Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

September 22, 2010

Re: TCEQ DOCKET NO. 2010-1212-AIR; Executive Director's response to hearing requests on Martin Marietta Materials Southwest, Inc's. application to the TCEQ for a New Source Review Authorization under Texas Clean Air Act (TCAA) § 382.0518 in Medina County, Texas.

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced matter, please find the original and 7 copies of the Executive Director's Response to the Hearing Requests. Please forward this filing to the Office of the General Counsel. If you have any questions, please call me at 239-6257.

Sincerely,

Ross Henderson

Ross W. Henderson,
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

**TCEQ AIR QUALITY PERMIT NUMBER 89957L001**
**TCEQ DOCKET NO. 2010-1212-AIR**

| | | |
|---|---|---|
| **APPLICATION BY** | § | **BEFORE THE** |
| | § | |
| **Martin Marietta Materials Southwest Inc** | § | **TEXAS COMMISSION ON** |
| **Rock Crushing Plant** | § | |
| **Hondo, Medina 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 Texas Administrative 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, modeling audit, and draft permit prepared by the ED's staff will be 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

Martin Marietta Materials Southwest, Inc. has applied to the TCEQ for a New Source Review Authorization under Texas Clean Air Act (TCAA) § 382.0518. This will authorize the construction of a new facility that may emit air contaminants. Specifically, this permit will authorize the applicant to construct a rock crushing plant consisting of one crusher, one screen, assorted conveyors, 20 acres of stockpiled aggregate and one 475 hp Caterpillar Diesel engine. The plant will be authorized to operate 24 hours per day, 7 days per week and 52 weeks per year for a total of 8,760 hours per year. The facility is located approximately ten miles north of Highway 90 on Farm-to-Market Road 462 (from Hondo) to Private Road 322 then west to Mine Lease Boundary, Hondo, Medina County. Contaminants authorized under this permit include 38.43 tons per year (tpy) of particulate matter (PM) including 16.14 tpy of particulate matter less than 10 microns in diameter ($PM_{10}$), 0.92 tpy of

[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.

organic compounds (VOC), 5.41 tpy of carbon monoxide (CO), 4.27 tpy of sulfur dioxides ($SO_2$), and 31.19 tpy of nitrogen oxides ($NO_X$). 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 application was received on July 30, 2009, and declared administratively complete on August 7, 2009. The Notice of Receipt and Intent to Obtain an Air Quality Permit (1st public notice) for this permit application was published on August 13, 2009, in the *Hondo Anvil Herald.* The Notice of Application and Preliminary Decision for an Air Quality Permit (2nd public notice) for the permit application was published on January 7, 2010 in the *Hondo Anvil Herald.* The Office of Chief Clerk received timely comments from the following persons: Roy and Carol Long, Barbara Thompson, and Robert Van Derbur. Since this application was administratively complete after September 1, 1999, this action is subject to the procedural requirements adopted in accordance with House Bill 801, 76th Legislature, 1999.

The ED's Response to Comments (RTC) was filed with the chief clerk on April 27, 2010 and mailed on April 30, 2010 to all interested persons, including those who asked to be placed on the mailing list for this application and those who submitted comment or requests for contested case hearing. The cover letter attached to the RTC included information about making requests for contested case hearing or for reconsideration of the ED's decision.[2] The letter also explained hearing requestors 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. A total of four timely hearing requests were received from three different persons or groups (Roy and Carol Long, Barbara Thompson, and Robert Van Derbur). None of the requestors is located within a mile of the facility. Based on the map created for this matter, the hearing requestors are located 5.7, 9.3, and 14.8 miles respectively from the proposed facility.

## 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,

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

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 requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor 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 requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and

(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, and 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.

