TCEQ AIR QUALITY STANDARD PERMIT NUMBER 86593
TCEQ DOCKET NUMBER 2009-1691-AIR

APPLICATION BY	§	BEFORE THE
	§	
EAST TEXAS PRECAST CO., LTD.	§	TEXAS COMMISSION ON
CONCRETE BATCH PLANT	§	
HEMPSTEAD, WALLER COUNTY	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director ("ED") of the Texas Commission on Environmental Quality ("Commission" or "TCEQ") files this response ("Response") to the requests for a contested case hearing submitted by persons listed herein. The Texas Clean Air Act ("TCAA") § 382.056(n) requires the Commission to consider hearing requests in accordance with the procedures provided in TEX. WATER CODE § 5.556.[1] This statute is implemented through the rules in 30 TEX. ADMIN. CODE ("TAC") Chapter 55, Subchapter F.

A map showing the location of the site for the proposed facility is included with this Response and has been provided to all persons on the attached mailing list. In addition, a current compliance history report, technical review summary, and draft permit prepared by the ED's staff have been filed with the TCEQ's Office of Chief Clerk for the Commission's consideration. Finally, the ED's Response to Public Comments ("RTC"), which was mailed by the chief clerk to all persons on the mailing list, is on file with the chief clerk for the Commission's consideration.

I. Application Request and Background Information

East Texas Precast Co., Ltd. ("Applicant") has applied to the TCEQ for a Standard Permit under TCAA § 382.05195. This permit will authorize the Applicant to increase production at an existing concrete batch plant. The plant is located at 44855 Old Houston Highway, Hempstead, Waller County. Contaminants authorized under this standard permit include particulate matter (including but not limited to) aggregate, cement, road dust, and particulate matter less than 10 microns in diameter (PM_{10}). It appears the Applicant is not delinquent on any administrative penalty payments to the TCEQ. The TCEQ Enforcement Database was searched and no enforcement activities were found that are inconsistent with the compliance history.

The permit registration application was received on October 15, 2008 and declared administratively complete on November 3, 2008. The Notice of Receipt and Intent to Obtain an Air Quality Permit (i.e., first public notice) for this permit application was published on December 8, 2008, in the *Waller Times*. The Notice of Application and Preliminary Decision for an Air Quality Standard Permit for Concrete Batch Plant Registration (i.e. second public notice) was published on March 23,

[1] Statutes cited in this response may be viewed online at www.capitol.state.tx.us/statutes/statutes.html. Relevant statutes are found primarily in the Texas Health and Safety Code and the Texas Water Code. The rules in the Texas Administrative Code may be viewed online at www.sos.state.tx.us/tac/index.shtml, or follow the "Rules, Policy & Legislation" link on the TCEQ website at www.tceq.state.tx.us.

2009 in the *Waller Times*. A public meeting was held on May 28, 2009 in Prairie View, Waller County. The public comment period ended on May 28, 2009, at the adjournment of the public meeting. The ED's RTC was mailed on September 11, 2009 to all interested persons, including those who asked to be placed on the mailing list for this application and those who submitted a comment or request for a contested case hearing. The cover letter attached to the RTC included information about making requests for a contested case hearing or for reconsideration of the ED's decision.[2] The letter also explained hearing requesters should specify any of the ED's responses to comments they dispute and the factual basis of the dispute, in addition to listing any disputed issues of law or policy.

The TCEQ received timely hearing requests during the public comment period that were not withdrawn from the following persons: Esel D. Bell, Marshall V. Brown, P.E., Luther V. Francis, Clifton and Hazel Gilliard, Alice Y. Good, Clara C. Gordon, Frank Jackson, Barbara L. Johnson, James I. Kirkwood, Erma Sadberry and Cleophus Sharp.

