

TCEQ AIR QUALITY PERMIT NO. 75068L001

APPLICATION BY  
SUPERIOR CRUSHED STONE LC  
PORTABLE ROCK CRUSHER  
CR 228 SITE  
FLORENCE, BELL COUNTY

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BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

2005 FEB -1 PM 4: 22  
CHIEF CLERK'S OFFICE  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS**

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this response (Response) to the requests for a contested case hearing submitted by persons listed herein. The Texas Clean Air Act (TCAA) §382.056(n) requires the commission to consider hearing requests in accordance with the procedures provided in Tex. Water Code §5.556.<sup>1</sup> This statute is implemented through the rules in 30 Texas Administrative Code (TAC) Chapter 55, Subchapter F.

A map showing the location of the site for the proposed facility is included with this response and has been provided to all persons on the attached mailing list. In addition, a current compliance history report, technical review summary, modeling audit, toxicology report, and draft permit prepared by the ED's staff have been filed with the TCEQ's Office of Chief Clerk for the commission's consideration. Finally, the ED's Response to Public Comments (RTC), which was mailed by the chief clerk to all persons on the mailing list, is on file with the chief clerk for the commission's consideration.

**I. Application Request and Background Information**

Superior Crushed Stone LC has applied to the TCEQ for a New Source Review Authorization under Texas Clean Air Act (TCAA) § 382.0518 to construct three portable rock crushers (the plant). The facilities are proposed to be located approximately 3.5 miles northeast of Highway 195 on County Road 228, Florence, Bell County. Contaminants authorized under this permit include particulate matter including particulate matter less than 10 microns in diameter. It appears the Applicant is not delinquent on any administrative penalty payments to the TCEQ. The TCEQ Enforcement Database was searched and no enforcement activities were found that are inconsistent with the compliance history.

The permit application was received on February 23, 2005, and declared administratively complete

<sup>1</sup> Statutes cited in this response may be viewed online at [www.capitol.state.tx.us/statutes/statutes.html](http://www.capitol.state.tx.us/statutes/statutes.html). Relevant statutes are found primarily in the Texas Health and Safety Code and the Texas Water Code. The rules in the Texas Administrative Code may be viewed online at [www.sos.state.tx.us/tac/index.shtml](http://www.sos.state.tx.us/tac/index.shtml), or follow the "Rules, Policy & Legislation" link on the TCEQ website at [www.tceq.state.tx.us](http://www.tceq.state.tx.us).

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on March 25, 2005. The Notice of Receipt and Intent to Obtain an Air Quality Permit (public notice) for this permit application was published on April 21, 2005, in the *Killeen Daily Herald*. The ED's RTC was mailed on August 21, 2007 to all interested persons, including those who asked to be placed on the mailing list for this application and those who submitted comment or requests for contested case hearing. The cover letter attached to the RTC included information about making requests for contested case hearing or for reconsideration of the ED's decision.<sup>2</sup> The letter also explained hearing requesters should specify any of the ED's responses to comments they dispute and the factual basis of the dispute, in addition to listing any disputed issues of law or policy.

