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

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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 16, 2009

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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2009 MAR 16 PM 2: 12
CHIEF CLERKS OFFICE

Re: **TXI OPERATIONS, LP**
TCEQ DOCKET NO. 2008-1839-AIR

Dear Ms. Castañuela:

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

Sincerely,

Amy Swanholm

Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2008-1839-AIR

APPLICATION BY	§	**BEFORE THE**
TXI OPERATIONS L.P. FOR	§	**TEXAS COMMISSION ON**
RENEWAL OF AIR QUALITY	§	**ENVIRONMENTAL QUALITY**
PERMIT NO. 1360A	§	

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2009 MAR 16 PM 2:
CHIEF CLERKS OFFICE

THE OFFICE OF PUBLIC INTEREST COUNSEL'S

RESPONSE TO REQUESTS FOR HEARING

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 recommend that the Commission find the following:

I. INTRODUCTION

A. Facility Background

TXI Operations LP (TXI) submitted an application to TCEQ for renewal of Air Quality Permit No. 1360A on June 24, 2008. The renewal would authorize the continued operation of a cement manufacturing plant in the city of Midlothian, in Ellis County, Texas. The cement plant consists of four wet kilns and one dry processing kiln, a quarry, a raw materials storage and processing area, finish mills, and an area for loading out cement by either truck or rail, as well as related support systems. The four wet kilns (Kilns 1-4) were constructed beginning in 1960 and completed in 1972. The wet kilns are permitted to burn fuels including natural gas, coal, petroleum coke, fuel oil, waste derived coal, and tire derived fuel. The dry processing kiln (Kiln 5) began operation in 2001 and is authorized to burn coal and natural gas.

The permit would authorize the continued release of the following contaminants; nitrogen oxides, carbon monoxide, hydrogen chloride, organic compounds, sulfur dioxide, chlorine, hydrogen fluoride, sulfuric acid, total reduced sulfur, hydrogen sulfide, particulate matter, particulate matter less than 10 microns, barium, trivalent chromium, nickel, selenium, thallium, zinc, lead and mercury. The permit also consolidates by reference nine permits by rule and

Standard Permit 53424. It consolidates by incorporation one permit by rule and SB1126 (Project No. 118978). As TXI does not request any changes to the existing authorized equipment, the ED concludes that a BACT review was not triggered.[1]

Pollution from the four wet kilns is controlled by proper combustion practices, proper engineering and electrostatic precipitators.[2] Pollution from the dry kiln is controlled by baghouses (to control particulates), a wet scrubber (to control sulfur dioxide and sulfuric acid), and a regenerative thermal oxidizer or RTO (to control carbon monoxide, volatile organic compounds, and sulfur compounds).[3] Pollution from raw materials handling, solid fuel handling, clinker and finished product handling, road emissions, and nuisance dust are controlled by water and chemical dust suppression, enclosures, reduced-fall drops, covered conveyors and fabric filters.[4]

B. Procedure

The ED declared the application administratively complete on June 10, 2008. On July 24, 2008, the Notice of Receipt and Intent to Obtain (hereinafter "NORI") an Air Quality Permit was published in *Midlotian Mirror* and the *Waxihachie Daily Light*. The NORI was republished on August 27, 2008, in *Midlotian Mirror* and the *Waxihachie Daily Light*. The comment period closed on September 11, 2008, as did the period to request a contested case hearing.

C. Comments and Hearing Requests

TCEQ received 21 comments from the public. Notably, comments were received from the Environmental Protection Agency, the City of Dallas, the City of Fort Worth, the City of Plano, and the City of Denton. TCEQ received a comment letter from Representative Dan

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[1] Executive Director's Permit Renewal Source Analysis and Technical Review, signed by Ruth Alvirez and Erik Hendrickson, January 13, 2009, page 3.

[2] *Id.* at 3.

[3] *Id.* at 3.

[4] *Id.* at 3.

Barrett, for House District 97, expressing concern that this permit would be issued without the opportunity for a contested case hearing.

TCEQ also received 195 separate hearing requests. Many of these requests state they are personally affected because of severe health problems associated with and exacerbated by elevated levels of air pollution. Notably, Representative Lon Burnam of Fort Worth's District 90 requests a hearing, stating that the permit for the four wet kilns should be reevaluated in light of complaints about sulfur dioxide from surrounding residents and a study by the Agency for Toxic Substances and Disease Control regarding the health effects of cement kilns.

