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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 SEP 15 PM 4:05
CHIEF CLERKS OFFICE

September 15, 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

RE: **WACO COMPOSITES I, LTD**
TCEQ DOCKET NO. 2008-0698-AIR

Dear Ms. Castañuela:

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

Sincerely,

Vic McWherter

Vic McWherter, Senior Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 SEP 15 PM 4:05

CHIEF CLERKS OFFICE

TCEQ DOCKET NO. 2008-0698-AIR

APPLICATION BY	§	**BEFORE THE**
WACO COMPOSITES I, LTD.	§	**TEXAS COMMISSION ON**
FOR AIR QUALITY PERMIT	§	**ENVIRONMENTAL QUALITY**
NO. 80500	§	

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

To the members of the Texas Commission on Environmental Quality:

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 Requests in the above-referenced matter, and would respectfully recommend referring this matter to the State Office of Administrative Hearings ("SOAH").

I. INTRODUCTION

On December 4, 2006, Waco Composites I, Ltd. ("Applicant") applied to the TCEQ for Air Quality Permit No. 80500, which would authorize construction of the Waco Composites Plant No. 2, located at 302 South 27th Street, Waco, McLennan County, Texas. The proposed plant would manufacture fiberglass reinforced plastic (FRP) armor plates that are used for military purposes. Contaminants authorized to be emitted under this permit include organic compounds including, but not limited to, styrene, 2-butoxyethanol, nonylphenoxy polyethoxy ethanol, dimethyl glutarate, dimethyl succinate, and dimethyl adipate. The application was declared administratively complete on February 28, 2007.

The Applicant published the Notice of Receipt of Application and Intent to Obtain Permit on March 21, 2007 in the *Waco Tribune-Herald*. Alternative Language Notice was published on March 21, 2007 in the *Tiempo*. In response to this first notice, TCEQ received timely hearing requests from Margie M. Abbott, Patricia and Raymond Bailey, Mary Darden, Robert Darden, Karina Deaver, Dr. Robert W. Grayson, Kate Groetzinger, David Heddy, Charlotte Henderson, Ron Henderson, R.E. Henderson and Co., Inc., Deedie Hering, Phillip Hering, Dr. Joyce Jones, John Lewis, Karen LiBassi, Michael LiBassi, and Chris and Andy McSwain. The Notice of Application and Preliminary Decision was published on December 11, 2007 in the *Waco Tribune Herald*. Alternative Language Notice was published on December 12, 2007 in the *Tiempo*. The public comment period ended on January 11, 2008. The Executive Director's (ED) Response to Comments (RTC) was filed March 31, 2008.

II. APPLICABLE LAW

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under Title 30, Texas Administrative Code (TAC) § 55.201(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;

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor 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 requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor 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.

Under 30 TAC § 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. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to 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.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

(A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;

(B) is timely filed with the chief clerk;

(C) is pursuant to a right to hearing authorized by law; and

(D) complies with the requirements of § 55.201.

Accordingly, pursuant to 30 TAC § 55.209(e), 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.

III. DISCUSSION

A. All of the requestors are affected persons.

According to the map prepared by the executive director's staff, the requestors are located the following respective distances from the proposed facility: Margie M. Abbott

(.50 miles); Patricia and Raymond Bailey (.27 miles); Mary Darden; Robert Darden (.25 miles); Karina Deaver (.49 miles); Dr. Robert Grayson (.50 miles); Kate Groetzinger (.85 miles); David Heddy (.94 miles); Deedie Hering (.68 miles); Phillip Hering (.68 miles); Charlotte Henderson (.90 miles); Ron Henderson (.90 miles); R.E. Henderson and Co., Inc. (.62 miles); Dr. Joyce Jones (.70 miles); John Lewis (.40 miles); Karen LiBassi (1.70 miles); Michael LiBassi (1.70 miles); and Chris & Andy McSwain (.64 miles).

Each requestor has stated a concern that his or her health, or the health of the requestors' children or employees, will be adversely affected by emissions of air contaminants from the facility, in addition to stating concerns regarding how pollution from the proposed facility may adversely affect their use and enjoyment of their property. 30 TAC §55.203(c)(4). Ms. Abbott is an avid gardener who states that she gets headaches from air pollutants and is prone to sinus infections. Mr. and Ms. Bailey have allergies. Mr. Bailey also has asthma which could be exacerbated by emissions from the proposed facility. Ms. Darden has severe allergies, headaches, and is prone to bronchitis. Like Ms. Abbott, she is concerned that Applicant's activities will affect her ability to work in her yard. Mr. Darden also expresses a concern about the impact of emissions on his allergies. Ms. Deaver states that she suffers from allergies and asthma and the proposed facility's activities will exacerbate these conditions. Dr. Grayson expresses concern about the facility's impact on his health. Ms. Groetzinger states that she has been diagnosed with Multiple Chemical Sensitivity, in addition to having allergies and lung scarring, and that emissions from the facility will harm her immune system and her health. Mr. Heddy states concern that the proposed emissions will adversely affect his severe allergies and an additional unspecified serious health condition he has experienced

