

feedstock quality. APAC has failed to use the best available control technology ("BACT") to protect the health and safety of nearby City residents by preventing the release of harmful particulates and odors.

II. ARGUMENT AND AUTHORITIES

The City has previously identified specific issues that provide justification for this Application to be forwarded to the State Office of Administrative Hearings ("SOAH") for a contested case hearing. In this Reply the City will reiterate each concern raised and provide evidence contrary to the ED and OPIC's bases for recommending denial of the City's Request for Hearing.

A. A CONTESTED CASE HEARING IS PERMITTED IN THIS APPLICATION PROCEEDING

The City has shown, and OPIC has agreed, that it is an affected person. The City disagrees with OPIC and the ED that this Application is not subject to a contested case hearing. The section of the Texas Health and Safety Code cited to by OPIC, Section 382.056(g), actually refers to Preconstruction permits, Section 382.0518, and renewal of preconstruction permits, 382.055. This Application is not a preconstruction permit or a renewal of a preconstruction permit. 30 Tex. Admin Code § 55.101(e) allows the Commission to hold a public hearing on this permit renewal based on APAC's continued disregard for the environment, public health, and TCEQ regulations.

APAC was issued its original permit without any testing, sampling, or verification of APAC Facility emissions. APAC was issued, without public notice,¹ a permit amendment which allowed for the use of waste-blended fuel oil as a fuel source. Due to TCEQ agreeing to waive the public notice provision, neither the City nor the public had an opportunity to contest the

¹ APAC specifically requested that TCEQ waive public notification because "overall emissions will not be increased by more than 25 tons per year." There was again no testing of the APAC Facility emissions with waste oil being burned, even though such waste oil is a known source of health-related contaminants including metals and halogenated compounds.

approval of waste oil as a burner fuel source. To date, APAC has not been required to provide TCEQ with any data on actual emissions from burning waste oil at the APAC Facility. This Application continues to ignore emissions from waste oil burning.

Contrary to APAC's assertion, it continues to violate its current permit conditions. As documented by its own records, APAC has not been consistently testing the incoming waste-blended fuel oil. There has been no stack compliance testing at the APAC Facility while burning waste oil. Sprinklers are not being used at all times on aggregate stockpiles and all road surfaces are not being maintained in a manner that prevents off-site dust emissions. Fenceline emission opacity is not being observed and documented. These violations were documented in correspondence between APAC and the Executive Director. A copy of the June 3, 2008 letter detailing each of these violations is attached to this Reply as Attachment A.

In response to public concern, TCEQ conducted multiple investigations of the APAC Facility and did issue some notices of violation. However, TCEQ repeatedly failed to address the fact that APAC continues to violate some permit conditions. APAC continues to demonstrate a consistent disregard for the regulatory process by violating its permit conditions. The City urges the Commissioners to determine that APAC's permit does, for the first time, need to be fully evaluated through a contested case hearing in order to be protective of the environment and public health.

B. POTENTIAL PUBLIC HEALTH EFFECTS IF THE APPLICATION IS GRANTED

In the ED's Response to Comments, he states that the Federal NAAQS includes primary and secondary standards. Primary standards are set, with an adequate margin of safety, to protect public health including sensitive members of the population such as children, the elderly, and people with existing lung or cardiovascular conditions. Secondary standards exist to protect public welfare and the environment including animals, crops, vegetation, and buildings from

known or anticipated effects associated with air contaminants. However, the standards are only for six criteria pollutants: ozone, lead, carbon monoxide, sulfur dioxide, nitrogen dioxide, and respirable particulate matter. Beyond the NAAQS, the ED states that TCEQ has also set effects screening levels ("ESLs") for specific constituents based on that constituent's potential to cause adverse health effects and to protect the general public and sensitive subgroups from adverse health effects, odor nuisances, and effects on vegetation. The ED's toxicology section is responsible for deriving ESLs and determining potential effects. The ED states that "Adverse health or welfare effects are not expected to occur if the air concentration of a constituent is below the ESL"² and "As long as the facility is operated in compliance with the terms of the permit, nuisance conditions, or conditions of air pollution are not expected."³ This begs the question: Can adverse health effects occur at levels below the ESL?

In its June 21, 2004 report on the tests conducted at the APAC Facility in March and April of 2004, TCEQ acknowledged that TCEQ Mobile Monitoring did not test for phenols and cresols (TCEQ did not have the equipment to measure these constituents at that time) or reduced sulfur compounds even though TCEQ's legal position presumes that the standards and ESL are protective if APAC complies with the permit. What if APAC doesn't comply? In fact, APAC did not comply with the requirements of permit specifications numbers 3 and 19E. During an October 1, 2003 follow-up on two complaints (Incidents 27651 and 27895), the TCEQ inspector found that the APAC Facility did not have the required documentation on testing waste oil prior to burning. APAC secured the required report from its main office and provided it to the TCEQ

² See Executive Director's Response to Public Comment, *In the Matter of the Application by APAC-Texas, Inc. For Renewal of Air Quality Permit No. 8597*, TCEQ Docket No. 2009-0848-AIR (June 4, 2009) [hereinafter "ED's RTC"] at 5-6.

³ ED's RTC at 7, *supra* note 2.

inspector before he completed his investigation.⁴ Unfortunately, the TCEQ inspector did not look at the report or he would have discovered APAC's failure to test for all constituents. The report from Precision Petroleum Labs, Inc. was dated September 18, 2003, and it showed the following concentrations of the 12 constituents of concern ("COCs"):

- Antimony – **Not Tested** Permit Limit is 180 ppm
- Arsenic – < 0.50 ppm Permit Limit is 3 ppm
- Beryllium – **Not Tested** Permit Limit is 1 ppm
- Cadmium – 0.253 ppm Permit Limit is 2 ppm
- Chromium – 1.764 ppm Permit Limit is 9 ppm
- Mercury – **Not Tested** Permit Limit is 37 ppm
- Selenium – **Not Tested** Permit Limit is 75 ppm
- Thallium - **Not Tested** Permit Limit is 37 ppm
- Vanadium – **Not Tested** Permit Limit is 18 ppm
- Lead – 61.699 ppm Permit Limit is 100 ppm
- Nickel – 1.642 ppm Permit Limit is 5 ppm
- Total halogens – 795.6 ppm Permit Limit is 1,000 ppm

APAC misrepresents the significance of this event as not presenting "any issue with the fuel oil itself."⁵ Furthermore, APAC relies on "very" regular inspections by TCEQ inspectors "who are very knowledgeable of the facility, the permit requirements, and regulatory requirements and who are thorough in their inspections."⁶ Based on the facts, this statement is nonsense. First, APAC did not have the required documentation on hand as required by its permit. TCEQ allowed APAC to provide the lab report after the fact when the permit requires it to be on hand at all times. This means that APAC received and burned the waste oil without any idea as to whether or not the oil conformed to the terms of the permit, which according to TCEQ is presumptively protective of the environment and public health. Second, the TCEQ inspector accepted the lab report without confirming whether or not the lab report demonstrated

⁴ See Investigation Report Number 253680.

⁵ See Applicant APAC-Texas, Inc.'s Responses to Hearing Requests, *In the Matter of the Application by APAC-Texas, Inc. For Renewal of Air Quality Permit No. 8597*, TCEQ Docket No. 2009-0848-AIR (Sept. 11, 2009) [hereinafter "APAC's RTC"] at 6.

