration for TSP in regulation Section 111.155.²⁰ The TSP standards were set to assure that no facility emits so much dust into the atmosphere that it creates a nuisance condition of excessive dust.²¹ The TCEQ rules do not specifically exempt any source from being considered in calculating the TSP ground level concentration; therefore, the implication is that all TSP sources should be included in the analysis.

By not including haul road emissions in its short term modeling calculations, the Applicant has failed to demonstrate that the SCC Facility will comply with the TCEQ rules regarding calculating TSP ground-level concentrations. The Applicant has omitted an important source of emissions out of their calculations. As demonstrated by the Protestant’s modeling results, when all emission sources, including the haul road emissions, are properly included in the short-term modeling runs, the modeling shows that Facility emissions will exceed the TCEQ the 1-hour and 3-hour property line standards for TSP.²² Therefore, it is likely that the SCC Facility emissions will create a nuisance condition of excessive dust thereby adversely affecting requesters’ air quality and use and enjoyment of their property.

¹⁹ FOF #47, Page 9.

²⁰ Prefiled Direct Testimony of Applicant Expert Witness Prince, Applicant’s Exhibit 52, Page 10-11 & 1-7; at Line 9-15; *See also*, 30 TAC Section 111.155(1) & (2).

²¹ Prefiled Direct Testimony of Applicant Expert Witness Dydek, Applicant’s Exhibit 53, Page 19, Line 12-24.

²² Prefiled Direct Testimony of CASCC Expert Witness Michael Hunt (“Hunt”), Protestants’ Exhibit 11, Page 21, Line 629-635; *See also*, Protestant Exhibit P-9.

C. OPIC excepts to the ALJ's findings of fact and conclusions of law that Operation of the Facility is not expected or likely to have an adverse effect on the health of requesters who reside within a mile of the Facility.

In reaching his conclusion that emissions from the SCC Facility will not adversely impact requesters' health that reside within one mile of the SCC site, the ALJ seems to rely heavily upon the opinions of Applicant's experts Mr. Prince and Mr. Dydek and the evidence provided by Applicant that it followed TCEQ guidance in completing its modeling and meets current federal NAAQS standards. OPIC asserts that the real issue is not whether the Applicant met the TCEQ's and the EPA's current requirements. Rather, the Commission directed SOAH to consider whether, "operation of the facility will have an adverse effect on the health of the requesters who live within one mile of the facility." OPIC is of the opinion that sufficient testimony was presented at hearing that raised the possibility that Facility emissions will adversely impact the health of requesters who reside less than a mile away from the proposed Facility site at the Reed Parque Apartment Complex.²³

As discussed in OPIC's closing argument, the current NAAQS standards for PM₁₀ and PM_{2.5} are currently under review by the EPA staff.²⁴ The EPA Staff Paper recommends lowering the current NAAQS for PM_{2.5} because the EPA staff believes the current NAAQS are not sufficiently protective.²⁵ Protestant Harris County's expert witness Lucy Frasier testified that, based upon her

²³ Please see the testimony of Harris County Expert Lucy Frasier, Transcript Page 422, Line 6-16.

²⁴ Prefiled Direct Testimony of Applicant Expert Witness Dydek, Applicant's Exhibit 53, Page 12, Line 17-28; *See also*, U.S. EPA's Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information OAQPS Staff Paper (June 2005) Harris County's ("HC") Exhibit 4.

²⁵ *Id.*

review of the EPA Staff Paper and recent peer reviewed epidemiological studies regarding the health effects of particulate matter, adverse health impacts could potentially occur if off-property concentrations of PM_{2.5} exceeded an annual average concentration of 12 ug/m³ or if concentrations exceed a 24-hour average concentration of 25 ug/m³.²⁶ Applicant's toxicologist expert Dr. Dydek testified that he agreed that there is a potential for adverse impacts to occur at an annual average PM_{2.5} concentration between 12 ug/m³ and 15 ug/m³ and at a 24 hour PM_{2.5} concentrations between 25 ug/m³ and 65 ug/m³.²⁷ Protestants' modeling results demonstrate that the PM 2.5 emitted from the facility will exceed PM_{2.5} concentration between 12 ug/m³ and 15 ug/m³ and at a 24 hour PM_{2.5} concentrations between 25 ug/m³ and 65 ug/m³. Therefore, both Applicant's and Protestants' experts agree that a potential for adverse health effects exists.

Considering the risks, the potential for adverse health effects is enough to justify the modification or denial of this permit application. Exposure to particulate matter, is associated with an increased incidence of adverse developmental effects such as low birth weight and increased infant mortality, as well as an increased risk of mortality from respiratory and cardiovascular disease.²⁸ Children are especially sensitive receptors for PM 2.5 because they have an undeveloped immune system and a smaller body size.²⁹ Therefore, a child's health will be more strongly impacted by a lower PM_{2.5} concentration level in the air, especially if they are playing outside and

²⁶Testimony of Harris County Expert Witness Lucy Frasier, Transcript Page 400, Line 17-24; See also, Prefiled Direct Testimony of Frasier, HC Exhibit 28, Page 11.

²⁷Prefiled Direct Testimony of Applicant Expert Dydek, Applicant's Exhibit 53, Page 13, Line 11-35.

²⁸U.S. EPA's Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information OAQPS Staff Paper ("EPA Staff Paper") (June 2005) Harris County's ("HC") Exhibit 4, Page 3-10-3-11, Section 3.3.

