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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 31, 2011

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: **CEMEX CEMENT OF TEXAS, L.P.**
TCEQ DOCKET NO. 2010-1850-IWD

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing and Requests for Reconsideration in the above-entitled matter.

Sincerely,

Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2010-1850-IWD

IN THE MATTER OF THE APPLICATION OF CEMEX CEMENT OF TEXAS, L.P. FOR PERMIT NO. WQ0002179000	**§ § § § § §**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO REQUESTS FOR HEARING AND REQUESTS FOR RECONSIDERATION

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) with a Response to Requests for Hearing and Reconsideration in the above-referenced matter.

I. INTRODUCTION

A. Background of Facility

CEMEX Cement of Texas, L. P., 2580 Wald Road, New Braunfels, Texas 78132, (CEMEX or Applicant) which operates Balcones Cement Plant, has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment with renewal to TPDES Permit No. WQ0002179000 to authorize discharge of storm water from two new areas of the facility via Outfall 001; to authorize reuse of wastewater for on-site landscaping and irrigation; and to authorize the discharge of truck wash water from CEMEX Construction Materials, Inc. Quarry via Outfall 001. The current permit authorizes the discharge of wash water from the plant process and truck wash areas and storm water from plant and material/product storage areas via Outfall 001. This application was submitted to the TCEQ on October 20, 2009.

The facility is located at 2580 Wald Road, at the intersection of Wald Road and Solms Road, approximately 0.75 mile north of Interstate Highway 35, and approximately 1.8 miles southwest of the City of New Braunfels, Comal County, Texas 78132. The effluent is discharged from the storm water settling pond through a controlled weir and into a 24-inch concrete pipe; thence to Dry Comal Creek; thence to the Comal River in Segment No. 1811 of the Guadalupe River Basin. The unclassified receiving waters have limited aquatic life use for Dry Comal Creek. The designated uses for Segment No. 1811 are high aquatic life use, contact recreation, public water supply/aquifer protection.

In accordance with 30 TAC '307.5 and the TCEQ implementation procedures (January 2003) for the Texas Surface Water Quality Standards, an antidegradation review of the receiving waters was performed by the Executive Director (ED). A Tier 1 antidegradation review preliminarily determined that existing water quality uses will not be impaired by this permit action. Numerical and narrative criteria to protect existing uses will be maintained. This review preliminarily determined that no water bodies with intermediate, high, or exceptional aquatic life uses are present within the stream reach assessed; therefore, no Tier 2 degradation determination is required. No significant degradation of water quality is expected in water bodies with intermediate, high, or exceptional aquatic life uses downstream, and existing uses would be maintained and protected. The preliminary determination can be reexamined by the ED and may be modified if new information is received.

B. Procedural Background

TCEQ received this application on October 20, 2009. On November 24, 2009, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain Water Quality Permit (NORI) was published in *New Braunfels Herald-Zeitung* on December 6, 2009. The Notice of Application and Preliminary Decision (NAPD) was published in *New Braunfels Herald-Zeitung* on June 1, 2010. The public comment period closed on July 1, 2010 and Chief Clerk mailed the Executive Director's Response

to Comments and the Executive Director's Decision on October 8, 2010. The deadline to request a contested case hearing or request for reconsideration was November 8, 2010.

TCEQ received timely hearing requests from the City of New Braunfels, Joseph Hager on behalf of the Schoenthal Ranch Community Association, and Tim and Sharlene Fey (the Feys). The Feys also make a request for reconsideration. The City of New Braunfels withdrew its hearing request on July 30, 2010.

OPIC recommends not referring this application to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

II. ANALYSIS OF REQUESTS FOR RECONSIDERATION

A. Applicable Law

Section 55.201(e) of the TCEQ procedural rules states that any person may file a request for reconsideration of the executive director's decision, and the request must expressly state that the person is requesting reconsideration of the executive director's decision and give reasons why the decision should be reconsidered. 30 Tex. Admin. Code § 55.201(e). The request must be in writing and filed with the Chief Clerk no later than 30 days after the Chief Clerk mails the ED's decision and response to comments. *Id*.