⁶ *Id.* at 6.

compliance with the terms of the permit. Since the lab did not test for half of the COCs and the TCEQ did not catch the permit violation, what confidence can the City or the public have that a TCEQ permit with clear terms and conditions will protect the environment and public health?

C. NEGATIVE IMPACTS ON "NORMAL USE AND ENJOYMENT" OF PROPERTY

In response to comments regarding the gritty deposits on outdoor equipment and a reluctance of children to use a nearby park, the ED explained that the purpose of the Federal Clean Air Act ("FCAA") is to protect public welfare and personal comfort. The ED also states that all facilities must comply with the Texas Clean Air Act ("TCAA") which prohibits a facility from causing or maintaining a nuisance. Finally, the ED states "As long as the facility is operated in compliance with the terms of the permit, nuisance conditions, or conditions of air pollution are not expected."⁷ At the crux of the ED's defense of his decision to grant APAC's permit renewal without a contested case hearing is the belief that NAAQS and TCEQ rules are sufficiently protective of the environment and public health, and the hope that APAC has, and will, comply with its permit. The City assumes that means that if there are instances of non-compliance, there is an adverse impact on the environment and public health. Does this mean a violation of the permit that goes undetected by TCEQ has no adverse impacts?⁸ Once again, this is a circular argument without meaning. There have been clear permit violations and, consequently, the environment and public health have been placed at risk.

D. CHANGES IN LAND USE AND BUFFER ZONES

Public comments regarding the change in land use were generally dismissed by the ED as being outside TCEQ's scope even though the ED recognized the importance of distance limitations created by State law (and TCEQ rules) as being enforceable ways of maintaining protection of the environment and public health. While the ED claims that protectiveness

⁷ ED's RTC at 7, *supra* note 2.

⁸ This is analogous to asking the question, "If a tree falls in the woods and no one is there to hear it, does it make a sound?" What does it matter, the tree's just as dead.

reviews are done by modeling maximum concentrations at (1) the property line, (2) the nearest off-property receptor, and (3) at any schools within 3,000 feet of the source, the City has not seen any documentation to confirm such modeling has been done at the APAC Facility. The ED further justifies his position by stating that TCEQ's toxicology section and the DFW Regional Office indicated there is no reason to deny the permit application. What is obviously ignored by the ED in this response is the dramatic erosion in APAC buffer zones in this permit renewal while increasing the toxicity of the fuels allowed at the APAC Facility. APAC's original permit required a distance of ½ mile between the APAC Facility and the nearest off site receptor. This buffer zone was cut in half, without public notice or input, in 1998 to ¼ mile. The decrease in buffer zone distance occurred at the same time TCEQ allowed APAC to go from clean fuel sources to waste oil. These unilateral TCEQ actions were not protective of the environment or public health.

E CONDITION OF AIR POLLUTION

While other responses have referred to the City's January 2007 air quality study as documenting a condition of air pollution, the ED attempts to discredit that study because the TCEQ did not perform the study. The City had the study done because of the failure of TCEQ to perform an adequate study of the problem.⁹ TCEQ testing in March and April 2004 found no evidence of potential health effects. However, the TCEQ only tested for a set of 142 gases and particulates that did not include phenols and cresols (that can be particularly odorous even at very low concentrations). Because of the identified shortfalls in the 2004 TCEQ testing (i.e., not testing for phenols, cresols, and reduced sulfur compounds, as well as problems with scheduling mobile tests at a time when the plant was operating), the City's consultant, TCEQ's former Chief Engineer, developed an air quality sampling plan based on odor event sampling and an expanded

⁹ In reviewing the history associated with the batch plant sites and determining the scope and methods associated with the City's air quality study, the City's consultant reviewed an extensive set of documents provided by the Frisco Independent School District, the TCEQ toxicology section, and TCEQ Region 4.

constituent set testing for 226 gases and particulates including phenols, cresols, and reduced sulfur compounds. The City's study documented possible adverse public health effects related to APAC's off-site emissions. The City's study was shared with both APAC and TCEQ. In attempting to discredit the City's study, the ED states that had TCEQ been consulted, his staff would have ensured that the study was properly designed and controlled.¹⁰ In fact, TCEQ was asked to participate, but chose not to. The City has expended public funds to conduct the comprehensive study that TCEQ should have done in the first place. The City's study was well designed and properly controlled. The uncontroverted results of the City's study indicate a continuing condition of air pollution caused by the APAC Facility.

F IMPOSITION OF BACT DURING PERMIT RENEWALS

The City has noted that current APAC environmental controls are inadequate and requested that renewal of the APAC air permit be contingent on installing BACT. The ED responded that BACT review only occurs for a new or modified facility.¹¹ The ED stated that in renewals with no emissions increase TCEQ only looks at emissions at the property lines and cannot impose more stringent controls unless TCEQ finds that additional controls are needed to avoid a condition of air pollution or to ensure compliance with other federal or state air quality control requirements. The ED concluded that the wet scrubber currently installed meets the reasonably available control technology ("RACT") standards for the 25-plus year old APAC Facility.

If the venturi wet scrubber is protective of public health and welfare as stated, why did TCEQ require air dispersion modeling in what TCEQ and APAC have characterized as a fairly routine renewal of an existing permit? Simply put, this is not a routine renewal of an existing

¹⁰ ED's RTC at 9, *supra* note 2.

¹¹ In this case, TCEQ's previous failure to allow public review of the APAC Facility permit means that the APAC Facility will never be subject to BACT review.

permit and it is not protective of the environment and public health. The use of the outdated venturi scrubber and is clearly not protective of the environment or public health.¹²

G PUBLIC CONCERN OVER ODORS FROM THE PLANT

In response to public comments about odors from the APAC Facility, the ED stated that APAC must comply with 30 TAC § 101.4 which prohibits any discharge of air contaminants which are or may be injurious to or adversely affect human health or welfare, animal life, vegetation, or property or interfere with the normal use and enjoyment of animal life, vegetation, or property. The ED additionally cites Texas Health and Safety Code § 382.003(2) as the authority for including particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor as "air contaminants". However, rather than use this permit renewal to address the cause of the problem, the ED simply advises concerned citizens to report suspected nuisances to the TCEQ 24-hour hotline. Given TCEQ's history of investigating 54 odor, dust, and smoke complaints at the APAC Facility over a five-year period, and confirming no nuisance conditions even though ten notices of violation were issued, it is easy to understand why the public might have doubts about TCEQ's ability to timely investigate citizen complaints and verify dust and odors from the APAC Facility.¹³

H CITY JURISDICTION

In its response to hearing requests, APAC incorrectly states that the City's legal authority is limited to "nuisance conditions and air ordinances which are not inconsistent with TCEQ rules and orders."¹⁴ In contrast, the ED stated that APAC is required to comply "with all local

¹² The scrubber is less efficient due to its age and condition as well as the fact that the baghouse is a much more effective way of controlling particulate matter. These facts may account for why APAC, in October 2007, requested a standard permit for a pollution control project to install a baghouse that will replace the venturi wet scrubber. However, in the almost two years since the standard permit for the baghouse was approved, APAC has refused to install the baghouse.

¹³ The City notes that it takes a minimum of one hour for a TCEQ investigator to travel from the regional office to the APAC Facility. In reality, TCEQ investigations of citizen complaints of dust and odor violations at the APAC Facility do not occur until hours after the emission event.

