

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*



TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
Blas J. Coy, Jr., *Public Interest Counsel*

2007 NOV 15 PM 3:44
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHIEF CLERKS OFFICE
Protecting Texas by Reducing and Preventing Pollution

November 15, 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

RE: **BORDER STEEL, INC.**
TCEQ DOCKET NO. 2007-1039-AIR

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script that reads "Emily A. Collins".

Emily A. Collins, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: www.tceq.state.tx.us

TCEQ DOCKET NO. 2007-1039-AIR

IN THE MATTER OF THE
APPLICATION BY BORDER STEEL,
INC., FOR PERMIT NOS. 19933 AND
EE0011P

§
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§

BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY

TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY
2007 NOV 15 PM 3:45
CHIEF CLERK'S OFFICE

THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUEST 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 Request in the above-referenced matter, and would respectfully recommend denying the hearing requests.

I. INTRODUCTION

Border Steel, Inc., ("Border Steel" or "Applicant") applied to TCEQ for renewal of Air Quality Permit No. 19933 to authorize continued operations of the Vinton Steel Mill Plant in El Paso County, Texas. The renewal application also seeks incorporation of Air Quality Permit No. 73387, which authorized two grandfathered electric arc furnaces ("EAFs"), and two standard exemption permit-by-rule sources into Permit 19933. While Permit 19933, issued in 1990, authorized construction of a new EAF to replace the grandfathered EAFs as well as scrap handling and billet casting, Border Steel continued operations with the grandfathered EAFs and never constructed the new EAF. Border Steel amended Permit 19933 on October 19, 2006, to reflect actual operations and emission sources. Therefore, the draft permit contains a Maximum Allowable Emission Rates Table ("MAERT") that combines the previously-authorized emissions from Permit 19933 (excluding the previously-proposed new EAF), Permit 73387, and the two permit-by-rule standard exemptions. The draft permit also contains many new Special

Conditions added with the agreement of the Applicant "to satisfy citizen concerns and clarify methodologies for determining permit compliance."¹

TCEQ received Border Steel's application on September 20, 2005, and the Executive Director ("ED") declared the application administratively complete on October 12, 2005. The Applicant published a Notice of Receipt of Application and Intent to Obtain an Air Permit Renewal ("NORI") on October 28, 2005, in the *El Paso Times*, and on October 29, 2005, in *El Paso Y Mas*. The Applicant published an amended NORI to include notice of the consolidation of Permit 73387 with Permit 19933 and to add air contaminants to the first NORI. The first Amended NORI was published on November 30, 2006 in the *El Paso Times* and in *El Paso Y Mas* to add language to the Notice that informed the public that the Applicant is seeking to incorporate Permit No. 73387 into Permit No. 19933. The NORI was republished in *El Paso Y Mas* on December 7, 2006, due to illegibility of the November 30, 2006, notice published in the same paper. TCEQ held a public meeting on the application on December 14, 2006, in Vinton, Texas. The Applicant published a Second Amended NORI on January 11, 2007, in the *El Paso Times* and in *El Paso Y Mas* due to TCEQ legal staff's request to include information in the Notice on the opportunity to request a contested case hearing. TCEQ received timely hearing requests from thirty-six individuals on November 14, 2005. The public comment and hearing request period ended on January 26, 2007. The ED issued a Response to Public Comment on July 2, 2007.

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

¹ Permit Renewal and Consolidation Technical Review Analysis for Border Steel Permit No. 19933, Review Summary Section, third paragraph, signed by Mr. Dois Webb, Permit Reviewer on July 12, 2007, and Stephanie L. Howell, Team Leader/Section Manager/Backup on July 20, 2007.

requests due to 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."²

II. APPLICABLE LAW

The Executive Director declared this application administratively complete on October 12, 2005. As the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of Texas Health & Safety Code ("THSC") section 382.056 and Texas Water Code ("TWC") Chapter 5, Subchapter M, Environmental Permitting Procedures, section 5.556 added by Acts 1999, 76th Leg., ch. 1350 (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 the public notice of the application. 30 TEXAS ADMIN. CODE ("TAC") § 55.201(d). 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).

² Tex. Health and Safety Code § 382.056(g) (2006).

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 Border Steel'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.³ However, notwithstanding THSC section 382.055(g), 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

Based on the technical review, the Executive Director's RTC, and the public notice, OPIC concludes that the renewal will not result in increased allowable emissions or the emission

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

of an air contaminant not previously emitted. With regard to the Applicant's compliance history, between September 21, 2000, and September 20, 2005, the site rating and classification was 8.43 or "average" and the company rating and classification was 4.18 or average.⁵ As the Applicant's compliance history is not classified in the lowest classification (poor) under the Commission's current method of determining compliance history, OPIC cannot recommend that a right to hearing exists based on the Applicant's compliance history.

