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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 28, 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 JUL 28 PM 1:46

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: **BLOCK CREEK CONCRETE PRODUCTS, LLC**
TCEQ DOCKET NO. 2008-1009-AIR

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Requests for Reconsideration and Hearing Requests 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

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 JUL 28 PM 1:46

CHIEF CLERKS OFFICE

BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY

TCEQ DOCKET NO. 2008-1009-AIR

**IN THE MATTER OF
THE APPLICATION BY
BLOCK CREEK
CONCRETE PRODUCTS
FOR AIR QUALITY
STANDARD PERMIT;
REGISTRATION NO.
83958**

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

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 Reconsideration and Hearing Requests in the above-referenced
matter.

I. PROCEDURAL HISTORY

Block Creek Concrete Products, L.L.C. (Applicant) has applied to the TCEQ for
an Air Quality Standard Permit, Registration No. 83958, which would authorize the
construction of a permanent specialty concrete batch plant (CBP) under 30 TAC
§116.611. The CBP is to be located at 444 Old Number 9 Highway A, near Comfort,
Kendall County, Texas. The primary function of the plant is to manufacture concrete for
septic tanks, water storage tanks, and electrical pads. The materials to be mixed include,
but are not limited to, sand, aggregate, cement, and water in the production of concrete.
The concrete is mixed on site and poured into the appropriate forms on site.

The application for the permit was received on January 23, 2008. The application was declared administratively complete on January 31, 2008. The Notice of Receipt of Application and Intent to Obtain an Air Quality Standard Permit Registration for a Concrete Batch Plant was published on February 14, 2008 in *The Comfort News*. Timely hearing requests were filed on February 22, 2008 by Dennis Spinelli and on February 19, 2008 by Mickey Bush. The Notice of Application and Preliminary Decision for an Air Quality Standard Permit for Concrete Batch Plant Registration was published on April 17, 2008 in *The Comfort News*. The public comment period ended on May 19, 2008. The Chief Clerk mailed the Executive Director's Response to Public Comment and Decision on June 4, 2008. A third timely hearing request was filed on June 19, 2008 by Jerald Winakur. The deadline for submitting a hearing request was July 7, 2008.

Dennis Spinelli and Jerald Winakur each submitted a request for reconsideration along with their request for a contested case hearing. Mickey V. Bush requested only a contested case hearing.

II. REQUESTS FOR RECONSIDERATION

A. Applicable Law

A person may file a request for reconsideration no later than 30 days after the chief clerk's transmittal of the executive director's decision and response to comments.¹ Any person may file a request for reconsideration of the ED's decision.² A request for reconsideration must state the reasons why the decision the decision should be

¹ Texas Water Code §5.5556; 30 TAC §55.201(a) & (e).

² 30 TAC §55.201(e).

reconsidered.³ Responses to requests for reconsideration should address the issues raised in the request.⁴

B. Discussion

Dennis Spinelli's request for reconsideration of the executive director's decision is based on several concerns regarding the operation of the plant. Firstly, Mr. Spinelli argues that permitting the plant under a Standard Permit would constitute a poor policy decision due to the fact that the plant had been operating without TCEQ permission for a number of years before submitting its application. To authorize plant operations through the registration would leave the past illegal operation of the plant unpunished. Secondly, Mr. Spinelli states that the plant has a history of pollution and an inspection of the premises is warranted before an application is granted. Therefore, the Applicant should not be allowed to proceed with registration under the Standard Permit, but rather required to apply for an air quality preconstruction permit that would result in more public participation and elevated scrutiny of the plant site and its effects on neighboring life and property.

OPIC finds that the policy issue raised by Mr. Spinelli does not warrant denial of the registration. The terms of a Standard Permit are as enforceable as the terms of an individual new source review permit. Moreover, both authorizations allow for public comment and opportunity for hearing. Further, although the plant has been noticed for violations, OPIC cannot find that these incidents are sufficient to recommend denial of the registration. OPIC therefore recommends that Mr. Spinelli's request for reconsideration be denied.