¹⁴ APAC's RTC at 5, *supra* note 5.

regulations that apply to their operations.”¹⁵ The City agrees with the ED and in 2007 the City adopted a City Air Pollution Control Ordinance that requires no visible emissions at the property line (as determined by USEPA Method 22), establishes a quantitative limit on the level of odor leaving a site, and prohibits the burning of reclaimed or used industrial oil in the City. With this ordinance the City has taken on the responsibility to safeguard Frisco residents from air pollution. The requirements of the City’s ordinance are consistent with the requirement that a local air pollution control ordinance be at least as stringent as the State and federal rules and regulations.

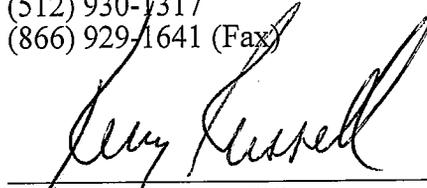
III. CONCLUSION

The City of Frisco is an affected person under Commission regulations, has identified a justiciable interest protected by State law, and has provided legal justification for a contested case hearing on APAC’s permit renewal. Therefore, the City’s request for a contested case hearing should be granted. The City respectfully requests that the Commission grant the City’s request for a contested case hearing on the terms and conditions of Proposed Permit Renewal of Permit No. 8597 that have never been subject to evidentiary review.

Respectfully submitted,

RUSSELL & RODRIGUEZ, L.L.P.

1633 Williams Drive
Building 2, Suite 200
Georgetown, Texas 78628
(512) 930-1317
(866) 929-1641 (Fax)



KERRY E. RUSSELL
State Bar No. 17417820

**ATTORNEY FOR THE CITY OF FRISCO,
TEXAS**

¹⁵ ED’s RTC at 11, *supra* note 2.

SERVICE LIST

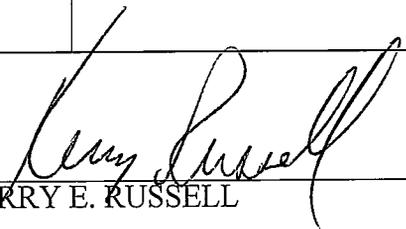
I hereby certify that on this the 25th day of September, 2009, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, Federal Express overnight delivery, or hand delivery to the following:

Docket Clerk TCEQ Office of the Chief Clerk, MC-105 P.O. Box 13087 Austin, Texas 78711-3087 Fax: 512/239-3311	
Mr. Les Trobman, General Counsel TCEQ Office of General Counsel, MC-101 P.O. Box 13087 Austin, Texas 78711-3087 Fax: 512/239-5533	For the Office of General Counsel
Mr. Doug Brown, Staff Attorney TCEQ Environmental Law Division, MC-173 P.O. Box 13087 Austin, Texas 78711-3087 Fax: 512/239-0606	For the Executive Director of the Texas Commission on Environmental Quality
Mr. Blas Coy TCEQ Office of Public Interest Counsel, MC-103 P.O. Box 13087 Austin, Texas 78711-3087 Fax: 512/239-6377	For the Office of Public Interest Counsel of the Texas Commission on Environmental Quality
Ms. Bridget Bohac TCEQ Office of Public Assistance, MC-108 P.O. Box 13087 Austin, Texas 78711-3087 Fax: 512/239-4007	For the Office of Public Assistance of the Texas Commission on Environmental Quality
MrKirk Morris Stephen Koonce APAC-Texas, Inc. P.O. Box 224048 Dallas, Texas 75222 Fax: 214/7423540	For the Applicant

2009 SEP 25 PM 3:47
 CHIEF CLERKS OFFICE
 TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

THE CITY OF FRISCO'S REPLY TO THE EXECUTIVE DIRECTOR'S,
 THE OFFICE OF PUBLIC INTEREST COUNSEL'S, AND APAC'S
 RESPONSES TO REQUEST FOR A CONTESTED CASE HEARING

Mr. Kyle Lucas Alternative Dispute Resolution, MC-222 Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 Fax: 512/239-4015	For Alternative Dispute Resolution
Ms. Carolyn Kresek-Lis 15634 Brookwood Drive Frisco, Texas 75035	Requester
The Honorable Phyllis Cole 210 South McDonald Street, Ste 626 McKinney, Texas 75069	Public Official
The Honorable Jerry Hoagland Joe Jaynes 210 South McDonald Street, Ste 626 McKinney, Texas 75069	Public Official
The Honorable Ken Paxton P.O. Box 2910 Austin, Texas 78768	Public Official
The Honorable Keith Self 210 South McDonald Street, Ste 626 McKinney, Texas 75069	Public Official
The Honorable Florence Shapiro P.O. Box 12068, Room 1E.3 Austin, Texas 78711	Public Official



 KERRY E. RUSSELL

R&R

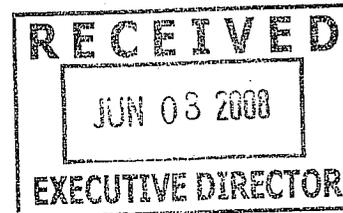
RUSSELL & RODRIGUEZ, L.L.P.
ATTORNEYS AT LAW

TEXAS HERITAGE PLAZA
102 W. MORROW STREET, SUITE 103
GEORGETOWN, TEXAS 78626

krussell@txadminlaw.com

PHONE (512) 930-1317
FAX (512) 930-7742
WWW.TXADMINLAW.COM

June 3, 2008



Mr. Glenn Shankle
Executive Director
Texas Commission on Environmental Quality
MC-100
P.O. Box 13087
Austin, TX 78711-3087

Re: *Application for Air Quality Permit Renewal by APAC-Texas, Inc. to Authorize Continued Operation of Hot Mix Asphalt Plant Permit No. 8597*

Dear Mr. Shankle:

This firm represents the City of Frisco ("City") in regard to the above referenced matter. On the City's behalf we timely filed a request for hearing in response to the published notice for this permit renewal. A copy of that notice and our filing is included as Attachment A for your reference. We also provided comments on the City's behalf at the public meeting held in Frisco on May 6, 2008. The purpose of this letter is to provide the Texas Commission on Environmental Quality ("TCEQ" including predecessor agencies) with the documentation that was described during our public comments and that formed the basis for our original hearing request. Therefore, this documentation is timely filed.

As noted in the TCEQ notice included in Attachment A, this is a renewal of an air quality permit. This is not a renewal of a standard air permit subject to the Texas Health & Safety Code Section 382.05195(g) contested case hearing prohibition. There is simply no legal validity to any public or private assertion by APAC representatives that this permit renewal is not subject to the possibility of a contested case hearing. Additionally, the City does not believe APAC's original permit was properly issued, renewed, or amended. TCEQ files show APAC is in continuing violation of specific permit conditions that directly relate to public health and safety. The documentation provided in this letter demonstrates that these and other fundamental issues of fact related to this application should be considered in an evidentiary hearing.

The primary issue of concern to the City in this matter is the health and safety of its residents in the immediate vicinity of the APAC Facility. Based on available information, there may be a public health risk directly related to APAC's burning of waste oil as a fuel source. This risk should be eliminated if natural gas is used for fuel. Since natural gas is readily available, and is a cost effective fuel source for APAC, this is strictly a profit maximization issue for APAC. The public health risk is obviously a more important consideration than a few additional dollars of profit. The City believes a short history of this Facility is necessary to demonstrate

Attachment A

Mr. Glenn Shankle

June 3, 2008

Page 2 of 5

why this renewal should be reviewed as a new source review rather than a simple permit renewal.

