

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*

October 7, 2010

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

Re: Texas Concrete Enterprises, L.L.C., Permit No. 91708  
TCEQ Docket No. 2010-1553-AIR

Dear Ms. Castañuela:

Enclosed is a copy of the following documents which constitute the Executive Director's Response to Hearing Requests on the above-referenced matter:

- The Executive Director's Response to Hearing Requests
- A map indicating the proximate location of the hearing requestors

If you have any questions, please do not hesitate to call me at extension 0649.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alexis Lorick".

Alexis Lorick  
Staff Attorney  
Environmental Law Division

Enclosures

**TCEQ STATE AIR QUALITY PERMIT NUMBER 91708  
TCEQ DOCKET NUMBER 2010-1553-AIR**

<b>APPLICATION BY</b>	§	<b>BEFORE THE</b>
	§	
<b>TEXAS CONCRETE</b>	§	<b>TEXAS COMMISSION ON</b>
<b>ENTERPRISE, L.L.C.</b>	§	
<b>EUSTACE, HENDERSON COUNTY</b>	§	<b>ENVIRONMENTAL QUALITY</b>

**EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS**

The Executive Director of the Texas Commission on Environmental Quality (commission or TCEQ) files this response (Response) to the requests for a contested case hearing submitted by the persons listed herein regarding the above-referenced matter. The Texas Clean Air Act (TCAA), TEXAS HEALTH & SAFETY CODE (THSC) § 382.056(n) requires the commission to consider hearing requests in accordance with the procedures provided in TEX. WATER CODE (TWC)§5.556.<sup>1</sup> 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, and a copy of the standard permit for concrete batch plants prepared by the Executive Director's staff have been filed with the TCEQ's Office of Chief Clerk for the commission's consideration. Finally, the Executive Director'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**

Texas Concrete Enterprise, L.L.C. (Texas Concrete or Applicant) has applied to the TCEQ for an Air Quality Standard Permit for Concrete Batch Plants under THSC § 382.05195, which would authorize the construction of a permanent concrete batch plant.<sup>2</sup> This permit will authorize Texas Concrete to construct a concrete batch plant utilizing a suction shroud for the truck drop, with the exhaust air venting to a central dust collector. Additionally, the Applicant certifies that its production rate will be 180 cubic yards or less. That rate triggers state rules requiring the Applicant to set back all emission points 25 feet from the site's property line. In all, the site will operate 11 hours per day, 6 days per week, and 52 weeks per year not to exceed a total of 3,432 hours per year. Therefore, the

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<sup>1</sup> Statutes cited in this response may be viewed online at [www.capitol.state.tx.us/statutes/statutes.html](http://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](http://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](http://www.tceq.state.tx.us).

<sup>2</sup> The contaminants authorized under this permit include road dust, aggregate, and cement. The contaminants emitted also have the potential to contain particles less than or equal to 10 microns in aerodynamic diameter (PM<sub>10</sub>), and particles less than or equal to 2.5 microns in aerodynamic diameter (PM<sub>2.5</sub>).

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*Texas Concrete Enterprise, L.L.C., State Air Quality Permit No. 91708*

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plant's hourly throughput will be authorized at 180 cubic yards or less with an annual throughput of 120,000 cubic yards per year. The facility is located near Kendleton in Fort Bend County, Texas.

The permit application was received on January 20, 2010, and declared administratively complete on January 28, 2010. The Notice of Receipt of Application and Intent to Obtain an Air Quality Permit (Public Notice) Registration for this permit application was published on February 4, 2010 in the *Fort Bend Sun*. An alternative language Public Notice was published in *La Subasta* on February 25, 2010. Several hearing requests were timely received by the TCEQ; therefore, Texas Concrete was required to publish a second public notice. The second public notice, or the Notice of Application and Preliminary Decision for an Air Quality Standard Permit, was published on May 13, 2010 in the *Fort Bend Sun*. An alternative language Public Notice was published April 29, 2010 in *La Subasta*. The public comment period ended on June 14, 2010. The RTC was filed on August 16, 2010. 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.