The TCEQ received timely hearing requests during the public comment period from the following persons: Barry A. Clemens, Debbie Porterfield, and Arthur Winans. In addition, the following persons submitted comments and requested a public hearing via a form letter: Jeff Adams, Bob Baier, Monica Baier, Dorothy Beesley, Patrick Beesley, Glyn M. Bell, Brandi Benoit, Thomas Bohac, Jim D. Bowmer, William Brooks, Johnny L. Buck, John Burchard, Mina Burchard, Glynsha Glayzer-Castro, Lance M. Castro, Sadie Clark, Barry A. Clemens, Eric Clemens, Shiela Clemens, Alice Colt, Robert Colt, Clyde M. Ford, Glenice A. Ford, Glenda Glayzer, Kimberly Goodelle, Richard Goodelle, Chester Green, Ralph Hale, Vicki Hale, Micheal David Heiser, Lonnie Henderson, Cheryl A. Hildebrand, Phil Hopkins, Jasper E. Hunter, Donnie Jackson, Floyd A. Jackson, Marilyn Jaeger, Ann Johnson, Bill Jones, Frances Jones, Janet Kenyar, Lynn Lemmons, Joseph T. Madden, Adrian Madden, Beth Mann, Edward Mann, Peter D. Maskunas, Paul B. Mitchell, Mary Moore, Col. Netherton, Barbara Newton, Jean Porras, Johnny Porras, Debbie Porterfield, Alan, D. Procter, Gene S. Ray, Michael A. Robinson, Jan Roth, Ed Rothbauer, David Schuchardt, Destiny Schuchardt, Martha Shreeve, Michael Shreeve, Jimmy Simpson, Nancy Simpson, Shirley Simpson, Wilburn Simpson, Shirley Thompson, Stayton Thompson, H. A. Thornton, Duff Tucker, Pat Tucker, Paul Vaccaro, Lynn Walker, Mike Walker, Jessie V. Warrick, Floyd W. Watson Jr., Paula Watson, Thomas Watson, Clint Watts, Randy Watts, Brenda Wilbur, Scott Wilbur, Virginia Wilson, Arthur Winans, Jessica Wise, and an Unnamed Concerned Citizen. The TCEQ received timely an additional hearing request during the period for requesting a contested case hearing after the filing of the ED's RTC from Joseph T. Madden and Adrian Madden.

### **II. Applicable Law**

The commission must assess the timeliness and form of the hearing requests, as discussed above. The form requirements are set forth in 30 TAC § 55.201(d):

- (d) A hearing request must substantially comply with the following:
  - (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime

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<sup>2</sup> See TCEQ rules at Chapter 55, Subchapter F of Title 30 of the Texas Administrative Code. Procedural rules for public input to the permit process are found primarily in Chapters 39, 50, 55 and 80 of Title 30 of the Code.

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telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requester's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requester believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;

(3) request a contested case hearing;

(4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requester should, to the extent possible, specify any of the executive director's responses to comments that the requester disputes and the factual basis of the dispute and list any disputed issues of law or policy; and

(5) provide any other information specified in the public notice of application.

The next necessary determination is whether the requests were filed by "affected persons" as defined by Tex. Water Code § 5.115, implemented in commission rule 30 TAC § 55.203. Under 30 TAC § 55.203, 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. An interest common to members of the general public does not qualify as a personal justiciable interest. Local governments with authority under state law over issues raised by the application receive affected person status under 30 TAC § 55.203(b).

In determining whether a person is affected, 30 TAC § 55.203(c) requires all factors be considered, including, but not limited to, the following:

(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 and safety of the person, and on the 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.

If the commission determines a hearing request is timely and fulfills the requirements for proper form and the hearing requester is an affected person, the commission must apply a three-part test to

the issues raised in the matter to determine if any of the issues should be referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing. The three-part test in 30 TAC § 50.115(c) is as follows:

- (1) The issue must involve a disputed question of fact;
- (2) The issue must have been raised during the public comment period; and
- (3) The issue must be relevant and material to the decision on the application.

The law applicable to the proposed facility may generally be summarized as follows. A person who owns or operates a facility or facilities that will emit air contaminants is required to obtain authorization from the commission prior to the construction and operation of the facility or facilities.<sup>3</sup> Thus, the location and operation of the proposed facility requires authorization under the TCAA. Permit conditions of general applicability must be in rules adopted by the commission.<sup>4</sup> Those rules are found in 30 TAC Chapter 116. In addition, a person is prohibited from emitting air contaminants or performing any activity that violates the TCAA or any commission rule or order, or that causes or contributes to a condition of air pollution.<sup>5</sup> The relevant rules regarding air emissions are found in 30 TAC Chapters 101 and 111-118. In addition, the commission has the authority to establish and enforce permit conditions consistent with this chapter.<sup>6</sup> The materials accompanying this response list and reference permit conditions and operational requirements and limitations applicable to this proposed facility.

