

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

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

November 16, 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: **EAST TEXAS PRECAST CO., LTD.**
TCEQ DOCKET NO. 2009-1691-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 black ink, appearing to read "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 P.O. Box 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

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TCEQ DOCKET NO. 2009-1691-AIR

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION BY EAST TEXAS	§	TEXAS COMMISSION ON
PRECAST CO., LTD. FOR	§	ENVIRONMENTAL QUALITY
STANDARD AIR PERMIT NO. 86593	§	

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

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas
Commission on Environmental Quality (the Commission or TCEQ) and files this
Response to Hearing Requests in the above-referenced matter.

I. PROCEDURAL HISTORY

East Texas Precast Co., LTD (Applicant) has applied to the TCEQ for a standard
permit registration under the Texas Clean Air Act (TCAA), Texas Health & Safety Code
§382.05195.

If granted, the registration will authorize Applicant to operate the standard permit
and increase production at a permanent concrete batch plant. The facility is located at
44855 Old Houston Hwy, Hempstead, Waller County. Contaminants authorized under
this standard permit include particulate matter (PM), including but not limited to
aggregate, cement, road dust, and particulate with an aerodynamic diameter of 10
microns or less (PM₁₀). Currently, this plant is operating under the specialty concrete
batch plant authorization, Registration No. 50702, using the Air Quality Standard Permit
for Concrete Batch Plants.

The application for this registration was received by the TCEQ on October 15,
2008, and declared administratively complete on November 3, 2008. The Notice of

Receipt of Application and Intent to Obtain an Air Quality Standard Permit Registration (NORI) was published on December 8, 2008 in *The Waller Times*. The Notice of Application and Preliminary Decision for an Air Quality Standard Permit Registration for a Concrete Batch Plant (NAPD) was published on March 23, 2009 in *The Waller Times*. The public comment period ended on May 28, 2009 after the conclusion of the public meeting held in Prairie View, Waller County. The Chief Clerk mailed the Executive Director's (ED) Response to Public Comment and Decision on September 11, 2009. The deadline for submitting a hearing request was October 9, 2009.

Eleven timely filed hearing requests were filed on this application by Eseld D. Bell, Marshall V. Brown, Luther V. Francis, Clifton & Hazel Gilliard, Alice Yvonne Good, Clara C. Gordon, Frank Jackson, Barbara L. Johnson, James I. Kirkwood, Erma Sadberry, and Cleophus Sharp.

II. DISCUSSION

A. Applicable Law

Under the applicable statutory and regulatory requirements, a person requesting a hearing must file the request in writing with the chief clerk no later than 30 days after the chief clerk's transmittal of the executive director's decision and response to comments. 30 TAC §55.201(a) and (c). For air authorizations, a hearing request must be filed during the first comment period in order for the authorization to be subject to further notice and public participation opportunities. TEXAS HEALTH & SAFETY CODE §382.056(g). Therefore, timely requests for air authorizations include all requests filed in response to the Notice of Intent to Obtain Permit, as well as any additional requests subsequently

filed during the comment period and the 30-day period following the transmittal of the executive director's response to comments.

The request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility of activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TAC §55.201(d).

Under 30 TAC §55.203(a), an affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." This justiciable interest does not include an interest common to the general public. 30 TAC §55.203(c) sets forth relevant factors that will be considered in determining whether a person is affected. These factors include:

- a. whether the interest claimed is one protected by the law under which the application will be considered;
- b. distance restrictions or other limitations imposed by law on the affected interest;
- c. whether a reasonable relationship exists between the interest claimed and the activity regulated;
- d. likely impact of the regulated activity on the health, safety, and use of property of the person;
- e. likely impact of the regulated activity on use of the impacted natural resource by the person; and
- f. for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The Commission shall grant an affected person's timely filed hearing request if:

(1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission's decision on the application. 30 TAC 55.211(c).¹

Accordingly, pursuant to 30 TAC §55.209(e), responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

In addition to these requirements, the Texas Clean Air Act specifies that only those persons residing in a permanent residence within 440 yards of the proposed plant may request a hearing on a concrete batch plant standard permit registration as a person who may be affected. TEXAS HEALTH AND SAFETY CODE §382.058(c).

B. Affected Persons

Pursuant to 30 TAC §55.203(c)(2), the Commission is required to determine distance limitations or other limitations imposed by law when determining who is an affected person entitled to receive a contested case hearing. As previously stated, TEXAS

¹ A hearing request can not be based on an issue raised solely in comments that have been withdrawn by written letter filed with the chief clerk prior to the filing of the executive director's response to comments. 30 TAC §55.211(c)(2)(A).

HEALTH & SAFETY CODE §382.058(c) provides that “only those persons actually residing in a permanent residence within 440 yards of the proposed plant may request a hearing under Section 382.056 as a person who may be affected.” Commission policy is to measure this distance from the nearest emission point of the facility to the closest portion of the requesting party’s permanent residence.¹ OPIC applied the above criteria to the ED’s maps illustrating the plant’s emission points and the location of the requestors’ residences in relation to the plant and recommends that none of the requestors be found affected persons because each requestor resides outside of the 440-yard radius set forth in TEXAS HEALTH & SAFETY CODE §382.058(c).