II. TXI HAS APPLIED FOR A "NO INCREASE RENEWAL"

A. Applicable Law regarding "Affected Persons"

The Executive Director declared this application administratively complete on June 10, 2008. As the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of Texas Health and Safety Code (THSC) § 382.056 added by Act 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: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of the application.[5] Hearing requests must be submitted to the Chief Clerk's Office in writing no later

[5] 30 TEXAS ADMIN. CODE (TAC) § 55.201(d) (2006).

than 30 days after the Chief Clerk's transmittal of the Executive Director's Response to Comments.[6]

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.[7] Relevant factors that will be considered in determining whether a person is affected include:

(1) whether the interest claimed is one protected by the law under which the application will be considered;
(2) distance restrictions or other limitations imposed by law on the affected interest;
(3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
(4) likely impact of the regulated activity on the health, safety, and use of property of the person;
(5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
(6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.[8]

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.[9]

Accordingly, responses to hearing requests must specifically address:

(1) whether the requestor is an affected person;
(2) which issues raised in the hearing request are disputed;
(3) whether the dispute involves questions of fact or law;
(4) whether the issues were raised during the public comment period;
(5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comment;
(6) whether the issues are relevant and material to the decision on the application; and

[6] 30 TAC § 55.201(c).

[7] *Id.*

[8] 30 TAC § 55.203(c).

[9] 30 TAC § 55.211(c).

(7) a maximum expected duration for the contested case hearing.[10]

B. Applicable Law regarding "No Increase Renewals"

There is no right to a contested case hearing on a renewal application under Chapter 382 of the Texas Health and Safety Code (THSC), if the application would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.[11]

However, notwithstanding THSC § 382.056(g), the Commission may hold a hearing on a permit renewal "if the commission determines that the application involves a facility for which the applicant's compliance history is in the lowest classification under §5.753 and 5.754 of the Texas Water Code, and rules adopted and procedures developed under those sections."[12] TCEQ rules also allow the Commission to hold a contested case hearing in the following circumstance: "if the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations."[13]

C. Discussion

Despite the numerous hearing requests and public concern, THSC §382.056(g) provides that "the commission may not seek further public comment or hold a public hearing...on an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted." Because this application meets these criteria,[14] OPIC finds there is no right to hearing on this application for

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[10] 30 TAC § 55.209(e).

[11] THSC § 382.056(g) and (o); 30 TAC §§ 55.201(i)(3)(C); 55.211(d)(2).

[12] THSC § 382.056(o).

[13] 30 TAC § 55.201(i)(3)(C); *see also* 30 TAC § 55.211(d)(2).

[14] *See* Executive Director's Permit Renewal Source Analysis and Technical Review, signed by Ruth Alvirez and Erik Hendrickson, January 13, 2009, page 3.

renewal, and cannot recommend the Commission find any of the 195 hearing requesters are entitled to a hearing.[15]

III. THE COMMISSION HAS AUTHORITY TO HOLD A PUBLIC INTEREST HEARING

Texas Water Code § 5.556(f) and 30 TAC § 55.211(d)(1) authorize the Commission to refer a matter to the State Office of Administrative Hearings (SOAH) if it concludes that holding a hearing is in the public interest. Because there is great public interest in this permit renewal and the TXI facility may adversely impact North Texas's ability to comply with state and federal air quality standards, OPIC recommends the Commission exercise its authority to hold a public interest hearing.

OPIC recommends holding a public interest hearing on this matter because;

1. North Texas has failed to meet federal standards for ambient air quality. Ellis County is currently within the DFW Eight-Hour Ozone Nonattainment Area (classified as moderate nonattainment) under the 1997 standard, [16] and is projected to be classified as a moderate nonattainment area under the 2008 standard;[17]
2. EPA has identified three issues with the proposed permit;
    a. The application lists NO_X emission rates as 2.726 lb/ton of clinker for the dry kiln, and 500 lbs/hr per each wet kiln or 2190 tons/yr per each wet kiln. The permit should, at a minimum, reflect the proposed *Dallas-Fort Worth (DFW) State Implementation Plan, Control of Emissions of NO_X from Cement Kilns*, listing that, as of March 1, 2009, in Ellis County, states that dry preheater-precalciner kilns should achieve a NO_X emission rate of 1.7 lb/ton of clinker,

[15] Attachment A lists individuals and entities that have requested a hearing on this matter.

