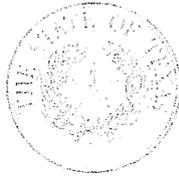


Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 10, 2008

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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 MAR 10 PM 4:00
CHIEF CLERKS OFFICE

Re: **BEXAR QUARRY SERVICES, LLC**
TCEQ DOCKET NO. 2007-2033-AIR

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Eli Martinez".

Eli Martinez, Attorney
Assistant 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. 2007-2033-AIR

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION OF BEXAR QUARRY	§	TEXAS COMMISSION ON
SERVICES, LLC FOR RENEWAL OF	§	ENVIRONMENTAL QUALITY
AIR QUALITY PERMIT NO. 43957	§	

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

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

Bexar Quarry Services ("Bexar" or "Applicant") has applied for a renewal of its air permit authorizing continued operation of a rock crushing plant located at 18394 FM 1283, Mico, Medina County, Texas (the plant). According to the Executive Director's technical review, the amended permit will not authorize construction of any new facilities, hourly or annual production, changes to the process, special conditions, or the maximum allowable emission rates table (MAERT). Emissions will remain at 8.70 tons per year (tpy) of particulate matter (PM) and 3.67 tpy of particulate matter less than 10 microns in diameter because the plant will continue to utilize the same processes and maintain production limits that do not exceed previous production limits.

The Executive Director ("ED") received the application on August 28, 2007, and declared the application administratively complete on September 4, 2007. The applicant published a Notice of Receipt of Application and Intent to Obtain an Air Permit on September 6,

2007, in the *San Antonio Express News*. The public comment period ended on September 21, 2007. During the comment period, the TCEQ received a hearing request from Mr. Jack Love.

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 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).

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

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 Bexar Quarry Service'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 382.056(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 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. Further, the Applicant's compliance history for the period between August 29, 2002 and August 28, 2007 is rated as "average," and the compliance rating for the plant is

² Tex. Health & Safety Code (hereinafter "THSC") § 382.056 (g); 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).

“high.” 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. For this reason, 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, OPIC finds that Mr. Love has a personal justiciable interest related to a legal right affected by this application. The request submitted by Mr. Love states that his property is surrounded on three sides by the quarry. Mr. Love believes he and his property will be affected by the air emissions from the plant, blasting, and increased truck traffic. The proximity of the requestor to the proposed facility combined with his interest regarding health effects and use and enjoyment of property support a finding that the requestor is an “affected person.”⁵ The hearing request states concerns protected by the law under which the application will be considered, including notice of the permit amendment, health hazards, and use and enjoyment of property.⁶ Such interests reasonably relate to the potential effects of facility operations.⁷ In addition, the requestor’s location relative to the facility shows a reasonable relationship between the interests stated and the activity regulated.⁸ Therefore, if the Commission finds a right to hearing exists on this application, OPIC recommends that the Commission find that the requestor is an affected person.

C. Issues Analysis

The hearing request raises the following issues:

⁵ 30 TAC § 55.203(c).

⁶ 30 TAC § 101.4 (2006).

⁷ 30 TAC § 55.203(c)(3).

⁸ *Id.*

- (1) Was notice of the permit amendment properly published in accordance with applicable TCEQ rules and statutes?
- (2) Will the facility adversely affect the hearing requestor's health?
- (3) Will the facility affect the requestor's use and enjoyment of his property?
- (4) Will blasting conducted by the facility cause a nuisance?
- (5) Will noise produced by the facility cause a nuisance?
- (6) Will the increased truck activity caused by the facility operations cause a nuisance?

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

No agreement exists between the parties on the issues discussed above.

2. The hearing requestors raise issues of fact.

The requestor raises specific factual issues in his hearing requests about notice, nuisance conditions, use and enjoyment of property, and health concerns. As these are issues of fact, rather than issues of law or policy, these issues are appropriate for referral to hearing.⁹

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

All of the above concerns were raised during the comment period and have not been withdrawn.

4. The issues raised by the requestor regarding nuisance conditions and the effect of emissions on the hearing requestor's 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 requestor directly relates to whether the applicant will meet the requirements of applicable substantive law.¹⁰

⁹ 30 TAC § 55.211(b)(3)(A), (B).

¹⁰ 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 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.” Furthermore, 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.” Therefore, the facility’s effect on the hearing requestor’s health, as well as the use and enjoyment of his property is relevant and material to the Commission’s decision on this application.¹¹

OPIC agrees with the ED that proper notice was issued under TCEQ rules.¹² Notice was published in a newspaper of general circulation in the municipality nearest to the location of the facility as required of the applicant.¹³ The issue of defective notice raised by Mr. Love should therefore not be referred to hearing. OPIC further finds that all other issues raised in the hearing request are not relevant and material to the Commission’s decision. Specifically, concerns about noise, blasting, and traffic 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.

¹¹ 30 TAC § 55.209(e)(6) (2006).

¹² See 30 TAC §§39.603 & 3.604, relating to newspaper notice and sign posting for air quality applications.

¹³ San Antonio is a municipality within 20 miles of Mico. Furthermore, conversation with an *Express News* representative on March 6, 2008 confirmed that circulation of the newspaper reaches Medina County.

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 hearing requestor's health?
2. Will the facility affect the requestor's use and enjoyment of his property?

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.

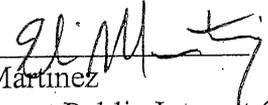
III. CONCLUSION

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, OPIC recommends granting the contested case hearing request of Mr. Love

and referring this matter to the State Office of Administrative Hearings for a hearing on the issues described above.

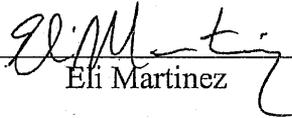
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2008, the original and eleven true and correct copies of the Office of Public Interest Counsel's Response to Hearing Request 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.


Eli Martinez

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TCEQ DOCKET NO. 2007-2033-AIR

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