OPIC notes, however, that although Eseld D. Bell, Marshall V. Brown, Clifton & Hazel Gilliard, Alice Yvonne Good, Clara C. Gordon, Erma Sadberry, and Cleophus Sharp have been located on the map produced by the ED, the residences of Frank Jackson, Barbara L. Johnson, Luther V. Francis, and James I. Kirkwood were either not found or otherwise not available for mapping. If any of the requestors disagree with the accuracy of the map produced by the ED and file a reply demonstrating that their residences are within 440 yards of Applicant’s plant, OPIC may reconsider its recommendation. In the event that such a reply is filed or the Commission otherwise finds that one or more of the requestors is an affected person, OPIC offers the following analysis relating to referring the application to the State Office of Administrative Hearings (SOAH).

¹For a recent example of the Commission’s interpretation of the proper measuring points between a plant and residence as contemplated by THSC §382.058(c), see Finding of Fact No. 7 and Conclusion of Law No. 3 in the Commission Issued Order, “Order Concerning the Application by Block Creek Products, LLC. for Issuance of Air Quality Registration No. 83958,” TCEQ Docket No. 2008-1009-AIR; SOAH Docket No. 582-08-4460.

C. Issues raised in the Hearing Requests

1. Each requestor raises the concern that the Applicant's activities will pose a health threat.
2. Each requestor raises the concern that the Applicant's activities will negatively affect the environment.
3. Each requestor raises the concern that the Applicant's activities will pose a dust nuisance.
4. Marshall V. Brown, Alice Yvonne Good, Erma Sadberry, and Cleophus Sharp raise the concern that the Applicant's activities will pose an odor, light, or noise nuisance.
5. Luther V. Francis and Clara C. Gordon raise the concern that the Applicant's activities will damage their property.
6. Esel D. Bell and Cleophus Sharp raise the concern that the Applicant's activities will pose dangerous traffic conditions.

D. Issues raised in Comment Period

The issues raised in the hearing requests were also raised in the comment period and have not been withdrawn. 30 TAC §§55.201(c) and (d)(4), 55.211(c)(2)(A).

E. Disputed Issues

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

F. Issues of Fact

If an issue is one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. *See* 30 TAC §55.211(b)(3)(A) and (B). OPIC finds that all issues raised by the requestors are issues of fact.

G. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the

Commission's decision to issue or deny this permit.² Relevant and material issues are those that are governed by the substantive law under which this registration is to be issued.³ The concerns related to health effects on human life,⁴ the environment,⁵ use and enjoyment of property,⁶ and nuisance conditions⁷ are all relevant and material to the Commission decision on this application because they relate to whether Applicant can comply with the terms of the standard air permit.

The remaining issue of traffic complications falls outside the scope of TCEQ jurisdiction with respect to this registration. Because this registration concerns air quality, TCEQ's jurisdiction in this matter is limited to safeguarding the state's air resources from pollution, as authorized by Chapter 382 of the Health and Safety Code. Potential effects on traffic are not addressed by the substantive law governing this application and are not considered relevant and material to the Commission's decision. OPIC therefore finds that this issue is inappropriate for referral to the State Office of Administrative Hearings.

H. Issues Recommended for Referral

If the Commission finds that one or more of the requestors is an affected person, OPIC recommends that the following disputed issues of fact be referred to the State Office of Administrative Hearings for a contested case hearing.

1. Will emissions from the proposed facility negatively affect human health?
2. Will emissions from the proposed facility negatively affect the environment?

² See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

³ *Id.*

⁴ Health and Safety Code §382.0518(b)(2).

⁵ Texas Clean Air Act § 382.002

⁶ *Id.* See also Health and Safety Code §382.002(a).

⁷ 30 TAC §101.4

3. Will emissions from the proposed facility negatively affect the requestors' use and enjoyment of their property?
4. Will emissions from the proposed facility create nuisance conditions?

I. Maximum Expected Duration of Hearing

Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

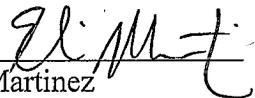
III. CONCLUSION

OPIC recommends that the requests of Eseld D. Bell, Marshall V. Brown, Luther V. Francis, Clifton & Hazel Gilliard, Alice Yvonne Good, Clara C. Gordon, Frank Jackson, Barbara L. Johnson, James I. Kirkwood, Erma Sadberry, and Cleophus Sharp be denied because they are not affected persons living within 440 yards of the plant. If any of the requestors file a reply demonstrating that their residences are in fact within 440 yards of Applicant's plant, OPIC may reconsider its recommendation. In the event that such clarification is made or the Commission otherwise finds that one or more of the requestors are affected, OPIC recommends a hearing duration of six months from the date

of the preliminary hearing until the date of the issuance of the proposal for decision based on the issues identified above.

Respectfully submitted,

Blas J. Coy, Jr.
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By 
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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2009 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Hearing Requests were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail


Eli Martínez

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TCEQ DOCKET NO. 2009-1691-AIR

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