APAC (then Gohmann Asphalt) received construction permit C-8597 on March 27, 1981. This initial permit was based on a representation that the Frisco Facility would only be using "sweet natural gas", liquid petroleum gas, diesel, or No. 2 fuel oil as a fuel source. Before the plant began commercial operations, APAC added No. 4 fuel oil as a fuel source. APAC was issued Operating Permit No. R-8597 on April 4, 1983.¹ This original permit was issued without any testing, sampling or verification of the Frisco Facility emissions. This original permit was issued in spite of concerns expressed by TCEQ staff over likely new residential development in the area. See Attachment B. Based on the City's document review, it appears that Permit 8597 was based on flawed emission data from a facility in Nevada or Wyoming. To date, there has never been Frisco facility-specific data required by TCEQ to verify APAC's actual emissions.

APAC was issued a renewal of Permit 8597 by TCEQ on August 14, 1998. Although it appears APAC published notice of the permit renewal application, TCEQ records do not document any public involvement in the permit renewal process.² Following the permit renewal, APAC received a permit amendment from TCEQ on October 25, 1999, which allows the use of waste-blended fuel oil (i.e., reclaimed industrial oil) as a fuel source. This significant amendment of Permit 8597 was approved by TCEQ without public notice, without any documented public involvement, and without any emission data related to this new fuel source.³

This fundamental change in fuel source should have triggered new source review. In fact, it is this type of action, without public participation, that prompted the Texas Legislature to enact the legislation that resulted in TCEQ adopting 30 TAC §39.402 on November 13, 2001.⁴ After 25+ years of operation, there is still no data on actual emissions from burning waste oil at APAC's Frisco Facility. APAC's current permit renewal application continues to ignore emissions from waste oil burning.

¹ Special Provision 1.C of Permit No. R-8597 required APAC to maintain a ½ mile buffer zone from the nearest residence.

² At the time of that permit renewal, Special Provision 21.D was changed, without explanation, to reduce the buffer zone to ¼ miles from the nearest residence.

³ APAC specifically requested that TCEQ waive public notification because "overall emissions will not be increased by more than 25 tons per year." There was no testing of Frisco Facility emissions with waste oil being burned, even though such waste oil is a known source of health-related contaminants including metals and halogenated compounds.

⁴ Section (a) of 39.402 states, "Air quality permit amendment applications under §116 (b) of this title (relating to Changes to Facilities)...must comply with this subchapter and Subchapter K of this chapter regarding notices when the amendment involves: (1) a change in character of emissions or release of an air contaminant not previously authorized under the permit or (4) any amendment when the executive director determines that: (A) there is reasonable likelihood for emissions to impact a nearby sensitive receptor; (B) there is a reasonable likelihood of high nuisance potential from the operation of the facilities; (C) the application involves a facility or site for which the compliance history contains violations which are unresolved or constitute a recurring pattern of conduct that demonstrates consistent disregard for the regulatory process; or (D) there is a reasonable likelihood of significant public interest in a proposed activity."

Mr. Glenn Shankle

June 3, 2008

Page 3 of 5

In addition to these basic permit problems, the City does not believe APAC has complied with its current permit conditions.⁵ Due to rapid growth in the residential area around APAC's Facility, the City is concerned that APAC is endangering public health by not observing its current permit requirements. Specifically:

1. As documented by its own records, APAC has not been consistently testing the incoming waste-blended fuel oil for all twelve chemicals of concern.
2. There has been no stack compliance testing at the Frisco Facility while APAC is burning waste oil.
3. Sprinklers are not being used at all times on aggregate stockpiles.
4. All road surfaces are not being maintained in a manner that prevents off-site dust emissions.
5. Fenceline visible emission opacity is not being observed and documented.

See Attachment B.

These continuing permit violations support the need for an evidentiary hearing to document the real status of APAC's permit compliance.

There is no documentation in TCEQ files of why the originally required APAC buffer zone was reduced from ½ mile to ¼ mile. However, the fact that it was reduced confirms that APAC is well aware of the currently required buffer zone for continued operation of its Frisco Facility. In spite of that knowledge, APAC has done nothing to maintain that required buffer zone.⁶ Consequently, APAC is in continuing violation of an original permit condition, even in its reduced form.

In response to an increasing number of Frisco citizen complaints, TCEQ conducted multiple investigations of the APAC Facility between 2001 and 2006. Although there were notices of violation sent to APAC as a result of those investigations, TCEQ investigators overlooked the critical fact that APAC has not been complying with the permit requirement to fully test waste-blended fuel oil before burning it at the Frisco Facility. See Attachment B. To date, TCEQ has not cited APAC for this clear permit violation even though it is directly related to public health.

As a result of the perceived shortcomings of the TCEQ investigations, the City hired TCEQ's former Chief Engineer, Dan Wittliff, to conduct an independent investigation of the APAC Facility and its actual emissions. Mr. Wittliff's investigation included specific emission contaminant testing for possible health effects in the residential area around APAC's Facility.

⁵ APAC's current permit contains (among others) the following conditions that directly relate to public health:

- Waste-blended fuel oil must be tested for 12 specific chemicals of concern.
- Sprinklers are required for aggregate stockpiles.
- Road surfaces must be paved and cleaned.
- Visible emission opacity must be less than 5%.

⁶ APAC did not participate in City hearings to rezone the area around the APAC Facility for residential use. As a result, there are now dozens of homes and a school within ¼ mile of the APAC Facility.

Mr. Glenn Shankle
June 3, 2008
Page 4 of 5

Mr. Wittliff's investigation documented possible adverse public health effects related to APAC's off-site emissions.

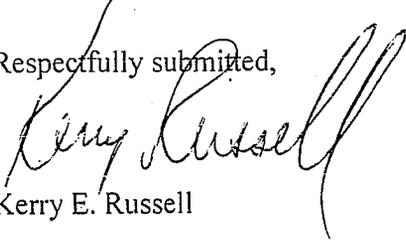
In conclusion, a review of APAC's current permit renewal application raises multiple factual issues, as well as possible misrepresentations.⁷ It is clear from APAC's May 6, 2008, letter to Chairman Garcia that it is ignoring many of these factual issues. It should also now be clear that a number of APAC's May 6 assertions are inaccurate. In this situation, public health concerns demand an evidentiary hearing to determine the facts that the Commission needs to have before it when making a final decision on APAC's renewal application for Air Quality Permit No. 8597.

If the Commission ultimately renews Permit 8597, it should, at a minimum, place the following special requirements in any renewal of Permit 8597 to fully protect the health and safety of Frisco residents:

1. Prohibition on burning waste oil.
2. Annual stack testing for all health risk constituents of concern.
3. An initial comprehensive health effects study with annual updates.
4. A minimum buffer zone of, at least, ¼ mile.
5. Requirement for full BACT, including counterflow drum technology.

The City of Frisco respectfully request that you recommend an evidentiary hearing on the renewal of Permit 8597 to determine (1) if new source review is required and (2) all issues of fact raised in this letter.

Respectfully submitted,


Kerry E. Russell

Cc: Chairman Buddy Garcia
Commissioner Bryan Shaw
Commissioner Larry Soward

⁷

The following sections of the current permit application do not appear to be accurate:

1. Section IV.J – Due to the burning of waste oil without emission data, there has been a change in the character of emissions due to new chemical species.
 2. Section VI.E – There is no documentation that no children at the nearby elementary school are enrolled in a bilingual education program.
 3. Section IX.A – The Frisco Facility is not operating in accordance with all previous permit representations, specifically waste fuel oil testing, nor is there a complete discussion of past non-compliance.
 4. Section IX.B – The Frisco Facility has no current ability to measure emissions of waste oil chemical contaminants in the stack emissions.
 5. Section IX.D – Waste oil is not included as a fuel source.
- Section X.A – APAC only includes AP-42 emission estimates to meet the requirements of 40 CFR Part 60. There is no site specific emission data related to the burning of waste oil and all of the AP-42 COCs (Metals, HAP VOCs, and non-HAP VOCs) included.

