

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

December 30, 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: **SPLENDORA READY MIX, INC.**
TCEQ DOCKET NO. 2010-1711-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,

A handwritten signature in cursive script that reads "Amy Swanholm".

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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printed on recycled paper using soy-based ink

TCEQ DOCKET NO. 2010-1711-AIR

**IN THE MATTER
OF THE APPLICATION OF
SPLENDORA READY MIX,
INC. FOR TPDES PERMIT
NO. 91552**

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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

Splendora Ready Mix, Inc., (Applicant or Splendora) 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 would be located at 26670 Midline Rd., Splendora, Montgomery County. The standard permit registration would authorize the facility to emit the following air contaminants: particulate matter including (but not limited to) aggregate, cement, road dust, and particulate matter with diameters of 10 microns or less and 2.5 microns or less.

B. Procedural Background

TCEQ received this application on December 14, 2009. On December 18, 2009, 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 January 7, 2010, in the *Houston Chronicle* and in Spanish in *La Voz, de*

Houston on January 10, 2010. 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) and Notice of Public Meeting for an Air Quality Standard Permit for a Concrete Batch Plant was published on May 30, 2010 in the *Houston Chronicle* and in Spanish in *La Voz, de Houston* on the same day. On June 28, 2010, a Public Meeting was held. The public comment period ended on June 29, 2010. On September 17, 2010, the Response to Comments (RTC) was mailed out, along with the ED's final decision. The deadline to request a contested case hearing was October 18, 2010.

TCEQ received timely requests for a contested case hearing from James Carson, Wayne and Nettie Hamilton, Charlie F. Lenox, Sr., Janie Lenox, and Regina Shaw. TCEQ also received a request for a public meeting from Texas State Senator Tommy Williams. OPIC recommends denying all hearing requests.

II. APPLICABLE LAW

This application was declared administratively complete on December 18, 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 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 [¼ 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. James Carson

James Carson filed a timely request for a contested case hearing. He states that he lives at 12810 Anmar Dr. and is concerned with the environmental impact that the proposed facility would have upon his community. Mr. Carson's property is located over ½ mile from the facility.

See Splendora Ready Mix Inc. Location Aerial, Standard Permit Registration No. 91552, Map Requested by TCEQ Office of Legal Services for Commissioners' Agenda (January 14, 2010) (ED's Map) (Attached as Exhibit A).

It does not appear that Mr. Carson's residence is within 440 yards of the proposed facility as required by TEX. HEALTH & SAFETY CODE § 382.058(c). Although Mr. Carson 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. Nettie and Wayne Hamilton

Nettie and Wayne Hamilton filed a timely request for a contested case hearing. They state that they live at 12774 Anmar Dr. and are concerned with the proposed facility's impact on the homes nearby. They are also concerned about dust, loud noise from the site, heavy traffic on residential roads, and flooding. They also express concern

about the impact this facility could have upon the health of children and elderly people living nearby.

Their property is located over 1/2 mile from the site of the proposed facility. See Splendora Ready Mix Inc. Location Aerial, Standard Permit Registration No. 91552, Map Requested by TCEQ Office of Legal Services for Commissioners' Agenda (January 14, 2010) (ED's Map) (Attached as Exhibit A). It does not appear that Nettie and Wayne Hamilton's 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.

3. Charlie F. Lenox, Jr. and Janie Lenox

Charlie F. Lenox, Jr. and Janie Lenox filed timely requests for a contested case hearing. They state that they live at 26908 Midline Rd. Although Charlie F. Lenox, Jr.'s hearing request does not state why he is requesting a hearing, he commented that he was concerned with dust settling on his home and automobile, as well as in his lungs. Further he expressed concern that the proposed site would cause a health risk to his family, create noise pollution, and cause safety issues. Janie Lenox states that she is also concerned about dust, noise, road destruction from large trucks, and safety issues for children in the neighborhood.

