

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

January 29, 2010

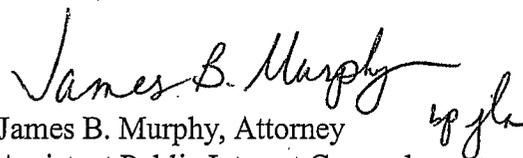
LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: ALAMO CONCRETE PRODUCTS
TCEQ DOCKET NO. 2010-0023-AIR**

Dear Ms. Castañuela:

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

Sincerely,


James B. Murphy, Attorney
Assistant Public Interest Counsel

Enclosure

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

P.O. Box 13087 Austin, Texas 78711-3087 512-239-1000 Internet address: www.tceq.state.tx.us

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TCEQ DOCKET NO. 2010-0023-AIR

**IN THE MATTER
OF THE APPLICATION OF
ALAMO CONCRETE PRODUCTS,
LTD., FOR TPDES PERMIT
NO. 86959**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

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

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

The Office of Public Interest Counsel (OPIC) of the Texas Commission on
Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in
the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

A. Background of Facility

Alamo Concrete Products, Ltd. (Applicant) has applied to TCEQ for a standard permit
registration under the Texas Clean Air Act (TCAA), TEX. HEALTH & SAFETY CODE § 382.05195,
to authorize construction and operation of a permanent concrete batch plant located at 1375 Weir
Ranch Road, Georgetown, Williamson County. The standard permit registration authorizes the
facility to emit air contaminants, specifically emissions of particulate matter including (but not
limited to) aggregate, cement, road dust, and particulate matter less than 10 microns in diameter
(PM₁₀).

B. Procedural Background

TCEQ received this application on December 5, 2008. On December 16, 2008, the
Executive Director of TCEQ (ED) declared the application administratively complete. The
Notice of Receipt and Intent to Obtain an Air Quality Permit (NORI) was published on

December 24, 2008 in the *Williamson County Sun* and in Spanish in *El Mundo Newspaper*. The ED completed technical review of the application, and prepared a draft permit. The Notice of Application and Preliminary Decision for an Air Quality Permit (NAPD) was published on April 19, 2009 in the *Williamson County Sun* and on April 16, 2009 in Spanish in *El Mundo Newspaper*. The public comment period ended on May 19, 2009. On November 30, 2009, the ED filed its decision and Response to Comments, which the Chief Clerk's office mailed on December 1, 2009. The deadline to request a contested case hearing was January 4, 2010.

TCEQ received timely comments and requests for a contested case hearing from Mark Freerks and Brian Lindsey on December 29, 2008.¹ OPIC recommends denying the hearing requests.

II. APPLICABLE LAW

This application was declared administratively complete on December 16, 2008. Because the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § (codified at TEX. HEALTH & SAFETY CODE § 382.056(n)).

Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material

¹ Note that TCEQ also received a comment from Jim Wilson on December 29, 2008 stating that he would like to be advised when there is a public hearing on the application. It does not appear from the comment that Mr. Wilson requests a hearing.

disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of the application. 30 TEX. ADMIN. CODE (TAC) § 55.201(d).

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.” 30 TAC § 55.203(a). This justiciable interest does not include an interest common to the general public. *Id.* Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.203(b). Relevant factors considered in determining whether a person is affected include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health 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.

30 TAC § 55.203(c).

The TCAA limits who may request a contested case hearing on a concrete plant registered under a standard permit: “[O]nly those persons actually residing in a permanent residence within 440 yards [$\frac{1}{4}$ mile] of the proposed plant may request a hearing under [TEX. HEALTH & SAFETY CODE] Section 382.056 as a person who may be affected.” TEX. HEALTH & SAFETY CODE § 382.058(c).

The Commission shall grant an affected person’s timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises

disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application. 30 TAC § 55.211(c).

Accordingly, responses to hearing requests must specifically address:

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

30 TAC § 55.209(e).

III. DISCUSSION

A. Determination of Affected Person Status

1. Brian Lindsey

Brian Lindsey timely filed a request for a contested case hearing. He states his address as 307 Rim Rock Drive in Georgetown. He is concerned about air quality and adverse effects on his family's health caused by the proposed facility. He expresses concern about the cumulative effects of the proposed facility and existing rock crushing and asphalt plants in the area. He is also concerned about noise from the proposed facility.

Mr. Lindsey's residence is located approximately 1.3 miles from the proposed facility. *See* Alamo Concrete Products, Ltd., Standard Permit Registration No. 86959, Map Requested by TCEQ Office of Legal Services for Commissioners' Agenda (January 20, 2010) (ED's Map) (Attached as Exhibit A). It does not appear Mr. Lindsey's residence is within 440 yards of the proposed facility as required by TEX. HEALTH & SAFETY CODE § 382.058(c). Although Mr.

Lindsey raises valid concerns about the proposed facility, OPIC concludes he is not entitled to a contested case hearing based on the location of his residence in relation to the facility.