II. Applicable Law

The Commission must assess the timeliness and form of the hearing requests, as discussed above. The form requirements are set forth in 30 TAC § 55.201(d):

> (d) A hearing request must substantially comply with the following:
> (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
> (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requester's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requester believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
> (3) request a contested case hearing;
> (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the Commission's determination of the number and scope of issues to be referred to hearing, the requester should, to the extent possible, specify any of the executive director's responses to comments that the requester disputes and the factual basis of the dispute and list any disputed issues of law or policy; and

2 *See* TCEQ rules at Chapter 55, Subchapter F of Title 30 of the Texas Administrative Code. Procedural rules for public input to the permit process are found primarily in Chapters 39, 50, 55 and 80 of Title 30 of the Code.

(5) provide any other information specified in the public notice of application.

The next necessary determination is whether the requests were filed by "affected persons" as defined by TEX. WATER CODE § 5.115, implemented in Commission rule 30 TAC § 55.203. Under 30 TAC § 55.203, 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. An interest common to members of the general public does not qualify as a personal justiciable interest. Local governments with authority under state law over issues raised by the application receive affected person status under 30 TAC § 55.203(b).

In determining whether a person is affected, 30 TAC § 55.203(c) requires all factors be considered, including, but not limited to, the following:

(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 and safety of the person, and on the 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.

Additionally, this application is for registration for the Standard Permit for Concrete Batch Plants. Hearing requests on a concrete batch plant standard permit are considered under TCAA § 382.058(c), which states that "only those persons actually residing in a permanent residence within 440 yards of the proposed plant may request a hearing … as a person who may be affected."

If the Commission determines a hearing request is timely and fulfills the requirements for proper form and the hearing requester is an affected person, the Commission must apply a three-part test to the issues raised in the matter to determine if any of the issues should be referred to the State Office of Administrative Hearings ("SOAH") for a contested case hearing. The three-part test in 30 TAC § 50.115(c) is as follows:

(1) The issue must involve a disputed question of fact;
(2) The issue must have been raised during the public comment period; and
(3) The issue must be relevant and material to the decision on the application.

The law applicable to the proposed facility may generally be summarized as follows. A person who owns or operates a facility or facilities that will emit air contaminants is required to obtain

authorization from the Commission prior to the construction and operation of the facility or facilities.[3] Thus, the location and operation of the proposed facility requires authorization under the TCAA. Permit conditions of general applicability must be in rules adopted by the Commission.[4] Those rules are found in 30 TAC Chapter 116. In addition, a person is prohibited from emitting air contaminants or performing any activity that violates the TCAA or any Commission rule or order, or that causes or contributes to a condition of air pollution.[5] The relevant rules regarding air emissions are found in 30 TAC Chapters 101 and 111-118. In addition, the Commission has the authority to establish and enforce permit conditions consistent with this chapter.[6] The materials accompanying this response list and reference permit conditions and operational requirements and limitations applicable to this proposed facility.

III. Analysis of Hearing Requests

A. Were the requests for a contested case hearing in this matter timely and in proper form?

The hearing requests were submitted during the public comment period. Furthermore, the ED has determined the hearing requests of Esel D. Bell, Marshall V. Brown, P.E., Luther V. Francis, Clifton and Hazel Gilliard, Alice Y. Good, Clara C. Gordon, Frank Jackson, Barbara L. Johnson, James I. Kirkwood, Erma Sadberry and Cleophus Sharp substantially comply with all of the requirements for form in 30 TAC § 55.201(d).

The ED addressed all public comments in this matter by providing responses in the RTC. The cover letter from the Office of the Chief Clerk attached to the RTC states that requesters should, to the extent possible, specify any of the ED's responses in the RTC that the requesters dispute and the factual basis of the dispute, and list any disputed issues of law or policy.[7] In the absence of any response by the hearing requesters within the thirty-day period after the RTC was mailed, the ED cannot determine or speculate whether the hearing requesters continue to dispute issues of fact, or whether there are any outstanding issues of law or policy. The ED nevertheless has evaluated the merits of the requests before action is taken regarding this application.

