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January 13, 2011

BY E-FILE

Ms. LaDonna Castanuela
Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle
Building F, 1st Floor, Room 1101
Austin, Texas 78753

Re: TCEQ Docket No. 2010-1706-IWD; *In the Matter of the Application of Capitol Aggregates, Ltd. for Amendment of TPDES Permit No. WQ0001510000*

Dear Ms. Castanuela:

Enclosed for filing in the above-referenced and numbered proceeding, please find *Capitol Aggregates, Ltd.'s Response to Request for Contested Case Hearing*.

A copy of this filing is being served on the persons identified in the attached Certificate of Service.

Thank you for your attention to this matter. If you have any questions concerning this filing, please do not hesitate to contact me.

Sincerely,

Sara M. Burgin

Sara M. Burgin

Enclosure

cc: (*With Enclosure)*
Alicia Lee (*Via Certified Mail & Email*)
Tres Koenings (*Via Certified Mail & Email*)
Blas J. Coy, Jr. (*Via Certified Mail & Email*)
Bridget Bohac (*Via Certified Mail & Email*)
Kyle Lucas (*Via Certified Mail & Email*)
Santa Garcia (*Via Federal Express*)

TCEQ DOCKET NO. 2010-1706-IWD

IN THE MATTER OF THE APPLICATION OF	§	BEFORE THE
CAPITOL AGGREGATES, LTD	§	
TPDES PERMIT NO. WQ0001510000	§	TEXAS COMMISSION ON
	§	
	§	ENVIRONMENTAL QUALITY

CAPITOL AGGREGATES, LTD'S RESPONSE TO REQUEST FOR CONTESTED CASE HEARING

TO: The Honorable Commissioners of the Texas Commission on Environmental Quality, P.O. Box 12548, Austin, Texas 78711-2548

COMES NOW APPLICANT CAPITOL AGGREGATES, LTD and files this Response to Request for Contested Case Hearing, and in support thereof, would respectfully show the following:

I. INTRODUCTION

Capitol Aggregates, Ltd. ("Capitol Aggregates" or "Applicant") submitted its Application for Major Amendment to Water Quality Permit No. WQ0001510000 (the "Application") to the Texas Commission on Environmental Quality ("TCEQ" or "Commission") on September 3, 2009 for its Portland Cement Plant located in Bexar County, Texas ("Cement Plant"). The Application seeks to renew and amend its existing Texas Pollutant Discharge Elimination System ("TPDES") Permit No. 01510.

In a decision dated September 15, 2010 ("ED's Decision"),[1] the Executive Director ("ED") found that that the Application met all applicable statutory and regulatory

[1] Letter from LaDonna Castañuela, Chief Clerk, to Mailing List of interested parties (September 15, 2010).

requirements and should be issued. The ED Decision also indicated that an "affected person" that "raise[s] disputed issues of fact that are relevant and material to the commission's decision on th[e] application" could request a contested case hearing.

Since flooding was the only issue raised in a request for contested case hearing on the permit amendment, and because flooding is not relevant or material to the TCEQ TPDES permitting process, there is no right to a contested case hearing on the Application. Moreover, the person requesting a contested case hearing is not an "affected person" because she fails to identify issues relevant to the TPDES permitting process and cannot, as a matter of law, demonstrate how she will be affected by the Application. Accordingly, the Commissioners should deny requestor's contested case hearing request and exercise its authority pursuant to Texas Water Code Section 26.028(d) to approve Capitol Aggregates' Application at its February 9, 2011 public meeting.

II. SUMMARY OF APPLICATION & PROCEDURAL BACKGROUND

In its Application submitted September 3, 2009, Capitol Aggregates requests that authorization be added for the discharge of cooling tower blowdown, facility sink water, dust suppression water from the primary crusher, and air compressor condensate via Outfalls 001 and 002. It also seeks to remove the authorization to discharge wastewater via Outfall 003. The proposed draft permit would authorize the discharge of material storage pile runoff, vehicle/plant wash water, road dust suppression water, cooling tower blowdown, air compressor condensate, water from facility sinks, dust suppression water from the primary crusher, and storm water on an intermittent and flow variable basis via Outfalls 001 and 002.