In addition to the requirements noted above regarding affected person status, in accordance with 30 TAC § 55.205(a), a group or association may request a contested case hearing only if the group or association meets all of the following requirements:

(1) One or more members of the group or association would otherwise have standing to request a hearing in their own right;

(2) the interests the group or association seeks to protect are germane to the organization's purpose; and

(3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.[3]

If the Commission determines a hearing request is timely and fulfills the requirements for proper form and the hearing requestor 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.

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[3] 30 TAC § 55.205(a)

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.[4] 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.[5] 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 air pollution.[6] 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.[7]

## III. Analysis of Hearing Requests

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

The following persons or groups submitted timely hearing requests in the proper form: Roy and Carol Long, Barbara Thompson, and Robert Van Derbur.[8]

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 requestors should, to the extent possible, specify any of the ED's responses in the RTC that the requestors dispute and the factual basis of the dispute, and list any disputed issues of law or policy.[9] The ED is unaware that any responses were filed by any of the hearing requestors. In the absence of a response from any of the hearing requestors or their representatives within the thirty-day period after the RTC was mailed, the ED cannot determine or speculate whether the hearing requestors continue to dispute issues of fact, or whether there are any outstanding issues of law or policy. The ED assumes the requestors continue to dispute all of the issues raised by hearing requestors and commenters regarding this application as listed below.

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

None of the requestors have demonstrated that they are "affected persons" as defined in 30 TAC § 55.203. The threshold test of affected person status is whether the requestor has a personal

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[4] TEXAS HEALTH & SAFETY CODE § 382.0518
[5] TEXAS HEALTH & SAFETY CODE § 382.0513
[6] TEXAS HEALTH & SAFETY CODE § 382.085 (a) and (b).
[7] TEXAS HEALTH & SAFETY CODE § 382.0513
8 Three separate communications came from Mr. Van Derbur. First comments were submitted, followed by a hearing request, and finally the same comments with another hearing request. Two of the communications have the name Tony Van Derbur in the data input, but are signed by Mr. Robert Van Derbur in the body of the comments.
[9] *See* 30 TAC § 55.201(d)(4).

justiciable interest affected by the application, and this interest is different from that of the general public.[10] The first question is whether the requestor has raised issues which are affected by the application. As will be discussed below, some of the requestors have raised issues which are not relevant to the TCEQ's review of this permit. Further, because the possible emissions expected from this facility disperse in the air as the distance from the emission point increases, distance from the proposed facility is also a key to the issue whether or not there is a likely impact of the regulated activity on a person's interests such as the health and safety of the person, and on the use of property of the person. As will be shown, none of the identified requestors reside near enough to the proposed facility to be affected in a manner different from the general public.

1. Thompson and the Longs

The closest requestor, Ms. Thompson, is 5.7 miles from the proposed facility. The next closest requestors are the Longs who reside 9.3 miles from the proposed facility. *See* attached map for individual requestors. Ms. Thompson and the Longs raised questions about the potential effects of a rail line that will purportedly serve the proposed facility. The rail line and its effects are not part of this application and will not be regulated by the TCEQ. Therefore, they have not raised personal justiciable interests affected by the application. The TCEQ cannot consider the requestors' concerns that are beyond the regulatory authority of the Commission. Further, even if the requestors had raised concerns relevant to the Commission's review of this application, at the distance each resides from the facility the requestors are unlikely to be impacted differently than any other member of the general public.

2. Van Derbur

Mr. Van Derbur raised relevant questions concerning the proposed facility's effects on wildlife and on public health and safety which were addressed by the ED in the RTC. However, Van Derbur resides approximately 14.8 miles from the proposed facility and is, therefore, unlikely to be impacted differently than any other member of the general public. *See* attached map for individual requestors.

C. Issues Raised by the Requestors.

If the Commission disagrees with the assessment of the ED and finds that some or all of the hearing requestors 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.