²⁹ Testimony of Harris County Expert Witness Frasier, Page 398, Line 13-25, Page 397, Line 1-12.

breathing hard.³⁰ Further, the EPA Staff Report states: “ Regardless of the relative weight placed on the estimates associated with either an assumed cutpoint of 10 ug/m3 or the lowest cutpoints considered, the risk assessment indicates the likelihood that thousands of premature deaths per year would occur in urban areas across the US even upon attainment of the current PM2.5 standards.”³¹

Considering the detrimental health effects linked to exposure to particulate matter, especially in children, and the dire consequences of high consistent exposure, awaiting the final results of a slow administrative process would prevent the TCEQ from following the mandate given the TCEQ by the Texas Legislature to protect the health and welfare of Texans.³² Moreover, Protestants put on testimony that the particulate matter emitted from crushing concrete road surfaces, like that expected to be crushed at the Facility, may be especially toxic due to deposited Polycyclic Aromatic Hydrocarbons (“PAHs”) from automobile exhaust.³³ PAH molecules can be highly carcinogenic. Therefore, OPIC recommends that the Commission deny or modify this Application in order to protect human health.

IV. Conclusion

Applicant has not met its burden of proof to support issuance of the Permit as written. The record shows, that Applicant has not sufficiently demonstrated that it complied with the TCEQ’s TSP rules and that the operation of the Facility may constitute a nuisance and a health hazard for those who reside withing one mile of the SCC Facility at the Reed apartments. Based on the

³⁰ Id.

³¹ Staff Draft Paper, HC Exhibit 4. Page 5-14, Section 5.3.1.3 Summary.

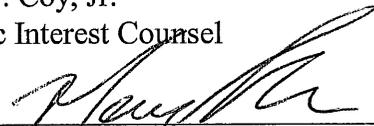
³² TEX. HEALTH AND SAFETY CODE ANN. §382.002; 30 TAC §101.4.

³³ Testimony of Harris County Expert Witness Frasier, Transcript Page 428, Line 7-25 & Page 429, Line 1-8; *See also*, Staff Draft Paper, HC Exhibit 4, Page 5-57.

foregoing, the Public Interest Counsel respectfully requests that the OPIC's exceptions to the PFD be granted and that the Commission deny Applicant's permit application or that the permit be amended to comply with TCEQ rules.

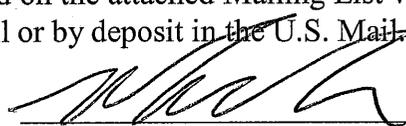
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on this the 21st day of February, 2006, the original and eleven copies of the Office of Public Interest Counsel's Exceptions to the PFD was served upon the Chief Clerk of the TCEQ and a true and correct copy on all persons listed on the attached Mailing List via hand delivery, e-mail, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Mary Alice C. Boehm-McKaughan
Assistant Public Interest Counsel

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

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

IN THE MATTER OF THE REQUEST OF § BEFORE THE
SOUTHERN CRUSHED CONCRETE, INC. § TEXAS COMMISSION
TO RELOCATE A PORTABLE ROCK § ON ENVIRONMENTAL QUALITY
CRUSHER PURSUANT TO §
AIR PERMIT NO. 40072 §

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
CLOSING ARGUMENT**

TO THE HONORABLE CRAIG R. BENNETT ADMINISTRATIVE LAW JUDGE:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission On Environmental Quality (TCEQ), and files this, its Closing Argument in the above styled matter.

I. Background

On October 6, 2003, Southern Crushed Concrete, Inc. ("Applicant" or "SCC") applied to the TCEQ to relocate one of its portable concrete crushing facilities ("Facility") authorized under Permit # 40072, from 5001 Gasmer St. in Houston, Texas onto a 58-acre tract at 2350 Bellfort Avenue in Houston, Texas ("288 Site"). The Facility will process used concrete from highway construction and demolition debris into gravel at rates of 200 tons per hour ("TPH") and 400,000 tons per year ("TPY").¹ The material will be transported from the raw material stockpile by a front end loader into a jaw crusher then pass through a cone crusher and screening prior to being stacked into finished product piles by a radial stacker.² The finished material size is expected to range from 1/16 to 1½ inches in size.

The 288 Site is located in the Sunnyside community which is a mixed light industrial/commercial area with the nearest off-property receptor being a cement coating plant company located approximately 900 feet away and the nearest property line being 250 feet from the

¹ Prefiled Direct Testimony of Applicant Witness James R. Miller, Jr. ("Miller"), Applicant's Exhibit 51, Page 2, Line 7-27; See also, *ED's Response To Comments*, page 1.

² *Id.* at page 5, Lines 15-43.

Exhibit A

288 Site.³ The nearest residence is the Reed Parque Apartment Complex which is approximately half a mile from the 288 Site.⁴ The nearest school is approximately 7000 feet from the 288 Site. God's Holy Temple Church is approximately 5,300 from the 288 Site. Horticultural Consultants, Inc., a wholesale nursery is located on the Texas Pipe and Supply, Inc., property just south and adjacent to the 288 Site.⁵

A large raw material stockpile currently exists at the 288 Site.⁶ Even when a yard is not active SCC will accept deliveries of broken concrete for future crushing.⁷ SCC will generally accept broken concrete and build up a raw material stockpile at one of its crushing yards/facilities for up to a year before moving a crusher to a yard.⁸

The entrance road leading into the Facility and the areas around the scales will be paved with asphalt.⁹ The plant/haul roads within the Facility will be paved with a mill material which will create a cohesive hard surface.¹⁰ SCC will attempt to contain dust from the roads though watering the interior Facility roads with a dedicated water truck as well as wet sweeping and vacuuming the Facility's main entrance road daily.¹¹

The Facility will emit the following air contaminants: particulate matter, including PM10 (particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers) and PM 2.5 (particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers) from

³ED's Response To Comments, Comment 9, page 7-8.