The Application was declared administratively complete on November 18, 2009, and declared technically complete on February 19, 2010. The Notice of Receipt of Application

and Intent to Obtain Water Quality Permit was published in Spanish in *La Prensa de San Antonio* on November 25, 2009, and in English in the *San Antonio Express - News* on November 20, 2009. The Notice of Application and Preliminary Decision was published in *Conexion* on June 10, 2010, and the *San Antonio Express - News* on June 10, 2010. A request for contested case hearing from Santa Garcia complaining of flooding and drainage issues was received on February 8, 2010.[2] The public comment period ended on July 12, 2010. The Executive Director filed his "Executive Director's Response to Public Comment, TCEQ Permit No. WQ0001510000" ("ED's Response to Comments") with the Chief Clerk on September 13, 2010.

On December 29, 2010, the Chief Clerk announced that all timely filed hearing requests will be considered by the Commissioners at their February 9, 2011 public meeting. In accordance with Commission rules, Capitol Aggregates is providing a response to Ms. Garcia's request for contested case hearing.

III. THE REQUEST FOR CONTESTED CASE SHOULD BE DENIED AND THE COMMISSION SHOULD APPROVE THE APPLICATION

A. Requestor Has No Right to a Contested Case Hearing on Capitol Aggregates' Application to Renew and Amend its Existing Permit

Neither the Texas Water Code nor the Commission's regulations guarantee the right to a contested case hearing on an application for renewal and amendment submitted under Chapter 26 of the Texas Water Code ("TWC").[3] In fact, if the following conditions are met,

[2] Ms. Garcia's request was received as a public comment and was addressed in the ED's Response to Comments. Because she requested a contested case in this comment, her public comment apparently has also been deemed a request for contested case hearing.
[3] TEX. WATER CODE § 26.028(d); 30 TAC § 55.201(i)(5).

there is no right to a contested case hearing on an application to renew or amend a permit issued under Chapter 26 of the TWC:

(1) the applicant is not applying to: (i) increase significantly the quantity of waste authorized to be discharged; or (ii) change materially the pattern or place of discharge;

(2) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of the waste authorized to be discharged;

(3) any required opportunity for public meeting has been given;

(4) consultation and response to all timely received and significant public comment has been given; and

(5) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit.[4]

The Application does not seek to increase the quantity of waste authorized for discharge, nor does it seek to materially change the pattern or place of discharge. Wastewater at the Cement Plant under existing TPDES Permit No. 01510 is currently gathered into Retention Ponds and intermittently discharged out of Outfalls 001, 002 and 003. Over 99% of the Cement Plant's wastewater discharged from the Retention Ponds will be stormwater runoff from the material storage piles. The discharges from the outfalls are intermittent and variable and only occur in response to storm events. The wastewater volume to be discharged will not increase as a result of the changes addressed in the permit amendment. Similarly, removal of Outfall 003 will not affect the intermittent nature of the discharges and the change in discharge from Outfall 003 to Outfall 002 is immaterial.[5]

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[4] *Id.*

[5] Capitol Aggregates merely intends to combine the waters previously discharged at Outfall 003 with those already discharged at Outfall 002 such that the total volume discharged from the Cement Plant will remain essentially the same. The change will result in a combined sampling point.

The quality of the wastewater to be discharged will also be maintained. The ED specifically concluded that effluent limits for total suspended solids, pH and chemical oxygen demand will not change as a result of the Application. While the ED is adding temperature limits as a result of the amendment, cooling water blowdown will be less than one percent of any discharge from Outfalls 001 and 002 and is not expected to affect water quality.[6] The ED performed an antidegradation review on the receiving waters and concluded that existing uses will be maintained and protected. The ED also concluded that the Cement Plant will not contribute to impairment of any listed water segment due to the extremely infrequent discharge, distance of the Cement Plant from the nearest impaired water segment, the types of impairments for this segment, and the application of the Texas Surface Water Quality Standards to the facility.

