

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

October 13, 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: **WHEATCRAFT, INC.**
TCEQ DOCKET NO. 2008-0870-AIR

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script that reads "Vic McWherter".

Vic McWherter, Senior Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 OCT 13 PM 2:39
CHIEF CLERKS OFFICE

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. 2008-0870-AIR

**IN THE MATTER OF THE
APPLICATION OF
WHEATCRAFT, INC. FOR
PERMIT NO. 76508**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

2008 OCT 13 PM 2:40
CHIEF CLERKS OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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

TO THE HONORABLE 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 Requests for Hearing in the above-referenced matter, and would respectfully show the following:

I. INTRODUCTION

Wheatcraft, Inc. (Applicant) has applied to the TCEQ for an Air Quality Permit No. 76508, which would authorize the construction of a Rock Crushing Facility at the Rhodes Pit Rock Quarry located at 6133 Highway 27, Center Point, Kerr County, Texas. The facility will emit the following air contaminant: particulate matter (PM), including particulate matter having diameter of 10 microns or less (PM₁₀) The application for a new permit was received August 1, 2005 and declared administratively complete August 12, 2005.

On September 6, 2005, Applicant published The Notice of Receipt and Intent to Obtain (NORI) an Air Quality Permit as required by Title 30 Texas Administrative Code (TAC) §39.603. The TCEQ received 80 timely hearing requests and public meeting, including requests for a public meeting from Senator Troy Fraser and Representative Harvey Hilderbran. The TCEQ held a public meeting in Center Point on January 24, 2006 and was attended by 168 persons. Upon resolution of all technical deficiencies, the technical review was completed in August 2006.

Applicant published the Notice of Application and Preliminary Decision (NAPD) on August 8, 2006. Representative Harvey Hilderbran requested another public meeting. The TCEQ held the public meeting in Center Point on November 9, 2006.

The comment period that started on September 7, 2005 closed at the end of the second public meeting on November 9, 2006 (428 days). This application received 296 hearing requests and 118 meeting requests. Comments were received from 225 persons or groups. Because the application was declared administratively complete after September 1, 1999, it is subject to the requirements adopted in accordance with House Bill 801, 76th Legislature, 1999.

II. REQUESTS FOR CONTESTED CASE HEARING

A. Applicable Law.

Under the applicable statutory and regulatory requirements, a person requesting a hearing must file the request in writing with the chief clerk "no later than" 30 days after the chief clerk's transmittal of the executive director's decision and response to comments. 30 TAC §55.201(a) and (c). For air authorizations, a hearing request must be filed during the first comment period in order for the authorization to be subject to further notice and public participation opportunities. Texas Health and Safety Code §382.056(g). Therefore, timely requests for a hearing on air authorizations include all requests filed in response to the Notice of Intent to Obtain Permit, as well as any additional requests subsequently filed during the comment period and the 30-day period following the transmittal of the response to comments.

The 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 of 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 application. 30 TAC §55.201(d).

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." This justiciable interest does not include an interest common to the general public. 30 TAC §55.203(c) sets forth 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 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

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).¹

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.

Furthermore, pursuant to 30 TAC §55.205, a request for hearing from a group or association must demonstrate the following:

- (1) one or more members of the group would otherwise have standing to request a hearing in their own right;
- (2) the interests the group seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

B. Requests for Contested Case Hearing

From the information made available, OPIC has identified the following hearing requestors:

1. Affected Person Analysis

Groups

The Guadalupe River Environmental Action Team (GREAT), represented by attorney David Frederick, filed hearing requests dated September 7, 2006 and May 28, 2008 in keeping with its objectives of protecting and maintaining the quality of life along the Guadalupe River and in Center Point, Texas. Many GREAT members own and occupy land in close proximity to the proposed crusher, including Marcey Downey discussed below. GREAT asserts that the crushing operations would impact many of its members by causing health problems, damaging their property, interfering with the use and

¹ A hearing request can not be based on an issue raised solely in comments that have been withdrawn by written letter filed with the chief clerk prior to the filing of the executive director's response to comments. 30 TAC §55.211(c)(2)(A).

enjoyment of their property, and ruining the aesthetics of their views and tranquil rural lifestyles.

The Texas Rivers Protection Association (TRPA), represented by attorney David Frederick, filed a request in its capacity as a not-for-profit membership organization. The group's purposes include protection of water quality and the natural beauty of Texas rivers. The organization identifies Ilse Bailey and Michael Van Winkle as group members who use the Guadalupe River for recreational purposes, including canoeing or "paddling." The request asserts that crusher operations would interfere with members' use and enjoyment of the Guadalupe River, negatively affecting their views and causing adverse impacts to their health. Recreational use interests may provide a sufficient basis for conveying standing as an affected person. 30 TAC §55.203(c)(5); *Friends of the Earth (FOE) v. Laidlaw Env't'l Services*, 528 U.S. 167(2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Weaver v. TNRCC*, No. 98-04623, (Dist. Ct. - Travis, May 5, 1999).

OPIC finds that both of these organizations have satisfied the criteria for group or associational standing found in 30 TAC §55.205. They have identified individual members who would be affected by proposed operations of the rock crushing facility in a manner not common to the public. The stated interests the groups seek to protect are germane to their purposes. For these reasons, OPIC recommends that the Commission find GREAT and TRPA to be affected persons.

