

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 24, 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

CHIEF CLERKS OFFICE
2008 MAR 24 PM 4:43
TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**RE: TRANSIT MIX CONCRETE & MATERIALS COMPANY
TCEQ DOCKET NO. 2008-0141-AIR**

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in black ink that reads "Scott A. Humphrey".

Scott A. Humphrey, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2008-0141-AIR

APPLICATION BY TRANSIT MIX	§	BEFORE THE TEXAS
CONCRETE & MATERIALS COMPANY	§	COMMISSION ON
FOR CONCRETE BATCH PLANT	§	ENVIRONMENTAL
PERMIT NO. 80840	§	QUALITY

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

TO THE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this Response to Hearing Requests in the above-referenced matter.

I. INTRODUCTION

TCEQ received an application on January 8, 2007 from Transit Mix Concrete & Materials Company (Transit Mix or Applicant) for a Standard Permit under Tex. Health & Safety Code § 382.05195. The proposed permit would authorize the Applicant to construct a concrete batch plant. The facility is located at 3372 US Highway 175 in Kaufman, Kaufman County. The contaminants that would be authorized under this permit would include aggregate, cement, road dust and particulate matter not less than 10 microns in diameter.

The Executive Director (ED) of the TCEQ declared the application administratively complete on January 23, 2007. Notice of Receipt and Intent to Obtain an Air Quality Permit was published on February 1, 2007 in *The Kaufman Herald*. The Notice of Application and Preliminary Decision was published on May 24, 2007 in *The Kaufman Herald*. A public meeting was held on June 24, 2007 in Kaufman, and a second public meeting was held in Kaufman on October 16, 2007. The comment period closed on October 16, 2007.

In response to the notices, the TCEQ received nine letters plus one petition requesting a contested case hearing on this matter. OPIC recommends denying all of the hearing requests as a matter of law because none of the requesters resides within 440 yards of the proposed site.

II. REQUIREMENTS OF APPLICABLE LAW

This application was declared administratively complete after September 1, 1999; therefore, it is subject to the requirements of both §382.056 of the Texas Health and Safety Code and §5.556 of the Texas Water Code, Chapter 5, Subchapter M, Environmental Permitting Procedures, 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: provide the name, address, daytime telephone number, and if possible, fax number of the person submitting the request; identify the requestor's personal justiciable interest affected by the application and explain how the requestor is an "affected person" who may be adversely impacted by the proposed facility or activity in a manner not common to members of the general public; specifically 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 application.¹

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."² This justiciable

¹TEX. ADMIN. CODE ("TAC") tit. 30, §55.201(d)

²30 TAC §55.203(a).

interest does not include an interest common to the general public. 30 TAC Section 55.203(c) provides relevant factors that will be considered in determining whether a person is affected.

These factors include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restriction 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.

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.³

III. RESPONSE TO HEARING REQUESTS

A. The Hearing Requests

The Commission received individual hearing requests from the following: 1) State Representative Betty Brown; 2) Brian Chambers; 3) Dr. Brent Gentzel from Kaufman's First Baptist Church; 4) Anne Glasscock, President and CEO of the Kaufman Chamber of Commerce; 5) Karel Holloway; 6) Jennifer McBride, Owner of the Dance Factory of Kaufman; 7) Lana McCallie, President and CEO of the Kaufman County Credit Union; 8) Curtis Snow, City

³30 TAC §55.211(c).

Manager of the City of Kaufman; and 9) Todd Williams, Superintendent of the Kaufman Independent School District. In addition, a petition requesting a hearing was signed by the following: 1) James and Michael Ashton; 2) Aaron and Jennifer Bynum; 3) Diane and Frankie Garcia; 4) Joyce, Logan and Louis Heath; 5) Marcos and Margarita Mendoza; 6) Karen and Keith Torres; and 7) Amy and Larry Walker.

1. State Representative Betty Brown

Representative Brown states that her constituents within the community of Kaufman have expressed serious concerns about the air contaminants that would be emitted from the plant. The Kaufman area has more than 4,000 households directly downwind from the proposed site.

2. Lana McCallie

On behalf of the Kaufman County Credit Union, Ms. McCallie expresses concern about how the plant will affect the households located downwind from the proposed location. In addition, she is concerned about how the contaminants from the facility will affect the air quality in the area.

3. Curtis Snow

In his capacity as City Manager of the City of Kaufman, Mr. Snow expresses nine specific concerns. First, the use of the site is in conflict with the City of Kaufman's Comprehensive Plan and Future Land Use Plan. Second, the site is adjacent to a commercial operation (a children's dance studio), and the emissions would be a threat to their customer base. Third, the area being considered is surrounded by residential uses, and this operation is a threat to the quality of life of nearby residents. Fourth, the City of Kaufman does not allow this kind of

use in residential, retail or highway commercial zones. Fifth, the site is in proximity to the Kaufman County Jail and emissions could be a health threat to prisoners under County custody. Sixth, other locations in Kaufman would be more suitable, and the negative air emissions would not be a threat to Kaufman citizens. Seventh, there are no applicable building codes, building standards or zoning laws that would require this operator to build a site that would minimize dust form leaving the site. Eighth, there are no regulations in place that would require the operator to pave all road and parking surfaces, maintain a properly clean site and to assure the operation will not be a nuisance or health hazard to the surrounding residential and retail areas. Finally, this is an industrial use that should be located inside an incorporated city, in an area zoned for this kind of activity.

