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

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

October 8, 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: TEXAS CONCRETE ENTERPRISE, L.L.C.**  
**TCEQ DOCKET NO. 2010-1553-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,

  
Amy Swanholm, 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. 2010-1553-AIR**

**IN THE MATTER  
OF THE APPLICATION OF  
TEXAS CONCRETE ENTERPRISE,  
L.L.C., FOR TPDES PERMIT  
NO. 91708**

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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**

Texas Concrete Enterprise, L.L.C. (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. The proposed site may be located using the following driving directions: take 59 South, exit to Kendleton, take Farm-to-Market (FM) Road 2919, go right on FM Road 2919 to Pink Taylor Run. Go to the right, the plant will be down on the right before West Tavener Road, Kendleton, Fort Bend County, Texas 77451. The standard permit registration would authorize the facility to emit the following air contaminants: road dust, aggregate and cement, particulate matter including (but not limited to) aggregate, cement, road dust. These contaminants have the potential to contain particulate matter with diameters of 10 microns or less, and 2.5 microns or less.

## **B. Procedural Background**

TCEQ received this application on January 20, 2010. On January 28, 2010, 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 February 4, 2010, in the *Fort Bend Sun* and in Spanish in *La Subasta* on February 25. 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 May 13, 2010 in the *Fort Bend Sun* and on April 29, 2010 in Spanish in *La Subasta*. The public comment period ended on June 14, 2010. On August 13, 2010, the ED filed its Response to Comments (RTC), and filed an updated RTC on August 16, 2010. The ED issued its decision on August 17, 2010. The RTC was amended again on September 18, 2010, which the Chief Clerk's office mailed on September 30, 2010. The deadline to request a contested case hearing was September 16, 2010.

TCEQ received timely comments and requests for a contested case hearing from Sandi Newkirk, Flora Smith, Oscar and Arlilia Taylor, Hasan Rasheed, Cornell Dillard. OPIC recommends denying the hearing requests.<sup>1</sup>

## **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

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<sup>1</sup> OPIC also received timely comments from A.M. Taylor, Lawrence Dillard and Noris Dillard requesting a Public Meeting. Charles Taylor also requested a contested case hearing, but withdrew this request on April 9, 2010.

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 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. Sandi Newkirk

Sandi Newkirk filed a timely request for a contested case hearing. She states she lives on Pink Taylor Run Road. She is concerned about inadequate posting of signs, and the proposed facility's impact on health and property value, agricultural crops and livestock. Ms. Newkirk's residence is located approximately 1 mile from the proposed facility. *See* Texas Concrete Enterprise, L.L.C., Standard Permit Registration No. 91708, 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 that Ms. Newkirk's residence is within 440 yards of the proposed facility as required by TEX. HEALTH & SAFETY CODE § 382.058(c). Although Ms. Newkirk raises valid concerns about the proposed facility, OPIC concludes she is not entitled to a contested case hearing based on the location of his residence in relation to the facility.

##### 2. Flora Smith

Flora Smith filed a timely request for a contested case hearing. She states that she lives on Pink Taylor Run Road. She is concerned about inadequate posting of signs, and the proposed facility's impact on health and property value, agricultural crops and livestock. She is also concerned about attitudes and affects of similar facilities in rural areas where homes, farming, and ranching are in nearby areas.

Flora Smith's residence is located approximately 1.5 miles from the proposed facility. *See* Texas Concrete Enterprise, L.L.C., Standard Permit Registration No. 91708, 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 Flora Smith's residence is within 440 yards of the proposed facility as required by TEX. HEALTH & SAFETY CODE § 382.058(c). Although she raises valid concerns about the proposed facility, OPIC concludes she is not entitled to a contested case hearing based on the location of her residence in relation to the facility.

### 3. Oscar & Arlilia Taylor

Oscar & Arlilia Taylor filed a timely request for a contested case hearing. They state that they live on Pink Taylor Run Road. They are concerned about inadequate posting of signs, and the proposed facility's impact on health and property value, agricultural crops and livestock. They are also concerned about attitudes and affects of similar facilities in rural areas where homes, farming, and ranching are in nearby areas.

Oscar & Arlilia Taylor's residence is located approximately 0.5 miles from the proposed facility. *See* Texas Concrete Enterprise, L.L.C., Standard Permit Registration No. 91708, 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 that Oscar Taylor residence is within 440 yards of the proposed facility as required by TEX. HEALTH & SAFETY CODE § 382.058(c). Although they raise valid concerns about the proposed facility, OPIC concludes they are not entitled to a contested case hearing based on the location of their residence in relation to the facility.

### 4. Hasan Rasheed

Hasan Rasheed filed a timely request for a contested case hearing. He states that he lives at 12302 Glen River Dr. He is concerned about the proposed facility's impact on residents' health, property value, agricultural crops and livestock.

It does not appear that Hasan Rasheed's residence is within 440 yards of the proposed facility as required by TEX. HEALTH & SAFETY CODE § 382.058(c). Although he 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.

5. Cornell Dillard

Cornell Dillard filed a timely request for a contested case hearing. He states that he lives at 12966 Winterburry Way in Moreno Valley, California, 92553-1228. He does not state any concerns with the proposed facility.

It does not appear Cornell Dillard's residence is within 440 yards of the proposed facility as required by TEX. HEALTH & SAFETY CODE § 382.058(c). Neither does he raise any valid concerns. Therefore, OPIC concludes she is not entitled to a contested case hearing based on the location of her residence in relation to the facility.

**B. Issues Raised in the Hearing Request**

The following issues have been raised in the hearing requests:

1. Whether the Applicant has complied with TCEQ rules regarding posted notice.
2. Whether the proposed facility will adversely affect residents' health, agricultural crops, cattle and livestock.
3. Whether the proposed facility will adversely affect residents' property values.
4. Whether the proposed facility is appropriate, considering attitudes and affects of similar facilities in rural areas where homes, farming, and ranching are nearby.

**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, animal life and vegetation. Accordingly, Issue Nos. 1–2 are appropriate for referral to SOAH.

Issue Nos. 3–4 are not relevant and material because this issue does not pertain to air quality and is outside the jurisdiction of the Commission in processing this air permit registration.

#### **G. Issues Recommended for Referral**

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

1. Whether the Applicant has complied with TCEQ rules regarding posted notice.
2. Whether the proposed facility will adversely affect residents’ health, agricultural crops, cattle and livestock.

#### H. Maximum Expected Duration of Hearing

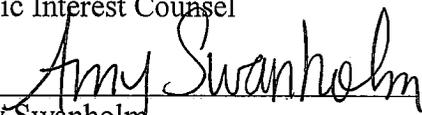
Commission Rule 30 TAC § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year 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 all the hearing requests. If the Commission determines any of the requesters are affected persons, 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

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 8, 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.

  
\_\_\_\_\_  
Amy Swanhholm



**MAILING LIST**  
**TEXAS CONCRETE ENTERPRISE, L.L.C.**  
**TCEQ DOCKET NO. 2010-1553-AIR**

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