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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

September 14, 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

Re: **APAC-TEXAS, INC.**
TCEQ DOCKET NO. 2009-0848-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 small flourish.

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2009-0848-AIR

**IN THE MATTER OF THE
APPLICATION BY APAC-TEXAS,
INC. FOR RENEWAL OF AIR
QUALITY PERMIT NO. 8597**

**§ BEFORE THE
§ TEXAS COMMISSION ON
§ ENVIRONMENTAL QUALITY
§**

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

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, and would respectfully recommend that the Commission find that no right to a hearing exists on this application for renewal of an air permit that does not authorize an increase in allowable emissions or the emission of a new contaminant.

I. INTRODUCTION

APAC-Texas Inc. ("APAC" or "Applicant") has applied for a renewal of its air permit authorizing continued operation of a hot mix asphalt plant located at 14900 SR 121, Frisco, Collin County, Texas. The facility will emit the following contaminants: particulate matter (PM) including particulate matter less than 10 microns in diameter (PM₁₀), nitrogen oxides, carbon monoxide, sulfur dioxide, and organic compounds not limited to asphalt, diesel, and kerosene vapors. According to the technical review conducted by the Executive Director ("ED"), the permit renewal will not authorize an increase in allowable emissions and will not result in the emission of an air contaminant not previously emitted.

The Commission received the application for renewal on November 12, 2007, and declared the application administratively complete on November 28, 2007. The applicant published a Notice of Receipt of Application and Intent to Obtain an Air Permit (NORI) on December 20, 2007, in the *Dallas Morning News*. The public comment period ended on January

4, 2008. An informational meeting was held in Frisco on May 6, 2008. During the comment period, the TCEQ received hearing requests from the Collin County Commissioners Court, the Honorable Ken Paxton, Carolyn Kresek-Lis, and Kerry Russell on behalf of the City of Frisco.

Based on a review of the information available in the Chief Clerk's file on this application, OPIC recommends denying the hearing requests in light of the statutory prohibition against holding a public hearing on a "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."¹

II. APPLICABLE LAW

Because this application was declared administratively complete after September 1, 1999, it is subject to the requirements of Texas Health and Safety Code Section 382.056 (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. 30 TEXAS ADMIN. CODE (hereinafter "TAC") § 55.201(d) (2006). Hearing requests must be submitted to the Chief Clerk's Office in writing no later than 30 days after the Chief Clerk's transmittal of the Executive Director's Response to Comments. 30 TAC § 55.201(c).

¹ Texas Health and Safety Code (hereinafter THSC) §382.056(g).

Under 30 TAC section 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. *Id.* 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.

30 TAC § 55.203(c).

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).

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
- (7) a maximum expected duration for the contested case hearing.

30 TAC § 55.209(e).

III. DISCUSSION

A. A Right to Hearing Does Not Exist on APAC's Renewal Application because the Renewal Will Not Result in an Increase in Allowable Emissions or the Emission of an Air Contaminant Not Previously Emitted.

As an initial matter, the Commission must determine whether a right to a contested case hearing exists on this application. No right to a contested case hearing exists on a renewal application under Chapter 382 of the Texas Health and Safety Code 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.² However, notwithstanding THSC section 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 Section 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections."³ TCEQ rules 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."⁴

Based on the technical review of this application, OPIC cannot find that this permit renewal would result in increased allowable emissions or the emission of an air contaminant not previously emitted. Further, the compliance history of the Applicant and plant for the period between November 12, 2002 and September 11, 2009 is rated as "average." Therefore, based on

² THSC § 382.056 (g); 30 TAC § 55.201(i)(3); 55.211(d)(2).

³ THSC § 382.056(o).

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

a review of the criteria set forth in THSC section 382.056(g) and (o), the applicant's compliance history does not trigger an opportunity for a hearing on this renewal application based on the applicant's compliance history.

Several requestors urge the Commission to require more stringent conditions in the renewal permit than currently exist to avoid a condition of air pollution in light of the fact that the plant operates in a nonattainment zone. When a permit is renewed, the Commission has the authority to impose additional requirements more stringent than the existing permit in order to avoid a condition of air pollution.⁵ The Executive Director has conducted a technical review of the permit's requirements. The provisions of THSC §382.055(e) regarding Commission authority to require additional controls must be read in harmony with the limitation on contested case hearings on air permit renewals under THSC §382.056. While OPIC is sympathetic to the concerns of the requestors and recognizes that the area surrounding the plant has significantly changed since Applicant's air permit was first issued, we cannot recommend that the Commission recommend a referral to SOAH in light of the mandates of THSC section 382.056(g). For these reasons, OPIC must conclude that there is no right to a hearing on this renewal application. In the event the Commission disagrees, OPIC offers the following analysis set forth below.

