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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 13, 2007

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

2007 AUG 13 PM 3:37
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**RE: VULCAN CONSTRUCTION MATERIALS, LP
TCEQ DOCKET NO. 2006-2168-AIR**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Vic McWherter".

Vic McWherter, Senior Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2006-2168-AIR

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IN THE MATTER OF THE
APPLICATION OF VULCAN
CONSTRUCTION MATERIALS, LP
FOR RENEWAL OF AIR QUALITY
PERMIT NO. 337M

§ BEFORE THE
§ TEXAS COMMISSION ON
§ ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUESTS FOR HEARING**

COMES NOW, the Office of Public Interest Counsel ("OPIC") of the Texas Commission on Environmental Quality (the "Commission" or "TCEQ") and files this Response to Hearing Requests in the above-referenced matter, and would respectfully recommend that the Commission find that no right to a hearing exists on this application for renewal of an air permit that does not authorize an increase in allowable emissions or the emission of a new contaminant.

I. INTRODUCTION

Vulcan Materials LP ("Vulcan" or "Applicant") has applied for a renewal of its permit authorizing continued operation of its hot mix asphalt plant located at 12354 FM 1560 N. in Helotes, Bexar County, Texas. The facility operates 2,600 hours per year. The permit authorizes maximum production rates of 400 tons per hour and 500,000 tons per year of standard hot mix and 40,000 tons per year of hot mix with crumb rubber. According to the Executive Director's technical review, any emission increases on the new maximum allowable emission rates table (MAERT) result from the identification of previously existing sources and to the use of new AP-42 emission factors. The technical review concludes that actual emissions at the facility have not increased since the controls remain the same, no new sources have been constructed, and there has not been an increase or change in production rates.

The Executive Director (hereinafter "ED") declared the application administratively complete on August 25, 2005. The applicant published a Notice of Receipt of Application and

Intent to Obtain an Air Permit on September 15, 2005, in the *San Antonio Express News*.

Spanish language notice was published on September 15, 2005 in *Conexion*. During the comment period, the TCEQ received hearing requests from Mr. William Mack Rigby and M.B. Farias. The response to comments was mailed by the TCEQ Chief Clerk on November 28, 2006. Mr. William Mack Rigby subsequently filed a timely hearing request, received by the Chief Clerk on December 27, 2006.

Based on the information submitted in the request and a review of the information available in the Chief Clerk's file on this application, OPIC recommends denying the hearing request in light of the statutory prohibition against holding a public hearing on a "renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted."¹

II. APPLICABLE LAW

Because this application was declared administratively complete after September 1, 1999, it is subject to the requirements of Texas Health and Safety Code Section 382.056 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in

¹ Texas Health and Safety Code §382.056(g).

the public notice of the application. 30 TEXAS ADMIN. CODE (hereinafter "TAC") § 55.201(d) (2006). Hearing requests must be submitted to the Chief Clerk's Office in writing no later than 30 days after the Chief Clerk's transmittal of the Executive Director's Response to Comments. 30 TAC § 55.201(c).

Under 30 TAC section 55.203(a), an "affected person" is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." This justiciable interest does not include an interest common to the general public. *Id.* Relevant factors that will be considered in determining whether a person is affected include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application. 30 TAC § 55.211(c).

Accordingly, responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;

- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

30 TAC § 55.209(e).

III. DISCUSSION

A. A Right to Hearing Does Not Exist on Vulcan's Renewal Application because the Renewal Will Not Result in an Increase in Allowable Emissions or the Emission of an Air Contaminant Not Previously Emitted.

As an initial matter, the Commission must determine whether a right to a contested case hearing exists on this application. No right to a contested case hearing exists on a renewal application under Chapter 382 of the Texas Health and Safety Code if the application would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.² However, notwithstanding THSC section 382.056g), the Commission may hold a hearing on a permit renewal "if the commission determines that the application involves a facility for which the applicant's compliance history is in the lowest classification under Section 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections."³ TCEQ rules allow the Commission to hold a contested case hearing in the following circumstance: "if the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations."⁴

² Tex. Health & Safety Code (hereinafter "THSC") § 382.056 (g), (o); 30 TAC § 55.201(i)(3); 55.211(d)(2).