³ *Id.*

⁴ 30 TAC §55.209(f).

Jerald Winakur also submitted a request for reconsideration of the executive director's decision. Mr. Winakur states that his ranch is a designated eco-tourist site and has been integrated into the Quail Restoration Project in Texas by the National Audubon Society. Mr. Winakur is concerned that byproducts from the plant will negatively affect the floodplain on which he claims the plant is sited and also have negative affects on the terrestrial life residing on his ranch. Mr. Winakur states that previous violations have occurred during operation of the plant and may recur, to include discharge of slag into the creek and exposure of fiberglass and concrete slurry to storm water. Mr. Winakur cites the negative impact of alkaline pH materials and heavy metals present in slag on animal and plant life, as well as the previous operation of the plant without a permit authorization as justification to deny Applicant's permit.

OPIC empathizes with Mr. Winakur's concerns for the wellbeing of his property and the wildlife contained therein, and recognizes that these concerns are within the jurisdiction of the commission to address in the context of these proceedings. An evidentiary record, however, would be necessary for OPIC to make a recommendation to the commission as to whether the registration should be denied based on these concerns. Without such a record, a recommendation for denial of the permit would be based on speculation and without the benefit of scientific inquiry and analysis. OPIC therefore recommends that Mr. Winakur's request for reconsideration of the executive director's recommendation be denied.

III. 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 & SAFETY CODE §382.056(g). Therefore, timely requests for 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 executive director's 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:

- a. whether the interest claimed is one protected by the law under which the application will be considered;
- b. distance restrictions or other limitations imposed by law on the affected interest;
- c. whether a reasonable relationship exists between the interest claimed and the activity regulated;
- d. likely impact of the regulated activity on the health, safety, and use of property of the person;
- e. likely impact of the regulated activity on use of the impacted natural resource by the person; and
- f. 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;

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).

- (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.

In addition to these requirements, the Texas Clean Air Act specifies that only those persons residing in a permanent residence within 440 yards of the proposed plant may request a hearing on a concrete batch plant standard permit registration as a person who may be affected. TEXAS HEALTH AND SAFETY CODE §382.058(c).

B. Affected Persons

Pursuant to 30 TAC §55.203(c)(2), the commission is required to determine distance limitations or other limitations imposed by law when determining who is an affected person entitled to receive a contested case hearing. As previously stated, TEXAS HEALTH & SAFETY CODE §382.058(c) provides that "only those persons actually residing in a permanent residence within 440 yards of the proposed plant may request a hearing under Section 382.056 as a person who may be affected."

1. Jerald Winakur

Jerald Winakur's hearing request states that he resides 2.5 miles from Block Creek Concrete Products. The maps provided by the executive director and the Applicant confirm that Mr. Winakur resides well beyond 440 yards of the proposed plant. There is no contradictory information demonstrating that the requirement is met. Therefore, OPIC cannot find that Mr. Winakur is an affected person pursuant to 30 TAC §55.203, or recommend that the commission grant his hearing request.

2. *Dennis Spinelli and Mickey V. Bush*

Dennis Spinelli and Mickey V. Bush independently state in their requests that they live within 440 feet of the proposed concrete batch plant. The executive director has produced a map purportedly showing both requestors' residences as being located outside of the 440 foot radius of the emission source. Likewise, the Applicant has produced a map showing that Mr. Spinelli and Mr. Bush reside outside of the 440 radius of the emission source. Significantly, however, these maps conflict on both the location of the emission source and the location of the residences. Depending on which plotting of the emission source and which plotting of the residence is correct, it is possible that these two requestors do reside within 440 yards of the plant.

Mr. Spinelli and Mr. Bush raise health, compliance history, and nuisance issues related to air quality. These interests are protected under the Texas Clean Air Act⁵ and section 30 of the Texas Administrative Code.⁶ Because the requestors explicitly claim that their property is within 440 yards of the proposed plant, and because the conflicting maps provided by the executive director and Applicant are inconclusive, OPIC recommends referring to SOAH the question of whether Mr. Spinelli and Mr. Bush meet applicable distance limitations and are affected persons.⁷

C. Issues raised in the Hearing Requests

1. Mr. Spinelli and Mr. Bush raise the concern that the Applicant's compliance history warrants denial of its application.
2. Mr. Spinelli and Mr. Bush raise the concern that the Applicant's activities will pose a health threat to residents on their property.