Hearing requests were filed by: Mr. Cornell Dillard, Mr. Lawrence Dillard, Ms. Sandi Newkirk, Mr. Hasan Rasheed, Ms. Flora Brown Smith, Mr. Charles Taylor, Mrs. Hazel Taylor, Mr. Oscar Taylor and Mrs. Arlilia Taylor. The Office of the Chief Clerk subsequently received from Mr. Charles Taylor a written request to withdraw his previous request for a contested case hearing.

## **II. Applicable Law**

The commission must assess the timeliness and form of the hearing requests, noted 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  
(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," pursuant to TWC § 5.115 and 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. 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, this application is for a registration for the Standard Permit for Concrete Batch Plants. In accordance with THSC § 382.058(c), individuals are considered an "affected person," and thusly may request a hearing on the construction of a concrete plant under a standard permit, if:

- (c) . . . those persons actually residing in a permanent residence within 440 yards of the proposed plant . . . request a hearing under Section 382.056 . . .<sup>3</sup>

If the commission determines a hearing request is timely, fulfills the requirements for proper form, and the hearing requester is an affected person, the commission must then 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 involves a disputed question of fact;
- (2) The issue was raised during the public comment period; and
- (3) The issue is relevant and material to the decision on the application.

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<sup>3</sup> TEXAS HEALTH & SAFETY CODE ANN. § 382.058 (Vernon 2001).

The law applicable to the facility proposed by Texas Concrete 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 pursuant to the TCAA prior to the construction and operation of the facility or facilities.<sup>4</sup> Permit conditions of general applicability must be in rules adopted by the commission.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> The materials accompanying this response list and reference permit conditions and operational requirements and limitations applicable to this proposed facility.

### **III. Evaluation and Analysis of the Requests**

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

The following persons submitted a timely hearing request and provided an address that is beyond one-quarter mile from the facility: Mr. Cornell Dillard, Mr. Lawrence Dillard, Ms. Sandi Newkirk, Mr. Hasan Rasheed, Mr. Charles Taylor, Mrs. Hazel Taylor, Mr. Oscar Taylor, and Mrs. Arlilia Taylor. Two individuals, Mr. Oscar Taylor and Mrs. Arlilia Taylor, also included in their requests a location for their place of residence from the facility as “. . . approximately 300 feet southwest. . .” on Pink Taylor Run Road, which contradicts the distance dictated by their residential address. Ms. Flora Brown Smith submitted a P.O. Box for her residential address. The Executive Director's staff was able to ascertain Ms. Smith's address through a search of public voting records, and evaluated her request for a contested case hearing accordingly.

The hearing requests were submitted during the public comment period or during the period for requesting a contested case hearing after the filing of the RTC. Furthermore, the Executive Director has determined that the hearing requests substantially comply with all of the form requirements in 30 TAC § 55.201(d).

The Executive Director 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 Executive Directors' responses in the RTC that the requesters dispute and the factual basis of the dispute, and list any disputed issues of law or policy.<sup>8</sup> As of the date of this filing, none of the hearing requestors have filed a response to the RTC which reiterated issues raised during the comment period. In the absence of a response from any of the

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<sup>4</sup> TEXAS HEALTH & SAFETY CODE ANN. § 382.0518 (Vernon 2001).

<sup>5</sup> TEXAS HEALTH & SAFETY CODE ANN. § 382.0513 (Vernon 1995).

<sup>6</sup> TEXAS HEALTH & SAFETY CODE ANN. § 382.085 (a) and (b) (Vernon 1997).

<sup>7</sup> TEXAS HEALTH & SAFETY CODE ANN. § 382.0513 (Vernon 1995).

<sup>8</sup> See 30 TAC § 55.201(d)(4) (2009)(Tex. Comm'n on Env. Quality, Requests for Reconsideration or Contested Case Hearing).

