



March 30, 2009

VIA REGULAR MAIL

Chief Clerk of the TCEQ
Attn: Agenda Docket Clerk
Mail Code 105
TCEQ
P.O. Box 13087
Austin, Texas 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 MAR 30 AM 11:11
CHIEF CLERKS OFFICE

RE: ***Docket No. 2008-1839-AIR
TXI Operations, L.P.
Request(s) filed on Permit No. 1360A***

Dear Chief Clerk:

Enclosed are the original and eight copies of City of Dallas' Reply to Responses to Hearing Requests and Recommendation Regarding Same.

Please file the original and copies among the papers of the above-referenced matter and return the extra copy, with your date of filing shown thereon, in the self-addressed, stamped envelope that has been provided.

By copy of this letter, all parties of record have been forwarded a copy of the above.

Very truly yours,

LEMUEL B. THOMAS
Assistant City Attorney

LBT:ltf

Enclosures

c: (w/encl)

VIA REGULAR MAIL

to all parties listed in attached Mailing List

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2009 MAR 30 AM 11:11

TCEQ AIR QUALITY PERMIT NO. 1360A

TCEQ DOCKET NO. 2008-1839-AIR

CHIEF CLERKS OFFICE

**APPLICATION BY
TXI OPERATIONS, LP
ELLIS COUNTY**

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**BEFORE THE
TEXAS COMMISSION
ON ENVIRONMENTAL
QUALITY**

**CITY OF DALLAS' REPLY TO RESPONSES TO HEARING REQUESTS
AND RECOMMENDATION REGARDING SAME**

The City of Dallas ("Dallas") hereby submits its reply to the responses to hearing requests filed in the above-referenced matter and, pursuant to § 382.112 of the Texas Clean Air Act ("Texas CAA"), Texas Health and Safety Code § 382.112, its recommendation regarding the hearing requests.

I. Introduction and Background

TXI filed its application for renewal of Air Quality Permit No. 1360A on June 24, 2008, as required for the continued operation of its cement manufacturing facility in Ellis County. Dallas timely submitted comments on TXI's application on August 6 and September 15, 2008. Dallas did not request a contested case hearing pursuant to Texas Health and Safety Code § 382.056. However, 195 other individuals or entities did request a contested case hearing.

The Office of Public Interest Counsel ("OPIC") of the Texas Commission of Environmental Quality ("TCEQ" or "Commission"), TCEQ's Executive Director, and the Applicant, TXI Operations, LP ("TXI") have each filed responses to the hearing requests (hereafter, "OPIC Response," "Executive Director Response," and "TXI Response," respectively). OPIC has recommended that the Commission hold a hearing pursuant to its authority under Texas Water Code § 5.556(f) and 30 TAC § 55.211(d)(1). OPIC

Response, p. 6. In addition, OPIC has recommended that "any governmental entities that have authority over the issues raised by the application and who may appear at the preliminary hearing and request to be admitted as a party" be named as parties to a hearing if one is granted. *Id.*, p. 8.

II. The Texas CAA Authorizes Dallas to File This Response and Recommendation

Section 382.112 of the Texas CAA states:

A local government may make recommendations to the commission concerning a rule, determination, variance, or order of the commission that affects an area in the local government's territorial jurisdiction. The commission shall give maximum consideration to a local government's recommendations.

Texas Health and Safety Code § 382.112.

Dallas would be affected by the granting of TXI's permit renewal application and thus has a right to make a recommendation regarding the Commission's decision whether to hold a hearing. Both Dallas and the TXI facility are located within the DFW Eight-Hour Ozone Nonattainment Area under the federal Clean Air Act. 69 FR 23858. See generally TCEQ, Dallas-Fort Worth Nonattainment Area, available at <http://www.tceq.state.tx.us/implementation/air/sip/dfw.html>. TXI's permit renewal would adversely impact the Dallas-Fort Worth area's ability to come into compliance with the Eight Hour Ozone Standard.

Moreover, Dallas has an additional stake in the Commission's decision. OPIC has recommended that any "governmental entit[y] [with] authority over the issues raised by the application[.]" Dallas is such an entity. While Dallas of course has no jurisdiction over the operations of the TXI facility, Dallas does have authority, under the Texas

CAA, to, among other things, "enact and enforce an ordinance for the control and abatement of air pollution . . ." Texas Health and Safety Code § 382.113.

For these reasons, Dallas respectfully submits this response and recommendation regarding the hearing requests.

III. The Commission Has the Authority to Hold a Hearing Pursuant to Texas Water Code § 556(f)

Texas Health and Safety Code § 382.056 sets forth procedures for air permit applications, including permit renewals, such as TXI's. Section 382.056(n) states that "the commission shall consider a request that the commission . . . hold a public hearing in accordance with the procedures provided by Sections 5.556 and 5.557, Water Code." Under those procedures, the Commission is not "preclude[d] from holding a hearing if it determines that the public interest warrants doing so." Texas Water Code § 5.556(f). Adopting this grant of authority, the Commission's regulations regarding requests for public hearing provide: "Notwithstanding any other commission rules, the commission may refer an application to [the State Office of Administrative Hearings] if the commission determines that . . . a hearing would be in the public interest[.]" 30 TAC 55.211(d). Thus, the Commission has broad discretion to hold a public hearing whenever it determines that to do so is in the public interest.