### **III. Analysis of Hearing Requests**

#### **A. Were the requests for a contested case hearing in this matter timely and in proper form?**

The hearing requests were submitted during the public comment period or during the period for requesting a contested case hearing after the filing of the ED's RTC. Furthermore, the ED has determined the hearing requests of Joseph T. Madden, Adrian Madden, Paul B. Mitchell, Alan D. Procter, David Schuchardt, Destiny Schuchardt, and Virginia Wilson substantially comply with all of the requirements for form in 30 TAC § 55.201(d).

The ED has determined the hearing requests of Jeff Adams, Thomas Bohac, Jim D. Bowmer, Marilyn Jaeger, Janet Kenyar, Beth Mann, Edward Mann, Shirley Thompson, Stayton Thompson, and an unnamed concerned citizen do not meet the requirements for form in 30 TAC § 55.201(d). Requesters Jeff Adams, Thomas Bohac, Jim D. Bowmer, Marilyn Jaeger, Janet Kenyar, Beth Mann, Edward Mann, Shirley Thompson, and Stayton Thompson did not provide a residential address. Therefore, with available information, it is impossible for the ED to determine the proximity of the

<sup>3</sup> TEXAS HEALTH & SAFETY CODE § 382.0518

<sup>4</sup> TEXAS HEALTH & SAFETY CODE § 382.0513

<sup>5</sup> TEXAS HEALTH & SAFETY CODE § 382.085

<sup>6</sup> TEXAS HEALTH & SAFETY CODE § 382.0513

requesters relative to the proposed facility and it is difficult to determine whether air emissions from the proposed facility will impact the requester in way not common to the general public. The concerned citizen, although they provided an address identified on the map, did not give a name in accordance with the rule to identify a particular person therefore it is also difficult to determine whether air emissions from the proposed facility will impact this person in way not common to the general public.

The ED addressed all public comments in this matter by providing responses in the RTC. The cover letter from the Office of the Chief Clerk attached to the RTC states that requesters should, to the extent possible, specify any of the ED's responses in the RTC that the requesters dispute and the factual basis of the dispute, and list any disputed issues of law or policy.<sup>7</sup> Joseph T. Madden and Adrian Madden filed a response to the ED's RTC, which included a request for a hearing, raising health effects and air quality issues. In the absence of a response from any of the other hearing requesters or their representatives within the thirty-day period after the RTC was mailed, the ED cannot determine or speculate whether the hearing requesters continue to dispute issues of fact, or whether there are any outstanding issues of law or policy. The ED nevertheless has evaluated the merits of the requests before action is taken regarding this application. The remaining disputed issues identified by Joseph T. Madden and Adrian Madden are addressed in the issues listed below.

B. Are those who requested a contested case hearing in this matter affected persons?

The hearing requesters listed herein submitted a form letter requesting a hearing. This requesters have not demonstrated that they are "affected persons" as defined in 30 TAC § 55.203. The threshold test of affected person status is whether the requestor has a personal justiciable interest affected by the application, and this interest is different from that of the general public.<sup>8</sup> The ED has identified six requesters who reside within 1 mile of the proposed facility and one hearing requester who resides just beyond a mile from the proposed facility. *See* attached map. Due to their distance from the proposed facility, the following requesters are not shown on the attached map: Clyde M. Ford, Glenice A. Ford, Col. Netherton, Barbara Newton, Gene S. Ray, and Jessie V. Warrick. In addition, the address provided by Debbie Porterfield could not be located using mapping software available to the ED's staff thus the address does not appear on the map. Furthermore, the above named hearing requesters who did not provide a residential address do not appear on the attached map.

All the requesters listed below have failed to demonstrate they are affected persons. Bob Baier, Monica Baier, Dorothy Beesley, Patrick Beesley, Glyn M. Bell, Brandi Benoit, William Brooks, Johnny L. Buck, John Burchard, Mina Burchard, Glynsha Glayzer-Castro, Lance M. Castro, Sadie Clark, Barry A. Clemens, Eric Clemens, Shiela Clemens, Alice Colt, Robert Colt, Clyde M. Ford, Glenice A. Ford, Glenda Glayzer, Kimberly Goodelle, Richard Goodelle, Chester Green,

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<sup>7</sup> See 30 TAC § 55.201(d)(4).