³ THSC § 382.056(o).

⁴ 30 TAC § 55.201(i)(3)(C); *see also* 30 TAC § 55.211(d)(2).

Based on the technical review of this application, OPIC cannot find that this permit renewal would result in increased allowable emissions or the emission of an air contaminant not previously emitted. According to the technical review, there would be no increase in actual emissions because no new sources have been constructed and controls will remain the same. The technical review further states that any increases in allowable emissions result from changes to AP-42 emission factors, the incorporation of an existing permit by rule registration, and the inclusion of previously existing facilities which had not previously been identified on the emissions table.

The Applicant's compliance history for the period between September 1, 2001 and August 31, 2006 shows site and company classifications of "average." Therefore, based on a review of the criteria set forth in THSC section 382.056(g) and (o), the applicant's compliance history does not trigger an opportunity for a hearing on this renewal application based on the Applicant's compliance history. OPIC notes, however, that the requestors have raised significant complaints in their filings concerning dust emissions and operations at the facility that have resulted in past "blasts" or explosions. OPIC is sympathetic to these concerns, despite the fact that Vulcan's compliance history is classified as "average." OPIC encourages the requestors to report any and all complaints to the TCEQ pursuant to the instructions provided in the ED's response to comments so that any future deviations from the requirements of the permit may be appropriately documented.

For these reasons, OPIC must conclude that there is no right to a hearing on this renewal application. In the event the Commission disagrees, the OPIC offers the following analysis set forth below.

B. Affected Person Analysis

If the Commission decides that a right to hearing exists on this application, both M. B. Farias and William Mack Rigby have a personal justiciable interest related to a legal right affected by this application. The map provided by the executive director shows that M.B. Farias is located approximately ¼ mile from emission sources and Mr. Rigby is located just over 1 mile from emission sources. The proximity of the requestors to the proposed facility combined with their interests regarding health effects and nuisance conditions support a finding that the requestors are “affected persons.”⁵ The hearing requests state concerns protected by the law under which the application will be considered, including health⁶ and nuisance conditions⁷. Such interests reasonably relate to the potential effects of facility operations.⁸ In addition, the requestors’ location relative to the facility shows a reasonable relationship between the interests stated and the activity regulated.⁹ Furthermore, nuisance dust conditions may affect the requestors’ health and their use of their property.¹⁰ Therefore, if the Commission finds a right to hearing exists on this application, OPIC recommends that the Commission find that the requestors are affected persons.

C. Issues Analysis

The hearing requests collectively raise the following issues:

- (1) Will the facility adversely affect the hearing requestors’ health;
- (2) Will the facility cause nuisance dust conditions; and
- (3) Should limitations be placed on the Applicant’s hours of operation at the permitted facility?

⁵ 30 TAC § 55.203(c).

⁶ THSC § 382.0518(b)(2) (2006).

⁷ 30 TAC § 101.4 (2006).

⁸ 30 TAC § 55.203(c)(3).

⁹ *Id.*

¹⁰ 30 TAC § 55.203(c)(4).