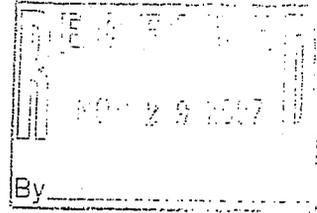
Mr. Glenn Shankle

June 3, 2008

Page 5 of 5

General Counsel Les Troubman
Senator Florence Shapiro
Representative Ken Paxton
Collin County Commissioner Phyllis Cole
Mayor Maher Maso
City Manager George Purefoy
City Attorney Richard Abernathy
Mr. Dan Wittliff
Ms. Deborah R. Murphey, APAC

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



EXAMPLE A

NOTICE OF RECEIPT OF APPLICATION AND INTENT TO OBTAIN AIR PERMIT RENEWAL

PERMIT NO. 8597

APPLICATION APAC-Texas, Inc. has applied to the Texas Commission on Environmental Quality (TCEQ) for renewal of Air Quality Permit No. 8597, which would authorize continued operation of the Hot Mix Asphalt Plant located at 14900 SR 121, Frisco, Collin County, Texas. The existing facility is authorized to emit the following air contaminants: particulate matter including particulate matter less than 10 microns in diameter, nitrogen oxides, sulfur dioxide, carbon monoxide and organic compounds including (but not limited to) asphalt, diesel and kerosene vapors.

This application was submitted to the TCEQ on November 12, 2007. The application is available for viewing and copying at the TCEQ central office, TCEQ Fort Worth regional office, and the Collin County Courthouse, 210 South McDonald, Annex A, Suite 120, McKinney, Collin County, Texas. The facility's compliance file, if any exists, is available for public review in the Fort Worth regional office of the TCEQ.

The TCEQ executive director has determined the application is administratively complete and will conduct a technical review of the application. Information in the application indicates that this permit renewal would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. **The TCEQ may act on this application without seeking further public comment or providing an opportunity for a contested case hearing if certain criteria are met.**

PUBLIC COMMENT You may submit public comments, or a request for a contested case hearing to the TCEQ Office of the Chief Clerk at the address below. The TCEQ will consider all public comments in developing a final decision on the application. **The deadline to submit public comments is 15 days after newspaper notice is published.** After the deadline for public comments, the executive director will prepare a response to all relevant and material, or significant public comments. Issues such as property values, noise, traffic safety, and zoning are outside of the TCEQ's jurisdiction to address in the permit process.

After the technical review is complete the executive director will consider the comments and prepare a response to all relevant and material, or significant public comments. If only comments are received, the response to comments, along with the executive director's decision on the application, will then be mailed to everyone who submitted public comments or who is on the mailing list for this application, unless the application is directly referred to a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING You may request a contested case hearing. The applicant or the executive director may also request that the application be directly referred to a contested case hearing after technical review of the application. A contested case hearing is a legal proceeding similar to a civil trial in state district court. Unless a written request for a contested case hearing is filed within 15 days from this notice, the executive director may act on the application. If no hearing request is received within this 15-day period, no further opportunity for hearing will be provided. According to the Texas Clean Air Act § 382.056(o) a contested case hearing may only be granted if the applicant's compliance history is in the lowest

Attachment A

classification under applicable compliance history requirements and if the hearing request is based on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission may only grant a hearing on those issues raised during the public comment period and not withdrawn.

A person who may be affected by emissions of air contaminants from the facility is entitled to request a hearing. If requesting a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" (4) a specific description of how you would be adversely affected by the application and air emissions from the facility in a way not common to the general public; (5) the location and distance of your property relative to the facility; and (6) a description of how you use the property which may be impacted by the facility. If the request is made by a group or association, the one or more members who have standing to request a hearing and the interests the group or association seeks to protect must also be identified. You may also submit your proposed adjustments to the application/permit which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing within 15 days following this notice to the Office of the Chief Clerk at the address below.

If any requests for a contested case hearing are timely filed, the executive director will forward the application and any requests for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. Unless the application is directly referred to a contested case hearing, the executive director will mail the response to comments along with notification of Commission meeting to everyone who submitted comments or is on the mailing list for this application. If a hearing is granted, the subject of a hearing will be limited to disputed issues of fact relating to relevant and material air quality concerns raised during the comment period. Issues such as property values, noise, traffic safety, and zoning are outside of the Commission's jurisdiction to address in this proceeding.

MAILING LIST In addition to submitting public comments, you may ask to be placed on a mailing list for this application by sending a request to the TCEQ Office of the Chief Clerk at the address below. Those on the mailing list will receive copies of future public notices (if any) mailed by the Office of the Chief Clerk for this application.

INFORMATION Written public comments or requests for a public meeting or contested case hearing should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For more information about this permit application or the permitting process, please call the Office of Public Assistance, Toll Free, at 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040. General information regarding the TCEQ can be found at www.tceq.state.tx.us.

Further information may also be obtained from APAC-Texas, Inc., P.O. Box 224048, Dallas, Texas 75222 or by calling Ms. Melissa Fitts, Environmental Specialist, Westward Environmental, Inc. at (830) 249-8284.

Issuance Date: November 28, 2007

R&R
RUSSELL & RODRIGUEZ, L.L.P.
ATTORNEYS AT LAW

TEXAS HERITAGE PLAZA
102 W. MORROW STREET, SUITE 103
GEORGETOWN, TEXAS 78626

PHONE (512) 930-1317
FAX (512) 930-7742
WWW.TXADMINLAW.COM

Email: krussell@txadminlaw.com

December 5, 2007

Via Facsimile and Certified United States Mail, Return Receipt Requested

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

Re: *Application of APAC-Texas, Inc. for renewal of Air Quality
Permit No. 8597 in Collin County, Texas*

To the Texas Commission on Environmental Quality:

This law firm represents the City of Frisco ("City"). The City is in receipt of the notification of the above-referenced application. In compliance with the notice, the City makes the following statements:

1. The City may be notified of any developments in this case by providing notice to:

Kerry E. Russell
Russell & Rodriguez, LLP
102 W. Morrow, Suite 103
Georgetown, Texas 78626
(512) 930-1317
(512) 930-7742 (Fax)

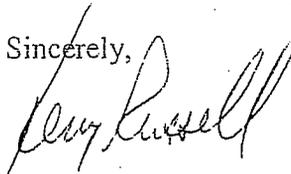
2. Applicant information: Application of APAC-Texas, Inc. for renewal of Air Quality Permit No. 8597 in Collin County, Texas.
3. The City requests a contested case hearing on the application.

December 5, 2007

Page 2 of 3

4. The City is adversely affected because the documented degradation of air quality in the vicinity of the Applicant's facility has had a negative impact on the nearby City residents. The Applicant has not complied with its permit by not maintaining a sufficient buffer zone and failing to properly monitor with burner feedstock quality. The Applicant has failed to use the best available control technology to protect the health and safety of nearby City residents by preventing the release of harmful particulates and odors.
5. The Applicant's facility is located within the City's corporate limits.
6. City streets and sidewalks used by City residents have been adversely impacted by harmful particulates and odors from the Applicant's facility.
7. Withdrawal of the application or implementation of best available control technology at the Applicant's facility will resolve the City's concerns.