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[10] *United Copper Industries and TNRCC v. Joe Grissom*, 17 S.W.3d 797 (Tex. App.-Austin, 2000)

The ED responded to all public comments in this matter in the RTC. The cover letter from the Office of the Chief Clerk transmitting the RTC cites 30 TAC § 55.201(d)(4), which states that requestors should, to the extent possible, specify any of the ED's responses in the RTC the requestors dispute and the factual basis of the dispute, and list any disputed issues of law or policy.

The hearing requests were filed at the same time as the comments. The ED did not receive any additional filings from the requestors. However, the ED acknowledges the hearing requestors have one more opportunity to identify disputed issues of fact in their replies to the positions of the ED, Office of Public Interest Counsel, and the Applicant regarding the hearing request. Therefore, to facilitate the Commission's consideration of this matter, the ED has analyzed the remaining two parts of the test, assuming that the issues raised in the comments in this matter remain disputed.

1. Issues involving questions of fact.

Requestors raised the following issues in comments and hearing requests filed on this application:

1. Whether there will be any safeguards regarding pollution caused by the quarry;
2. Whether there will be mitigation of dust during crushing at the proposed facility;
3. Whether there will be mitigation of dust during transport of materials to market;
4. Whether increased diesel truck traffic during transport of materials to market will cause adverse impacts;
5. Whether the facility will cause adverse impacts to wildlife and livestock;
6. Whether the facility will cause adverse impacts to endangered species (particularly bats);
7. Will there be any changes in flows of top soil and waters on stock ponds due to facility;
8. Will there be testing regarding impacts to water quality;
9. Whether a proposed railroad will impact drainage and natural flows;
10. Whether dust from transportation of materials by proposed rail line will be mitigated;
11. Whether there is a potential for fire caused by sparks from proposed rail line;
12. Who is liable for fire caused by sparks from proposed rail line;
13. Whether a proposed rail line for transportation of material will increase noise; and
14. Whether the volume of train traffic will be increased by the permit.

2. Were the issues raised during the public comment period?

The public comment period is defined in 30 TAC § 55.152. The public comment period begins with the publication of the Notice of Receipt and Intent to Obtain an Air Quality Permit. The end date of the public comment period depends on the type of permit. In this case, the public comment period began on August 13, 2009, and ended on September 14, 2009. All of the issues listed above upon which the hearing requests in this matter are based were raised in comments received during the public comment period.

3. Whether the issues are relevant and material to the decision on the application.

In this case, the permit would be issued under the Commission's authority in Tex. Water Code § 5.013(11) (assigning the responsibilities in Chapter 382 of the Tex. Health and Safety Code) and the TCAA. The relevant sections of the TCAA are found in Subchapter C (Permits). Subchapter C requires the Commission to grant a permit to construct or modify a facility if the Commission finds the proposed facility will use at least the best available control technology (BACT) and the emissions from the facility will not contravene the intent of the TCAA, including the protection of the public's health and physical property. In making this permitting decision, the Commission may consider the Applicant's compliance history. The Commission by rule has also specified certain requirements for permitting. Therefore, in making the determination of relevance in this case, the Commission should review each issue to see if it is relevant to these statutory and regulatory requirements that must be satisfied by this permit application.

The ED finds the following issues relevant and material to the decision on the application:

2. Whether there will be mitigation of dust during crushing at the proposed facility;
5. Whether the facility will cause adverse impacts to wildlife and livestock; and
6. Whether the facility will cause adverse impacts to endangered species (particularly bats).

The ED finds the following issues are beyond the jurisdiction of TCEQ and thus not material to the decision on the application:

3. Whether there will be mitigation of dust during transport of materials to market;
4. Whether increased diesel truck traffic during transport of materials to market will cause adverse impacts;
9. Whether a proposed railroad will impact drainage and natural flows;
10. Whether dust from transportation of materials by proposed rail line will be mitigated;
11. Whether there is a potential for fire caused by sparks from proposed rail line;
12. Who is liable for fire caused by sparks from proposed rail line;
13. Whether a proposed rail line for transportation of material will increase noise; and
14. Whether the volume of train traffic will be increased by the permit.