1. The hearing requestors raise issues disputed by the parties.

No agreement exists between the parties on the issues discussed above. In the ED's Response to Comments, the ED states that compliance with the renewed permit's conditions should ensure compliance with applicable National Ambient Air Quality Standards (NAAQS) and thereby protect human health, general welfare, and property.¹¹ As evidenced by the hearing requests, the requestors dispute the position of the ED on these issues. Therefore, the issues set forth above are disputed.¹²

2. The hearing requestors raise issues of fact.

The requestors raise specific factual issues in their hearing requests about nuisance conditions and health concerns. As these are issues of fact, rather than issues of law or policy, these issues are appropriate for referral to hearing.¹³

3. The hearing requestors raise issues similarly raised in comments on the application.

Issues regarding nuisance conditions and health concerns that were raised during the comment period have not been withdrawn. Furthermore, while Mr. Rigby's December 26, 2006 hearing request expresses an interest in limiting operating hours primarily because of concerns about noise, OPIC finds that this request reasonably relates to the requestors' previously stated concerns regarding nuisance conditions and human health. Therefore, OPIC finds that the issues raised in the hearing request were also raised during the public comment period.¹⁴

¹¹ Executive Director's RTC, Response 1.

¹² 30 TAC §§ 50.115(c)(1); 55.201(d)(4); 55.209(e)(2); 55.211(c)(2)(A).

¹³ 30 TAC § 55.211(b)(3)(A), (B).

¹⁴ 30 TAC §§ 55.201(c), (d)(4); 55.211(c)(2)(A).

4. The issues raised by the requestors regarding nuisance conditions and the effect of emissions on the hearing requestors' health are relevant and material to the Commission's decision on this application.

The hearing request raises issues that are relevant and material to the Commission's decision on this application under the requirements of 30 TAC sections 55.201(d)(4) and 55.211(c)(2)(A). The factual issues raised by the hearing requestors relate directly to whether the applicant will meet the requirements of applicable substantive law.¹⁵

In accordance with THSC section 382.0518(b)(2), the Commission may grant a permit "if, from the information available to the commission, including information presented at any hearing held under Section 382.056(k), the commission finds:...(2) no indication that the emissions from the facility will contravene the intent of this chapter, including protection of the public's health and physical property." Therefore, the facility's effect on the hearing requestors' health is relevant and material to the Commission's decision on this application.¹⁶

Pursuant to 30 TAC section 101.4, the Applicant shall not "discharge...air contaminants...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."¹⁷ Therefore, nuisance dust conditions must be taken into account in the Commission's determination on this application.

OPIC finds that other issues raised in the hearing requests are not relevant and material to the Commission's decision. Specifically, concerns about noise, transportation, and greenhouse

¹⁵ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated the following: "[a]s to materiality, the substantive law will identify which facts are material...it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

¹⁶ 30 TAC § 55.209(e)(6) (2006).

¹⁷ See also 30 TAC § 111.155 (2006).

gases, are matters which the agency does not currently regulate. OPIC cannot support including these issues in any referral to SOAH.

5. Any Commission referral to SOAH should include issues regarding human health and nuisance conditions.

In light of the requirements of 30 TAC sections 50.115(b) and 55.211(b)(3)(A)(i), OPIC recommends that any referral to the State Office of Administrative Hearings ("SOAH") include the following issues:

- (1) Will the facility cause nuisance dust conditions? (hearing requests of Mr. Rigby and M.B. Farias);
- (2) Will the facility adversely affect human health? (hearing requests of Mr. Rigby and M.B. Farias); and
- (3) Should the permit include limitations on Vulcan's hours of operations? (hearing request of Mr. Rigby dated November 28, 2006)

D. OPIC Estimates that the Maximum Expected Duration of Hearing will be Six Months.

Commission rule 30 TAC section 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall proceed longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. In assisting the Commission to state a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC section 55.209(e)(7), OPIC estimates that the maximum expected duration of any hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

III. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission find that no right to a hearing exists on this application for renewal of an air permit that does not authorize an increase in allowable emissions or the emission of a new contaminant. However, if the Commission finds that a right to hearing exists on this application, OPIIC recommends granting the contested case hearing requests of M. B. Farias and William Mack Rigby and referring this matter to the State Office of Administrative Hearings for a hearing on the issues described above.

Respectfully submitted,

Blas J. Coy, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2007, the original and eleven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

Vic McWherter
Vic McWherter

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TCEQ DOCKET NO. 2006-2168-AIR

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