No public meeting was required in this proceeding.[7] The public comment period closed on July 12, 2010 without any request received by TCEQ during that time to hold a public meeting based on substantial public interest or based on a request from a legislator representing the area in which the Cement Plant is located.[8] In addition, the Commission responded to all timely and significant public comments in its Response to Comments.[9] Accordingly, the requirements related to public comment and public meetings have been satisfied.

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[6] *See* ED's Statement of Basis/Technical Summary at Appendix B.

[7] *See* 30 TAC § 55.154(c) (requiring a public meeting only when the Executive Director determines there is a "substantial or significant degree of public interest in an application;" a public meeting is requested by member of the legislature representing the general area in which the facility is located or proposed; or a public meeting is otherwise required by law.)

[8] TEX. WATER CODE § 5.554.

[9] *See* ED's Response to Comments (Sept. 13, 2010). Capitol Aggregates supports the manner in which the Executive Director responded to Ms. Garcia and incorporates herein by reference the ED's Response to Comments. In particular, Capitol Aggregates adopts the ED's statements that issues related to flooding are generally not within the purview of a TPDES permit and are better brought to the attention of a flood control district. *See id*. at 2.

Finally, the Applicant's compliance history ranking is "average" and there is nothing in the Applicant's compliance history that would raise an issue regarding its ability to comply with any material term of TPDES Permit No. 01510.[10]

For these reasons, there is no right to a contested case hearing on Capitol Aggregates' Application. The Commission should deny Ms. Garcia's hearing request on this basis alone and approve the Application pursuant to its authority under Texas Water Code Section 26.028(d).

B. Even if a Right to a Contested Case Hearing Exists, Which it Does Not, Ms. Garcia is Not an "Affected Person"

1. Only "affected persons" may be granted a contested case hearing.

The Texas Legislature has narrowly defined the universe of "affected persons" who may validly request that a contested case hearing be held by or on behalf of the Commission.[11] Only those persons who have "a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing" may require that a hearing be held.[12] "An interest common to members of the general public does not qualify as a personal justiciable interest."[13]

Pursuant to Section 5.115 of the Texas Water Code, the Commission has adopted rules specifying factors that must be considered in determining whether a person is an "affected person," including:

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[10] While the ED notes that the Cement Plant received Notices of Violation ("NOVs") relating to the dissolved oxygen daily minimum limit in the five-year period before the Application, it also notes that it believes that the NOVs relate to how data was entered into TCEQ's electronic coding system and concludes that it does not believe the NOVs indicate a compliance issue at the facility.
[11] TEX. WATER CODE §§ 5.556 and 5.115; *see also* 30 T.A.C. §§ 55.201(b)(4), 55.203 and 55.211(c)(2).
[12] TEX. WATER CODE § 5.115(a).
[13] *Id.*

(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) the likely impact of the regulated activity on the health and safety of the person, and on the use of the property of the person; and

(5) the likely impact of the regulated activity on the use of the impacted natural resource by the person.[14]

Further, the Commission is required to grant a contested case hearing request by an "affected person" if the request:

> raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application.[15]

Generalized concerns that do not directly bear on the applicable permitting criteria are not appropriate for referral to a contested case hearing. Commission rules require that a proper hearing request include a discussion of how and why the requestor will be adversely affected in a manner not common to the general public and a list of all relevant and material disputed issues of fact that were raised during the comment period and that form the basis of the hearing request.[16] Commission rules dictate that the requestor specify the Executive Director's responses to public comment that the requestor disputes and the factual basis of that dispute.[17] The burden is on the requestor to satisfy these requirements and if the hearing request is deficient in these respects, it should be denied.

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[14] 30 T.A.C. § 55.203(c).
[15] TEX. WATER CODE § 5.556(d); 30 T.A.C. § 55.211(c)(2)(A).
[16] *See* 30 T.A.C. § 55.201(d).
[17] *See* 30 T.A.C. § 55.201(d)(4).