The ED finds the following issues, although within the TCEQ's jurisdiction, not within the scope of this air permit review and thus not material to the decision on the application:

1. Whether there will be any safeguards regarding pollution caused by the quarry;
7. Will there be any changes in flows of top soil and waters on stock ponds due to facility; and
8. Will there be testing regarding impacts to water quality.

## IV. Maximum Expected Duration of the Contested Case Hearing

The ED recommends the contested case hearing, if held, should last no longer than six months from the preliminary hearing to the proposal for decision.

## V. Executive Director's Recommendation

For the foregoing reasons, the Executive Director respectfully recommends the Commission deny all hearing requests.

Respectfully submitted,

Texas Commission on Environmental Quality
Mark R. Vickery, P.G., Executive Director

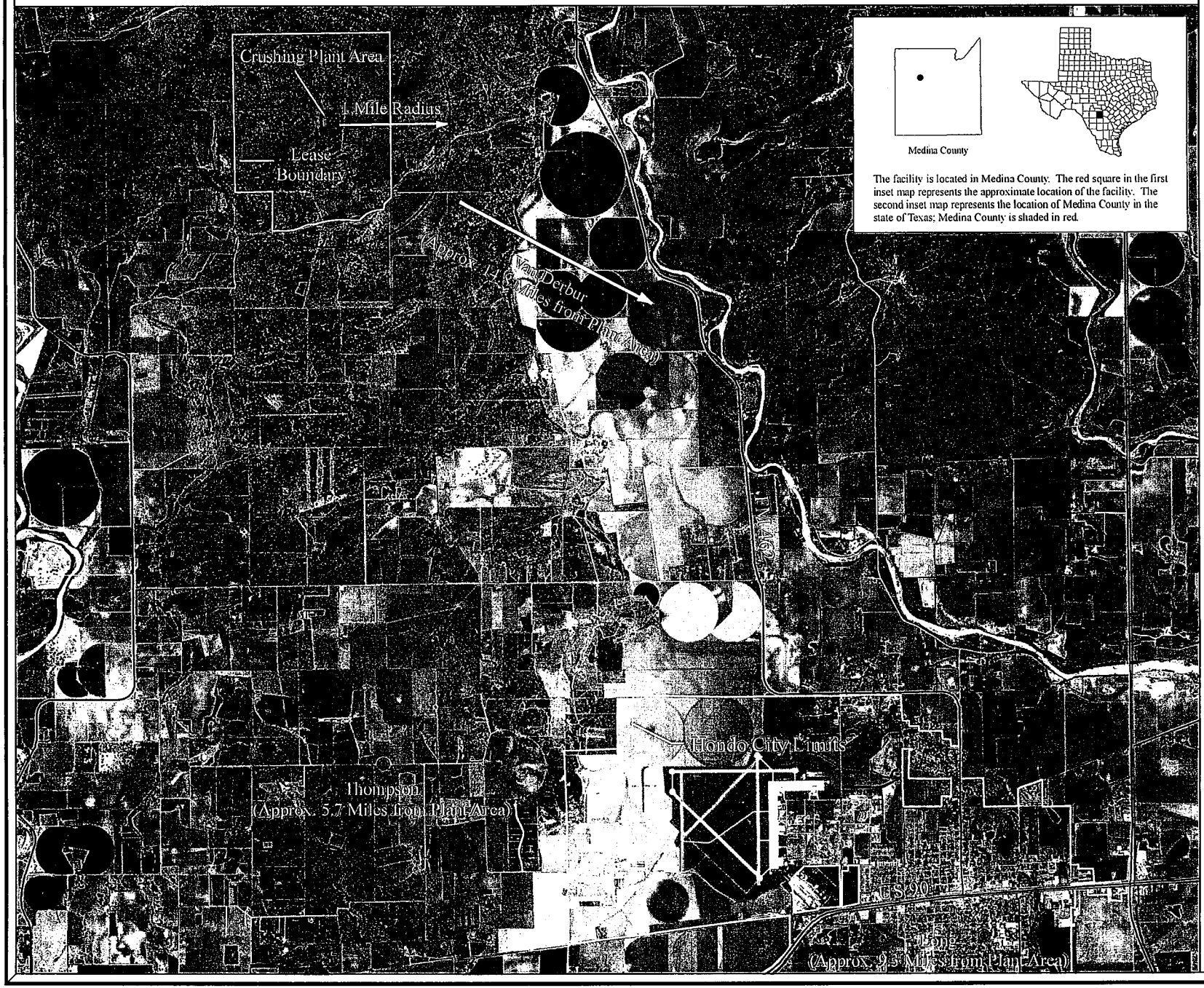
Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Robert Martinez, Director
Environmental Law Division