⁴Prefiled Direct Testimony of Applicant Witness Miller, Applicant's Exhibit 51, Page 10, Line 16, 24-26.

⁵Prefiled Direct Testimony of Protestant Texas Pipe & Supply, Co., LTD Witness Grant Stephenson, CASCC's Exhibit P 12, Page 1-2, Line 10-25 & 11-18.

⁶Testimony of Applicant's Witness James Miller, Transcript Page 51, Line 7-11.

⁷Prefiled Direct Testimony of Applicant Witness Miller, Applicant's Exhibit 51, Page 4, Line 7-9;

⁸Prefiled Direct Testimony of Applicant Witness Miller, Applicant's Exhibit 51, Page 5, Line 4-5

⁹ Testimony of Applicant Witness Miller, Transcript, Page 49, Line 3-10.

¹⁰Prefiled Direct Testimony of Applicant Witness Miller, Applicant's Exhibit 51, Page 8, Line 12.

¹¹Prefiled Direct Testimony of Applicant Witness Miller, Applicant's Exhibit 51, Page 8, Line 12-14; Page 6, Lines 18-33.

crushing concrete and aggregate and from road dust.¹² The operations at the Facility that emit particulate matter include the concrete crushing, screening, material handling and storage operations.¹³ Exposure to particulate matter, including PM10 and PM2.5, is associated with an increased incidence of adverse developmental effects such as low birth weight and increased infant mortality as well as an increased risk of mortality from respiratory and cardiovascular disease.¹⁴ PM2.5 particles pose a greater health risk than PM10 particles.¹⁵ Because of their small size, they can easily lodge in the lungs.¹⁶ Children are especially sensitive receptors for PM 2.5 because they have an undeveloped immune system and a smaller body size.¹⁷ Therefore; a child's health will be more strongly impacted by a lower PM2.5 concentration level in the air, especially if they are playing outside and breathing hard.¹⁸

Particulate emissions are subject to National Ambient Air Quality Standards ("NAAQS") which establish ambient concentrations of criteria pollutants that the Environmental Protection Agency ("EPA") considers are protective of public health.¹⁹ There are NAAQS for both PM10 and PM2.5 that are given in both a 24-hour average concentration and an annual concentration.²⁰ The

¹²Prefiled Testimony of Applicant's Expert Witness Dr. Thomas M. Dydek ("Dydek"), Applicant's Exhibit 53, Page 5, Line 17-18; See also, Applicant's Exhibit 5; *TCEQ Technical Review*; See also, *TCEQ From PI-I General Application for Air Preconstruction Permits & Amendments* submitted by SCC to the TCEQ on October 6, 2003. Page 32.

¹³Prefiled Direct Testimony of Applicant Expert Witness Tim Prince ("Prince"), Applicant's Exhibit 52, Page 10, Line 17-19.

¹⁴U.S. EPA's Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information OAQPS Staff Paper ("EPA Staff Paper") (June 2005) Harris County's ("HC") Exhibit 4, Page 3-10-3-11, Section 3.3.

¹⁵Prefiled Direct Testimony of Harris County Toxicology Expert Witness Frasier, Harris County's Exhibit HC 28, Page 10, Line 33-36, & Page 11, Line 1-2.

¹⁶Id.

¹⁷ Testimony of Harris County Expert Witness Frasier, Page 398, Line 13-25, Page 397, Line 1-12.

¹⁸ Id.

¹⁹Prefiled Direct Testimony of Applicant Expert Witness Tim Prince ("Prince"), Applicant's Exhibit 52, Page 10-11 & 1-7; See also, 40 CFR 50.6(a)&(b) 40 CFR 50.7(a)&(b).

²⁰ Id.

current NAAQS for PM_{2.5} is 65 micrograms per cubic meter ("ug/m³") for the 24-hour average concentrations, and an 15 ug/m³ annual arithmetic mean concentration, averaged over three years.

The current NAAQS standards for PM₁₀ and PM_{2.5} are currently under review by the EPA staff.²¹ The EPA Staff Paper recommends lowering the current NAAQS for PM_{2.5} because the EPA staff believes the current NAAQS are not sufficiently protective.²² The EPA's proposed rules regarding its review of the PM NAAQS will be published no later than December 20, 2005, and the final rules will be published no later than September 27, 2006.²³ Protestant Harris County's expert witness Lucy Frasier testified that, based upon her review of the EPA Staff Paper and recent peer reviewed epidemiological studies regarding the health effects of particulate matter, adverse health impacts could potentially occur if off-property concentrations of PM_{2.5} exceeded an annual average concentration of 12 ug/m³ or if concentrations exceed a 24-hour average concentration of 25 ug/m³.²⁴

The TCEQ also has an established a property-line standard for total suspended particulate matter ("TSP") that limits the allowable net concentration of particulate matter emitted from emission sources.²⁵ The TCEQ TSP standards were set to assure that no facility emits so much dust into the atmosphere that they create a nuisance condition of excessive dust.²⁶ The TCEQ TSP property line standards are: 400 ug/m³ averaged over a one hour period and 200 ug/m³ averaged

²¹Prefiled Direct Testimony of Applicant Expert Witness Dydek; Applicant's Exhibit 53, Page 12, Line 17-28; *See also*, U.S. EPA's Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information OAQPS Staff Paper (June 2005) Harris County's ("HC") Exhibit 4.