Therefore, based on a review of the criteria set forth in THSC section 382.056(g) and (o), OPIC concludes 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, each of the Hearing Requestors have a personal justiciable interest related to a legal right affected by this application. The Hearing Requestors include the following individuals: Gabriel Aleman, Veronica Anchoride, Jose Cadena, Rita Calderon, Edward M. Garcia, Victoria Garcia, Maria Hinojos, Raul Hinojos, Antonia Holguin, Juan Manuel Holguin, Vicente and Antonia Lemon, San Juana Luna, Ramona Macias, Miguel Marquez, Connie Mendoza, Juan Manuel Mufios, Angelica Murillo, Laura Pasillas, Rosalinda and Rogelio Perez, Enrique Portillo, Maria J. Ramirez, Alejandro Rodriguez, Ruperto and Maria Ruiz, Family Salazar, Paula Salazar, Angelino de los Santos, David Soriano, Salvador Soriano, Abdenago Torres, Carmen Urbina, Mercedes Varela, Rosa Velasquez, Francisco Vigil, Augustin Villa, Augustin Villa Jr., and Emeterio Villareal.

⁵ An average classification denotes a rating between 0.10-45. A poor classification denotes a rating of 45 or more.

The proximity of the Hearing Requestors' residences to the proposed facility combined with their interests regarding health environmental effects and the Applicant's compliance history support a finding that they each are "affected persons."⁶ The hearing requests state that the requestors' each reside between 350 feet to 1/2 mile from the facility. The Requestors state concerns protected by the law under which the application will be considered, including health and environmental degradation⁷ and compliance history.⁸ Such interests reasonably relate to the potential effects of steel mill operations.⁹ In addition, the close proximity of the Requestors' residences to the facility also shows a reasonable relationship between the interests stated and the activity regulated.¹⁰ Therefore, if the Commission finds a right to hearing exists on this application, OPIC recommends that the Commission find that each of the Requestors are affected persons.

C. Issues Analysis

The hearing requests collectively raise the following issues:

- (1) Will the facility's operations adversely affect the hearing requestors' health and the environment;
- (2) Will the facility's operations result in water contamination;
- (3) Will the facility's operations cause nuisance conditions, including nuisance odors and dust;
- (4) Will the facility's operations cause excessive smoke;
- (5) Will the facility's operations cause noise pollution and vibrations;

⁶ 30 TAC § 55.203(c).

⁷ THSC § 382.0518(b)(2) (2006).

⁸ THSC § 382.055(d) (2006); 30 TAC § 60.1(a)(1)(A) (2006).

⁹ 30 TAC § 55.203(c)(3). The Notice of Receipt of Application and Intent to Obtain an Air Permit Renewal for this application states that the facility will emit organic compounds, nitrogen oxides, sulfur dioxide, carbon monoxide, hydrogen sulfide, and PM¹⁰.

¹⁰ *Id.*

(6) Does the Applicant's compliance history justify modification or denial of the permit?

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, dated July 2, 2007, the ED stated that the health effects study done by his staff "is not a requirement for renewal of the permit, and is not within the purview of an air quality renewal application..."¹¹ and "adverse effects to the environment are not expected."¹² In addition, the ED stated that "[e]missions from the facility are no expected to produce nuisance odors."¹³ The ED has included opacity limits in the draft permit, which, he believes, will address any concerns regarding "smoke."¹⁴ The ED also states that noise and vibrations are not within TCEQ's jurisdiction to consider, and water contamination cannot be addressed in an air permit.¹⁵ Furthermore, the Executive Director's responses indicate that he has reviewed the Applicant's compliance history to determine that additional restrictions or requirements are not justified,¹⁶ As evidenced from the hearing requests, the requestors dispute the position of the ED on these issues. Therefore, the issues set forth above are disputed.¹⁷

¹¹ Executive Director's RTC, Response 1, dated July 2, 2007.

¹² Executive Director's RTC, Response 2.

¹³ Executive Director's RTC, Response 7.

¹⁴ Executive Director's RTC, Response 3.

¹⁵ Executive Director's RTC, Responses 4, 6.

¹⁶ Executive Director's RTC, Response 17.

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

2. The Hearing Requestors raise issues of fact.

The requestors raise specific factual issues in their hearing requests about the Applicant's compliance history, odors, and health and environmental concerns. As these are issues of fact, rather than issues of law or policy, these issues are appropriate for referral to hearing.¹⁸

3. The Hearing Requestors raise issues similarly raised in comments on the application.

The hearing requestors filed their requests for hearing during the public comment period. The Executive Director appears to have based his Response to Comments on the issues raised in the hearing requests. The issues that were raised during the comment period have not been withdrawn. Therefore, the issues raised in the hearing request were also raised during the public comment period.¹⁹

4. The issues raised regarding nuisance odors, the Applicant's compliance history, opacity, and the effect of emissions on the hearing requestors' health, welfare, and environment are relevant and material to the Commission's decision on this application.

The hearing request raises issues which 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). Aside from the issues raised regarding noise, vibrations, and water contamination, the factual issues raised by the hearing requestors relate directly to whether the applicant will meet the requirements of applicable substantive law.²⁰

¹⁸ 30 TAC § 55.211(b)(3)(A), (B).