Ross Henderson, Staff Attorney
Environmental Law Division
State Bar No. 24046055
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
(512) 239-6033

Representing the Executive Director of the
Texas Commission on Environmental Quality

# Application by Martin Marietta Materials Southwest, Inc. for Air Quality Permit No. 89957L001
## TCEQ Docket No. 2010-1212-AIR
### Map Requested by TCEQ Office of Legal Services for Commissioners' Agenda




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

*Protecting Texas by Reducing and Preventing Pollution*

TCEQ


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


September 9, 2010

0 0.25 0.5 1 Miles

Projection: Texas Statewide Mapping System (TSMS)

Scale 1:79,000

Legend

- Crushing Plant Area
- Requestor's Property
- Lease Boundary

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 requestor information from the requestor. 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 "Crushing Plant Area".
(2) The approximate plant boundary. This is labeled "Lease Boundary".
(2) Circle and arrow depicting 1-mile radius. This is labeled "1-Mile Radius".

N


This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries. For more information concerning this map, contact the Information Resource Division at (512) 239-0800.


M McDonough CRF-332967

**CERTIFICATE OF SERVICE**

On the 22nd day of September, 2010, 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.

Ross Henderson

**MAILING LIST**
**MARTIN MARIETTA MATERIALS SOUTHWEST, INC.**
**DOCKET NO. 2010-1212-AIR; PERMIT NO. 89957L001**

FOR THE APPLICANT:
Jason R. Reed
Senior Environmental Engineer
Martin Marietta Materials Southwest, Inc.
5710 Hausman Road West, Suite 121
San Antonio, Texas 78249-1646
Tel: (210) 452-4754
Fax: (210) 208-4206

FOR THE EXECUTIVE DIRECTOR
via electronic mail:

Ross Henderson, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

Mike Gould, Technical Staff
Texas Commission on Environmental Quality
Air Permits Division, MC-163
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-1097
Fax: (512) 239-1300

Beecher Cameron, Technical Staff
Texas Commission on Environmental Quality
Air Permits Division, MC-163
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-1495
Fax: (512) 239-1300

FOR PUBLIC INTEREST COUNSEL
via electronic mail:

Mr. Blas J. Coy, Jr., Attorney
Texas Commission on Environmental Quality
Public Interest Counsel, MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-6363
Fax: (512) 239-6377

FOR OFFICE OF PUBLIC ASSISTANCE
via electronic mail:

Ms. Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE RESOLUTION
via electronic mail:

Mr. Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:
Ms. LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

REQUESTER(S)
Kevin Long
1002 25th Street
Hondo, TX 78861-2820

Barbara Thompson
1805 County Road 424
Hondo, TX 78861-5101

Robert Van Derbur
P.O. Box 344
Hondo, TX 78861-0344

Tony Van Derbur
P.O. Box 344
Hondo, TX 78861-0344

INTERESTED PERSON(S)
Carol & Roy Long
1002 25th Street
Hondo, TX 78861-2820

Patty Q. Lopez
6407 Seneca Dr.
San Antonio, TX 78238-1537