2. Mark Freerks

Mark Freerks timely filed a request for a contested case hearing. He states his address as 201 Fox Hollow Drive in Georgetown. He is concerned about noise and traffic caused by the proposed facility.

Mr. Freerks's residence is located approximately 1.2 miles from the proposed facility. *See* ED's Map. It does not appear Mr. Freerks's residence is within 440 yards of the proposed facility as required by TEX. HEALTH & SAFETY CODE § 382.058(c). In addition, Mr. Freerks's concerns about noise and traffic are not protected by the statutes and rules governing air quality under which the application will be considered. OPIC concludes Mark Freerks is not an affected person entitled to a contested case hearing.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing requests:

1. Whether emissions from the proposed facility will cause adverse effects on human health. (Brian Lindsey)
2. Whether the combined effect of emissions from existing operations in the area and the proposed facility will exceed air quality standards. (Brian Lindsey)
3. Whether the proposed facility will create nuisance noise conditions. (Brian Lindsey, Mark Freerks)
4. Whether the proposed facility will cause adverse traffic conditions. (Mark Freerks)

C. Issues Raised in the Comment Period

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

D. Disputed Issues

There is no agreement between the hearing requesters and the ED on the issues raised in the hearing requests.

E. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. 30 TAC § 55.211(c)(2)(A). All of the issues presented are issues of fact.

F. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission’s decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission’s decision to issue or deny this permit. *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”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

TCEQ is responsible for the protection of air quality under the TCAA and accompanying administrative rules. The purpose of the TCAA is “to safeguard the state’s air resources from pollution by controlling or abating air pollution and emission of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility.” TEX. HEALTH & SAFETY CODE § 382.002. In addition, “[n]o person shall discharge from any source

whatsoever one or more air contaminants or combinations thereof, in such concentration and of such duration as are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property, or as to interfere with the normal use and enjoyment of animal life, vegetation, or property.” 30 TAC § 101.4.

Issue Nos. 1–2 raise relevant and material issues related to air quality and effects on human health. Accordingly, Issue Nos. 1–2 are appropriate for referral to SOAH.

Issue Nos. 3–4 related to noise and traffic are not relevant and material because these issues do not pertain to air quality and are outside the jurisdiction of the Commission in processing this air permit registration. Although traffic hazards are within the Commission’s jurisdiction under 30 TAC § 101.5, this provision refers to hazards created by air emissions, not from increased use of the roadway by trucks entering and leaving the facility. Accordingly, Issue Nos. 3–4 are inappropriate for referral to SOAH.

G. Issues Recommended for Referral

If the Commission determines Brian Lindsey is an affected person, OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

1. Whether emissions from the proposed facility will cause adverse effects on human health.
2. Whether the combined effect of emissions from existing operations in the area and the proposed facility will exceed air quality standards.

H. Maximum Expected Duration of Hearing

Commission Rule 30 TAC § 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

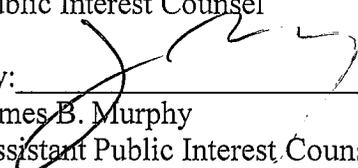
expected to issue a proposal for decision, and as required by 30 TAC § 55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC recommends denying the hearing requests from Brian Lindsey and Mark Freerks. If the Commission determines Brian Lindsey is an affected person, OPIC recommends referring Issue Nos. 1–2 referenced in Section III.G to SOAH, with a hearing duration of six months.

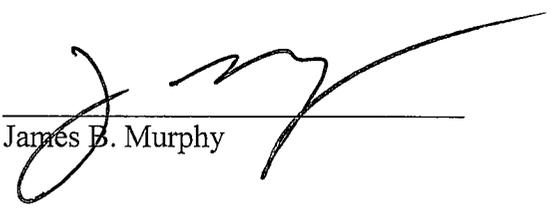
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By: 
James B. Murphy
Assistant Public Interest Counsel
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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2010 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing was 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, electronic mail, or by deposit in the U.S. Mail.


James B. Murphy

Alamo Concrete Products, Ltd.
Standard Permit Registration No. 86959
Map Requested by TCEQ Office of Legal Services
for Commissioners' Agenda



Texas Commission on Environmental Quality
 GIS Team (Mail Code 197)
 P.O. Box 13687
 Austin, Texas 78711-3087

January 20, 2010



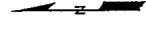
Projection: Texas Statewide Mapping System
 (TSM5)
 Scale 1:15,000

- Legend**
- Plant
 - Requestor's Property

Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestors information from the requestors. 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 plant. This is labeled "Plant".
- (2) Circle depicting 440 yard radius. This is labeled "440-Yard Radius".
- (3) The requestors. These are labeled with their names.



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.

J.McDonough, CRE-10015005



Williamson County

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

Exhibit A

MAILING LIST
ALAMO CONCRETE PRODUCTS
TCEQ DOCKET NO. 2010-0023-AIR

FOR THE APPLICANT:

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FOR OFFICE OF PUBLIC ASSISTANCE:

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FOR ALTERNATIVE DISPUTE

RESOLUTION:

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REQUESTERS:

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Brian Lindsey
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