Sincerely,



Kerry E. Russell

cc: Mr. George Purefoy, City Manager
Mr. Richard Abernathy, City Attorney

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
 Addressee

B. Received by (Printed Name) **TPASSICPA**

C. Date of Delivery

D. Is delivery address different from item 1? Yes
 No
 If YES, enter delivery address below:
DEC 16 2007

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Office of the Chief Clerk
 Texas Commission on Environmental Quality
 MC-105
 Post Office Box 13087
 Austin, Texas 78711-3087

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.
 4. Restricted Delivery? (Extra Fee) Yes

2. Article Number (Transfer from service label) **7006 0100 0007 3080 0330**
 PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

U.S. Postal Service™ CERTIFIED MAIL™ RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$ 41	Postmark Here 12.05.07
Certified Fee	2.65	
Return Receipt Fee (Endorsement Required)	2.15	
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$ 5.21	

Sent To **TCEQ: Chief Clerk MC105**
 Street, Apt. No., or PO Box No. **POB 13087**
 City, State, ZIP+4 **Austin, TX 78711-3087**

PS Form 3800, June 2002 See Reverse for Instructions

FINDINGS REGARDING APAC PERMIT AND RECORDS REVIEW

Dan Wittliff, P.E., DEE

May 27, 2008

Page 1

Analysis of Air Permit Number 8597 APAC Hot Mix Asphalt Facility, Frisco, Texas Findings, Conclusions and Recommendations

In developing the findings listed below, I reviewed a number of sources of information regarding the APAC (and its predecessor) Hot Mix Facility in Frisco, Texas. These sources included:

- Files available in the TCEQ Central Files
- Files provided by the Region 4 of TCEQ
- Files provided by TCEQ Toxicology
- Files provided by TCEQ Air Permits Division
- Files provided by Frisco Independent School District
- Report on potential emission controls provided by APAC
- Emissions and control data available on the state environmental agency web sites in Arizona, New Mexico, Texas, Colorado, Oklahoma, Louisiana, Ohio, Washington, Florida, Minnesota, and Oregon as well as USEPA
- *Ambient Air Quality Potential Health Risk Assessment in Southeast Frisco, Texas*, Dan Wittliff Consulting, January 2007

Finding 1: In documents contained in the official TCEQ Central Files on this facility, there was no evidence that a health assessment was done during the original permitting of the facility and only one health assessment during any subsequent permit modification, amendment, or renewal.

- An April 29, 1981 memo from Wayne Davison asked JoAnn Wiersema (toxicologist) to comment on the health effects of the air contaminants from the plant. He stated that "The prevailing winds are not toward the nearest residences; however, it is possible that houses could be built downwind of the facility in the future." Mr. Davison's biggest concern was particulate matter emissions (from rock dust) and SO₂. Ms. Wiersema's response is not included in the TCEQ files.
- A copy of a Screen Model run conducted by TACB Toxicologist Alberto Tohme on July 26, 1993 was included in TACB's file on response to a request from Gohmann to add anti-strip additives to the Frisco Plant process. This assessment concluded that the maximum concentration occurred at a distance of 636 feet downwind, 8 miles per hour wind speed, and plume height of 65 feet. At this time, the nearest residence was 800 feet away and there was no school within a ½ mile radius of the plant.

FINDINGS REGARDING APAC PERMIT AND RECORDS REVIEW

Dan Wittliff, P.E., DEE

May 27, 2008

Page 2

Finding 2: TCEQ and its predecessor agencies granted APAC and its predecessor several permit amendments without requiring that the company go through the public notice process.

- The TCEQ files show that the 1993 permit renewal, the 1981 amendment to add No.4 fuel oil, and the 1999 amendment to add waste industrial oil (1999) appear to have been done without public notice. In fact, APAC specifically requested on July 20, 1999 that TCEQ waive public notification because "overall emissions will not be increased by more than 25 tons per year." The 1999 amendment allowed burning "reclaimed industrial oil" in the primary burner.
- 30 TAC §116.10 was adopted by TCEQ to be effective July 8, 1998 and amended to be effective on September 4, 2000, June 12, 2002, September 12, 2002. Paragraph (11) of this section defines **modification of existing facility** as "Any physical change in, or change in the method of operation of, a facility in a manner that increases the amount of any air contaminant emitted by the facility into the atmosphere or that results in the emission of any air contaminant not previously emitted. The term does not include:
 - (A) insignificant increases in the amount of any air contaminant emitted that is authorized by one or more commission exemptions;
 - (B) insignificant increases at a permitted facility;
 - (E) a physical change in, or change in the method of operation of, a facility that does not result in a net increase in allowable emission of any air contaminant and that does not result in the emission of any air contaminant not previously emitted, provided that the facility:
 - (i) has received a preconstruction permit or permit amendment or has been exempted under the TCAA, §382.057, from preconstruction permit requirements no earlier than 120 months before the change will occur; or
 - (ii) uses, regardless of whether the facility has received a preconstruction permit or permit amendment or has been exempted under the TCAA, §382.057, an air pollution control method that is at least as effective as the BACT that the commission required or would have required for a facility of the same class or type as a condition of issuing a permit or permit amendment 120 months before the change will occur;
- 30 TAC §39.1 was adopted by TCEQ to be effective January 8, 1997 and amended to be effective on June 5, 1997, December 10, 1998, September 23, 1999, and September 14, 2000. This rule subjects air quality permit applications identified in 30 TAC §39.201 that were declared administratively complete before September 1, 1999 to be subject to the notice requirements of this subchapter. However, 30 TAC §39.201(a)(1) and (2) states that these notice requirements apply to air actions declared administratively complete before September 1, 1999 and involving (1)

FINDINGS REGARDING APAC PERMIT AND RECORDS REVIEW

Dan Wittliff, P.E., DEE

May 27, 2008

Page 3

hearings (contested case hearings) for permit applications, permit amendments or permit renewals relating to new construction or modification or (2) hearings on applications for a registration for a standard exemption required to provide public notice under Chapter 116.

- 30 TAC §116.312 was adopted by TCEQ effective July 8, 1998 and amended to be effective September 23, 1999. This rule states, "The executive director shall mail a written notice to the permit holder within 30 days after receipt of a complete application. The notice will confirm receipt of the application and shall require the applicant to provide notice of the application for permit renewal in accordance with Chapter 39 of this title (relating to Public Notice)."
- 30 TAC §39.402 was adopted by TCEQ to be effective November 13, 2001. Section (a) of this rule states, "Air quality permit amendment applications under §116 (b) of this title (relating to Changes to Facilities)...must comply with this subchapter and Subchapter K of this chapter regarding notices when the amendment involves: (1) a change in character of emissions or release of an air contaminant not previously authorized under the permit or (4) any amendment when the executive director determines that: (A) there is reasonable likelihood for emissions to impact a nearby sensitive receptor; (B) there is a reasonable likelihood of high nuisance potential from the operation of the facilities; (C) the application involves a facility or site for which the compliance history contains violations which are unresolved or constitute a recurring pattern of conduct that demonstrates consistent disregard for the regulatory process; or (D) there is a reasonable likelihood of significant public interest in a proposed activity."