<sup>8</sup> *United Copper Industries and TNRCC v. Joe Grissom*, 17 S.W.3d 797 (Tex. App.-Austin, 2000)

Ralph Hale, Vicki Hale, Micheal David Heiser, Lonnie Henderson, Phil Hopkins, Jasper E. Hunter, Donnie Jackson, Floyd A. Jackson, Ann Johnson, Bill Jones, Frances Jones, Lynn Lemmons, Peter D. Maskunas, Mary Moore, Col. Netherton, Barbara Newton, Jean Porras, Johnny Porras, Debbie Porterfield, Gene S. Ray, Michael A. Robinson, Jan Roth, Ed Rothbauer, Martha Shreeve, Michael Shreeve, Jimmy Simpson, Nancy Simpson, Shirley Simpson, Wilburn Simpson, H. A. Thornton, Duff Tucker, Pat Tucker, Paul Vaccaro, Lynn Walker, Mike Walker, Jessie V. Warrick, Floyd W. Watson Jr., Paula Watson, Thomas Watson, Clint Watts, Randy Watts, Brenda Wilbur, Scott Wilbur, Arthur Winans, Jessica Wise provided addresses beyond 1 mile of the proposed facility. **As they reside more than 1 mile from the proposed facility, they are not likely to be impacted differently than any other member of the general public.** The requests of Jeff Adams, Thomas Bohac, Jim D. Bowmer, Marilyn Jaeger, Janet Kenyar, Beth Mann, Edward Mann, Shirley Thompson, and Stayton Thompson did not include a residential address, therefore it is difficult to determine whether air emissions from the proposed facility will impact these requesters in way not common to the general public.

C. Which issues in this matter should be referred to SOAH for hearing?

If the commission determines any of the hearing requests in this matter are timely and in proper form, and some or all of the hearing requesters are affected persons, the commission must apply the three-part test discussed in Section II to the issues raised in this matter to determine if any of the issues should be referred to SOAH for a contested case hearing. The three-part test asks whether the issues involve disputed questions of fact, whether the issues were raised during the public comment period, and whether the issues are relevant and material to the decision on the permit application, in order to refer them to SOAH.

The ED addressed all public comments in this matter by providing responses in the RTC. The cover letter from the Office of the Chief Clerk transmitting the RTC cites 30 TAC § 55.201(d)(4), which states that requesters should, to the extent possible, specify any of the ED's responses in the RTC the requesters dispute and the factual basis of the dispute, and list any disputed issues of law or policy. A hearing request was filed by Joseph T. Madden and Adrian Madden that identified two disputed issues within TCEQ's jurisdiction. In the absence of a response from any of the other hearing requesters within the thirty-day period after the RTC was mailed, the ED cannot determine or speculate on the issues of fact that may continue to be disputed by the hearing requesters, or any alleged outstanding issues of law or policy. However, the ED acknowledges the hearing requesters have one more opportunity to identify disputed issues of fact in their replies to the positions of the ED, Office of Public Interest Counsel, and the Applicant regarding the hearing request. Therefore, to facilitate the commission's consideration of this matter, the ED has analyzed the remaining two parts of the test, assuming that the issues raised in the comments in this matter remain disputed. The issues identified by Joseph T. Madden and Adrian Madden and Barry Clemens are included in the issues of fact listed below.

**1. Three issues involving questions of fact.**

The following issues involving questions of fact regarding the operation of the Applicant's proposed facility were raised during the comment period:

1. Whether air emissions from the proposed facility will adversely affect human health.
2. Whether air emissions from the proposed facility will adversely affect the land or the biological diversity of the area surrounding the proposed facility.
3. Whether air emissions from the proposed facility will adversely affect air quality in the area.

**2. Were the issues raised during the public comment period?**

The public comment period is defined in 30 TAC § 55.152. The public comment period begins with the publication of the Notice of Receipt and Intent to Obtain an Air Quality Permit. The end date of the public comment period depends on the type of permit. In this case, the public comment period began on April 21, 2005, and ended on November 13, 2006. Issues 1-3 listed above upon which the hearing requests in this matter are based were raised in comments received during the public comment period. These issues may be considered by the commission.