⁵ Health and Safety Code §§382.0518(b)(2) & 382.0518(c).

⁶ 30 TAC §101.4

⁷ 30 TAC §55.211(b)(4) authorizes the Commission to refer the question of affected person status to SOAH.

3. Mr. Spinelli and Mr. Bush raise the concern that the Applicant's activities will pose a health threat to animal life and vegetation on their property.
4. Mr. Spinelli raises the concern that the Applicant's activities will result in a noise nuisance.
5. Mr. Bush raises the concern that the Applicant's activities will result in a dust nuisance.
6. Mr. Bush raises the concern that the Applicant's activities will result in the interference with the use and enjoyment of his property.
7. Mr. Bush raises the concern that the Applicant's activities will result in pollution of Block Creek.

D. Issues raised in Comment Period

The issues raised in the hearing requests were also raised in the comment period and have not been withdrawn. 30 TAC §§55.201(c) and (d)(4), 55.211(c)(2)(A).

E. Disputed Issues

There is no agreement between the Requesters and the Applicant or Executive Director on the issues raised in the hearing requests.

F. Issues of Fact

If an issue is one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. See 30 TAC §55.211(b)(3)(A) and (B). OPIC finds that all issues raised by affected persons are issues of fact.

G. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.⁸ Relevant and material issues are

⁸ 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

those that are governed by the substantive law under which this registration is to be issued.⁹ The issues concerning compliance history,¹⁰ health effects on human, animal, and vegetative life,¹¹ use and enjoyment of property,¹² and dust and noise nuisances¹³ are all relevant and material to the commission decision on this registration application because they relate to whether Applicant can comply with the terms of the standard permit.

The remaining issue of pollution of Block Creek falls outside the scope of TCEQ jurisdiction with respect to this registration. Because this registration concerns air quality, TCEQ's jurisdiction in proceeding in this matter is limited to safeguarding the state's air resources from pollution, as implicitly authorized by Chapter 382 of the Health and Safety Code. Potential effects on water quality are not addressed by the substantive law governing this application and are not considered relevant and material to the Commission's decision. OPIC therefore finds that this issue is inappropriate for referral to the State Office of Administrative Hearings.

H. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact be referred to the State Office of Administrative Hearings for a contested case hearing. Issues 2-7 below need only be addressed if SOAH determines there is an affected person.

1. Preliminarily, are Mr. Spinelli and Mr. Bush affected persons permanently residing within 440 yards of the emission source, pursuant to Health and Safety Code §382.058(c)?
2. Does the Applicant's compliance history warrant denial of its application?

identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

⁹ *Id.*

¹⁰ Health and Safety Code §382.0518(c).

¹¹ Health and Safety Code §382.0518(b)(2).

¹² *Id.* See also Health and Safety Code §382.002(a).

¹³ 30 TAC §101.4

3. Will the Applicant's activities pose a health threat to affected requestors or their families?
4. Will the Applicant's activities pose a health threat to animal life and vegetation?
5. Will the Applicant's activities result in a noise nuisance?
6. Will the Applicant's activities result in a dust nuisance?
7. Will the Applicant's activities result in interference with the use and enjoyment of property?

I. Maximum Expected Duration of Hearing

Commission Rule 30 TEX. ADMIN. CODE § 55.115(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 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 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC recommends that the requests of Mr. Spinelli and Mr. Bush be granted, with the determination of emission source and permanent residence location constituting a preliminary matter at the hearing.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By *Eli Martinez*
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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2008 the original and eleven true and correct copies of the Office of the Public Interest Counsel's Response to Requests for Reconsideration and Hearing Requests 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
Eli Martinez

CHIEF CLERKS OFFICE

2008 JUL 28 PM 1:46

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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