

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

May 8, 2009

Texas Commission on Environmental Quality
Mr. Les Trobman, General Counsel
MC 101
PO BOX 13087
Austin, TX 78711-3087

CHIEF CLERKS OFFICE
2009 MAY -8 PM 3: 06
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Re: Office of Public Interest Counsel's Request to Withdraw Response to Hearing Request concerning Potter Ready Mix, LLC, Docket No. 2009-0408-AIR

Dear Mr. Trobman

This matter is scheduled to be considered by the Commission at the May 20, 2009 agenda. The Office of Public Interest Counsel filed a response to hearing requests dated April 27, 2009, that analyzed the pending requests in reliance on the 440-yard radius drawn on the Executive Director's initial mapping of the location of the hearing requestors.

In OPIC's experience with concrete batch plant authorizations, such mapping typically shows a 440 yard radius drawn around emission sources. While the map provided with the ED's response to hearing requests shows requestors' distance from emission sources, the map initially made available to OPIC, and upon which OPIC relied, depicted a 440-yard radius that was drawn from the facility's boundary. Based on this newly discovered information, OPIC respectfully requests that its response be withdrawn. We regret any inconvenience this misunderstanding may have caused.

Sincerely,

A handwritten signature in black ink that reads "Eli Martinez".

Eli Martinez
Assistant Public Interest Counsel

cc: Service List

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TCEQ DOCKET NO. 2009-0408-AIR

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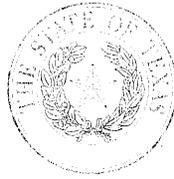
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 27, 2009

LaDonna Castañuela, Chief Clerk
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Office of the Chief Clerk (MC-105)
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Austin, Texas 78711-3087

CHIEF CLERKS OFFICE
2009 APR 27 PM 2:43
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Re: **POTTER READY MIX, LLC**
TCEQ DOCKET NO. 2009-0408-AIR

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez" followed by a smaller signature "by jle".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2009-0408-AIR

2009 APR 27 PM 2:43

**IN THE MATTER OF THE
APPLICATION BY POTTER
READY MIX LLC CONCRETE
BATCH PLANT SOUTHLAKE,
TARRANT COUNTY, FOR AIR
QUALITY STANDARD PERMIT
REGISTRATION NO. 52168L019**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

CHIEF CLERKS OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO 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 Hearing Requests in the above-referenced matter.

I. INTRODUCTION

Potter Ready Mix LLC (Potter or Applicant) has applied to the TCEQ for
authorization to operate under a Standard Permit issued under Texas Clean Air Act
(TCAA) §382.05195. If granted, this permit will authorize Applicant to construct a
temporary concrete batch plant. The proposed facility will be located on the north side of
SR 114, west of North Kimball Avenue and east of North Carroll Avenue, Southlake,
Tarrant County. Contaminants authorized under this permit include particulate matter
that includes, but is not limited to: aggregate, cement, road dust, and particulate matter
less than 10 microns in diameter (PM₁₀).

The application for the permit was received on September 29, 2008 and declared
administratively complete on October 7, 2008. The Notice of Receipt of Application and
Intent to Obtain an Air Permit was published on October 15, 2008 in the *Ft. Worth Star*

Telegram. A public meeting was held on January 22, 2009 in Southlake. The public comment period ended on January 22, 2009. The Executive Director's Response to Public Comments was mailed out on February 19, 2009. The deadline for submitting a hearing request was March 23, 2009. Twenty-one timely hearing requests were received before this deadline.¹ Twelve hearing requests were subsequently withdrawn. OPIC will therefore respond to only the nine hearing requests that have not been withdrawn at this time.

II. 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

¹ These requests were filed by: Danny & Gina Blaser; Scott L. Haire; Boyd K & Susan Herndon; Gerald & Karen Hodges; Barbara E & Keith A Houser; Jeff C. Pannell; Ann & Phillip Swanson; Fabienne & Marvin Williams; Alex & Karen Zaal; Jere L. Francis; Barbara & Barry Johnson; Harold & Shirley Knight; Carol & William Lloyd; Ronald Lorenz; Gloria & Sid Lorio; Allen & Cynthia Melton; Jim & Karen Mertz; Aloha & Glenn Payne; Meg & Phillip Rydzewski; Ernie & Roxann Sadau; and John Underwood.

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;
- (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).

A. 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 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).

1. *Danny & Gina Blaser, Scott L. Haire, Boyd K. & Susan Herndon, Gerald & Karen Hodges, and Alex & Karen Zaal*

Timely filed hearing requests were submitted by Danny & Gina Blaser, Scott L. Haire, Boyd K. & Susan Herndon, Gerald & Karen Hodges, and Alex & Karen Zaal. A map was produced by the Executive Director plotting out the respective distances from the requestors' permanent dwellings to the proposed plant. This map indicates that each of these requestors lives within 440 yards of the proposed plant.