[16] See http://www.tceq.state.tx.us/implementation/air/sip/dfw.html (TCEQ website providing information about Dallas–Fort Worth' s air quality challenges, air quality plan, and control strategies. And containing links to rules, agreements, Texas State Implementation Plan (SIP) revisions, and other documents that relate to the Dallas-Fort Worth (DFW) area).

[17] *See* http://www.tceq.state.tx.us/implementation/air/aqps/eighthour.html (website describing and linking to documents showing the Commission's recent approval of a recommendation concerning designations under the EPA's 2008 Eight-hour Ozone Standard: the state's recommendation is due to EPA by March 12, 2009 and is currently before the governor for his consideration).

and long wet kilns should achieve an emission rate of 3.4 lb/ton of clinker during the DFW ozone season.

b. There is no mention of maintenance, start up, and shut down emissions in the permit application. The TCEQ must follow EPA policy for addressing periods of maintenance, start up, and shut down when preparing the draft permit;

c. The permit should contain emissions levels that reflect TXI's use of regenerative thermal oxidizers (RTO) as a pollution control device. Including this in the permit would ensure that the RTO is utilized effectively and make the permit more practicably enforceable.[18]

3. No changes have been made to the draft permit, in response to EPA's August 8, 2008 letter;[19]
4. A report titled "Midlothian Area Air Quality Part 1: Volatile Organic Compounds and Metals" was released in December of 2007, classifying the Midlothian area as an indeterminate public health hazard.[20] In response to this report, the TCEQ is currently collecting and studying ambient air quality samples in the Midlothian area;[21]
5. Numerous hearing requestors, including Representative Lon Burnam of Texas House District 90, have expressed concern regarding the impact of cement kilns on the public health of North Texas' citizens;

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[18] Letter from Jeff Robinson, Chief of Air Permits Section for the Environmental Protection Agency, Region 6, dated August 8, 2008.

[19] Executive Director's Response to Comments (ED's RTC), dated November 25, 2008, Response 9, 10, 14, 15 and Changes Made in Response to Comment.

[20] *See* http://www.dshs.state.tx.us/epitox/midlothian/midlothian.shtml (Texas Department of State Health website providing a copy of and information on the "Midlothian Area Air Quality Part 1: Volatile Organic Compounds and Metals" study conducted by the Texas Department of State Health, in connection with the Agency for Toxic Substances and Disease Registry); *See also* ED's RTC, Response 16.

[21] *See* http://www.tceq.state.tx.us/implementation/tox/research/midlothian.html (Describing TCEQ study initiated to address air quality issues in the Midlothian area. Results of study are anticipated to address citizens' questions, including;

How are industries in Midlothian affecting air quality?
Is the TCEQ every-6th-day monitoring site an accurate representation of daily air concentrations?
What is the air quality close to schools and parks in Midlothian?
What percentage of total chromium does chromium VI represent in Midlothian?).

6. TXI has recently decided to idle all four wet kilns,[22] yet the draft permit does not appear to reflect this decision or the implications of this decision on total site emissions, emissions from the four wet kilns, current and future compliance with the Texas SIP, and other North Texas air quality issues.[23] [24]

A. Parties to the Public Interest Hearing

Should the Commission choose to hold a public hearing, OPIC recommends that the ED, TXI, and OPIC be named as statutory parties. Without limiting SOAH's discretion to admit additional parties, OPIC also recommends Downwinders at Risk be named as a party, as well as any governmental entities that have authority over issues raised by the application and who may appear at the preliminary hearing and request to be admitted as a party.

B. Issues to Refer to SOAH

OPIC respectfully recommends the scope of the hearing be limited to the following issues;

1. Whether additional requirements should be included in the draft permit;
    a. as necessary to avoid a condition of air pollution; or
    b. to ensure compliance with otherwise applicable federal or state air quality control requirements;[25]
2. Whether additional requirements should be included in the draft permit, considering the condition and effectiveness of existing emission control equipment and practices;[26]

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[22] *See* letter from the City of Dallas, submitted on September 17, 2008.

[23] ED's RTC, Changes Made in Response to Comment, page 18.