B. Are those who requested a contested case hearing in this matter affected persons?

Esel D. Bell, Marshall V. Brown, P.E., Luther V. Francis, Clifton and Hazel Gilliard, Alice Y. Good, Clara C. Gordon, Frank Jackson, Barbara L. Johnson, James I. Kirkwood, Erma Sadberry and Cleophus Sharp are hearing requestors who have all stated a "personal justiciable interest" in the permit, by stating that they believe that their health would be adversely affected by dust from the proposed plant. All of these hearing requestors, however, reside more than 440 yards from the

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[3] TEX. HEALTH & SAFETY CODE § 382.0518
[4] TEX. HEALTH & SAFETY CODE § 382.0513
[5] TEX. HEALTH & SAFETY CODE § 382.085
[6] TEX. HEALTH & SAFETY CODE § 382.0513
[7] *See* 30 TAC § 55.201(d)(4).

proposed facility. For a concrete batch plant, TCAA § 382.058(c) requires residence within 440 yards of the proposed plant for affected person status. As indicated on the included map, none of the hearing requestors are within the 440 distance requirement. The requestors' failure to meet the distance requirement of TCAA § 382.058(c) is an absolute bar to affected person status. Therefore, none of these hearing requestors are affected persons able to request a contested case hearing according to 30 TAC § 55.201.

C. Which issues in this matter should be referred to SOAH for hearing?

If the Commission determines any of the hearing requests in this matter are timely and in proper form, and some or all of the hearing requesters are affected persons, the Commission must apply the three-part test discussed in Section II to the issues raised in this matter to determine if any of the issues should be referred to SOAH for a contested case hearing. The three-part test asks whether the issues involve disputed questions of fact, whether the issues were raised during the public comment period, and whether the issues are relevant and material to the decision on the permit application, in order to refer them to SOAH. However, none of the persons requesting a hearing on this permit are affected persons as a matter of law under TCAA § 382.058(c) because they reside more than 440 yards from the proposed facility. Therefore, there are no hearing requests that meet the necessary requirements for the Commission to consider for referral to SOAH.

IV. Executive Director's Recommendation

The Executive Director respectfully recommends that the Commission deny all requests for a contested case hearing for this permit as a matter of law.