Requestors Boyd & Susan Herndon raise concerns regarding the plant's proximity to Johnson Elementary School. This concern is relevant to permitting considerations under Health & Safety Code §382.052. All other requestors in this group share this concern, and additionally raise the issues of human health and safety, air quality, and nuisance conditions. These concerns are likewise relevant to permitting review and are protected by the law under which the application will be considered. OPIC therefore recommends that the Commission determine Danny & Gina Blaser, Scott L. Haire, Boyd K. & Susan Herndon, Gerald & Karen Hodges, and Alex & Karen Zaal are affected persons.

2. *Barbara E. & Keith A. Houser*

Barabara & Keith Houser specifically state in their request that they live within $\frac{1}{4}$ of a mile of the proposed concrete batch plant. Although the Executive Director's map shows that the requestors' residences are located outside of the 440 foot radius of the emission source, OPIC recommends that the Housers be allowed to present evidence regarding their location relative to the facility at an evidentiary hearing. Health impacts may have especially high consequences for the Housers, who have a disabled family member with a heart condition residing in the home, and the Executive Director's map

indicates they are a mere 110 yards from the statutory limit. The Housers should be allowed the opportunity to challenge the accuracy of the Executive Director's map at the preliminary hearing on this registration.

In addition to health concerns, the Housers also raise issues related to air quality and nuisance conditions. These interests are protected under the Texas Clean Air Act² and section 30 of the Texas Administrative Code.³ Because the requestors explicitly claim that their property is within 440 yards of the proposed plant, OPIC recommends referring to SOAH the question of whether the Housers meet applicable distance limitations and are affected persons.⁴

3. *Jeff Pannell, Ann & Phillip Swanson, and Marvin & Fabienne Williams*

According to the Executive Director's map, Jeff Pannell, Ann & Phillip Swanson, and Marvin & Fabienne Williams do not live within 440 yards of the proposed plant as prescribed by §382.058(c) of the Health and Safety Code. Furthermore, a review of the requests submitted by the above petitioners does not reveal specific representations that they live within the prescribed distance. OPIC therefore cannot find that Jeff Pannell, Ann & Phillip Swanson, and Marvin & Fabienne Williams are affected persons pursuant to 30 TAC §55.203, or recommend that the Commission grant their hearing requests without further information demonstrating that they reside within 440 yards of the proposed plant. If credible information making this demonstration is subsequently submitted, OPIC may reconsider its recommendation.

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

³ 30 TAC §101.4

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

B. Issues raised in the Hearing Requests

1. Each requestor raises the concern that the Applicant's activities will impermissibly affect air quality.
2. Each requestor raises the concern that the Applicant's activities will negatively affect human health.
3. Barabara & Keith Houser, Danny & Gina Blaser, Scott L. Haire, Boyd K. & Susan Herndon, Gerald & Karen Hodges, and Alex & Karen Zaal raise the concern that the Applicant's activities will pose a noise and dust nuisance.
4. Barabara & Keith Houser, Danny & Gina Blaser, Scott L. Haire, Boyd K. & Susan Herndon, Gerald & Karen Hodges, and Alex & Karen Zaal raise the concern that the Applicant's activities will increase traffic.
5. Danny & Gina Blaser, Scott L. Haire, Boyd K. & Susan Herndon, Gerald & Karen Hodges, and Alex & Karen Zaal raise the concern that the Applicant's activities will decrease property values.

C. 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).

D. Disputed Issues

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

E. 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.

F. 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.⁵ Relevant and material issues are those that are governed by the substantive law under which this registration is to be issued.⁶ The issues health effects on human health,⁷ air quality,⁸ and dust and noise nuisances⁹ 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 issues of increased traffic and decreased property values fall outside the scope of TCEQ jurisdiction with respect to this registration. Because this registration concerns air quality, TCEQ's jurisdiction in this matter is limited to safeguarding the State's air resources from pollution, as authorized by Chapter 382 of the Health and Safety Code. Potential effects on property values and traffic 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 these issues are inappropriate for referral to the State Office of Administrative Hearings.

G. 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.

1. Preliminarily, are Barabara & Keith Houser affected persons permanently residing within 440 yards of the emission source, pursuant to Health and Safety Code §382.058(c)?
2. Will operation of the proposed plant negatively affect human health?
3. Will operation of the proposed plant impermissibly affect air quality?

⁵ 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.")

⁶ *Id.*

⁷ Health and Safety Code §382.0518(b)(2).

⁸ Health and Safety Code §382.002.

⁹ 30 TAC §101.4

4. Will operation of the proposed plant negatively pose a dust and noise nuisance?

H. 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 nine months from the first date of the preliminary hearing until the proposal for decision is issued.

III. CONCLUSION

OPIC recommends that the requests of Barabara & Keith Houser, Danny & Gina Blaser, Scott L. Haire, Boyd K. & Susan Herndon, Gerald & Karen Hodges, and Alex & Karen Zaal be granted and that the above issues be referred to SOAH, with the determination of the Housers' permanent residence location in relation to the plant constituting a preliminary matter at the hearing.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
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Assistant Public Interest Counsel
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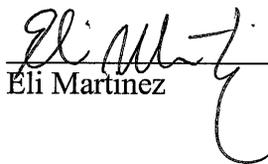
CHIEF CLERKS OFFICE

2009 APR 27 PM 2:43

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2009 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to 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

MAILING LIST
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TCEQ DOCKET NO. 2009-0408-AIR

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