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other hearing requesters or their representatives within the thirty-day period after the RTC was mailed, the Executive Director 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 Executive Director nevertheless has included all of the issues raised by hearing requesters and commenters regarding this application as listed below.

**B. Analysis of the Hearing Requests utilizing the Other Factors the Commission must Consider in Evaluating the Hearing Requests**

**1. *Were the Hearing Requests received in a Timely Manner and the Proper Form?***

All hearing requests were received in a timely manner. As for the proper form, all of the hearing requests provided information that could be considered substantial compliance with the applicable law. For these requestors, the Executive Director can determine whether it is likely that these requestors will be impacted differently than any other member of the general public or if there is a likely impact of the regulated activity on these persons' interests. This will be discussed in detail below.

**2. *Are any of the Hearing Requestors an Affected Person?***

The threshold test of affected person status is whether the requestor has a personal justiciable interest affected by the application and whether this interest is different from that of the general public.<sup>9</sup> The definition of an affected person for Standard Permits for Concrete Batch Plants is limited to only those persons who reside in a permanent residence within 440 yards of the proposed plant.<sup>10</sup> In determining whether a person is affected, one of the factors of 30 TAC § 55.203(c) requires the Executive Director to consider distance restrictions or other limitations imposed by law on the affected interest.<sup>11</sup> All of the hearing requestors who submitted requests on application 91708 fail to meet this distance requirement.<sup>12</sup> As indicated on the included map, none of the hearing requestors permanently reside within the 440 yard distance requirement. The requestors' inability to meet the distance requirement of THSC § 382.058(c) bars their affected person status. In addition, because the Executive Director determined that the hearing requestors for application 91708 reside greater than 440 yards from the proposed facility, they are also not likely to be impacted differently than any other member of the general public; therefore, the requestors have failed to state any "personal justiciable interest" under 30 TAC § 55.203. Without a "personal justiciable interest," these hearing requestors are also not "affected persons" as defined by 30 TAC § 55.203, and do not meet the requirements of a person able to request a contested case hearing

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<sup>9</sup> *United Copper Indus. v. Joe Grissom*, 17 S.W.3d 797 (Tex. App.—Austin 2000, pet. abated).

<sup>10</sup> TEXAS HEALTH & SAFETY CODE ANN. 382.058(c) (Vernon 2001).

<sup>11</sup> 30 TAC § 55.203(c)(2) (1999) (Tex. Comm'n on Env. Quality, Determination of an Affecter Person).

<sup>12</sup> See, attached map and legend listing the locations of the hearing requestors. While Mr. and Mrs. Oscar and Arlilia Taylor stated in their hearing requests that their residence was located 300 feet southwest from the facility, none of the mapping software that TCEQ utilizes to create its maps (GIS maps, MapQuest, or Google Earth) show any homes within this purported distance from either the plant's boundary lines or the facility.

according to 30 TAC § 55.201.

C. *Which Issues in this Matter should be Referred to SOAH for a 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. Based on the analysis previously offered, none of the persons requesting a hearing on this permit are affected persons as a matter of law; therefore, none of the hearing requests meet the prerequisites necessary for the commission to consider issues for referral to SOAH.<sup>13</sup>

**IV. Conclusion and Recommendation**

The Executive Director respectfully recommends the Commission: (1) deny the hearing requests for permit no. 91708 as a matter of law pursuant to 30 TAC § 55.201(d)(4), and; (2) approve the issuance of Applicant's permit Nno. 91708.

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, Division Director  
Environmental Law Division



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Alexis Lorick, Staff Attorney  
Environmental Law Division  
Bar No. 24070174

Representing the Executive Director of the Texas  
Commission on Environmental Quality

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<sup>13</sup> TEXAS HEALTH & SAFETY CODE ANN. § 382.058(c) (Vernon 2001).