Finding 3: The APAC (previously the Gohmann Asphalt) facility and its concrete batch plant neighbors were the subject of 41 TCEQ investigations based on 54 odor, dust, and smoke complaints and received 10 notices of violation between 2001 and 2006 alone. However, TCEQ staff:

- Could not confirm a nuisance condition during any of the 41 investigations;
- Maintained two regulated entity identification numbers on the same facility; and
- Was only aware of the ID number that had almost no complaints or violations against it, but not the other ID number that had the numerous complaints and violations assigned against it.

Finding 4: Given that (1) 30 TAC 101.8 grants the TCEQ Executive Director broad discretionary authority to require site-specific stack testing, (2) the TCEQ's own field air quality tests in 2004 raised questions about TCEQ's inability to measure some of the asphalt plant's potential emissions, and (3) the TCEQ relied on stack testing on different plants in *Wyoming* and *Nevada* instead of requiring that a site-specific stack sampling at the APAC facility, how can the TCEQ determine exactly what contaminants are coming out of the APAC stack into the air breathed by children in the hundreds of homes downwind of the plant without comprehensive stack testing of the APAC facility?

FINDINGS REGARDING APAC PERMIT AND RECORDS REVIEW

Dan Wittliff, P.E., DEE

May 27, 2008

Page 4

- The original permit was granted based on Mr. Davison's "guess" that the TACB could approve the applications based on being less than 5% opacity (see February 7, 1983 memo).
- The ED can, at his discretion require site-specific stack testing. Yet none has been done in more that 25 years of operation. In fact, 30 TAC 101.8 requires that:
 - "a) Any person owning or operating a source which emits air contaminants into the air of this state shall, upon request by the board or the executive director, conduct sampling to determine the opacity, rate, composition, and/or concentration of such emissions. Sampling shall be conducted at a frequency and within a period of time which are reasonable as specified by the board or executive director. The sampling method shall be specified by the board or the executive director and, further, the sampling shall be conducted so as to reflect with reasonable accuracy the above listed characteristics of such emissions.
 - (b) Any person affected by subsection (a) of this section may request the executive director to approve alternate sampling techniques or other means to determine the opacity, rate, composition, and/or concentration of emissions. The executive director may approve such alternate methods or means if it can be demonstrated that such alternatives will be substantially equivalent to the sampling methods specified by the executive director or the board."
- 30 TAC 101.8 has been in place since 1976 and seems to mean that other approved alternative methods of determining emissions can be applied to a specific applicant unit at a specific site. However, the TACB permitted the Frisco facility based on stack tests done in Wyoming in 1981 at a flow rate about 80 percent of what was permitted at the APAC (then Gohmann) facility (see January 28, 1983 memo from Frank DeVought to Wayne Davison).
- While there are two stack tests in the TCEQ files related to the APAC permit, neither of them is the Wyoming test used for the original permit. Therefore, we don't know under what fuel or additive conditions those test were conducted or if they represent conditions at the APAC facility.
- Since the original construction permit in 1981, a number of amendments have been approved to add No. 4 fuel oil and waste oil, as well as additives, without public notice , but with knowledge that downwind residential development was possible.
- Some of these additives (e.g., Polymer Modified Cement, Butonal NS 175, and Total Asphalt) show acute and chronic health effects by either inhalation or skin contact.
- Based on AP-42 emission factors alone, burning any kind of oil at the APAC facility creates more than twice as much nitrogen oxide (NO_x) as burning natural gas; to say nothing of organic compounds, methane, and hazardous air pollutants.
- Because of the lack of site specific plant performance data (e.g., stack sampling for gaseous and condensable emissions as well as particulate matter) and the

FINDINGS REGARDING APAC PERMIT AND RECORDS REVIEW

Dan Wittliff, P.E., DEE

May 27, 2008

Page 5

abundance of data collected on speciated compounds around and downwind of the plant (e.g., the 2004 TCEQ Mobile Monitoring Tests and the 2006 Ambient Air Quality Study conducted by the City of Frisco), it is necessary to conduct comprehensive site-specific stack sampling (one with waste fuel oil, another with first-run No. 2 fuel oil, and another on sweet pipeline quality natural gas) to identify what, if any, public health risks are associated with the APAC facility operating so close to hundreds of homes and an elementary school with small children.

Finding 5: TCEQ's actions, and those of its predecessor agencies, appear to be inconsistent with its established mission of protecting the State's human and natural resources and of ensuring meaningful public participation when it routinely (1) granted a permit to the APAC asphalt plant knowing that homes would be built downwind and that there could be potential health consequences, (2) renewed the permit and granted amendments for increasingly worse grades of fuel without any public notice or meaningful public involvement, and (3) didn't catch APAC or its used oil supplier failing to test for the 12 constituents with known public health effects.

- In its Mission Statement, the TCEQ "strives to protect our state's human and natural resources consistent with sustainable economic development. Our goal is clean air, clean water, and the safe management of waste." In its Agency Philosophy, TCEQ states that in accomplishing its mission it will:

1. base decisions on the law, common sense, good science, and fiscal responsibility;
2. ensure that regulations are necessary, effective, and current;
3. apply regulations clearly and consistently;
4. ensure consistent, just, and timely enforcement when environmental laws are violated;
5. ensure meaningful public participation in the decision-making process;

- However, in response to Mr. Paschal's (a protestant) January 7, 1981 letter, Mr. Davison states, "the Texas Clean Air Act does not confer zoning authority on the Texas Air Control Board. Thus we cannot legally deny a permit on the basis of location of the source. The Act does give to the Board authority to regulate emissions of contaminants from *all sources (emphasis added)* and accordingly, the Board has established and continues to develop regulations to *control all pollution (emphasis added)*. Regulation VI, applicable to new and modified sources such as the one referenced above, requires that new sources obtain construction and operating permits from the Board. The construction permit may be issued only when the applicant commits to the use of Best Available Control Technology (BACT)."

- While BACT has changed over the past twenty seven years since the APAC asphalt plant was originally permitted, and awareness of emissions (other than PM and SO₂) has increased, the TCEQ has routinely granted a permit renewal and

FINDINGS REGARDING APAC PERMIT AND RECORDS REVIEW

Dan Wittliff, P.E., DEE

May 27, 2008

Page 6

permit amendments that change the amount and character of these emissions without meaningful public participation and appropriate characterization of the emissions from the APAC facility.

- In at least one instance, APAC **did not comply** with the requirements of Special Condition Numbers 3 and 19E. During an October 1, 2003 follow-up on two complaints (Incidents 27651 and 27895), the TCEQ inspector found that the site did not have the required documentation. Instead, the plant operator had to get the information from their main office about 30 miles away and provided the required information to the inspector before the inspector left the site. See Investigation Report Number 253680 in Attachment 8.13. The report from Precision Petroleum Labs, Inc. was dated September 18, 2003. It showed the following concentrations of the 12 COC:

1.	Antimony – Not Tested	Permit Limit is 180 ppm
2.	Arsenic – < 0.50 ppm	Permit Limit is 3 ppm
3.	Beryllium – Not Tested	Permit Limit is 1 ppm
4.	Cadmium – 0.253 ppm	Permit Limit is 2 ppm
5.	Chromium – 1.764 ppm	Permit Limit is 9 ppm
6.	Mercury – Not Tested	Permit Limit is 37 ppm
7.	Selenium – Not Tested	Permit Limit is 75 ppm
8.	Thallium – Not Tested	Permit Limit is 37 ppm
9.	Vanadium – Not Tested	Permit Limit is 18 ppm
10.	Lead – 61.699 ppm	Permit Limit is 100 ppm
11.	Nickel – 1.642 ppm	Permit Limit is 5 ppm
12.	Total halogens – 795.6 ppm	Permit Limit is 1,000 ppm

- What the example above demonstrates is that (1) APAC **did not** do what it was required to do by its permit and (2) the TCEQ inspector **did not** realize that APAC had not complied with its permit conditions. Therefore, the potential health effects of having unknown quantities of heavy metals released into the air remained unknown.