B. Requests for Reconsideration

The Feys request that the Commission reconsider the matter, as well as hold a contested case hearing. The requests for reconsideration rely on substantially similar issues cited to support the hearing requests. An evidentiary record would be necessary for OPIC to make a recommendation to the Commission on whether the ED's decision to issue the permit should be reconsidered, based on these issues. Accordingly, OPIC recommends denying the requests for reconsideration.

III. ANALYSIS OF REQUESTS FOR CONTESTED CASE HEARINGS

A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 5.556 added by Acts 1999, 76th Leg., ch 1350 (commonly known as "House Bill 801"). 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 application. 30 TAC § 55.201(d). Under 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." This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors 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, safety, and 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.

A group or association may request a contested case hearing if:

> (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.

30 TAC § 55.205(a). The ED, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements. 30 TAC § 55.205(b).

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, pursuant to 30 TAC § 55.209(e), 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 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.

B. Determination of Affected Person Status

1. Schoenthal Ranch Community Association

TCEQ received timely hearing requests from the City of New Braunfels, Joseph Hager on behalf of the Schoenthal Ranch Community Association, and Tim and Sharlene Fey (the Feys). The City of New Braunfels withdrew its hearing request on July 30, 2010.

The Schoenthal Ranch Community Association (the Association), through Joseph Hager is concerned that the proposed discharge would degrade the receiving waters, and impact any high or intermediate aquatic life uses of those waterways. He is concerned that more studies should be done of the Dry Comal Creek and surrounding areas, as it is a habitat for wildlife and endangered species. He also requests the TCEQ consider the cumulative impacts upon the Dry Comal Creek from the proposed discharge as well as from subdivision runoff and infrastructure development. Finally, he is concerned about the proposed discharge's impact upon the Dry Comal Nature Trail, located about 1.5 miles away from the proposed facility location.

A group or association may request a hearing if (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. Joseph Hagar's hearing request does not meet the requirements for associational standing. Although Joseph Hagar has raised relevant issues, his property is located quite some distance from the proposed facility and discharge route. Without any information about Association members who might possess a recreational interest, or live near or along the discharge route, OPIC cannot find that the Association has met the first element of associational standing. Neither has it provided enough information in its hearing request for OPIC to conclude that it has met the second and third requirements.

The Association has not met any of the three elements required for associational standing. Therefore OPIC cannot recommend the Commission find that the Association is affected. OPIC may reconsider this recommendation, should the Association provide the Commission with more information.

2. The Feys

The Feys requested a contested case hearing. In their request, they state they own about 72 acres north of Farm-to-Market Road 482 located

approximately 1.5 to 1.9 miles from the proposed facility location. Their family has farmed the land for over 100 years, and is "Designated Family Land Heritage Property." This is a program administered by the Texas Department of Agriculture, to recognize farms and ranches that have been in continuous operation for 180 years or more. They claim they would be adversely impacted by the negative stigma associated with industrial discharges, and that this discharge would damage the entire stream, not just the area where it discharges. They also believe that the pollution in the proposed discharge would spread upstream and downstream in the Dry Comal Creek, reaching into its seep springs. The Feys are concerned about the proposed facility's impact on a water well they use for human and livestock consumption, located on their property, very close to the Dry Comal Creek. They also question whether the receiving waters are properly classified, believing that the Dry Comal Creek should be classified as having intermediate or high aquatic life use. Because of this, degradation of this stream should not be allowed. If there is not life in the proposed receiving waters, they state, this may be an indication that degradation has already taken place due to the current discharge, storm water runoff, and non-point sources in the area.

They are also concerned about the proposed discharge's impact on wildlife and endangered species, flooding, impacts on the Dry Comal Nature Trail, cumulative impacts on the Dry Comal Creek, and impact to the historical and cultural perspective of the Dry Comal Creek.

Although the Feys raise numerous issues, they have not shown a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. Their property lies upstream of the proposed discharge and discharge route, and they have not articulated any interests separate from their interest as property owners, that would constitute a personal justicable interest. They argue that the negative stigma associated with this proposed discharge would harm them. However, a general perception of wastewater discharges as harmful is not an interest uncommon to the generally public. The Feys also state that they have an interest in protecting a groundwater well on their property, less than 100 feet from the Dry Comal Creek, used for human and livestock consumption. Their property is located several miles

upstream from the discharge point, though, so this interest in preventing groundwater contamination would not be separate from that of the general public. Therefore OPIC concludes that the Feys are not affected.