Respectfully submitted,

Texas Commission on Environmental Quality

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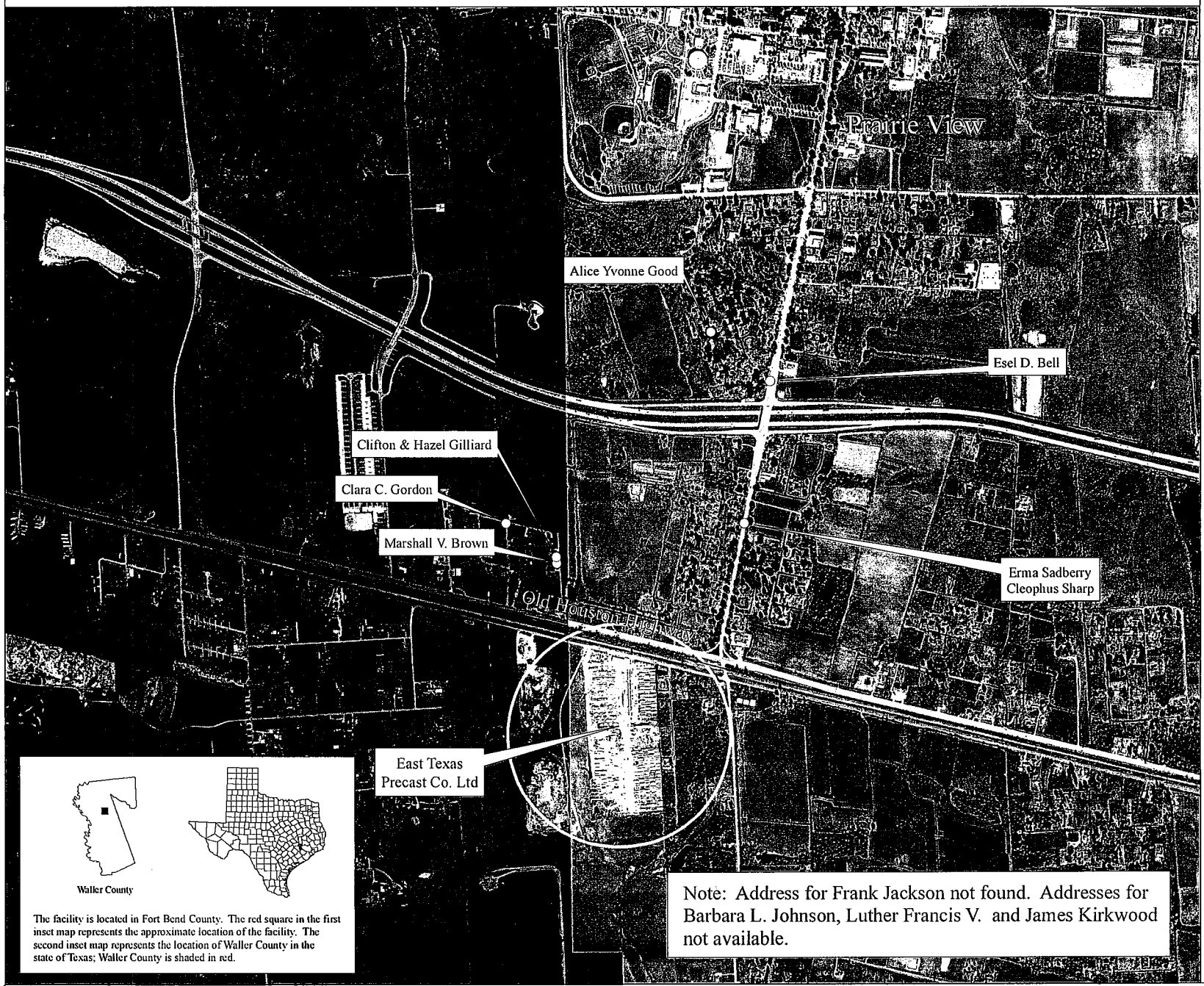
REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Map of Hearing Requestor's Locations in Relation to
East Texas Precast Co., Ltd.'s
Proposed Concrete Batch Plant, Permit No. 86593

East Texas Precast Co. Ltd.
Permit No. 86593
Map Requested by TCEQ Office of Legal Services for Commissioners Agenda



The facility is located in Fort Bend County. The red square in the first inset map represents the approximate location of the facility. The second inset map represents the location of Waller County in the state of Texas; Waller County is shaded in red.

Note: Address for Frank Jackson not found. Addresses for Barbara L. Johnson, Luther Francis V. and James Kirkwood not available.

Protecting Texas by Reducing and Preventing Pollution

Texas Commission on Environmental Quality
GIS Team (Mail Code 197)
P.O. Box 13087
Austin, Texas 78711-3087

November 6, 2009

0 0.1 0.2 0.4 Miles

Projection: Texas Statewide Mapping System (TSMS)

Scale 1:20,000

Legend

- ○ Requestor's Property
- ◌ 440-yard radius

Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information and the requestor information from the applicant. The vector data are U.S. Census Bureau 1992 TIGER/Line Data (1:100,000). The background of this map is a one-half meter photograph from the 2008 Texas Orthoimagery Project.

This map depicts the following:

(1) The approximate location of the facility. This is labeled "East Texas Precast Co. Ltd.".
(2) Points depicting the location of the requestors. These are labeled with their names.
(3) Circle indicating a 440-yard radius around the batch plant.

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This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This map was not generated by a licensed surveyor, and is intended for illustrative purposes only. No claims are made to the accuracy or completeness of the data or to its suitability for a particular use. For more information concerning this map, contact the Information Resource Division at (512) 239-0800.

M McDonough CRF-091105093

CERTIFICATE OF SERVICE

On the 16th day of November, 2009, a true and correct copy of the foregoing instrument was served on all persons on the attached mailing list by the undersigned via deposit into the U.S. Mail, inter-agency mail, facsimile, or hand delivery.

Tommy Tucker Henson II

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DOCKET NO. 2009-1691-AIR; PERMIT NO. 86593

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See attached list of Requesters/Interested Persons.

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