2. Ms. Garcia fails to satisfy the "affected person" criteria.

a. Flooding is not generally relevant to a TPDES permit application

In its Response to Public Comments, the ED specifically concluded that the TCEQ's permitting process is limited to controlling the discharge of pollutants into waters in the state and protecting the water quality of the state's rivers, lakes, and coastal waters, and that the TCEQ does not address flooding issues in the wastewater permitting process unless flooding has an effect on water quality.[18]

The discharges from the Cement Plant will not affect flooding and will not affect water quality during flooding. As the ED noted in its Technical Summary of the Application, the discharges from the Cement Plant are very infrequent and intermittent in nature. Neither flooding nor water quality during flooding would change as a result of the permit amendment. Rather, the Applicant would still be required to meet all effluent limits and other permit requirements even during significant rainfall events and periods of flooding.[19] According to TCEQ's rules, a reasonable relationship must exist between the interest claimed and the activity regulated for a contested case hearing to be granted.[20] Because Ms. Garcia's flooding concerns are not relevant and material to the commission's decision on the Application, she is not an affected person as a matter of law.[21]

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[18] ED's Response to Comments at 2.
[19] *Id*.
[20] 30 T.A.C. § 55.203(c).
[21] TEX. WATER CODE § 5.556(d); 30 T.A.C. § 55.211(c)(2)(A).

b. Ms. Garcia's request is insufficient as a matter of law

As stated in the public notice of the Application, a person requesting a contested case hearing must provide "a specific description of how you would be adversely affected by the facility in a way not common to the general public."[22]

Even if Ms. Garcia's request for contested case hearing was germane to the TPDES permitting process, Ms. Garcia has failed to provide a specific description of how she would be adversely affected by the Application in a way not common to the general public. Her request for contested case hearing is her comment submitted on the Application and reads in full as follows:

> Already with flooding and one does not get any help from the city flooding zone and not our councilman. And now we have to put up with your drainage too. I request a contested case hearing.[23]

Ms. Garcia has not provided any details as to how or why the permit renewal and amendment would specifically affect her or her use of property, let alone how it would affect her in a way that is not common to the general public. The little detail she does provide—that she is located "1 mile" from the Cement Plant—suggests that any drainage or flooding concerns would not arise solely from the Cement Plant's permit amendment. The ED's review of the Application makes clear that the discharges from Outfalls 001 and 002 are very infrequent, and nothing in the Application indicates that the permit amendment would affect drainage or flooding. If Ms. Garcia's bare-bone assertion regarding drainage was considered sufficient to establish an affected person's status to contest a TPDES permit, then the factors outlined by statute and TCEQ rules would be meaningless. Instead, the lack of detail relevant to an issue relating to

[22] Notice of Application and Preliminary Decision (May 11, 2010).
[23] Under her address, Ms. Garcia also notes that she is located "1 mile" from "Capital Cement."

wastewater permitting and within the jurisdiction of the TCEQ establishes that Ms. Garcia is not an affected person as a matter of law.

IV. CONCLUSION

For the reasons set forth above, Ms. Garcia's hearing request in this matter should be denied. All of the criteria set out at Texas Water Code Section 26.028(d) for approval of an application for renewal and amendment without the necessity of holding a public hearing are satisfied. Moreover, Ms. Garcia fails to satisfy any of the criteria necessary to establish affected person status. Accordingly, Capitol Aggregates respectfully requests that the Commissioners deny Ms. Garcia's contested case hearing request and approve Capitol Aggregates' Application to renew and amend TPDES Permit No. 01510 pursuant to the Commission's authority under TEX. WATER CODE § 26.028(d).

Respectfully submitted,

BAKER BOTTS L.L.P.

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CERTIFICATE OF SERVICE

By my signature below, I certify that a true and correct copy of this response was served on the following individuals as indicated below, on the 13th day of January, 2011:

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