The Center Point Alliance for Progress states that Wheatcraft's application is deficient in addressing the health and safety of the community, schools, and children. The group identifies no individual member who would have standing in his or her individual capacity. Therefore, OPIC cannot recommend that this request be granted.

Governmental Entities

Kerr County, by a hearing request submitted by its Commissioners Court, raises concerns of the quarry causing air and water pollution. Particularly, Requestor is concerned that particulate matter may harm the health of those living in close proximity to the facility. Kerr County is also concerned with the quarry's proximity to Center Point ISD. Section 121.003(a) of the Health and Safety Code provides that "[t]he governing body of a municipality or the commissioners court of a county may enforce any law that is reasonably necessary to protect the public health." For these reasons, OPIC finds that Kerr County is an affected person.

Center Point ISD, by a hearing request from its Superintendent and School Board president, states that its school district is within 2,000 feet of the proposed quarry. The school district has 165 students and staff members with respiratory disorders or seasonal allergies. The school district is concerned about the quarry causing air pollution, sediment being discharged in the Guadalupe River, petroleum/chemical contamination of the ground, and quarry's proximity adversely affecting the health and safety of the school district's students and staff, as well as Center Point's residents. Because of its interest in

protecting its students, employees and property with the district, OPIC finds that Center Point Independent School District is an affected person.

The Headwaters Groundwater Conservation District raises concern about the applicant's possible need for groundwater either now or in the future. OPIC cannot recommend granting this request because it is based on interests outside the Commission's jurisdiction to address in proceedings on this air quality permit application.

Individuals

Dr. John M. Alaniz and Ms. Anne Alaniz own a home where they plan to retire "right on the Guadalupe River in Center Point." Their request contends that their property is "a stone's throw" away from the location of the proposed crusher. Dr. Alaniz suffers from asthma. Dr. and Ms. Alaniz are concerned about the impact of the facility of the air they breathe and on pollution in the river.

David B. Anderson states that he resides approximately 2 miles from the plan. He states concern about the impact of dust and particulate matter and also about potential traffic hazards associated with trucks transporting materials to and from the plant.

Betty Aycock owns Bluff Creek Ranch located approximately 2000 feet from the proposed plant. She states she will be affected by dust, noise, impacts from the plant's waster use needs, water contamination, and the traffic generated by the plant on traffic hazards and road conditions.

William I. Aycock III also resides at Bluff Creek Ranch and his hearing request expresses the same concerns as expressed by Betty Aycock.

Amy Barger states that she resides within one thousand feet of the proposed site. She suffers from respiratory allergies and asthmatic reactions to airborne dust. She is concerned about impacts to air quality, noise, and water quality and impact on the Guadalupe River. She is concerned not only for herself, but also on behalf of grandchildren who have asthma and attend a neighboring school.

Thomas Barger, husband of Amy Barger, resides at the same location and filed a hearing request stating the same concerns as Ms. Barger.

Guy and Lorna Bason state concern about air and water quality and the impact of facility operations on the lungs of students at neighboring schools.

Don and Barbara Boehme state that they reside approximately one mile from the plant. They are concerned about dust and the impact of particulate matter on their health and the health of their visiting grandchildren. They also state concern about polluting the Guadalupe River.

Mr. and Mrs. Andrew Bowser filed a hearing request which they subsequently withdrew by letter dated May 5, 2008.

Robert Brown objects to the plant on the grounds that it is too close to residences and schools and will have an adverse impact on residents' health.

Mary Pattie Butters lives 3 miles south of the facility and expresses concern that the facility will cause air pollutants that will exacerbate her allergies, increased trucks on the road that will increase traffic hazards, pollution that will affect the river and thereby prevent fishing and swimming, and also pollution that will have an impact on groundwater. As a member of the health committee of the Center Point ISD, she is also concerned about the impact on school children's health. She expresses additional concern about noise and impacts to wildlife.

Joyce Chase states that she resides 3 miles from the plant. She states interest in property values and prevention of poor air quality.

Thomas H and Sherry L Collins reside one mile from the facility. They state that dust from the facility will impact their residence and already subjects them to nuisance conditions. They state further concerns regarding the applicant's proposed operating schedule, compliance history, and wastewater and water usage concerns. In additional separate requests they state that operations of the facility will have a negative effect on their well water and the Guadalupe River. Ms. Collins experiences severe bronchitis when exposed to pollutants and has concern that the emissions of particulate matter from the facility will exacerbate her condition. The Collins are also concerned about the adverse effect on their property values and the effect on the view from their home. Mr. Collins expresses additional concerns about noise and traffic congestion.

Clara Conner states in her hearing request that she is opposed to the plant.

Dan Davis states that he resides two miles northeast of the quarry. In his hearing request, he alleges that the facility is located too close to schools and populated areas. He has a respiratory condition that is aggravated by the dust that will be blown toward his property.

Jonathon Delmer states that he is located 4 miles downstream from the Wheatcraft facility on the Guadalupe River. He states an interest in protecting his river front property and his livestock from facility pollutants that will enter the Guadalupe River.

Marcy Downy states that she is the "nearest next door neighbor" to the facility, with a home approximately 400 yards from the rock crusher and a barn 300 yards away. She states concern regarding emissions' impact on her home, barns, orchard and pastures and the emissions' adverse impact on her livestock. She states interests in protecting her health and the use and enjoyment of her property.