**3. Whether the issues are relevant and material to the decision on the application.**

In this case, the permit would be issued under the commission's authority in Tex. Water Code § 5.013(11) (assigning the responsibilities in Chapter 382 of the Tex. Health & Safety Code) and the TCAA. The relevant sections of the TCAA are found in Subchapter C (Permits). Subchapter C requires the commission to grant a permit to construct or modify a facility if the commission finds the proposed facility will use at least the best available control technology (BACT) and the emissions from the facility will not contravene the intent of the TCAA, including the protection of the public's health and physical property. In making this permitting decision, the commission may consider the Applicant's compliance history. The commission by rule has also specified certain requirements for permitting. Therefore, in making the determination of relevance in this case, the commission should review each issue to see if it is relevant to these statutory and regulatory requirements that must be satisfied by this permit application.

Joseph T. Madden and Adrian Madden have identified two of the issues addressed in the RTC. In the absence of identification by the other hearing requesters of disputed issues in the RTC, the ED cannot determine which issues remain disputed. However, if the assumption is made that the issues raised in the public comments continue to be disputed, the following is the ED's position on those issues.

1. Whether air emissions from the proposed facility will adversely affect human health.

The issue of health impacts to humans was raised during the comment period.<sup>9</sup> Whether the proposed facility will use BACT and will be protective of human health is a factual issue that is relevant and material to the commission's decision on the application. The ED concludes impact of air emissions to human health is a referable issue.

**2. Whether air emissions from the proposed facility will adversely affect the land or the biological diversity of the area surrounding the proposed facility.**

The issue of impacts to the surrounding land or the biological diversity of the area was raised during the comment period.<sup>10</sup> Whether the proposed facility will have a detrimental effect on the native wildlife species, specifically the endangered Black Capped Vireo is a factual issue that is relevant and material to the commission's decision on the application. The ED concludes impact of air emissions to the surrounding land or wildlife in the area is a referable issue.

**3. Whether air emissions from the proposed facility will adversely affect air quality in the area.**

The issue of impacts to air quality in the area was raised during the comment period.<sup>11</sup> Whether the proposed facility will be protective of air quality in the area is a factual issue that is relevant and material to the commission's decision on the application. The ED concludes impact of air emissions to the quality of the air in the area is a referable issue.

**IV. Maximum Expected Duration of the Contested Case Hearing**

The ED recommends the contested case hearing, if held, should last no longer than four months from the preliminary hearing to the proposal for decision.

**V. Executive Director's Recommendation**

The Executive Director respectfully recommends the commission:

- A. Find all hearing requests in this matter were timely filed;
- B. Find the requests of Joseph T. Madden, Adrian Madden, Paul B. Mitchell, Alan D. Procter, David Schuchardt, Destiny Schuchardt, and Virginia Wilson satisfy the requirements for form under 30 TAC§ 55.201(d).
- C. Find all other hearing requesters are not affected persons in this matter;

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<sup>9</sup> This issue was addressed in the ED's RTC in Response 1.

<sup>10</sup> This issue was addressed in the ED's RTC in Responses 1 & 6.

<sup>11</sup> This issue was addressed in the ED's RTC in Response 1.

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D. If the commission determines any requester is an affected person, refer the following issues to SOAH:

1. Whether air emissions from the proposed facility will adversely affect human health;
2. Whether air emissions from the proposed facility will adversely affect the land or the wildlife in the area surrounding the proposed facility;
3. Whether air emissions from the proposed facility will adversely affect air quality in the area;

H. Find the maximum expected duration of the contested case hearing, if held, would be four months.

Respectfully submitted,

Texas Commission on Environmental Quality  
Glenn Shankle, Executive Director

Stephanie Bergeron Perdue, Deputy Director  
Office of Legal Services

Robert Martinez, Director  
Environmental Law Division



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Representing the Executive Director of the  
Texas Commission on Environmental Quality

**CERTIFICATE OF SERVICE**

On the 1<sup>st</sup> day of February, 2008, a true and correct copy of the foregoing instrument was served on all persons on the attached mailing list by the undersigned via deposit into the U.S. Mail, inter-agency mail, facsimile, or hand delivery.



Erin Selvera