**Texas Concrete Enterprise, LLC.**  
**Permit No. 91708**  
**Map Requested by TCEQ Office of Legal Services**  
**for Commissioners' Agenda**



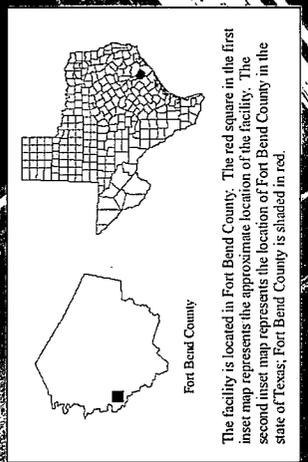
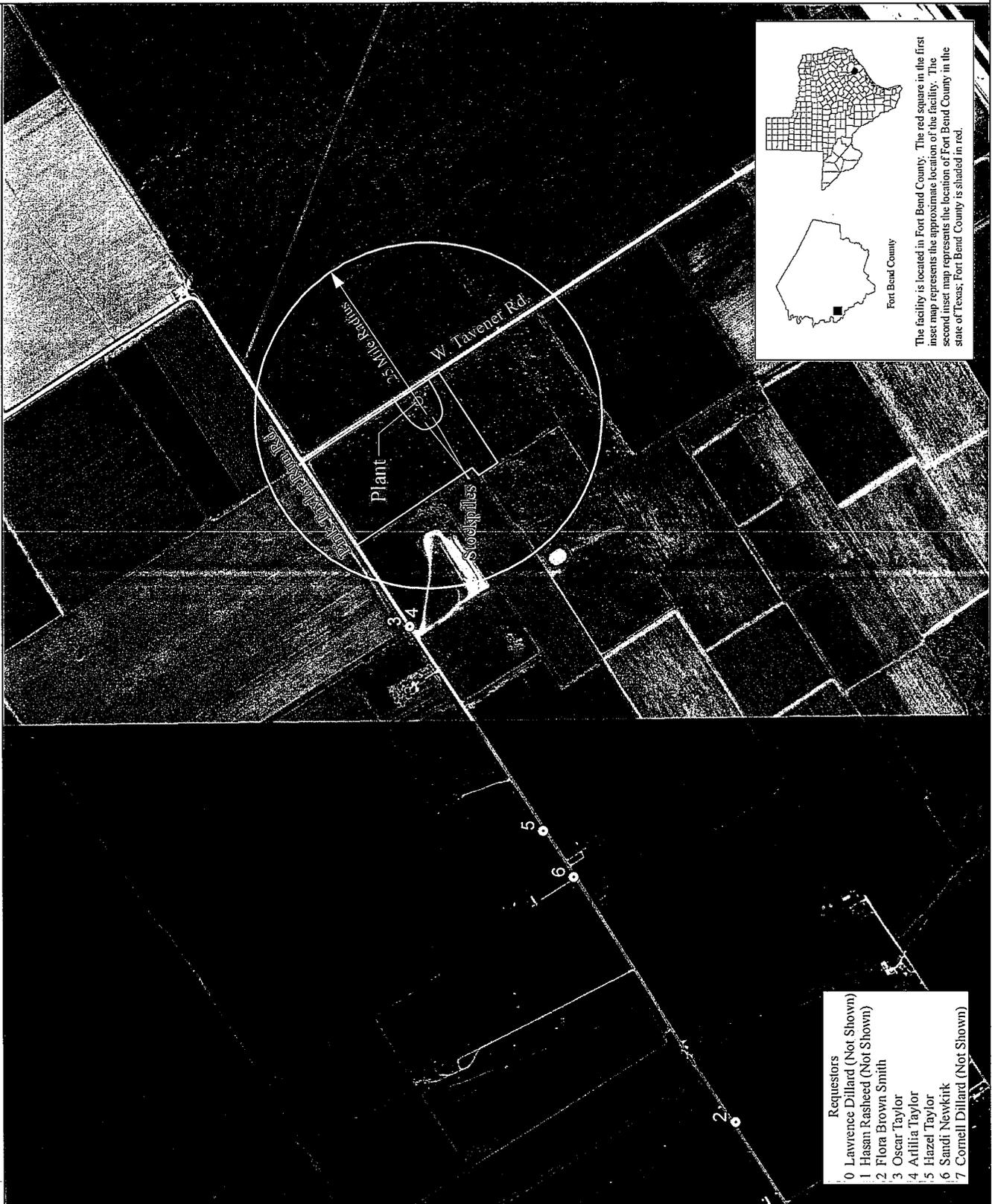
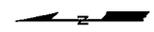
Texas Commission on Environmental Quality  
 GIS Team (Mail Code 197)  
 P.O. Box 13087  
 Austin, Texas 78711-3087  
 July 6, 2010