[24] OPIC bases this statement on the fact that the ED made no changes to the draft permit in response to public comments. *See* ED's RTC, page 18.

[25] THSC § 382.055(e).

[26] THSC § 382.055(d)(1) and (2).

3. If additional requirements are necessary, has the applicant shown that the requirements are not economically reasonable and technically practicable, considering;
    a. the age of the facility; and
    b. the effect of the facility's emissions on the surrounding area;[27]
4. If additional requirements are necessary, what is the basis for that conclusion;[28]
5. If additional requirements are necessary, what schedule, if any, should be established for the implementation of these requirements or would such requirements be self-implementing under the proposed revised provisions of the permit.[29]

IV. IN THE ALTERNATIVE, OPIC RECOMMENDS THIS MATTER BE CONTINUED

As an alternative to holding a public interest hearing, OPIC recommends the Commission continue this matter. This would give the ED, OPIC, TXI and any interested parties an opportunity to engage in discussions on how the proposed amended permit may be changed to address concerns with the current draft permit. If the matter is continued, this could allow time for the ED, the applicant and any other interested parties to discuss and negotiate any additional requirements that should be added to the renewed permit, as "necessary to avoid a condition of air pollution or to ensure compliance with otherwise applicable federal or state air quality control requirements."[30] After the designated continuance, the ED could request a remand in order to issue a revised draft permit. If revision of the draft permit does occur, OPIC would revisit its position on whether to recommend a public interest hearing and present the Commission with an updated recommendation when the item is again set for Agenda.

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[27] THSC § 382.055(e).

[28] THSC § 382.055(f)(1); THSC § 382.055(e).

[29] THSC § 382.055(f)(2); THSC § 382.055(e).

[30] THSC § 382.055(e); *see also* THSC § 382.055(d), (e), (f) and (g).

V. CONCLUSION

There is no right to a hearing on a "no-increase" air permit renewal. Nevertheless, OPIC recommends the Commission exercise its authority to hold a public interest hearing[31] to determine whether additional requirements should be included in the draft permit to protect the health of Texas's citizens and ensure compliance with state and federal air quality standards. In the alternative, OPIC recommends continuing this matter to allow the ED, applicant and interested parties time to discuss the possibility of amending the draft permit to address the significant public interest issues included in Section III of this document.

Respectfully submitted,

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Public Interest Counsel

By Amy Swanholm
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[31] TWC § 5.556(f) and 30 TAC § 55.211(d)(1).

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2009, 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 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.

Amy Swanholm

Amy Swanholm

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2009 MAR 16 PM 2:13
CHIEF CLERKS OFFICE

Attachment A

List of Hearing Requestors in 2008-1839-AIR

Representative Lon Burnam
Alice Alvarado
Leon Baker
Janen Baker
Rick Beaty
Mary Beaty
Elizabeth Ann Booth, MD
Becky Bornhorst for Downwinders at Risk
Linda Bostic
Bonita Bowman
Karl Bradford
Sam Brasfield
Suellen Brasfield
Sandra Breakfield
Rick Breckenridge
Anette Briggs
Deborah Brown
Drew Brown
Manesh Brown
Kara Browne
Joan M. Burnard
William Burnard
Janine Byard
Christie Campbell
Parker Campbell
Don Campbell
Peggy Campbell
Stan Campbell
Ken Chambers
Kay Christlieb
Kenneth Chruscielski
Kathy Chruscielski
Rita Clarke
Melanie Clifton
Amanda Coley
Bryan Coley
Kim Collie
Serena Simmons Connelly, MSSW
Paulette Cooper
Albert Cullins
Kim Davis
Dawn Davison
Anna DeSelle
Julie A. Dill
Connie Domingue
James Domingue
Barbara Downey
Mr. and Mrs. Dunklin
Richard Durham
Randie Ellis
HD Ellison
Veronica Estrada
Billie Kay Fields
Dan Fowler
Rebecca Fowler
Patricia Gant
Ronald Gant
Jennifer Garcia
Brian Garrison
Tama Garrison
Louis Golman
Stanley Golman
Mike Griffith
Cynthia Griffith
Elaina Gross
Marilyn M. Gunther
Regina B. Hall
Candy Halliburton
Wayne Halliburton
Maralyn Hamaker
Linda Hanratty
Bonnie Harllee
Sarah Harllee
Walt Harrisson
The Hastings
Michaelynn Hawking
Phillip Hennan
Myra Waldrop
Elizabeth Hedden
George T. Hill
Susan Catherine Hilton
Bonnie Hoffman
Brian Hoffman
Stephanie Hoffman
Barbara Holley
Cyntila Hollins
Carole Anne Hoppenstein
Eliza Hopewell
John Huffman
Charlotte Hyams PhD.
Linda Walsh Jenkins
Jess Jessen
Robert Johnson
Taylor Jones
Paul G. Kalich
Kerrie Kimberling
Daniel Kocurek
Leslie Kuhn
Marilynn Kuss
Kelly Lane
Rhonda Laudermilk
Bobby D. Lee
Carolynn A. Lee
Lewis Lee
Deborah J. Lemoine
Katherine Liddle
Lou Ann Ligon
Cindy Little
Eva Lloyd
Jody Luckie
Samantha Luckie