Their residence is located over 1/4 of a mile from the facility, according to the ED's map. See Splendora Ready Mix Inc. Location Aerial, Standard Permit Registration No. 91552, Map Requested by TCEQ Office of Legal Services for Commissioners' Agenda (January 14, 2010) (ED's Map) (Attached as Exhibit A). A hearing requestor's residence must be within 440 yards of the proposed facility for them to be found affected, as required by TEX. HEALTH & SAFETY CODE § 382.058(c). Taking this map at face value,¹

¹ OPIC notes that the ED's map states that it was not generated by a licensed surveyor and is intended for illustrative purposes only. It also makes no claims of accuracy or completeness of the data, or to its suitability for a particular use. There is also a previous version of the map, attached as Exhibit B, which locates the facility on an adjacent strip of property, which is closer to the requesters. In most situations, a map approximating a hearing requestor's distance from a facility is sufficient to show that they are or are not within 440 yards of the proposed facility. These individuals' residences fall within an area that could place them within 440 yards of the facility, if the Splendora property is accurately identified on Exhibit B, and the facility is located further north, as shown on Exhibit A. However, OPIC assumes that the most recent map, included here as Exhibit A, contains the accurate location of the Applicant's property, and

OPIC concludes that they are not entitled to a contested case hearing based on the location of their residence.

4. Regina Shaw

Regina Shaw filed a timely request for a contested case hearing. She states that she lives at 12258 Cole Dr. She is concerned about the proposed facility's impact on her quality of life, property values, and the particulate matter emitted from the proposed facility damaging air quality. She is also concerned about traffic safety and neighborhood access, deterioration of road quality, and noise.

Her residence is located over 1/4 of a mile from the facility, according to the ED's map. See Splendora Ready Mix Inc. Location Aerial, Standard Permit Registration No. 91552, Map Requested by TCEQ Office of Legal Services for Commissioners' Agenda (January 14, 2010) (ED's Map) (Attached as Exhibit A). A hearing requestor's residence must be within 440 yards of the proposed facility for them to be found affected, as required by TEX. HEALTH & SAFETY CODE § 382.058(c). Taking this map at face value,² OPIC concludes that she is not entitled to a contested case hearing based on the location of their residence.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing requests:

1. Whether the proposed facility will adversely affect the environment in the communities surrounding the facility?
2. Whether the proposed facility will create excess dust and noise?
3. Whether the proposed facility will create heavy traffic on surrounding roads and whether any increase in traffic from the proposed facility would create a safety hazard and limit access to the surrounding neighborhoods?

accurately depicts the residence as located more than 440 yards from the proposed facility. Should the map be updated to include any new information, or should any protestants provide evidence disputing the accuracy of the most recent map, OPIC may revise its position on whether these requestors would be entitled to a contested case hearing.

² *Id.*

4. Whether the proposed facility should include a large retention area?
5. Whether the proposed facility would increase flooding in the area.
6. Whether the proposed facility will adversely affect residents' property values.

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. 3-6 are not relevant and material because this issue does not pertain to air quality and are 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 proposed facility will adversely affect the environment in the communities surrounding the facility.
2. Whether the proposed facility will create excess dust and noise?

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. OPIC will reconsider its position if timely filed replies or other information received subsequent to this filing cast doubt on the accuracy of the map attached as Exhibit A. 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

By: 
Amy Swanholm
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(512) 239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 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 Swanholm

Exhibit A

Splendor Ready Mix, Inc. Location Aerial Determination of Affected Person Status Map Requested by TCEQ Office of Legal Services for Commissioners' Agenda January 26, 2011



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

December 20, 2010



Projection: Texas Statewide Mapping System (TSMS)

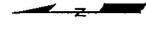
Scale 1:12,085

- Legend
- Facility
 - Property Boundary
 - 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 Orthoimagery Project.

This map depicts the following:

- (1) The approximate location of the facility. This is labeled "Splendor Ready Mix, Inc."
- (2) Circle and arrow depicting 1/4 mile radius. This is labeled "25-Mile Radius".
- (3) Approximate property boundary. This is labeled "Property Boundary".
- (4) Requestors locations. These are labeled with an id number.



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 Resources Division at (512) 239-0800.

LMC/Donna G. CRP-32748



Montgomery County

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

- Requestors:
1. James Carson
 2. Nettie Hamilton
 3. Wayne Hamilton
 4. Jamie Lenox
 5. Charlie F. Lenox
 6. Regina Shaw

Exhibit B

Splendora Ready Mix, Inc. Location Aerial Determination of Affected Person Status 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
 June 21, 2010