²²*Id.*

²³Prefiled Direct Testimony of Harris County Toxicology Expert Witness Dr. Lucy H. Fraiser ("Fraiser"), Harris County's Exhibit HC 28, Page 9, Line 37-40; *See also*, HC Exhibit 4, U.S. EPA's Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information OAQPS Staff Paper (June 2005), Page 1-7.

²⁴Testimony of Harris County Expert Witness Lucy Frasier, Transcript Page 400, Line 17-24; *See also*, Prefiled Direct Testimony of Frasier, HC Exhibit 28, Page 11.

²⁵Prefiled Direct Testimony of Applicant Expert Witness Prince, Applicant's Exhibit 52, Page 10-11 & 1-7; at Line 9-15; *See also*, 30 TAC Section 111.155(1) & (2).

²⁶Prefiled Direct Testimony of Applicant Expert Witness Dydek, Applicant's Exhibit 53, Page 19, Line 12-24.

over a three hour period.²⁷ If the Facility meets the TCEQ TSP standards then site operations are not expected to cause a nuisance condition or adversely impact the use and enjoyment of nearby property.²⁸ The reverse is also true.

Applicant's modeling results predict that Applicant's 288 Site operations will not cause or contribute to a violation of the current annual or 24-hour PM2.5 NAAQS.²⁹ Applicant's modeling results also predict that the maximum predicted ground-level concentration of TSP at the 288 Site would meet the TCEQ TSP property-line standards for both the one-hour and three-hour averaging periods.³⁰ In calculating the expected haul road emission rates from the proposed operations of the Facility at the 288 Site, Applicant's modeling expert Tim Prince used the unpaved roads emission factor from Section 13.22 of AP-42.³¹ Mr. Prince only included his modeled haul road emissions in his "long-term" modeling runs that predict impacts on an annual average basis.³² Mr. Prince did not include haul road emissions in his twenty-four (24) hour averaging period "short-term" modeling runs.³³ For calculating stockpile emissions, Mr. Prince used the stockpile emission factor provided in the TCEQ's Rock Crushing Plants guidance document, TCEQ Document No. RG 058, dated February 2002 (Draft).³⁴ The stockpile emission factor provided in the TCEQ's Rock Crushing Plants guidance document calculates the stockpile emissions based on stockpile footprint/area not

²⁷Prefiled Direct Testimony of Applicant Expert Witness Prince, Applicant's Exhibit 52, Page 10-11 & 1-7; at Line 9-15; *See also*, 30 TAC Section 111.155(1) & (2).

²⁸Prefiled Direct Testimony of Applicant Expert Witness Dydek, Applicant's Exhibit 53, Page 19, Line 25-29.

²⁹ *Id.* at Page 28, Line 20-25.

³⁰ *Id.* at Page 29, Line 2-8.

³¹ *Id.* at Page 17, line 19-25 & Page 22, Line 11-22.

³² *Id.* at Page 23, Line 20-22.

³³ *Id.*

³⁴ *Id.* at Page 17; Lines 19-34; *See also*, Applicant's Exhibit No. 24; TCEQ's Rock Crushing Plants guidance document, TCEQ Document No. RG 058, dated February 2002 (draft), Applicant's Exhibit No. 26, U.S. EPA's unpaved road emission factors 13.2.2.

height.³⁵ In modeling stockpile emissions, Mr. Prince assumed a stockpile height of 25 feet.³⁶

Harris County's modeling expert Michael S. Hunt's modeling results, like those of Applicant's expert, predict that Applicant's 288 Site operations will not cause, or contribute, to a violation of the current annual or 24-hour PM2.5 NAAQS.³⁷ However, using Mr. Hunt's results, Lucy Frasier did predict that the Applicant's 288 Site operations will cause, and contribute, to a violation of the annual and 24-hour PM2.5 NAAQS recommended by the EPA staff in the EPA Staff Paper.³⁸ Unlike Applicant's expert's results, Mr. Hunt's results also predict that the maximum predicted ground-level concentration of TSP at the site will exceed both of the TCEQ TSP property-line standards.³⁹ According to Mr. Hunt's calculations, the Facility emissions would exceed the TCEQ TSP 1 hour net ground level standard by a factor of 2.4 and would exceed the predicted TCEQ 3-hour net ground level standard by a factor of 3.2.⁴⁰

The different modeling results reached by the parties regarding PM2.5 and TSP are largely a result of the different emissions rates used as inputs to the model. CASCC Expert Mr. Hunt testified that Applicant did not properly calculate the emission sources for all of the proposed Facility.⁴¹ Most significantly, according to Mr. Hunt, Applicant did not properly address the on-site haul roads and the material stockpiles.⁴² In calculating the expected emission rates from the 288 Site,

³⁵ Id. at line 34.

³⁶ Id. at page 24, Line 21-22.

³⁷ Prefiled Direct Testimony of CASCC Expert Witness Michael Hunt ("Hunt"), Protestants' Exhibit 11, Page 23, Line 688-695; *See also*, Protestant Exhibit P-9.

³⁸ Testimony of Harris County Expert Lucy Frasier, Transcript Page 400, Line 17-24.

³⁹ Prefiled Direct Testimony of CASCC Expert Witness Michael Hunt ("Hunt"), Protestants' Exhibit 11, Page 21, Line 629-635; *See also*, Protestant Exhibit P-9.

⁴⁰ Id.