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

²⁰ 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.")

In regard to water contamination by atmospheric deposition, OPIC interprets the law to allow the Commission to consider the Applicant's stack as a nonpoint source²¹ subject to the TCEQ Nonpoint Source Management Program's Best Management Practices (BMPs).²² While Border Steel's emissions may indeed cause water quality standards exceedances and may cause degradation of water quality, the Commission must consider air deposition impact on water quality through the State's water quality standards, including antidegradation, and section 319 responsibilities.²³ TCEQ's nonpoint source pollution management program, rather than the air permit renewal currently before the Commission, provides the appropriate framework in which to assess and control an individual source's contributions to water quality degradation via air deposition of mercury. Therefore, water contamination is not relevant and material to the Commission's decision on this application.

In accordance with THSC section 382.0518(b)(2), the Commission may grant a permit to construct a facility "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

²¹ See *Chemical Weapons Working Group, Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485 (10th Cir. 1997) (holding that smokestacks are not point sources when they emit particles that eventually fall into navigable waters); *but see No Spray Coalition, Inc. v. City of New York*, 351 F.3d 602 (2nd Cir. 2003).

²² 2005 Texas Nonpoint Source Management Program Report, *available at* http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/sfr/068_04.pdf (last checked August 21, 2006).

²³ See 33 U.S.C. § 1329 (2006).

hearing requestors' health, welfare, and environment is relevant and material to the Commission's decision on this application.²⁴

The Commission regulates opacity, or the degree to which an emission of air contaminants obstructs transmission of light,²⁵ and the draft permit contains restrictions on opacity.²⁶ Therefore, the Hearing Requestors' concerns regarding visible emissions such as smoke are relevant and material to this application.

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."²⁷ Therefore, nuisance odor and particulate considerations must be taken into account in the Commission's determination on this application.

The Requestors' concern about the "risk involved with air pollution violations from this company" relate to the Commission's consideration of the Applicant's compliance history. In accordance with Texas Health and Safety Code sections 382.055(d) and 382.056(o), and 30 TAC sections 60.1(a)(1)(A) and 60.3(a)(1), the Commission must consider an Applicant's compliance history in making a decision regarding issuance of a permit renewal. Therefore, the issue of the Applicant's compliance history is relevant and material to the Commission's decision on this application.

²⁴ 30 TAC § 55.209(e)(6) (2006).

²⁵ 30 TAC §§ 101.1(73), 101.1(32), 111.111(a) (2007).

²⁶ Draft Permit No. 19933, Special Conditions 3-5.

²⁷ *See also* 30 TAC § 111.155 (2006).

5. OPIC recommends that the Commission refer the issues regarding the Requestors' health and impact to the environment as well as compliance history to SOAH.

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 adversely affect the Requestors' health, welfare, and the environment?²⁸
- (2) Does the Applicant's compliance history justify modification or denial of the permit?²⁹
- (3) Will the facility cause nuisance odor and particulate conditions?³⁰
- (4) Will the facility cause opacity violations?³¹

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

²⁸ Hearing Requests of Vicente and Antonia Lemon, Edward M. Garcia, Angelica Murillo, Emeterio Villareal, Rita Calderon, Ruperto and Maria Ruiz, Gabriel Aleman, Jose Cadena, Francisco Vigil, Laura Pasillas, Carmen Urbina, Rosalinda and Rogelio Perez, San Juana Luna, Paula Salazar, Connie Mendoza, Veronica Anchoride, Mercedes Varela, Juan Manuel Muños, Maria Hinojos, Raul Hinojos, Familia Salazar, Agustin Villa Jr., Antonia Holguin, Juan Manuel Holguin, Andenago Torres, Salvador Soriano, Angelino de los Santos, David Soriano, and Maria J. Ramirez.

²⁹ Hearing Request of Angelica Murillo.

³⁰ Hearing Requests of Rosa Velasquez, Miguel Marquez, and Antonia Holguin.

³¹ Hearing Requests of Emeterio Villareal, Rita Calderon, Gabriel Aleman, Enrique Portillo, Victoria Garcia, Rosa Velasquez, Carmen Urbina, Connie Mendoza, Maria Hinojos, Alejandro Rodriguez, Miguel Marquez, Antonia Holguin, Juan Manuel Holguin, and Angelino de los Santos.

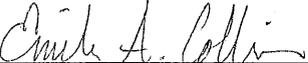
date the proposal for decision is issued. In assisting the Commission to state a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC section 55.209(e)(7), OPIC estimates that the maximum expected duration of hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. 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, OPIC recommends granting the contested case hearing requests of the individuals listed above and refer this matter to the State Office of Administrative Hearings for a hearing on the issues described above.

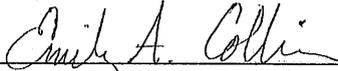
Respectfully submitted,

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By 
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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 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.



Emily A. Collins

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TCEQ DOCKET NO. 2007-1039-AIR**

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*See attached for a complete list of all
Requesters.*

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