0 0.1 0.2 Miles

Projection: Texas Statewide Mapping System
 (TSMMS)
 Scale 1:13,000

Legend

- Facility
- Property Boundary
- Requestor's Property

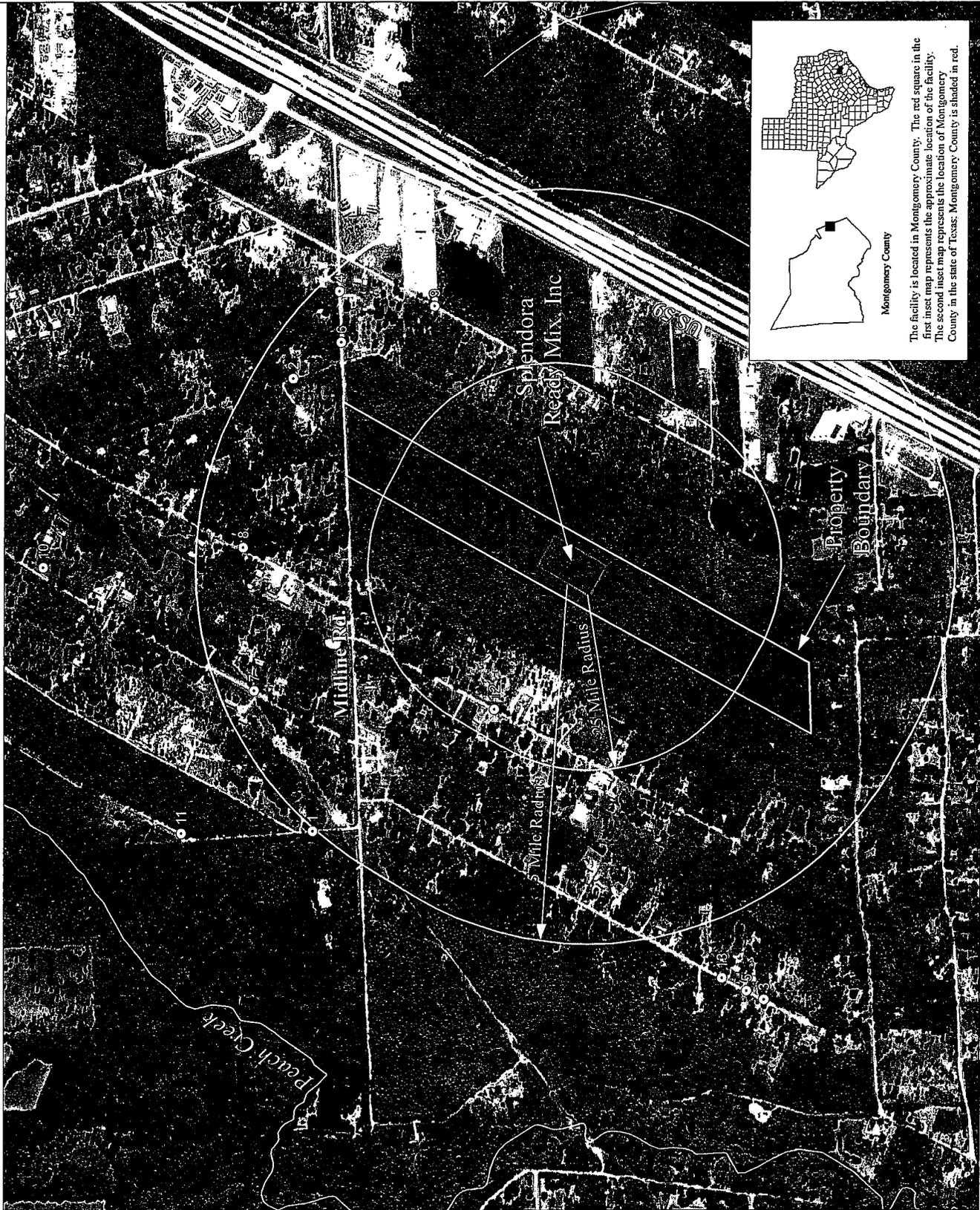
Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestor information from the requestor. The vector data are U.S. Census Bureau 1992 TIGER/Line Data (1:100,000). The background of this map is a one-half meter photograph from the 2008 Texas Orthorectified Project.

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- (2) Circle and arrow depicting 1/4 mile radius. This is labeled "25-Mile Radius"
- (3) Circle and arrow depicting 1/2 mile radius. This is labeled "5-Mile Radius"
- (4) Approximate property boundary. This is labeled "Property Boundary"
- (5) Requestor's locations. These are labeled with an id number.



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Montgomery County

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**SPLENDORA READY MIX, INC.
TCEQ DOCKET NO. 2010-1711-AIR**

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RESOLUTION

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REQUESTERS:

James Carson
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Nettie & Wayne Hamilton
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Janie Lenox
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Cleveland, Texas 77328-7319