The Executive Director and TXI both contend that the Commission lacks the discretion to hold a hearing in this case. *See* Executive Director Response, pp. 3-4; TXI Response, pp. 2-4. Both cite Texas CAA § 382.056(g), which states that the Commission "may not . . . hold a public hearing . . . in response to a request for a public hearing on . . . [a permit] 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" (emphasis

added). Texas Health and Safety Code § 382.056(g). Based on this provision, OPIC has concluded that the hearing requestors have “no right to hearing on this application for renewal[.]” OPIC Response, pp. 5-6. Assuming, *arguendo*, that OPIC’s conclusion is correct, Texas CAA § 382.056(g) precludes only the Commission from granting a hearing, as a matter of right, in response to the requests for a hearing. This provision does not speak to the Commission’s discretionary authority to hold a hearing if it determines a hearing would be in the public interest. See Texas Water Code § 5.556(f); 30 TAC 55.211(d). Thus, OPIC has recommended that the Commission find that a hearing is in the public interest and to hold such a hearing. OPIC Response, p. 6.

TCEQ regulations suggest that the Commission has agreed with OPIC’s interpretation of Texas CAA § 382.056(g) vis-à-vis Texas Water Code § 5.556(f). Mirroring Texas CAA § 382.056(g), TCEQ regulations state that “there is no right to a contested case hearing [where] . . . renewal of an air application . . . would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted” (emphasis added) 30 TAC 55.201(i). However, TCEQ regulations further provide may hold a hearing if it determines a hearing is in the public interest “[n]otwithstanding any other commission rules” (emphasis added). 30 TAC 55.211(d). Thus, under TCEQ’s interpretation of Texas CAA § 382.056(g), the provision does not trump the Commission’s discretion to hold a hearing when it determines a hearing is in the public interest.

Neither the Executive Director nor TXI address or acknowledge the Commission’s discretion to find that a hearing is in the public interest and to thereby hold a hearing pursuant to Texas Water Code § 5.556(f) and 30 TAC 55.211(d). See

Executive Director Response, pp. 3-4; TXI Response, pp. 2-4. Dallas submits that the Commission does retain this discretion and should exercise it in this permit renewal application.

IV. A Hearing is Warranted for TXI's Permit Renewal Application

OPIC has identified six reasons that the public interest warrants a hearing on TXI's permit renewal application. OPIC Response, pp. 6-8. Dallas agrees with all of the reasons cited by OPIC, particularly (1) the TXI facility's location within the Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area and the facility's contribution to ozone pollution, (2) EPA's concerns with the permit, as expressed in comments submitted August 8, 2008, (3) the fact that the Executive Director has not proposed any changes to the permit to address EPA's concerns, and (4) the fact the permit does not reflect TXI's decision to idle its four high-emissions wet kilns. These issues are largely consistent with the concerns regarding TXI's application Dallas raised in its comments submitted August 6 and September 15, 2008.

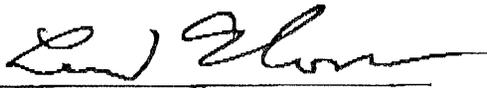
In addition, Dallas notes that bills are pending in the Texas Legislature that address air emissions from cement manufacturing facilities such as TXI's. *See, e.g.*, HB 3424 (Relating to Nitrogen Oxide emission limits for cement kilns in certain non-attainment areas for ozone) (available at <http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=81R&Bill=HB3424>). At the very least, the pendency of these bills suggests that the public interest lies in a thorough hearing of the issues OPIC identifies.

Conclusion

For the reasons stated above, Dallas respectfully recommends, pursuant to Texas Health and Safety Code § 382.112, that the Commission refer this matter to the State Office of Administrative Hearings on the issues identified by OPIC.

Respectfully submitted,

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Certificate of Service

I certify that a true and correct copy of the foregoing City of Dallas' Reply to Responses to Hearing Requests and Recommendation Regarding Same was served to all parties on March 30, 2009, via regular mail.


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DALLAS TX 75234

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GIOVANNI ULIBARRI
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MIDLOTHIAN TX 76085-3617

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IRVIN A UPHOFF
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STEVEN SVERDLIK
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DALLAS TX 75220

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6230 FM 1830
ARGYLE TX 76226

DEAN THOMAS
880 KING ARTHUR DR
MIDLOTHIAN TX 76085-5431

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DALLAS TX 75228-5504

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MD
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DALLAS TX 75230-3850

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JUDITH WOOD
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FORT WORTH TX 76133

JONNA WOODBURN
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MIDLOTHIAN TX 76085

ROBERT WOODBURN
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MR BRAD & MRS LAURIE YOUNG
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MIDLOTHIAN TX 76065-5449

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DON YOUNG
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CITY OF DALLAS

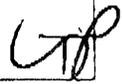
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From:	Lemuel B. Thomas	Transmitted By:	LTP 

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	TXI Operations, L.P.
	Request(s) filed on Permit No. 1360A
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