Don and Janet Drinkard filed a request expressing concern about air and water contamination and the facility's impact on groundwater. They are further concerned that the facility does not meet the siting requirements of TCEQ regulations.

William Dunlap resides ½ mile from the facility and states concern that the crusher's operations will have a dramatic adverse impact on his asthma

Mrs. Rickie Eichler resides within 200 feet of the facility. She is concerned that emissions will jeopardize her health and cause water and air pollution. She is also concerned about the impact to the Guadalupe River and a possible increased likelihood of flooding if the crusher dumps rock into the river.

Shirley Eller resides two miles from the facility. She is concerned about her breathing and the impact of the facility's use of water with respect to neighboring water wells. She is also concerned about property values.

Don Esbjornson resides 2000 feet from the crusher. She states that the crusher does not meet applicable requirements concerning distances from recreational facilities, residences, private and public structures and highways. He states interests in protecting property values, and preventing increases in noise, air pollution and water pollution. His property is used as a wildlife management area.

Marcia Esbjornson resides 2000 feet from the crusher. She questions whether the facility complies with applicable distance limitations and whether it will adversely affect schools and residences, livestock in the area. She states that air pollution will affect human health, animal life and plant life.

Steve and Ann Galland state that they reside within one mile of the proposed quarry. They are both in cancer remission. They are concerned about the rock crusher being within a one mile radius of: three schools, four churches, all downtown, a historic park, outdoor river recreation areas, commercial plant nurseries, a school outdoor stadium, cattle/haying businesses, and family residences. Additionally, the Gallands raise concern with air pollution affecting their health, noise pollution, water pollution, the River Valley's ecosystem, recreational use of the river, and property values.

David Gray states that he resides ½ mile from the proposed facility. He is concerned that dust from the facility will carry itself to his outdoor living area.

Donald H. Greer and Mary B. Greer state that they reside approximately three miles from the proposed quarry. They are concerned that dust emission from the quarry will detrimentally affect their health and the environment of the area.

Marion L. Stile Hacker states that she owns property, with which she resides and raises hay and goats, within 3,000 feet of the proposed facility. Her son, who suffers from asbestosis and silicosis, and his wife also reside at this location. Ms. Hacker is concerned that dust and debris will adversely affect her health and the health of her son and his wife.

Jackie Hamlyn states that she resides about two miles from the proposed facility. She is concerned about the quarry causing air pollution and pollution to the river, thereby negatively affecting the river's wildlife.

Georgianna Haught states that she resides 1 ½ miles from the proposed facility. She raises concerns about air pollution, river pollution, noise pollution, and the impact of heavy trucks on the highway.

William E. Haught resides at the same location as his wife, Georgiana Haught. He is concerned about water quality, noise pollution, the quarry's nitro storage, diesel emission from trucks, ecosystem recovery, increased traffic on Highway 27, and the quarry's proximity to houses and Center Point schools.

Nina Kinney states she owns property on which she resides and ranches, one mile from the proposed quarry. She suffers from chronic bronchitis and states that the operation will degrade her health and enjoyment of her neighborhood. Particularly, Ms. Kinney is concerned about air pollution, pollution of the Guadalupe River, safety hazards from heavy equipment and vehicles, and damage to local roads.

John C. Kovacs, Center Point resident, is concerned about air pollution and the proximity of the quarry to schools and existing homes, including his own.

Kay Kyle states that she resides and raises livestock 1.5 miles from the proposed quarry. She also works for Center Point ISD. Ms. Kyle's husband and son suffer from severe allergies to airborne pollutants. She states that the quarry's operation will cause respiratory problems to animals and people. She is also concerned with water pollution, limited water supply, and noise pollution.

T.H. Lackey states that his property is approximately 5 miles from the proposed facility. His daughter lives in a foster home in close proximity to the crusher and he is concerned about the operation's effect on her asthma. He is concerned about the dust affecting school children and the elderly who have trouble breathing.

Juliana Leonard states that she is a landowner across the Guadalupe River from the proposed operation. She believes this will seriously affect the serenity of her quality of life and the land values of the area.

Robert Ligon states that his residence is less than 1500 feet from the proposed facility. He believes that his health would be affected by the emissions.

Robert Ligon also filed a petition dated September 21, 2005 containing the hearing requests of numerous nearby residents stating concerns for their health and impacts to the Guadalupe River. These requestors include:

Guy Burney

Kay Kyle

Sarah Sheets
Luke Sheets
Mary Weekley
Don Esbjornson
Barbara Boehme
Donald Boehme
Concerned Citizen Gayle Kennedy (Last
Name Illegible from petition)
Steve Augustine
Betty and William Aycock
Maria E. Boroaer
James Pularity
Janet and Don Drinkard
John and Jennifer Barnett
Theresa M. Sayer
Brent Sayer
Phil and Sally Sneed
Pam White
George Schroeder
Dorothy Bursch
Joanne Fenninger
Bonnie Willis
Jon Maxwell
Kim Williams
Jim Grand
Concerned citizen (illegible name) at
141 Verde Hills
Gerald Nunnery
Karen Nunnery
Thomas Collins
Sherry Collins
Susan L. Sander
Kay Steadham
Richard Steadham
Concerned Citizen (illegible name) at
391 McDonald Loop
John Mosty
Dub Martin
Trinidad Dominguez
Thomas Bayer
Laurie Milton
Phillip Milton
Audrey and Rene Verhalst
Danny and Kelly Lena
Joanne M. Wilson
John Wilson