4. Brian Chambers and Jennifer McBride

These identical hearing requests express concern over the location of the concrete batch plant so close to numerous homes, a children's dance studio, the county jail, a city water treatment plant and several tributaries that feed into the Trinity River, Kings Creek or Cedar Creek Lake. There is a planned community expected to be built well within 1300 feet of the proposed site. They are concerned that the winds will carry materials over the county jail, nearby schools and family dwellings.

5. Brent Gentzel, Anne Glasscock, Karel Holloway and Todd Williams

These nearly identical hearing requests express concerns regarding air contaminants (particulate matter) that this plant will be emitting including aggregate, cement, road dust and small matter. They are especially interested in the health concerns of students, nearby residents

and patrons of businesses near the proposed site. There are also over 4,000 Kaufman households directly downwind from the proposed site.

6. The Petition

The petition states that several of the signatories are in ill health. They express concern that the approval of this permit would further exacerbate those conditions. They are also concerned about the people who live within 440 yards of the proposed site.

B. Distance Limitations

A standard permit for a concrete batch plant contains a specific distant limitation with respect to who qualifies as an affected person entitled to a contested case hearing. Specifically, according to Tex. Health & Safety Code § 382.058(c), only persons actually residing in a permanent residence within 440 yards of the proposed plant are entitled to request a hearing concerning an application for this standard permit.

While virtually all of the hearing requests express concerns for those who are downwind of the facility or those who do live within 440 yards of the proposed facility, none of these hearing requesters alleges that he or she personally and actually resides within 440 yards of the proposed facility. In the absence of this information, OPIC must rely on any mapping supplied with this application to make that determination.

The ED has included a GIS map of ten of the addresses that correlate with the addresses identified in the hearing requests. Of those identified on the map, only one address, the Dance Factory, is within 440 yards of the proposed site. The Dance Factory's address was identified on the hearing requests submitted by the Heaths and Jennifer McBride, who states she is the owner

of The Dance Factory.

Since Ms. McBride identifies the Dance Factory as a business, OPIC cannot conclude that either she or the Heaths actually reside there, and residence is a statutory requirement for affected person status. If any of these requesters were to provide additional evidence showing they actually reside at The Dance Factory, OPIC may reconsider its recommendation. However, based on the information available, OPIC cannot identify any hearing requesters that qualify as affected persons with respect to this standard permit.

OPIC also notes that several addresses for hearing requesters were not captured on the GIS map.⁴ In the absence of any information in the record regarding these requesters' distance from the proposed site, OPIC cannot conclude they are affected persons entitled to a contested case hearing. If these requesters provide information that they do in fact reside within 440 yards of the proposed site, OPIC will reconsider its recommendation.

Therefore, OPIC recommends denying all hearing requests. Should the Commission conclude otherwise, OPIC provides the following information regarding what issues to refer to a contested case hearing.

C. Disputed Issues

The following issues are raised in the hearing requests: 1) whether the emissions from the proposed facility will adversely affect public health and air quality; 2) whether the Applicant would be required to pave roads and parking surfaces to ensure its operation will not be a

⁴ OPIC did conduct an informal Mapquest search for Brent Gentzel, Karel Holloway, Curtis Snow and Todd Williams, none of whose addresses were included on the GIS map. That unofficial search showed they all lived between 3.9 miles and 20.44 miles from the proposed site. OPIC presumes that they were not included on the GIS map because of their relatively long distance from the facility. However, OPIC emphasizes that the legal basis for concluding they are not affected persons is a lack of information in the record, not the Mapquest result.

nuisance to surrounding residential and retail areas; 3) whether the proposed application will be sufficient to control dust emissions; 4) whether there would be a better location in the county for the proposed facility; 5) whether the proposed facility will adversely impact water quality; and 6) whether the proposed facility is consistent with the area's regional growth plan.

If there were a contested case hearing, the first three issues are protected under the law by which this application is being considered. Furthermore, there is a likely impact of the regulated activity on the health, safety and use of property of the person. There is also a likely impact on the use of a natural resource.

The last three issues, however, are not issues that would be adjudicated in a hearing for a concrete batch plant standard permit. With respect to location, the TCEQ does not have zoning authority when reviewing air permit applications. With regard to water quality, although the Commission does regulate water quality, its authority over this matter comes from the Texas Clean Air Act (TCAA). The water quality issues go beyond the scope of the TCAA. Finally, concerning the comprehensive planning issues, the TCEQ does not have jurisdiction to consider land use or planning issues when reviewing an air quality permit.

With respect to the three issues that the Commission may consider, these issues remain in dispute. Furthermore, they were all raised during the comment period. Therefore, should the Commission determine that this matter should be referred to a contested case hearing, OPIC would recommend referring issues 1-3 *supra* with a hearing duration of six months.

IV. CONCLUSION

For the reasons stated above, OPIC recommends the Commission deny the requests for a contested case hearing in this matter.

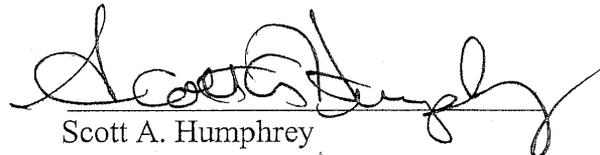
Respectfully submitted,

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Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2008 the original and eleven true and correct copies of the foregoing 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.


Scott A. Humphrey

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TCEQ DOCKET NO. 2008-0141-AIR

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