0 0.1 0.2 Miles  
 Projection: Texas Statewide Mapping System (TSMS)  
 Scale 1:13,000

- Legend**
- Plant
  - Stockpiles
  - ⊙ 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 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 Orthoregistry Project.

This map depicts the following:  
 (1) The approximate location of the plant. This is labeled "Plant".  
 (2) Circle and arrow depicting 1/4 -mile radius. This is labeled "25 Mile Radius".  
 (3) Dots representing the approximate location of the stockpiles. These are labeled "Stockpiles".  
 (4) Dots representing the approximate locations of requestors. These are labeled with numbers that correspond to the names on the list.

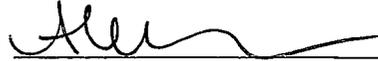


**Requestors**

0	Lawrence Dillard (Not Shown)
1	Hasan Rasheed (Not Shown)
2	Flora Brown Smith
3	Oscar Taylor
4	Artillia Taylor
5	Hazel Taylor
6	Sandi Newkirk
7	Cornell Dillard (Not Shown)

**CERTIFICATE OF SERVICE**

On the 7th day of October, 2010, I certify that a true and correct copy of the foregoing instrument has been served via hand delivery, facsimile, electronic mail, first class mail, interagency mail, and/or overnight mail on the undersigned



Alexis Lorick  
Staff Attorney, Environmental Law Division

**SERVICE LIST**

FOR THE APPLICANT:

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Texas Concrete Enterprise, L.L.C.  
3506 Cherry Street  
Houston, Texas 77026-3502  
Tel: (713) 227-1122  
Fax: (713) 227-1139

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Austin, Texas 78711-3087  
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FOR THE PUBLIC INTEREST COUNSEL  
via electronic mail:

FOR THE EXECUTIVE DIRECTOR  
via electronic mail:

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Air Permits Division, MC-163

Ms. Bridget Bohac, Director  
Texas Commission on Environmental Quality  
Office of Public Assistance, MC-108  
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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

**REQUESTER(S):**

Cornell Dillard  
12966 Winterberry Way  
Moreno Valley, CA 92553-1228

Sandi Newkirk  
P.O. Box 774  
Kendleton, TX 77451-0774

Hasan Rasheed  
12302 Gleen River Dr.  
Houston, TX 77050-3808

Flora Brown Smith  
P.O. Box 61  
Kendleton, TX 77451-0061

Charles Taylor  
12727 Pink Taylor Run Rd.  
Beasley, TX 77417-9647

Oscar Taylor  
12506 Pink Taylor Run Rd.  
Beasley, TX 77417-9648

**WITHDRAWN REQUESTS:**

Charles Taylor  
12727 Pink Taylor Run Rd.  
Beasley, TX 77417-9647

**INTERESTED PERSONS:**

Lawrence Dillard  
3811 Tankersly Cir  
Rosharon, TX 77583-8223

Norris Dillard  
4922 Mayflower St.  
Houston, TX 77033-3523

A M Taylor  
12506 Pink Taylor Run Rd.  
Beasley TX 77417-9648