Alma McClendon
Henry Knocke
Amber Blackledge
Karen Blackledge
Joel Blackledge
Christina Blackledge
Charles Young
Arlene Johnson
Jon Maxwell
Lesley Swope
Kim Williams
Eugene Pittman
Clarence Schmidt
Mary Schmidt
Jimmie Swofford
Pat Swofford
Jareda Eskew
J Keith
David Gray
M Cody Bishop
Douglas Smith
Frances Smith
Ellen Lucas
Guy Smith
Dennis Brown
Charlie Kaiser
Neal Coldwell at 314 China
Ann Fritz
Mark Abbott
Dorothy Bursch
Dorothy and James Pierce
Jan D. Menna
Marion L. Stiles
Joanne Cagle
Sharon Forster
CB Douglas
JA Douglas
JB Douglas
Mary Greer
Roland Seigler
Mary Pattie Butters
Alice Hammond
Neva J. Martin
Donna Gardner
Jo Ann Lynch
Jean Mosty

Edgar R. Ligon Jr.
Suzanne Trice
Jerry W. Trice
Patricia Whitworth
Don Eichler
Rickie Eichler

David L. John
Julia C. Dewey
Mr. and Mrs. E. W. Walker
Becky Valenzuela
Julie A. Giffith

Pat and Earl Long state that the crusher would be less than a mile from their church. They are concerned about air, noise, and water pollution. They are also concerned that the proposed facility will make the area less desirable.

Bill and Linda Lowrance state that their primary residence is one mile from the proposed facility. Their concerns include poor air quality; adverse affects on the Guadalupe River, the aquifer, and water tables; heavy truck traffic; health risks associated with silica dust; property devaluation; and deterioration of local roads.

Ben and Ellen Lucas state that their property is located 2000 to 3000 feet northwest of the proposed pit. Their concerns include air quality, particulate matter, light and noise pollution during sleeping hours, and water quality of the Guadalupe River.

JoAnn and W.R. Lynch state that their residence is located 1.5 miles southwest of the proposed facility. Their concerns include air quality, the lack of an air dispersion model, the lack of an archaeological model, the lack of ambient air sampling, health effects, and adverse impacts on the Guadalupe River.

Neva Martin states that her residence is located about 2 miles north of the proposed facility. She is concerned about health effects.

Jon Maxwell states that his ranch is located 5 miles north of the proposed facility. His concerns include: air pollution, pollution of the Guadalupe River, excess wear and tear on state and county roads, and noise pollution.

Sam McLarty states that his residence is located 1,000 feet from the proposed facility. He is concerned about health hazards and decreased property value.

Laurie Milton states that she resides within one mile of the proposed facility. She states that she will be affected by air pollution, noise pollution, and water pollution.

Phillip Milton resides at the same location as his wife, Laurie Milton. He is concerned about breathing pollution, increased traffic wearing highways and causing safety hazards, aquatic life, and the impairment of recreational use of the Guadalupe River.

John R. Mosty states that he resides within 3,000 feet of the proposed quarry. He is concerned about air pollution, the proximity of the proposed quarry to residential neighborhoods, the Guadalupe River, and the existing and future location of Center Point School.

Robert Mosty states that he owns property approximately 1,500 feet from the proposed Rhodes Pit. He is concerned that the pit will have a detrimental effect on air quality, the Guadalupe River, the health of area residents, and his property's value.

Gerald (Jerry) Nunnery states that he lives about 1 ½ miles from the proposed quarry. He suffers from asthma and inhalation allergies, and he is concerned that dust particles from the crushing of rocks will compromise his health and the health of his family. Mr. Nunnery also states that his work on his ranch will be disturbed by noise pollution. Additionally, he is concerned with air pollution, noise pollution, water pollution, damage to wildlife and river vegetation, public use and enjoyment of the Guadalupe River, and road degradation.

Karen Nunnery resides at the same location as her husband, Gerald Nunnery. She also uses this property for ranching and raising crops. She is concerned that her tank could be affected by the quarry's air pollution. Additionally, Ms. Nunnery raises concerns about noise pollution, water pollution, damage to wildlife and river vegetation, public use and enjoyment of the Guadalupe River, and road degradation.

George and Daryn Oliver state that they live less than two miles from the proposed facility. They are concerned about the quarry affecting air and water quality, causing noise pollution, and creating dangers for drivers of Highway 27 and residents of Center Point.

Carolyn S. Osborn states that she resides about one mile from the proposed quarry. She raises concerns about the quarry causing air and water pollution, road degradation, and diminishing property values. She is also concerned with the quarry's operating schedule and its proximity to Highway 27, residences, churches, and the school.

Raúl Peña and Sandra L. Peña are concerned about the proposed quarry's proximity to Highway 27 and a school and about airborne particulate matter affecting the health of students.

Theresa M. Sayer states that she resides about one mile from the proposed quarry. She suffers from allergies. She states that dust and other airborne debris from the quarry would make their way to Center Point, and that dust will land on crops, which will then be fed to livestock, which would end up in the public food chain. Additionally, she raises concerns that the Rock Crusher will not meet TCEQ requirements, including the operating schedule and distance requirements from recreational areas, residences, other structures, and highways.