Tobie Marks
Kassie Marks
Debora L. Markwardt
Rebecca Marin
Raymond Massey
Cathy Mathia
Hallie Mathia
Joseph Mathia
Ann McFadyen
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Alicia Melo
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Diane Mitschke
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Eileen Moore
Sarah Moore
George Morris
Ethyl Nelms
Sheri Nelson
Ned Newsom
Nora Newsom
Chris Nichols
Angela Nichols
Lylyan Nobles
Willem Noteboom
Paula Noteboom
Robin D O'Byrne
Jose Ochoa
Jennifer Ochoa
Marsh Paisley
Anitra Patterson
Lori Peniche
Amelia S. Perez
John Peroyea
Carolyn Beyer Pickle
Donna Piercy
Harriet Plaskoff
Suzanne Pope
Ralph Pope
Suzette Pope
Janet Powell
Annabel Qualls
JoAnn Ranton
James Ranton
Harriet Raskin
Gina Raybourne
William Redding
Mary Anne Meyer
Redmond
Allen Reed
Jacinto Reyes
John Reyes
Kathy Reyes
Patricia Reyes
Sam Rodgers
Elizabeth Rodzinski
Sharon Ross
Mark Russo
Ken Sambell
Jan Sanders
Sandra Sanford
Mary Saucedo
Felix Saucedo
Dick Schoech
Sharon Schoech
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Tyda Shields
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TCEQ DOCKET NO. 2008-1839-AIR

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REQUESTERS:
See attached list.

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DALLAS TX 75225

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2310 FM 1387 REAR APT
MIDLOTHIAN TX 76065

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MIDLOTHIAN TX 76065

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MAYPEARL TX 76064-2134

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MIDLOTHIAN TX 76065-5309

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16106 TERRACE TRL
WHITEWRIGHT TX 75491-7201

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603 S 2ND ST
MIDLOTHIAN TX 76065

CANDY & WAYNE HALLIBURTON
905 RIDGEWOOD TER
ARLINGTON TX 76012-3121

JULIE A DILL
120 CLINTON LN
MIDLOTHIAN TX 76065-5118

BECKY & DAN FOWLER
200 N 3RD ST
MIDLOTHIAN TX 76065

MARALYN HAMAKER
1139 HAINES AVE
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CONNIE DOMINGUE
351 DAISY RD
MIDLOTHIAN TX 76065

MRS PATRICIA & RONALD GANT
555 WOODCREEK DR
MIDLOTHIAN TX 76065-3155

LINDA L HANRATTY
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FORT WORTH TX 76109-9552

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351 DAISY RD
MIDLOTHIAN TX 76065

JENNIFER GARCIA
604 FIRST ST
TERRELL TX 75160

BONNIE HARLLEE
8327 WINECUP RIDGE
DALLAS TX 75249

SARA HARLLEE
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614 RENEE LN
DESOTO TX 75115-4680

BRIAN HOFFMAN
1302 HALIFAX DR
GRAND PRAIRIE TX 75050

STEPHANIE HOFFMAN
614 RENEE LN
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MIDLOTHIAN TX 76065-4909

LEWIS LEE
3418 CHARING CROSS RD
MIDLOTHIAN TX 76065-8724

DEBORAH LEMOINE
3421 STARWASHED DR
MIDLOTHIAN TX 76065-5474

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DALLAS TX 75218-2803

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