⁴¹ Prefiled Direct Testimony of CASCC Expert Witness Michael Hunt ("Hunt"), Protestants' Exhibit 11, Page 5, Line 134-144.

⁴² Id.

Mr. Hunt used the paved roads emission factor from Section 13.2.1 of AP-42 for the road emissions.⁴³ Mr. Hunt also included his estimated haul road emissions in both his “short term” twenty-four (24) hour averaging period and his “long-term” modeling runs that predict impacts on an annual average basis.⁴⁴ Mr. Hunt also testified that Applicant’s stockpile emission calculations and results were “impossible,” because his modeling results showed the same emission concentration rates from the proposed Facility as those found in the original permit even though the amount of material passing through the stockpiles in the proposed permit has doubled.⁴⁵ For an accurate estimate of stockpile emissions, Mr. Hunt recommends calculating the emissions for each of the activities that result in emissions from storage piles including emissions from: dropping material onto storage piles, emissions from traffic around the storage pile and emissions from wind erosion.⁴⁶

II Procedural History.

Applicant filed its change of location request on October 6, 2003.⁴⁷ This is Applicant’s third attempt to relocate a permitted portable concrete crusher to a site in the Crestmont/Sunnyside community.⁴⁸ On October 16, 2003, SCC’s application was declared administratively complete. On October 23, 2003, Applicant’s Notice of Receipt and Intent to Obtain an Air Quality Permit was

⁴³Prefiled Direct Testimony of CASCC Expert Witness Michael Hunt (“Hunt”), Protestants’ Exhibit 11, Page 20, Line 591-605.; *See also*, Protestant Exhibit P-9.

⁴⁴Prefiled Direct Testimony of CASCC Expert Witness Michael Hunt (“Hunt”), Protestants’ Exhibit 11, Page 20, Line 591-605.

⁴⁵Prefiled Direct Testimony of CASCC Expert Witness Michael Hunt (“Hunt”), Protestants’ Exhibit 11, Page 11, Line 303-316.

⁴⁶*Id.*

⁴⁷Prefiled Direct Testimony of Applicant Expert Witness Tim Prince (“Prince”), Applicant’s Exhibit 52, Page 7, Line 20.

⁴⁸On February 8, 2000, the Houston Regional Office granted Applicant permission to relocate a concrete crusher to 10501 E. Almeda Street in Houston, Harris County, Texas. A public meeting was held and motions to overturn the permit were timely filed. On April 5, 2000 the Commission granted motions to overturn filed by Texas Pipe & Supply Company, Inc. and 288/Holmes Road JV, TNRCC Docket No. 2000-0275-AIR. On June 28, 2000, Applicant filed its second notice to relocate a portable concrete crusher to 10501 E. Almeda Street in Houston, Harris County, Texas. Applicant’s second portable concrete crusher relocation request was designated Permit No. 9733C. This application was subsequently withdrawn by SCC during the contested case hearing process after Applicant received a Motion For Summary Disposition Response from the Executive Director (“ED”) stating that the relocation did not comply with permit requirements.

published in the *Houston Press*. On January 15, 2004, Applicant's Notice of Application and Preliminary Decision was also published in the *Houston Press*. On January 27, 2004, the TCEQ held a public meeting on SCC's Application in Houston, Texas at the Blueridge United Methodist Church. The public comment period ended on February 17, 2004. The Executive Director's Response to Comments, and its preliminary decision on SCC's permit application, was mailed by the Chief Clerk of the TCEQ on June 9, 2004. The deadline to file a hearing request with the TCEQ was July 9, 2004.

The TCEQ received over fourteen hundred (1,400) timely contested case hearing requests and one (1) request for reconsideration on the Application. On September 29, 2004, the Commission considered this matter at Agenda and determined that the City of Houston, Citizens Against Southern Crushed Concrete ("CASCC"), and Texas Pipe & Supply Co., Inc. ("Texas Pipe"), were all "affected persons," granted their requests for a contested case hearing and referred the case to the State Office of Administrative Hearings ("SOAH").⁴⁹ In referring this application to SOAH, the Commission limited the scope of the hearing to the following issues:

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 emission's calculations are accurate?;
5. Is a stockpile limitation necessary and are stockpile emissions adequately addressed in the permit conditions?; and,
6. Whether or not the record keeping requirements set forth in the draft permit are sufficient to enable enforcement.⁵⁰

At the preliminary hearing in Houston, Texas on December 16, 2004, the City of Houston, Harris County, Citizens Against Southern Crushed Concrete, and Texas Pipe & Supply Co., Inc., were all designated as parties. Applicant and Protestants all timely pre-filed testimony. An

⁴⁹Tex. Natural Resource Conservation Comm'n, An Interim Order Concerning the *Application by Southern Crushed Concrete to Authorize the Relocation of a Portable Rock Crushing Facility*, TCEQ Docket No. 2004-0839-AIR (Oct. 04, 2004) Page. 1.

⁵⁰ Id. at page 2.

evidentiary hearing on the application was held on Monday, September 19, 2005 through Wednesday, September 21, 2005 in Houston, Texas.

III. Summary of OPIC's Argument

OPIC recommends denial of SCC's permit application because the evidence at hearing demonstrated that SCC's permit would not be protective of human health and the environment. At hearing, both the Applicant's and the Protestant's toxicologist experts agreed that the proposed Facility's PM 2.5 emissions have a potential to adversely impact the health of those persons residing near the 288 Site.⁵¹ The evidence also demonstrated that Applicant would exceed the TCEQ TSP property line standards and thereby contribute to a nuisance condition in violation of TCEQ rule 30 TAC Section 101.4. The Commission cannot issue permits that are not protective of human health and the environment;⁵² therefore, SCC's permit application should be denied.