Peggy Schlottman states that she resides less than ¼ mile from the proposed quarry. She states that she will be affected by dust, noise pollution as well as increased truck traffic, water pollution, and air pollution, all as a result of the quarry's operation.

Ronnie Schlottman, husband of Peggy Schlottman, resides at the same location and filed a hearing request stating the same concerns as Ms. Schlottman.

George H. Schroeder states that he owns property approximately 2 miles from the proposed quarry, where he raises donkeys. He states concerns about the quarry's dust and noise pollution as well as its excessive water use affecting aquifer levels, thereby affecting wells.

Nell I. Sevey states that she owns property, where her family resides, about 1.5 miles from the proposed quarry. Ms. Sevey states concern about the quarry causing air pollution and contaminating the river.

Luke Sheets states that he resides less than one mile from the proposed quarry. He suffers from allergies. Mr. Sheets states that the quarry will negatively affect him, his children, and the children of Center Point ISD by creating air and noise pollution and polluting the river

Sarah Sheets, wife of Luke Sheets, resides at the same location as her husband. She suffers from allergies and is concerned that air pollution will worsen her condition. Additionally, she states concern about pollution to the Guadalupe River, noise pollution, and the quarry's proximity to the school, churches, and private residences.

Linnette Shine states that she resides three miles from the proposed quarry. She states that her and her family's health will be negatively affected by air pollution and pollution to their drinking water because of the quarry's proximity to her home and Center Point ISD, where her son goes to school and where she works.

Donald Shirkey states that he resides and owns an art studio less than ½ mile from the proposed quarry. He suffers from allergies and is concerned that air pollution caused by the quarry will increase his allergies. Also, he states that dust pollution will degrade his paintings and reduce the value of his property. Mr. Shirkey is also concerned that the health of the community will be negatively affected by the quarry polluting the Guadalupe River.

Lisa Skidmore states that she resides 4,000 yards from the proposed quarry. She raises concern about the proposed quarry affecting her husband's asthma and the proximity of the proposed quarry to the school. She is also concerned about water quality.

Michael Skidmore, husband of Lisa Skidmore, resides at the same location as his wife. Mr. Skidmore suffers from asthma. He states the same concerns as Ms. Skidmore and also raises concern about the quarry's operation creating heavy traffic.

Suzanne Wray Smith and Brian Smith state that they own property directly across the Guadalupe River from Wheatcraft. They are both sensitive and allergic to dust emissions and particulate pollution and are concerned that air pollution will diminish their health. Additionally, they are concerned that the quarry's operation will cause noise pollution,

generate traffic, and decrease the value of their property. The Smiths are also concerned that the quarry will produce water pollution, which will affect their well water and future irrigation needs. They also raise concern about Wheatcraft's history of past permit violations.

Phillip W. and Sarah M. Sneed state that they own property, where they plan to build their residence, less than ½ mile from the proposed quarry. They raise concerns about the quarry causing air and noise pollution.

Phil Spain states that he owns property on Highway 27 where he plans to reside and build a housing development. He states that the quarry will reduce air and water quality, increase the risk of floods, negatively affect soil and animals, and render his property unusable for residential development because of the quarry would expose people there to health problems.

Belinda Stanush states that she owns property within several hundred feet of the proposed operation. She states that the proposed quarry will negatively affect air and water quality (particularly the Guadalupe River) and the growth of crops, as well as cause noise pollution and erosion. Ms. Stanush states this will lower the value of her property, as well as render her property and the river unsuitable for recreation, particularly for her granddaughter, who suffers from asthma.

Jeffrey C. Stiles states that he owns property, with which he raises livestock and produces hay, within a 3,000 foot radius of the proposed quarry. He suffers from asbestosis and silicosis and is concerned that airborne pollution caused by the quarry will worsen his condition. Mr. Stile is also concerned that air and water pollution from the quarry will negatively affect the entire community and devastate the economy by discouraging people to move to Center Point.

Frank Thomason raises concerns of the quarry causing air and water pollution, and adversely affecting the health of the school districts children and the elderly of Center Point.

Jerry W. Trice states that he resides and operates an RV park less than ½ mile from the proposed quarry. He suffers from allergies and sinuses and he is concerned pollution from the quarry will adversely affect his health. Mr. Trice also states concern about noise pollution, highway safety, increased cost of road maintenance as a result of increased traffic, loss of local growth and revenue, and the safety of the Guadalupe Bass, and Wheatcraft's past non-compliance of the law in applying for a permit. Furthermore, he is concerned the quarry's presence will affect his income from his RV park.

Suzanne H. Trice, wife of Jerry W. Trice, resides at the same location as her husband. She suffers from allergies and respiratory problems, which she states will be aggravated by pollutants in the air. Ms. Trice also raises concern that these pollutants will harm crops and animals, which will financially harm farmers and ranchers. Additionally, Ms.

Trice is concerned that the quarry's distance from her property will impair its recreational uses by producing air and noise pollution.

Kenneth H. Wardlaw is concerned about air pollution, pollution of the Guadalupe River, the river's aquatic life, increased traffic on Highway 27, and the safety of children.