B. Affected Person Analysis

A timely-filed hearing request was submitted by the Commissioners Court of Collin County in the form of a resolution requesting that the TCEQ "require a public hearing in Collin County to ensure that all public health and safety issues have been fully examined." In recognition of the extensive knowledge and intimate concern local governments have over

⁵ THSC §382.055(e)

issues taking place within their territorial jurisdiction, the Texas Health and Safety Code mandates that the Commission "give maximum consideration to a local government's recommendations" concerning a rule, determination, or order that will affect an area within that government's jurisdiction.⁶ 30 TAC §55.203(b) also states that "governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons." The Commissioners Court raises concerns related to human health, air quality, and nuisance odors in its request.

OPIC finds that the Collin County Commissioners Court has a personal justiciable interest related to a legal right affected by this application. The hearing request states concerns protected by the law under which the application will be considered that reasonably relate to the potential effects of facility operations.⁷ Local governments, such as Collin County, have statutory authority over air quality affecting their residents under the provisions of THSC Chapter 382m Subchapter E, including §382.117. Therefore, if the Commission decides that a right to hearing exists on this application, OPIC recommends that the Commission find that the Collin County Commissioners Court is an affected person.

A timely filed hearing request was also filed by Carolyn Kresek-Lis, who raises concerns related to human health, air quality, utilization of best available control technology, and compliance history on behalf of her child who attends Isbell Elementary School some 2,000 feet from APAC's asphalt plant. Ms. Kresek-Lis cites the *City of Frisco Ambient Air Quality Potential Health Risk Assessment in Southeast Frisco, Texas* demonstrating that chemicals of concern in the area near the plant such as acetaldehyde, formaldehyde, o-Tolualdehyde, bis(2-Ethylhexyl)phthalate, and aluminum were found to be in concentrations above long term health

⁶ THSC § 382.112

⁷ 30 TAC § 55.203(c)(3).

effects screening levels (HESL), and that chemicals of concern above short term HESL included propanal, carbon disulfide, carbonyl sulfide, calcium, and sodium. Ms. Kresek-Lis also points to the fact that the plant operates in a nonattainment area and may be contributing to impermissible air pollution in the area.

OPIC finds that Ms. Kresek-Lis has a personal justiciable interest related to a legal right affected by this application. The proximity of the facility to the family of Ms. Kresek-Lis combined with her interest regarding health effects and air quality support a finding that the requestor is an "affected person with a reasonable relationship between the interests stated and the activity regulated."⁸ The hearing request states concerns protected by the law under which the application will be considered that reasonably relate to the potential effects of facility operations.⁹ If the Commission decides that a right to hearing exists on this application, OPIC recommends that the Commission find that Ms. Kresek-Lis is an affected person.

Kerry E. Russell, on behalf of the City of Frisco (the City), also submitted a timely hearing request dated December 5, 2007. The City raises concerns related to human health and safety; air quality; utilization of best available control technology; nuisance conditions, including odor nuisance; sufficiency of the buffer zone between the plant and nearby residents; and compliance history. As stated *supra*, 30 TAC §55.203(c)(6) states that "governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons." The City's interest in protecting the health and safety of residents and preserve air quality within its territorial jurisdiction support a finding that the requestor is an "affected person with a reasonable relationship between the

⁸ *Id.*

⁹ *Id.*

interests stated and the activity regulated.¹⁰ The hearing request states concerns protected by the law under which the application will be considered that reasonably relate to the potential effects of facility operations.¹¹ If the Commission decides that a right to hearing exists on this application, OPIC recommends that the Commission find that the City of Frisco is an affected person.

Representative Ken Paxton also submitted a request that “the TCEQ require a public hearing in Collin County before final action is taken on this application.” Legislators may request a public meeting on behalf of their constituents, but there is no corresponding section automatically granting a legislator’s request for a contested case hearing on behalf of their constituents.¹² Without information demonstrating how Representative Paxton may be adversely affected by the proposed facility or activity in a manner not common to members of the general public, OPIC cannot recommend to the Commission that he be determined an “affected person” with a reasonable relationship between the interests stated and the activity regulated.

C. Issues Analysis

The hearing requests raise the following issues:

- (1) Will the facility adversely affect the health or safety of nearby residents?
- (2) Will the facility impermissibly degrade air quality?
- (3) Does the facility utilize best available control technology?
- (4) Will the facility pose impermissible nuisance conditions to nearby residents?
- (5) Is the permitted buffer zone sufficient to protect nearby residents?
- (6) Does the Applicant’s compliance history warrant denial of the renewal permit?

1. The hearing requestors raise issues disputed by the parties.

No agreement exists between the parties on the issues discussed above.

2. The hearing requestors raise issues of fact.

¹⁰ *Id.*

¹¹ *Id.*

¹² See 30 TAC § 55.154(c)(2).