- Note that the 2003 example is in stark contrast to the May 24, 1999 analytical report from Gray Laboratories, Inc. that was presumably the basis of APAC's permit amendment to allow the burning of industrial reclaimed oil. Where the original test report showed "ND" or Not Detectable, I included the level as less than (<) the detection of the test method used. The results of that test are shown below and clearly demonstrate that Safety Kleen, who supplied the waste oil, was aware of the constituents of concern and instructed the lab accordingly.

1.	Antimony – < 2.00 ppm	Permit Limit is 180 ppm
2.	Arsenic – < 3.00 ppm	Permit Limit is 3 ppm
3.	Beryllium – 0.010 ppm	Permit Limit is 1 ppm
4.	Cadmium – 0.21 ppm	Permit Limit is 2 ppm
5.	Chromium – 1.07 ppm	Permit Limit is 9 ppm
6.	Mercury – < 2.00 ppm	Permit Limit is 37 ppm
7.	Selenium – < 2.0 ppm	Permit Limit is 75 ppm

FINDINGS REGARDING APAC PERMIT AND RECORDS REVIEW

Dan Wittliff, P.E., DEE

May 27, 2008

Page 7

8.	Thallium – < 2.0 ppm	Permit Limit is 37 ppm
9.	Vanadium – < 2.0 ppm	Permit Limit is 18 ppm
10.	Lead – 21.10 ppm	Permit Limit is 100 ppm
11.	Nickel – < 1.0 ppm	Permit Limit is 5 ppm
12.	Total halogens – 119.7 ppm	Permit Limit is 1,000 ppm

Finding 6: The example of the incomplete test report and the subsequent agency inaction seems to have undermined the confidence of Frisco residents in TCEQ's ability to: (1) establish relevant and protective emissions limits, (2) communicate these requirements clearly in the provisions of an air permit, (3) ensure compliance with all the terms of an air permit, and (4) take prompt and effective enforcement action against offenders.

- TCEQ received hundreds of letters from nearby citizens concerning this most recent renewal of the APAC permit. In the main, the citizens voiced their concern about the continued burning of used oil and the lack of site-specific stack testing of the APAC facility for speciated gaseous and condensable emissions as well as particulate matter. At the public meeting on May 6, 2008, over 130 nearby citizens attended the public meeting and voiced their informed concerns about these issues.
- TCEQ received 54 complaints against APAC and its two concrete batch plant neighbors between 2001 and 2006 coincidental with the rapid residential development of the area north of the plants.
- From 2004 through 2006, Frisco Independent School District conducted a compliance review of the batch plants, conducted pre-commissioning tests of Isbell Elementary, engaged the TCEQ on potential effects of the batch plants, requested a follow-up inspection on Isbell Elementary from the Texas Department of State Health Services (TDSHS), and corrected identified issues where practicable.
- TCEQ Mobile Monitoring conducted plant air monitoring of the APAC facility in March and April 2004. In these tests, TCEQ sought "to characterize maximum pollutant concentrations" at the property line. The APAC tests on March 11 and April 11 to 13, 2004 involved tests of air quality downwind of the APAC plant. The TCEQ tested for 142 constituents of concern and particulates, but did not include phenols and cresols that can be particularly odorous even at very low concentrations.
- City of Frisco commissioned an ambient air quality investigation in 2006. This expanded set of testing included the phenols and cresols missing from the TCEQ testing. Of the 226 gas and particulate COCs tested for, the labs found only 56 COCs that rose above the test method detection limits. Five COC sample concentrations were above the short-term health effects screening levels (HESL).
- Responding to the results of the air quality investigation, and public concerns over ambient air quality, Frisco enacted the City of Frisco Clean Air Ordinance in 2007 (Number 07-04-14). This ordinance bans the burning of used oil within the city limits, controls odors leaving the property, and limits fugitive particulates to no visible emissions at the property line as measured by USEPS Method 22.

FINDINGS REGARDING APAC PERMIT AND RECORDS REVIEW

Dan Wittliff, P.E., DEE

May 27, 2008

Page 8

Finding 7: TCEQ has not required the APAC facility upgrade its environmental controls even though there have been substantial improvements in dryer, burner, baghouse, and scrubber technology during the 25+ years the APAC facility has been operating.

- In 1981, APAC's parallel flow drum design was the BACT of the day for asphalt batch plants. There are about 1,000 of these units in the U.S. operating today. However, 85 percent of the new asphalt plants being permitted today are counter flow drum mix plants.
- Today, counter flow drums with fugitive VOC emissions collection and removal/destruction should have lower emissions than parallel flow drums without fugitive VOC emissions collection and removal/destruction because the process materials are mixed in a zone removed from the exhaust gas stream.
- APAC argues that it cannot voluntarily replace the parallel drum design with a counter flow design and fugitive recycling without triggering New Source Review. However, APAC should be able to upgrade to current BACT and avoid triggering NSR if TCEQ required the upgrade.
- In 1981, TACB was preoccupied with SO₂ from the stack and PM from the stack and aggregate handling process. The agency was not looking for other stack emissions. Today, Section 11.1.2 of USEPA AP-42 shows that asphalt plant emissions include: particulate matter, carbon monoxide, volatile organic compounds, methane, and hazardous air pollutants. BACT should control these emissions.

Conclusions: The intense level of informed interest by citizens downwind from the APAC facility reflects their concerns for the safety of themselves and their children as well as their quality of life. While these concerns have resulted in a number of constructive responses from the TCEQ and others (see Finding 6), only the TCEQ can take the necessary actions required to ensure that emissions from the APAC Hot Mix Asphalt Plant in Frisco, Texas are controlled in manner that protect the health and safety of the surrounding community. These necessary actions include:

- Requiring APAC to conduct site-specific stack testing for speciated gaseous and condensable emissions as well as particulate matter.
- Rescinding the 1999 authorization granted to APAC to burn reclaimed industrial fuel oil in the facility dryer.
- Requiring APAC to implement BACT, including a baghouse, fugitive emissions collection and control, and a counter flow drum.

Recommendations: To appropriately address the TCEQ's mission and restore citizen confidence in the agency's ability to protect public health and the environment, TCEQ should grant the requests for a contested case hearing. In granting the requests for a contested case hearing the Commissioners should certify to SOAH that this is a case whose specifics warrant examination of three issues:

FINDINGS REGARDING APAC PERMIT AND RECORDS REVIEW

Dan Wittliff, P.E., DEE

May 27, 2008

Page 9

- Whether or not site-specific stack testing for speciated gaseous and condensable emissions as well as particulate matter is justified as condition of continued operation at this site.
- Whether or not the agency should rescind the 1999 authorization granted to APAC to burn reclaimed industrial fuel oil at the Frisco facility.
- Whether or not the specific conditions of this facility in this community warrant requiring APAC to implement BACT, including a baghouse, fugitive emissions collection and control, and a counter flow drum.

Dan Wittliff, P.E., DEE

Managing Director of Environmental Services

GDS Associates, Inc.