David R. Weekly states that he resides and operates a ranch ½ mile from the Wheatcraft site. He raises concerns about emissions of air contaminants impairing his health, the quarry's proximity to residences, schools, churches, and agricultural facilities, the quarry's operation schedule, the quarry's water use, water pollution, the quarry's operation aggravating those with respiratory conditions, and Applicant's plan in the event of flooding. Additionally, Mr. Weekly is concerned that noise pollution and contamination of soil will impair his business, farms and nurseries.

Mary Weekly resides and works at the same location as David Weekly. She suffers from asthma and is concerned that increased air pollution will impair her health and interfere with her work. Requestor raises concerns about the quarry's operating schedule, air pollution, water pollution, noise pollution, dangers of falling rocks from loaded trucks, pollution of crops, harm to wildlife, economic impairment of businesses, and the health and safety of Center Point residents and students of Center Point ISD.

Pam White resides in Center Point and also owns property in Center Point, on which she plans to build a residential development. She is concerned that the quarry would expose her and potential buyers to health and safety problems. Ms. White is also concerned about the quarry adversely affecting land, air, water, flooding, and residents' quality of life.

Milton A Whitworth and Patricia Whitworth state that they reside a mile or less from the proposed facility. Mr. Whitmore suffers from a heart condition due to a heart bypass, and both Mr. and Mrs. Whitworth suffer from allergies. They raise concern that the quarry will adversely affect the use and enjoyment of their property, additional truck traffic will present a safety hazard, their property will lose value, and the quarry's operation will harm the Guadalupe River.

Marilyn L. Wiles, Center Point resident, requests a local public hearing and opposes the air quality permit for Wheatcraft, Inc.

Greg Williams states that he resides less than three miles from the proposed facility. He also works at the Center Point schools, which he states are located within 2,000 feet of the proposed facility. He suffers from pulmonary problems and is concerned for his health and his ability to continue teaching.

Debbie Williams resides at the same location as her husband, Greg Williams. She is concerned about personal health, both general and respiratory, and the environment as pertains to the emission of the crusher polluting the Guadalupe River.

Kimberly Williams states that she lives within ¼ mile of the proposed quarry. She suffers from allergies and chronic bronchitis and is concerned that particulate matter from the quarry will affect her health. Additionally, Ms. Williams is concerned that her drinking water well will be affected by the quarry's water use.

Charles Willis states that he resides 2,000 feet from the proposed facility. He raises concern about air quality, noise, water usage, pollution of the Guadalupe River, and his health, particularly impacts on his eyes and lungs.

Bernice Willis resides at the same location as her husband, Charles Willis. She raises concerns about air quality, noise pollution, children and endangered species.

Stephen Wray states that he and his sister, Suzanne Wray, own property one mile from the proposed facility. He is allergic to dust emissions and particulate pollution, and he is concerned that air pollution will severely diminish his health. He also raises concern about the quarry's noise pollution impairing the use and enjoyment of his property and the quarry's use of groundwater impairing his future irrigation needs.

C. Jean Young raises concerns about air pollution, noise pollution, water pollution, damage to wildlife and river vegetation, public use and enjoyment of the Guadalupe River, and road degradation.

Eldo W. Young resides at the same location as his wife, C. Jean Young. He suffers from bronchitis and filed a hearing request stating the same concerns as Ms. Young.

OPIC's Conclusions regarding Affected Person Status

For the reasons set forth above, OPIC recommends denial of the requests filed by the Center Point Alliance for Progress and the Headwaters Groundwaters Groundwater Conservation District.

Because of the severe time constraints resulting from this agenda setting and briefing deadlines – very challenging deadlines in light of the enormous number of individual hearing requests to be examined; OPIC has prepared this response without the benefit of a map locating the individual requestors. The map was not made available in time for OPIC to consider it in meeting the deadline for filing its response. OPIC recommends that the Commission deny none of the individual hearing requests and allow such requestors to attend the preliminary hearing to present their request for party status to the presiding Administrative Law Judge.

Without limiting who may otherwise be admitted as a party at SOAH, OPIC specifically finds the following requestors to be affected persons based on their stated proximity to the facility and their stated interests:

GREAT, TRPA, Kerr County, Center Point ISD, Dr. John M. Alaniz and Ms. Anne Alaniz, William I. Aycock III and Betty Aycock, Amy Barger and Thomas Barger, Don and Barbara Boehme, Thomas H. and Sherry L. Collins, Marcy Downy, Mrs. Rickie Eichler, Don and Marcia Esbjornson, Steve and Ann Galland, Marion L. Stile Hacker, Nina Kinney, Juliana Leonard, Robert Ligon, Bill and Linda Lowrance, Ben and Ellen

Lucas, Sam McLarty, Laurie Milton, Phillip Milton, John R. Mosty, Robert Mosty, Carolyn Osborn, Theresa Sayer, Peggy and Ronnie Schlottman, Luke and Sarah Sheets, Donald Shirkey, Suzanne Wray Smith and Brian Smith, Belinda Stanush, Jeffrey C. Stiles, Jerry W. Trice and Suzanne H. Trice, David R. Weekly and Mary Weekly, Milton and Patricia Whitworth, Kimberly Williams, Charles Willis and Bernice Willis, and Stephen Wray.