IV. Argument

SCC has the burden of proof with respect to the issues referred to hearing by the Commission.⁵³ The burden of proof remains with the Applicant throughout this proceeding and does not shift to the Protestant.⁵⁴ In its closing OPIC will focus on what it considers as the two (2) main public interest issues referred to SOAH: (1) whether operation of the SCC Facility at the 288 Site will have an adverse affect on the health of the requesters who live within one mile of the 288 Site; and, (2) whether Applicant's emission's would cause, or contribute to, a nuisance condition.

A. Applicant's permit should be denied because Facility emission's will adversely impact surrounding residents' health.

At issue is whether emissions from the Facility will adversely impact the health of the requesters who live within one mile of the facility. OPIC concludes that the proposed SCC Facility emissions have the potential to adversely impact the health of the residents in the Reed Parque

⁵¹ Prefiled Direct Testimony of Applicant's Expert Witness Dydek, Applicant's Exhibit 53, Page 13, Line 2-16.

⁵² TEX. HEALTH AND SAFETY CODE ANN. §382.002; 30 TAC §101.4.

⁵³ 30 TAC Section 80.17

⁵⁴ Id.

Apartment Complex less than a mile away from the proposed Facility site. In reaching its conclusion, OPIC relied upon the testimony of Harris County's toxicologist Lucy Frasier that the PM2.5 emissions from the Facility will adversely impact the health of those persons who reside at the Reed Parque Apartment Complex.⁵⁵ Lucy Frasier's testimony regarding the adverse health effects of SCC's proposed Facility at the 288 Site was based upon the background concentrations set forth in Protestant's modeling contained in CASCC Exhibit No. 9 and the proposed new NAAQS levels for PM2.5.⁵⁶

Applicant claims it has met its burden of proof because its modeling expert followed current TCEQ guidance and the concentrations from Applicant's modeling meet the current NAAQS and TCEQ TSP property-line standards. Applicant also claims that Protestant's position that the emissions from the Facility at the 288 Site will adversely affect the health of surrounding residents is suspect because Protestants' modeling results are unreliable and the proposed new PM2.5 NAAQS is too speculative.⁵⁷ OPIC disagrees.

1. The main issue is whether surrounding residents' health will be impacted, not whether Applicant complied with the TCEQ Modeling Guidance.

The TCEQ's review of a permit consists of five basic elements: (1) review of technical information; (2) evaluation regarding whether the proposed emission controls meet the TCEQ criteria for the Best Available Control Technology ("BACT"); (3) determination regarding whether any specific state or federal air regulations apply to the proposed operations and consideration of these regulations in the proposed emission controls and calculated emissions for the site; (4) evaluation of whether the proposed operations will be protective of human health and the environment; (5) drafting of the permit language to ensure the proposed plant operations employ BACT and are consistent with the application's representations and the technical analyses conducted

⁵⁵ Testimony of Harris County Expert Lucy Frasier, Transcript Page 422, Line 6-16.

⁵⁶ Id.

⁵⁷ Prefiled Direct Testimony of Applicant's Expert Witness Dydek, Applicant's Exhibit 53, Page 13, Line 2-16.

during the permit application review process.⁵⁸ Therefore, the issue of whether a proposed Facility's emissions will adversely impact the health of surrounding residents is a separate determination from whether the application meets any specific state or federal air regulations. Moreover, the question of whether the Applicant met the TCEQ's current requirements was not one of the issues referred by the Commission to SOAH. The issue referred was whether the emissions from the site will adversely impact surrounding residents' health.

2. Protestants' modeling results are more reliable than Applicant's.

OPIC does not find Applicant's modeling results as accurate and reliable as Protestants' modeling results because Applicant's results do not quantify all the possible particulate emissions from the Facility at the 288 Site. The main point of contention between the modeling of the Applicant and Protestants is that Applicant did not include emissions from the haul roads in any of its short term modeling runs.⁵⁹ Protestants challenge the appropriateness of excluding consideration of maximum short term road emissions, asserting that this practice results in vastly underestimating the maximum amount of emissions that may result from the plant when determining whether applicable federal and state standards are met for 24-hour, 3-hour and 1-hour averaging periods.⁶⁰

OPIC agrees with Protestants' argument.

Applicant counters that it relies upon the TCEQ Air Quality Monitoring Guidelines in excluding haul road emissions from its short term modeling.⁶¹ The Applicant's modeling expert, testified that road emission equations "are not intended for hourly calculations" and "are not valid for short-term averaging periods." The TCEQ's TCEQ Air Quality Monitoring Guidelines does state, "In general do not include road emissions."⁶² However, TCEQ Guidance does not prohibit

⁵⁸Prefiled Direct Testimony of Applicant Expert Witness Tim Prince ("Prince"), Applicant's Exhibit 52, Page 4-5, Line 26-37, 1-7.

⁵⁹Prefiled Direct Testimony of CASCC Expert Witness Hunt, Protestants' Exhibit 11, Page 12, Line 356-361.

⁶⁰Prefiled Direct Testimony of CASCC Expert Witness Hunt, Protestants' Exhibit 11, Page 14, Line 408-413 (Applicant underestimates short term emissions).

⁶¹ Prefiled Direct Testimony of Applicant Expert Witness Prince, Applicant's Exhibit 52, Page ____; *See also*, Applicant's Exhibit No. 23.

