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

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

September 27, 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 SEP 27 PM 2:21  
CHIEF CLERKS OFFICE  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**RE: H & B CONTRACTORS, LTD**  
**TCEQ DOCKET NO. 2006-1165-AIR**

Dear Ms. Castañuela:

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

Sincerely,

*Vic McWherter*  
Vic McWherter, Senior Attorney *bp gla*  
Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2006-1165-AIR

IN THE MATTER OF THE  
APPLICATION OF H & B  
CONTRACTORS, LTD FOR AIR  
QUALITY PERMIT NO. 2345

§ BEFORE THE  
§ TEXAS COMMISSION ON  
§ ENVIRONMENTAL QUALITY  
§

CHIEF CLERK'S OFFICE

2007 SEP 27 PM 2:25

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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 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

H & B Contractors, Ltd. ("H&B" or "Applicant") has applied for a renewal of its permit authorizing continued operation of its hot mix asphalt plant located at 2017 East Tinsley Road, Waco, McLennan County (the plant). The renewed permit would not authorize the construction of any new facilities nor any increase in hourly or annual production. The renewed permit would not authorize any increase in air emissions. The permit would continue to authorize a maximum production rate of 200 tons per hour of hot mix asphalt. A diesel storage tank, lime silo and associated conveyance system and replacement burners on the drum dryer previously authorized by permits by rule have been incorporated into the draft renewed.

The application was initially received on November 4, 2004. The Executive Director (hereinafter "ED") declared the application administratively complete on January 6, 2005. The applicant published a Notice of Receipt of Application and Intent to Obtain an Air Permit (NORI) on January 26, 2005, in the *Waco Tribune-Herald*. Spanish language notice was

published on January 26, 2005 in *Tiempo*. Mr. John Angerman filed a timely hearing request on February 4, 2005.

The permit was amended in February of 2007 to authorize use of first run no. 2 fuel oil to power the drum dryer. This change to the permit was processed under 30 TAC section 39.402 as a de minimus amendment not requiring public notice. As a result of the change to the permit, the applicant republished notice of the renewal application on April 4, 2007 in the same newspapers. Mr. Angerman filed an additional hearing request on April 11, 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 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."<sup>1</sup>

## 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

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<sup>1</sup> Texas Health and Safety Code §382.056(g).

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 (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 H & B'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.<sup>2</sup> 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."<sup>3</sup> 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

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

<sup>3</sup> THSC § 382.056(o).

regulatory process, including the failure to make a timely and substantial attempt to correct the violations.”<sup>4</sup>

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 Applicant's compliance history from November 24, 1999 through September 24, 2007 shows a site compliance classification of "high" and a company classification 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. OPIC is sympathetic to Mr. Angerman's concerns about emissions from the plant, despite the legal prohibition preventing the TCEQ from holding further proceedings on this application. OPIC encourages the neighbors of the facility to report any and all complaints concerning facility emissions to the TCEQ pursuant to the instructions provided in the ED's response to comments.

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, Mr. Angerman has a personal justiciable interest related to a legal right affected by this application. Mr. Angerman states that his residence is located within 1000 yards of the facility. The

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

proximity of the requestor to the proposed facility combined with his interest regarding health effects support a finding that the requestor is an "affected person."<sup>5</sup> The hearing requests state concerns protected by the law under which the application will be considered, including health<sup>6</sup> and nuisance conditions<sup>7</sup>. Such interests reasonably relate to the potential effects of facility operations.<sup>8</sup> In addition, the requestor's location relative to the facility shows a reasonable relationship between the interests stated and the activity regulated.<sup>9</sup> Therefore, if the Commission finds a right to hearing exists on this application, OPIC recommends that the Commission find that Mr. Angerman is an affected person.

### C. Issues Analysis

Mr. Angerman's requests raise the following issue:

- (1) Will the facility adversely affect the health of Mr. Angerman and nearby residents?

#### 1. The hearing requestor raises a disputed issue.

No agreement exists on the issue of the effect of facility emissions on human health. In the ED's Response to Comments, the ED states that the renewed permit's conditions should ensure compliance with applicable National Ambient Air Quality Standards (NAAQS) and thereby protect human health.<sup>10</sup> As evidenced by the hearing requests, Mr. Angerman disputes the position of the ED on this issue. Therefore, this issue is disputed.<sup>11</sup>

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<sup>5</sup> 30 TAC § 55.203(c).

<sup>6</sup> THSC § 382.0518(b)(2) (2006).

<sup>7</sup> 30 TAC § 101.4 (2006).

<sup>8</sup> 30 TAC § 55.203(c)(3).

<sup>9</sup> *Id.*

<sup>10</sup> Executive Director's RTC, Response 1.

<sup>11</sup> 30 TAC §§ 50.115(c)(1); 55.201(d)(4); 55.209(e)(2); 55.211(e)(2)(A).

**2. The hearing requestor raises issues of fact.**

Mr. Angerman raises the issue of whether the facility's operations will harm human health. This is an issue of fact, rather than an issue of law or policy. Therefore, this issue is appropriate for referral to hearing.<sup>12</sup>

**3. The hearing requestor raised his issue during the public comment period.**

Mr. Angerman raised his concerns in his first hearing request filed on February 4, 2005, within the comment period following initial publication of the NORI. Therefore, OPIC finds that the issue raised in the hearing request was also raised during the public comment period.<sup>13</sup>

**4. The effect of emissions on health is an issue that is relevant and material to the Commission's decision on this application.**

The hearing request raises an issue that is 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 effect of facility operations on human health relates directly to whether the applicant will meet the requirements of applicable substantive law.<sup>14</sup>

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." 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

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<sup>12</sup> 30 TAC § 55.211(b)(3)(A), (B).

<sup>13</sup> 30 TAC §§ 55.201(c), (d)(4); 55.211(c)(2)(A).

<sup>14</sup> 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.")

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.”<sup>15</sup> Therefore, the facility's effect on human health is relevant and material to the Commission's decision on this application.<sup>16</sup>

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 issue: Will facility operations under the renewed permit adversely affect human health?

**D. OPIC Estimates that the Maximum Expected Duration of Hearing will be Four 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 four months from the first date of the preliminary hearing until the proposal for decision is issued.

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<sup>15</sup> See also 30 TAC § 111.155 (2006).

<sup>16</sup> 30 TAC § 55.209(e)(6) (2006).

### 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, OPIC recommends granting the contested case hearing request of Mr. John Angerman on the issue of whether the facility's operations under the proposed renewed permit would adversely affect human health.

Respectfully submitted,

Blas J. Coy, Jr.  
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### CERTIFICATE OF SERVICE

I hereby certify that on September 27, 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. 2007-1165-AIR**

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