2. Issues Raised in the Hearing Requests that OPIC Recommends for referral to SOAH

OPIC finds that the following issues raised in hearing requests from affected persons are disputed issues of fact that were raised during the comment period. Furthermore, these issues are relevant and material to the commission's decision under the requirements of 30 TAC §§55.201(d)(4) and 55.211(c)(2)(A). The requests are based on issues regarding air quality and health effects. These issues are relevant and material to the commission's decision on the registration because they are addressed by the substantive law governing this application, are within the jurisdiction of the TCEQ and can be addressed in a hearing on the pending application. The factual issues raised by the requests relate directly to whether the applicant will meet the requirements of applicable substantive law. *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 "[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.") Pursuant to 30 TAC §106.4(c), emissions from Applicant's proposed plant must comply with all rules and regulations of the commission and with the intent of the Texas Health and Safety Code, including protection of health and property of the public. Accordingly, the issues identified below are relevant and material to the commission's decision concerning Wheatcraft's application and draft permit. permit by rule:

1. Will the rocker crushing operations have an adverse impact on the health of the requestors and their families and exacerbate existing health problems? (multiple requestors)
2. Will the rock crushing operations result in nuisance conditions? (multiple requestors)
3. Will the facility's operations have an adverse impact on requestors' livestock, orchards, and other agricultural enterprises? (Marcy Downey, , Nina Kinney, Kaye Kyle, John Maxwell, Belinda Stanush and other requestors)
4. Is the draft permit based on incorrect and outdated emission factor? (GREAT, TRPA)
5. Did Wheatcraft omit sources of emissions that will be generated from the rock crushing operations? (GREAT, TRPA)

6. Did Wheatcraft conduct inappropriate air modeling and thereby underestimate off-property impacts of emissions? (GREAT, TRPA)
7. Did Wheatcraft improperly omit analysis or modeling of respirable limestone, silica or other categories of emissions other than "particulate matter" thereby rendering its modeling inadequate? (GREAT, TRPA)
8. Has Wheatcraft demonstrated compliance with the National Ambient Air Quality Standards for PM 2.5? (GREAT, TRPA)
9. Have the appropriate effects screening levels (ESLs) been used in developing the draft permit? (GREAT, TRPA)
10. Are the terms of the draft permit specific enough to be enforceable (including without limitation permit terms regarding dust control visibility and hours of operation)? (GREAT, TRPA)
11. Does the draft permit contain adequate recordkeeping provisions? (GREAT)
12. Are the draft permit's monitoring provisions inadequate to determine compliance with allowable emission rates because they do not require continuous opacity or emissions monitoring at any point at the Wheatcraft facility? (GREAT, TRPA)
13. Does the draft permit contain adequate provisions to ensure monitoring of throughput and compliance with throughput representations in the application? (GREAT, TRPA)
14. Are the draft permit's monitoring provisions inadequate because the draft permit does not require property line monitors to test for particulates and speciated particulates? (GREAT, TRPA)
15. Have cumulative impacts been considered as required by applicable law? (GREAT, TRPA)
16. Should the permit be denied because impacts of the rock crushing operations cannot be determined without data gathered from baseline air quality monitoring at the Wheatcraft quarry? (GREAT, TRPA)
17. Are there schools located within 3,000 feet of the facility? If so, has the executive director considered possible adverse short-term or long-term effects of air contaminants and nuisance conditions on individuals attending school facilities? (GREAT, Center Point ISD, and multiple other requests)
18. Does Wheatcraft's compliance history warrant denial of the permit? (GREAT, TRPA)

2. Issues Raised in the hearing requests which OPIC cannot recommend for referral to SOAH

The TCEQ cannot address issues relating to the potential effects of water use or water discharges from the facility in the context of an air permitting action, except to the extent such issues are related to requirements for dust suppression subsumed in issues 1, 2, and 9 above. Therefore, as independent stand-alone issues, OPIC cannot find that these issues are relevant and material to the Commission's decision on this application. To the extent Wheatcraft's operations would require authorization from TCEQ because of discharges of wastewater generated by the crusher's operations, such authorization would be regulated under the auspices of the TCEQ's water quality permitting program, rather than through this air quality permit.

With respect to stormwater discharges, OPIC has learned that Wheatcraft's quarry operation is currently authorized under Stormwater Multi-Sector General Permit No. TXR05V305. It is possible that the proposed rock crusher could be authorized under the same general stormwater permit. If members of the public believe that Wheatcraft is not complying with its current water permit or any future water permit, a complaint can be filed with the TCEQ San Antonio Regional Office. Such a complaint will trigger an agency investigation.

Issues relating to noise pollution, off-site traffic hazards, and impacts on property value are also outside the authority for the agency to address in this permit proceeding concerning air quality issues. The agency's regulatory prohibitions against the creation of nuisance conditions are directed to nuisances caused by creation of conditions of air pollution. However, as noted in the executive director's response to comments, the scope of the agency's jurisdiction in no way prohibits private causes of action in Texas courts.

Many requestors cite to certain distance limitation requirements relating to distances from buildings used as residences, schools or places of worship. OPIC assumes that these requestors are referring to the siting criteria set forth in Texas Health and Safety Code section 382.065. This statute does not apply to the proposed facility which is a rock crusher, not a concrete crusher. Therefore, OPIC cannot find that these limitations are relevant and material to this application.