⁶²Testimony of Protestant Witness Mr. Hunt, transcript page 358, Line 5-17.

including road emissions. The policy for road emissions evaluation set forth in the memorandum dated February 25, 2000 from John Steib, Director, Air Permits Division (“Steib memorandum”) also does not provide detail on this subject. The policy simply states that road emissions for materials handling facilities such as concrete batch plants should be calculated and impacts evaluated only for long term (annual) periods because there are “no reliable calculation methods for shorter periods (24-hour, 3-hour, 1-hour).” OPIC shares Protestants’ concerns that excluding the maximum hourly road emissions from consideration may result in underestimating potential short term off-site impacts. The policy for excluding these emissions stated in the Steib memorandum states a concern about reliability of short term calculations for road emissions, but does not explain why there should be less confidence placed in short term road emission calculations than is placed in other short term calculations.

The appropriate equation to use for the calculation of road emissions is also a key issue in this case. Protestants’ expert, Mr. Hunt, testified that use of the paved versus the unpaved road equation is the primary reason for the difference in the parties’ emissions calculations and resulting modeling.⁶³ Applicant followed TCEQ guidance in using a formula derived from AP-42’s unpaved road equation to calculate road emissions. Protestants dispute that the unpaved road equation is appropriate for use in this case because: (1) there is a paved road equation in AP-42 and it is rated more reliable; (2) the roads at the SCC Facility will be paved; and (3) the ED has not provided a satisfactory explanation of why the unpaved road equation is better. For these reasons, the record does not support a finding that the unpaved road equation is more appropriate than the paved road equation for calculating the emissions from the paved roads at the proposed SCC Facility.

As discussed above, Applicant uses an unpaved factor for calculating emissions from haul roads that are paved and excludes the haul road emissions from its short term emission calculations. The TCEQ TSP Property line concentration regulations and the NAAQS for PM10 and PM2.5 do not exempt any source of emissions from consideration.⁶⁴ Therefore OPIC agrees with Protestant CASCC expert Hunt’s opinion that Applicant cannot meet its burden of proof that the Facility will

⁶³ Tr at page 904, lines 3-13.

⁶⁴ Prefiled Direct Testimony of CASCC Expert Witness Hunt, Protestants’ Exhibit 11, Page 14-15, Line 417-441.

comply with these ambient air quality standards if it does not include haul road emissions in its short-term modeling.⁶⁵ OPIC disagrees with Applicant's assertions that Protestant's modeling calculations are flawed or inappropriate. Moreover, OPIC finds that Protestant emission calculations are more reliable.

3. Sufficient evidence exists that there is a potential for adverse health impacts at off-property concentrations of PM2.5 that exceed an annual average of 12 ug/m3 or if PM2.5 concentrations exceed a 24-hour average of 25 ug/m3.

Applicant's toxicologist expert Dr. Dydek testified that he agrees that there is a potential for adverse impacts to occur at an annual average PM2.5 concentration between 12 ug/m3 and 15 ug/m3 and at a 24 hour PM2.5 concentrations between 25 ug/m3 and 65 ug/m3.⁶⁶ However, Dr. Dydek claims it is premature to employ any threshold other than the current NAAQS standards to evaluate potential health impacts.⁶⁷ Dr. Dydek would wait until the EPA promulgated new standards before applying the current evidence regarding the adverse health impacts of PM2.5.⁶⁸ OPIC disagrees with this approach.

Waiting until final EPA rules are published on September 27, 2006⁶⁹ to see what the EPA proposes is too long a wait. The EPA Staff Report states: "Regardless of the relative weight placed on the estimates associated with either an assumed cutpoint of 10 ug/m3 or the lowest cutpoints considered, the risk assessment indicates the likelihood that thousands of premature deaths per year would occur in urban areas across the US even upon attainment of the current PM2.5 standards."⁷⁰ Considering the terrible health effects linked to exposure to particulate matter, especially in children,

⁶⁵ Id.

⁶⁶ Prefiled Direct Testimony of Applicant Expert Dydek, Applicant's Exhibit 53, Page 13, Line 11-35.

⁶⁷ Prefiled Direct Testimony of Applicant Expert Dydek, Applicant's Exhibit 53, Page 13, Line 11-35.

⁶⁸ Id.

⁶⁹ Prefiled Direct Testimony of Harris County Toxicology Expert Witness Dr. Lucy H. Fraiser ("Fraiser"), Harris County's Exhibit HC 28, Page 9, Line 37-40; *See also*, HC Exhibit 4, U.S. EPA's Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information OAQPS Staff Paper (June 2005), Page 1-7.

⁷⁰ Staff Draft Paper, HC Exhibit 4. Page 5-14, Section 5.3.1.3 Summary.

and the dire consequences of high consistent exposure, Awaiting the final results of a slow administrative process would prevent the TCEQ from following the mandate given the TCEQ by the Texas Legislature to protect the health and welfare of Texans.⁷¹ Moreover, Protestants put on testimony that the particulate matter emitted from crushing concrete road surfaces, like that expected to be crushed at the Facility, may be especially toxic due to deposited Polycyclic Aromatic Hydrocarbons (“PAHs”) from automobile exhaust.⁷² PAH molecules can be highly carcinogenic. Therefore, OPIC recommends that the Commission deny this Application in order to protect human health.

B. Applicant’s permit should be denied because relocation of the concrete crusher to the 288 Site would result in a nuisance condition in violation of 30 TAC Section 101.4.