for the past two years. Mr. and Ms. Henderson state that they and her two children suffer from allergies that would be worsened by exposure to the facility's emissions. Mr. Henderson also is president of R.E. Henderson and Co., Inc., which is located approximately half a mile from the facility (or .62 miles according to the ED's map.) He expresses concern for his health and the health of his four employees who work for his company. Deedie and Phillip Hering suffer from allergies and believe their health would be adversely affected by the facility's emissions. Dr. Joyce Jones is concerned about her health, and the health of her husband who has severe allergies, COPD, emphysema and congestive heart failure and is on oxygen. John Lewis asserts that his health will suffer as a result of facility emissions. Karen and Michael LiBassi are concerned about the proposed emissions' effect on their allergies and Ms. LiBassi's asthma. Chris and Andy Swain state concerns about the effect of the facility on their health, especially because they suffer from allergies she contends that hazardous air pollutants cause her to have asthma.

The proximity of these requestors' residences or workplaces to the proposed facility and interest in protecting their health support a finding that they are "affected persons. 30 TAC § 55.203(c). The requestors state concerns protected by the law under which the application will be considered, including the health of the individual requestors, their children, and their employees. 30 TAC §55.203(c)(1). In addition, because the requestors reside within close proximity to the facility and some have children or employees who live or work close to the facility, requestors have shown a reasonable relationship between the interests stated and the activity regulated. 30 TAC §

55.203(c)(3). Therefore, OPIC recommends that the Commission find that all requestors discussed above are affected persons.

C. Issues Raised in the Requests

All of the requests raise the issue of whether emissions from the proposed facility will adversely affect their health. Under 30 TAC § 55.211(c)(2), a hearing request must raise disputed issues of fact that are relevant and material to the Commission's decision on an application. The issues must also be raised during the public comment period, and the hearing request cannot be based on issues raised solely in a public comment that has been withdrawn.[1]

1. The requestors raise disputed issues of fact that were raised during the comment period.

In their hearing requests, all of which were timely-filed in response to the first notice of the application, the requestors stated a litany of concerns about the effect of facility air emissions on their general health, as well as on specific medical conditions. The requestors' concern about the impact of emissions on their health is an issue of fact, rather than an issue of law or policy. The Executive Director's Response to Comments replied to these concerns by stating that if the facility is operated in compliance with the permit, there should be no adverse impacts resulting from facility operations. The

[1] OPIC notes that, subsequent to the filing of their hearing requests, certain requestors filed letters requesting that their status be changed from "contesting the application" to "requesting an indefinite stay of the application." The Commission rules do not provide for an opportunity to request a stay of application processing. Therefore, OPIC asserts that these subsequent letters have no effect. These letters are not withdrawals of the prior hearing requests.

requestors have not withdrawn their requests; therefore, whether the proposed facility will affect the requestors' health is a disputed issue of fact.

2. The requests raise issues that are relevant and material to the Commission's decision on the application.

Each requestor questions whether emissions from the proposed facility will negatively affect human health. This issue concerns the policy and purpose of the Texas Clean Air Act, as stated in § 382.002, and is therefore relevant and material to the Commission's decision on this application.

3. **Issue to be referred to the State Office of Administrative Hearings.**

OPIC recommends that the following issue be referred to the State Office of Administrative Hearings for a contested case hearing:

(1) Will air emissions from the proposed facility have an adverse impact on affected persons living and working near the facility?[2]

III. CONCLUSION

For the reasons set forth above, OPIC concludes that Margie M. Abbott, Patricia and Raymond Bailey, Mary Darden, Robert Darden, Karina Deaver, Dr. Robert W. Grayson, Kate Groetzinger, David Heddy, Charlotte Henderson, Ron Henderson, R.E. Henderson and Co., Inc., Deedie Hering, Phillip Hering, Dr. Joyce Jones, John Lewis, Karen LiBassi, Michael LiBassi, and Chris and Andy McSwain are affected persons and recommends that Commission grant their requests for a contested case hearing and refer

[2] OPIC does not limit the issue to specifically named individuals because additional or different parties may be named at any preliminary hearing convened by the State office of Administrative Hearings.

this application to the State Office of Administrative Hearings. Pursuant to 30 TAC§55.209(e)(7), OPIC recommends a hearing duration of one year from the date of the preliminary hearing until the date of the issuance of the proposal for decision.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By Vic McWherter

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2008 the original and eleven true and correct copies of the Office of the Public Counsel's Response to Requests 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

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