III. CONCLUSION

For these reasons, the OPIC respectfully recommends that the commission refer this matter to the State Office of Administrative Hearings. Without limiting who may otherwise be admitted as a party at SOAH, OPIC specifically finds the following requestors to be affected persons and recommends that their requests be granted:

GREAT, TRPA, Kerr County, Center Point ISD, Dr. John M. Alaniz and Ms. Anne Alaniz, William I. Aycock III and Betty Aycock, Amy Barger and Thomas Barger, Don and Barbara Boehme, Thomas H. and Sherry L. Collins, Marcy Downy, Mrs. Rickie

Eichler, Don and Marcia Esbjornson, Steve and Ann Galland, Marion L. Stile Hacker, Nina Kinney, Juliana Leonard, Robert Ligon, Sam McLarty, John R. Mosty, Robert Mosty, Peggy and Ronnie Schlottman, Luke and Sarah Sheets, Donald Shirkey, Suzanne Wray Smith and Brian Smith, Belinda Stanush, Jeffrey C. Stiles, Jerry W. Trice and Suzanne H. Trice, David R. Weekly and Mary Weekly, Kimberly Williams, Charles Willis and Bernice Willis, and Stephen Wray.

Pursuant to the requirements of 30 TAC §§50.115(b) and 55.211(b)(3)(A)(i), the OPIC further recommends that the commission refer to the State Office of Administrative Hearings the issues identified in Section II. B. 2. above. Commission rule 30 TAC §55.115(d) requires that any 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 be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC §55.209(d)(7), the OPIC estimates that the maximum expected duration of a hearing on this application would be one year from the first day of the preliminary hearing until the proposal for decision is issued.

Respectfully submitted,

Blas J. Coy, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2008 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served the same day on all persons listed on the attached mailing list via interoffice mail or by deposit in the U.S. mail.

Vic McWherter
Vic McWherter

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QUALITY

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DOUGLAS SMITH
138 BOARDWALK DR
CENTER POINT TX 78010

EDWIN STEARNS
CENTER POINT ISD
PO BOX 377
CENTER POINT TX 78010-0377

BECKY VALENZUELA
5966 HIGHWAY 27
CENTER POINT TX 78010-5468

FRANCES SMITH
138 BOARDWALK DR
CENTER POINT TX 78010

JEFFREY C STILES
422 CHINA ST
CENTER POINT TX 78010-5575

AUDREY & RENE VERHALST
244 RED BIRD LOOP
CENTER POINT TX 78010-5477

GUY SMITH
138 BOARDWALK DR
CENTER POINT TX 78010

EW WALKER
169 RIVER RD
CENTER POINT TX 78010

PHIL & SALLY SNEED
BLUFF CREEK RANCH
CENTER POINT TX 78010

MARY ELLEN SUMMERLIN
HEADWATERS GCD
125 LEHMANN DR STE 102
KERRVILLE TX 78028-6077

KENNETH H WARDLAW
PO BOX 7
CENTER POINT TX 78010-0007

PHILLIP & SARAH M SNEED
PO BOX 3441
ABILENE TX 79604-3441

JIMMIE SWOFFORD
336 RED BIRD LOOP
CENTER POINT TX 78010-5478

DAVID R WEEKLEY
510 BLUFF CREEK RD
CENTER POINT TX 78010-5419

PHIL SPAIN
2745 BANDERA HWY APT 2
KERRVILLE TX 78028-9613

PAT SWOFFORD
336 RED BIRD LOOP
CENTER POINT TX 78010-5478

MARY K WEEKLEY
510 BLUFF CREEK RD
CENTER POINT TX 78010-5419

BELINDA STANUSH
321 BLUE BONNET BLVD
SAN ANTONIO TX 78209-4632

LESLEY SWOPE
123 PUT RD
CENTER POINT TX 78010

PAM WHITE
2745 BANDERA HWY # A2
KERRVILLE TX 78028-9613

KAY STEADHAM
131 CENTER PT RIVER RD
CENTER POINT TX 78010

FRANK THOMASON
5720 HIGHWAY 27
CENTER POINT TX 78010-5466

MILTON A & PATRICIA WHITWORTH
PO BOX 431
CENTER POINT TX 78010-0431

RICHARD STEADHAM
131 CENTER PT RIVER RD
CENTER POINT TX 78010

JERRY TRICE
117 JJ LN
CENTER POINT TX 78010-5471

MARILYN L WILES
260 DEER PARK LN
CENTER POINT TX 78010-5444

CHARLES YOUNG
104 CANE LN
CENTER POINT TX 78010

DEBBIE WILLIAMS
271 DEER PARK LN
CENTER POINT TX 78010-5444

ELDO YOUNG
305 CENTER POINT DR E
CENTER POINT TX 78010-5431

GREG WILLIAMS
271 DEER PARK LN
CENTER POINT TX 78010-5444

THE HONORABLE TROY FRASER
TEXAS SENATE
PO BOX 12068
AUSTIN TX 78711-2068

KIMBERLY WILLIAMS
165 JJ LN
CENTER POINT TX 78010-5471

BERNICE WILLIS
PO BOX 315
CENTER POINT TX 78010-0315

BONNIE WILLIS
PO BOX 315
CENTER POINT TX 78010-0315

JOANNE M WILSON
210 RED BIRD LOOP
CENTER POINT TX 78010-5477

JOHN WILSON
210 RED BIRD LOOP
CENTER POINT TX 78010-5477

STEPHEN WRAY
2601 DOUGLAS ST
AUSTIN TX 78741-5709

C JEAN YOUNG
305 CENTER POINT DR E
CENTER POINT TX 78010-5431