The requestors raise specific factual issues in their hearing requests related to human health and safety, air quality, best available control technology, nuisance conditions, and compliance history. As these are issues of fact, rather than issues of law or policy, these issues are appropriate for referral to hearing.¹³

3. The hearing requestors raise issues similarly raised in comments on the application.

All of the above concerns were raised during the comment period and have not been withdrawn.

4. Each of the issues raised by the requestors are relevant and material to the Commission's decision on this application.

The hearing request raises issues that are relevant and material to the Commission's decision on this application under the requirements of 30 TAC sections 55.201(d)(4) and 55.211(c)(2)(A). The factual issues raised by the hearing requestors directly relate to whether the applicant will meet the requirements of applicable substantive law.¹⁴

The requestors have raised the issue of human health and safety. In accordance with THSC section 382.0518(b)(2), the Commission may grant a permit "if, from the information available to the commission, including information presented at any hearing held under Section 382.056(k), the commission finds:...(2) no indication that the emissions from the facility will contravene the intent of this chapter, including protection of the public's health and physical property." Furthermore, pursuant to 30 TAC section 101.4, the Applicant shall not "discharge...air contaminants...in such concentration and of such duration as are or may tend to

¹³ 30 TAC § 55.211(b)(3)(A), (B).

¹⁴ 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 the following: "[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.")

be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property, or as to interfere with the normal use and enjoyment of animal life, vegetation, or property.” Therefore, the facility’s effect on the hearing requestor’s health and safety, and the sufficiency of the permitted buffer zone is relevant and material to the Commission’s decision on this application.¹⁵

The requestors have raised the issue of air quality. The purpose of the Texas Clean Air Act (TCAA) is to safeguard the state’s air resources from pollution by controlling or abating air pollution and emissions of air contaminants.¹⁶ The issue of air quality is therefore relevant and material to the Commission’s decision on this application.

The requestors have raised the issue of best available control technology (BACT). The TCAA and THSC, Chapter 382, require the utilization of best available control technology (BACT) applicable for the sources and types of contaminants emitted to minimize the level of emissions from specific sources at the facility. The issue of BACT is therefore relevant and material to the Commission’s decision on this application.

The requestors have raised the issue of nuisance conditions, specifically odor and deposition of visible particulate matter. TCEQ rules prohibit emissions which injure or adversely affect human welfare or property, or which interfere with the normal use and enjoyment of property.¹⁷ Therefore, the issue of nuisance is relevant and material to the Commission’s decision on this application.

¹⁵ 30 TAC § 55.209(e)(6).

¹⁶ See TCAA § 382.002.

¹⁷ See 30 TAC § 101.4.

The requestors have raised the issue of compliance history. When determining whether to grant a permit, the Commission is required to consider compliance history.¹⁸ The issue of compliance history is therefore relevant and material to the Commission's decision on this application.

5. Any Commission referral to SOAH should include issues regarding human health and nuisance conditions.

In light of the requirements of 30 TAC sections 50.115(b) and 55.211(b)(3)(A)(i), OPIC recommends that any referral to the State Office of Administrative Hearings ("SOAH") include the following issues:

- (1) Will permitted facility operations adversely affect the health or safety of nearby residents?
- (2) Will permitted facility operations impermissibly degrade air quality?
- (3) Will the facility meet the statutory requirements relating to utilization of best available control technology?
- (4) Will permitted facility operations pose impermissible nuisance conditions to nearby residents?
- (5) Is the permitted buffer zone sufficiently protective of the health and property of nearby residents?
- (6) Does the Applicant's compliance history warrant denial of the renewal permit?

D. OPIC Estimates that the Maximum Expected Duration of Hearing will be Nine Months.

Commission rule 30 TAC section 50.115(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 proceed longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. In assisting the Commission to state a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC section

¹⁸ See TEX. WATER CODE § 5.754.

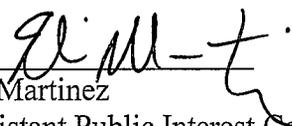
55.209(e)(7), OPIC estimates that the maximum expected duration of any hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

III. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission find that no right to a hearing exists on this application for renewal of an air permit that does not authorize an increase in allowable emissions or the emission of a new contaminant. However, if the Commission finds that a right to hearing exists on this application, OPIC recommends granting the contested case hearing requests of the Collin County Commissioners Court, Carolyn Kresek-Lis, and the City of Frisco, and referring this matter to the State Office of Administrative Hearings for a hearing on the issues described above.

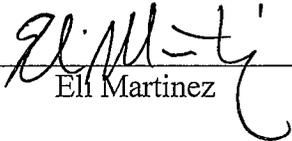
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CERTIFICATE OF SERVICE

I hereby certify that on September 14, the original and seven true and correct copies of the Office of 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

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