C. Issues Raised in the Hearing Requests

OPIC finds that none of the hearing requesters are affected. However, should the Commission recommend that this matter be sent to the State Office of Administrative Hearings, OPIC provides the following analysis on what issues may be appropriate for the subsequent hearing. The Fays and Schoenthal Ranch Community Association raise the following issues:

1. Whether the proposed discharge would cause groundwater contamination or pollute area groundwater wells.
2. Whether receiving water are properly classified for aquatic life use and whether the proposed discharge would degrade the receiving waters.
3. Whether the proposed discharge would impact seep springs in the area.
4. Whether the proposed discharge would impact wildlife and any endangered species.
5. Whether the cumulative impacts of pollution on the Dry Comal Creek violate TCEQ rules.
6. Whether the proposed discharge would adversely impact the Dry Comal Nature Trail.
7. Whether the proposed discharge would violate rules protecting the Dry Comal Creek as a National Historic Trail.
8. Whether the contaminants in the proposed discharge would pose a risk to surrounding communities, including Comal River, Comal Springs, Guadalupe River, the City of New Braunfels, and surrounding rural subdivisions.

D. Issues raised in Comment Period

All of the hearing requests raise issues that were also raised during the comment period.

E. Disputed Issues

There is no agreement between hearing requestors and the Applicant or Executive Director on the issues raised in the hearing requests.

F. 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. All of the issues raised in timely hearing requests by affected parties are issues of fact. *See* 30 TAC §55.211(b)(3)(A) and (B).

G. Relevant and Material Issues

Hearing requests may raise issues relevant and material to the Commission's decision under 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.[1] Relevant and material issues are those governed by the substantive law under which this permit is to be issued.[2]

TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307 and 309, as well as under specific rules related to wastewater systems found at 30 TAC Chapters 30 and 217. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit "maintain the quality of water in the state consistent with public health and enjoyment." 30 TAC § 307.1. Furthermore, the proposed permit must comply with 30 TAC § 305.122(c), 307.1 and 309.10, which prohibit injury to private property and invasion of property rights and require minimization of

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[1] *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.")

[2] *Id.*

exposure to nuisance conditions. Therefore all of the issues listed in Section III.C, above, are relevant and material.

H. Issues Recommended for Referral

Should the Commission refer this matter to the State Office of Administrative Hearings for a contested case hearing OPIC recommends the Commission refer the following disputed issues of fact:

1. Whether the proposed discharge would cause groundwater contamination or pollute area groundwater wells.
2. Whether receiving water are properly classified for aquatic life use and whether the proposed discharge would degrade the receiving waters.
3. Whether the proposed discharge would impact seep springs in the area.
4. Whether the proposed discharge would impact wildlife and any endangered species.
5. Whether the cumulative impacts of pollution on the Dry Comal Creek violate TCEQ rules.
6. Whether the proposed discharge would adversely impact the Dry Comal Nature Trail.
7. Whether the proposed discharge would violate rules protecting the Dry Comal Creek as a National Historic Trail.
8. Whether the contaminants in the proposed discharge would pose a risk to surrounding communities, including Comal River, Comal Springs, Guadalupe River, the City of New Braunfels, and surrounding rural subdivisions.

IV. MAXIMUM EXPECTED DURATION OF HEARING

Commission Rule 30 TEX. ADMIN. CODE § 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 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected

duration of a hearing on this application would be one year from the first date of the preliminary hearing until the proposal for decision is issued.

V. CONCLUSION

OPIC recommends the Commission find that none of the hearing requesters are affected, and decline to refer this matter to the State Office of Administrative Hearings for a contested case hearing.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2011 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Requests for Hearing and Requests for Reconsideration were 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 or by deposit in the U.S. Mail.

_____
Amy Swanholm

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DOCKET NO. 2010-1850-IWD; PERMIT NO. WQ0002179000

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