The Commission referred the issue regarding whether the emissions from the proposed SCC Facility would adversely affect the ability of the requesters to use and enjoy their property or cause damage to the requester’s property. TCEQ rules require that emissions from a Facility not constitute a nuisance.⁷³ Specifically, 30 TAC Section 101.4 entitled states:

No person shall discharge from any source whatsoever one or more air contaminants or combinations thereof, in such concentration and of such duration as are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property, or as to interfere with the normal use and enjoyment of animal life, vegetation, or property.

The TCEQ has an established a property-line standard for total suspended particulate matter (“TSP”) that limits the allowable net concentration from emission sources.⁷⁴ The TCEQ TSP standard found in 30 TAC Section 111.155(1) & (2) states:

No person may cause, suffer, allow, or permit emissions of particulate matter from a source

⁷¹TEX. HEALTH AND SAFETY CODE ANN. §382.002; 30 TAC §101.4.

⁷²Testimony of Harris County Expert Witness Frasier, Transcript Page 428, Line 7-25 & Page 429, Line 1-8; *See also*, Staff Draft Paper, HC Exhibit 4, Page 5-57.

⁷³ 30 TAC Section 101.4

⁷⁴Prefiled Direct Testimony of Applicant Expert Witness Prince, Applicant’s Exhibit 52, Page 10-11 & 1-7; at Line 9-15; *See also*, 30 TAC Section 111.155(1) & (2).

or sources operated on a property or from multiple sources operated on contiguous properties to exceed any of the following net ground level concentrations.

(1) Two hundred micrograms per cubic meter of air sampled, averaged over any three consecutive hours.

(2) Four hundred micrograms per cubic meter of air sampled, averaged over any one-hour period.

30 TAC Section 111.155(1) & (2) contemplates that emissions of all particulate matter from all sources operated on the property be measured to determine if they exceed the TCEQ TSP standard. If the SCC Facility meets the TSP standards then its site operations are not expected to cause a nuisance or adversely impact any persons use and enjoyment of their property.⁷⁵ The reverse is also true. If the expected SCC Facility emissions exceed the TSP standards then the SCC emissions will probably constitute a nuisance and adversely affect the ability of the requesters to use and enjoy their property or cause damage to the requester's property.⁷⁶

In making the determination regarding whether SCC's proposed Facility meets the TCEQ TSP standards, OPIC relies on Protestant's modeling results because, as discussed above, they are in a form acceptable to the TCEQ, more reliable and more complete than Applicant's modeling calculations.⁷⁷ The different modeling results reached by the parties regarding TSP and PM2.5 are largely a result of the different emissions rates used as inputs to the model. CASCC Expert Mr. Hunt testified that Applicant did not properly calculate the emission sources for all of the proposed Facility.⁷⁸ Most significantly, according to Mr. Hunt, Applicant did not properly address the on-site haul roads and the material stockpiles.⁷⁹ The TCEQ TSP concentration regulation and the short term NAAQS for PM10 and PM2.5 do not exempt any source of emissions from consideration.

⁷⁵Prefiled Direct Testimony of Applicant Expert Witness Dydek, Applicant's Exhibit 53, Page 19, Line 25-29.

⁷⁶Testimony of Harris County Expert Witness Frasier, Transcript Page 398, Line 3-21.

⁷⁷Testimony of CASCC Expert Witness Hunt, Transcript, Page 344, Line 10-25.

⁷⁸Prefiled Direct Testimony of CASCC Expert Witness Michael Hunt ("Hunt"), Protestants' Exhibit 11, Page 5, Line 134-144.

⁷⁹ Id.

Applicant cannot meet its burden of proof that the Facility will comply with these ambient air quality standards if it does not include haul road emissions in its short-term modeling.⁸⁰ Therefore, OPIC cannot rely on Mr. Prince's modeling results because Mr. Prince's calculations do not include all possible particle emissions from the proposed Facility in its modeling, as is contemplated by 30 TAC Section 111.155(1) & (2).

According to Protestants' modeling results, the SCC Facility emissions will exceed the TCEQ property-line standards for TSP for both the one-hour and three-hour averaging periods.⁸¹ Since the SCC emissions exceed the relevant TSP standards, it is likely that the SCC emissions will constitute a nuisance in violation of the TCEQ requirements set forth in 30 TAC Section 101.4. As stated in the TCEQ rule, emissions that, "adversely affect human health or welfare, animal life, vegetation, or property, or as to interfere with the normal use and enjoyment of animal life, vegetation, or property," are not allowed.⁸² Therefore, Applicant's permit should be denied.

V. Conclusion

OPIC recommends denial of SCC's permit application because the Facility's PM 2.5 emissions have a potential to adversely impact the health of those persons residing near the 288 Site.⁸³ The evidence also demonstrated that Applicant would exceed the TCEQ TSP property line standards and thereby contribute to a nuisance condition in violation of TCEQ rule 30 TAC Section 101.4.

⁸⁰Prefiled Direct Testimony of CASCC Expert Witness Hunt, Protestants' Exhibit 11, Page 14-15, Line 417-441.

⁸¹Prefiled Direct Testimony of CASCC Expert Witness Michael Hunt ("Hunt"), Protestants' Exhibit 11, Page 21, Line 629-635; *See also*, Protestant Exhibit P-9.

⁸² 30 TAC Section 101.4.

⁸³Prefiled Direct Testimony of Applicant's Expert Witness Dydek, Applicant's Exhibit 53, Page 13, Line 2-16.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2005, the original of the Office of Public Interest Counsel's Closing Argument was served upon the Chief Clerk of the TCEQ and a true and correct copy on all persons listed on the attached Mailing List via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

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