

TCEQ DOCKET NO. 2011-0172-AIR

APPLICATION BY	§	BEFORE THE
CONNERS CONSTRUCTION, INC.	§	TEXAS COMMISSION ON
FALLS COUNTY, TEXAS	§	ENVIRONMENTAL QUALITY

APPLICANT’S RESPONSE TO REQUESTS FOR CONTESTED CASE HEARING

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

COMES NOW Applicant Conners Construction, Inc. (“*Conners*” or “*Applicant*”) and, pursuant to 30 Tex. Admin. Code § 55.209(d), files this response to requests for contested case hearing that were submitted to the Texas Commission on Environmental Quality (“*TCEQ*” or “*Commission*”) by various individuals (collectively, “*Requestors*”) concerning Conners’ application to construct and operate a portable rock crushing facility in Falls County (the “*Application*”).

The majority of the requests for contested case hearing do not include information required by Commission rules and fail to demonstrate that the Requestors are “affected persons” capable of successfully requesting a contested case hearing.¹ For these reasons, and in the event that the Commission grants a hearing request, the only issues that should be referred to the State Office of Administrative Hearings (“*SOAH*”) should be those issues raised by the few Requestors who may have established “affected person” status.

I.
BACKGROUND

Conners submitted an application for an air quality permit to the TCEQ to authorize the construction and operation of a portable rock crushing facility on County Road 246, approximately three-fourths of a mile north of Farm-to-Market Road 413, in Falls County. The

¹ See 30 TEX. ADMIN. CODE § 55.201(b) (2011) (“The following may request a contested case hearing . . . (4) affected persons, when authorized by law.”).

Application was filed on March 19, 2009, and declared administratively complete on March 31, 2009.

Ample opportunity has been provided for the public to comment on the Application. All appropriate notices have been published, including the: (1) Notice of Receipt and Intent to Obtain an Air Quality Permit, published in the *Marlin Democrat* on April 8 and May 13, 2009; and (2) Notice of Application and Preliminary Decision, published in the *Marlin Democrat* on February 10, 2010. In addition to providing the public with the opportunity to submit written comments in response to the published notices, a public meeting was held on March 11, 2010. The Executive Director filed his Response to Public Comments on December 10, 2010, and mailed his final decision letter regarding the Application, indicating that the Application meets the requirements of applicable law, on December 15, 2010. All hearing requests and public comments were submitted prior to the Executive Director's filing of his Response to Public Comments and mailing of his final decision letter.

II. ARGUMENT

TCEQ rules are explicit: a request for a contested case hearing must be timely, must substantially comply with content requirements, and must be submitted by an "affected person."²

Eleven hearing requests have been timely filed.³ However, a limited number of the hearing requests possibly comply with the content and "affected person" requirements specified

² See 30 TEX. ADMIN. CODE § 55.201(b)(4) (2011).

³ The Chief Clerk's database represents that thirteen hearing requests were filed. The Applicant's characterization of the number of hearing requests differs from the Chief Clerk's number for the following reasons: (i) Paul and Evelyn Bostick submitted separate hearing requests, but Applicant combined their hearing requests because they are nearly identical; (ii) Bob White submitted identical hearing requests from two separate email addresses, which Applicant has also combined; and (iii) Pamela Kelly submitted a hearing request, but subsequently withdrew it.

in TCEQ rules. As a result, few issues remain that the Commission can refer to SOAH, in the event that a hearing is required at all.

A. A NUMBER OF THE REQUESTS FOR CONTESTED CASE HEARING DO NOT SUBSTANTIALLY COMPLY WITH APPLICABLE CONTENT REQUIREMENTS AND, AS A RESULT, DO NOT ESTABLISH “AFFECTED PERSON” STATUS

The Commission’s rules require that a hearing request include the following:

1. the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
2. the person’s personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor’s location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor 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. a request for a contested case hearing;
4. 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 the issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director’s responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
5. any other information specified in the public notice of application.⁴

Commission rules require hearing requestors to provide this information in hearing requests in part so that the Commission can determine whether a requestor is an “affected person,” because only an “affected person”—as opposed to the general public—can successfully request a contested case hearing.⁵ Commission rules define an affected person as “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest

⁴ 30 TEX. ADMIN. CODE § 55.201(d) (2011).

⁵ See 30 TEX. ADMIN. CODE § 55.211(c) (2011).

affected by the application,” *but* “[a]n interest common to members of the general public does not qualify as a personal justiciable interest.”⁶

In determining whether a person is an “affected person,” Commission rules provide that the following factors must be considered:

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 the property of the person;
5. likely impact of the regulated activity on use of the impacted natural resource by the person⁷

The majority of the Requestors have failed to satisfy the content requirements listed in Commission rules and, as a result, have failed to provide sufficient information to establish that they are “affected persons.” For this reason, the concerns and issues raised by these Requestors should not provide the basis for, or be considered in, a contested case hearing.

1. David Kinard Is Not An “Affected Person”

David Kinard’s hearing request should not be granted by the Commission, and the issues and concerns raised therein should not be considered in a contested case hearing, because (1) he failed to comply with the hearing request content requirements by failing to indicate where his property lies in relation to the proposed rock crushing facility, and (2) he neglected to explain

⁶ 30 TEX. ADMIN. CODE § 55.203(a) (2011).

⁷ 30 TEX. ADMIN. CODE § 55.203(c) (2011).

how or why he will be adversely affected by the proposed facility in a manner not common to members of the general public. As a result, he cannot be classified as an “affected person.”

Mr. Kinard lists a post office box in Reagan, Texas as his mailing address, but does not list a physical address or provide any information regarding his location or distance from the proposed rock crushing facility, in violation of the content requirements of 30 Tex. Admin. Code § 55.201(d)(2).⁸ Further, Mr. Kinard’s hearing request does not establish that he has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the Application. Instead, his hearing request raises issues common to members of the general public. For example, he generally comments that rock crushing operations will reduce air quality, and comes across as a spokesman-of-sorts for the entire Falls County community (e.g., “I respectfully request that this air permit application be further reviewed and take into account the concerns of those citizens in the affected region”). Mr. Kinard does not list a personal medical condition, specific livestock concerns, or any other information that could be used to distinguish him from the general public.

As such, Mr. Kinard can not be classified as an “affected person.” For this reason, the issues and concerns contained in his hearing request were invalidly raised, and can not form the basis of, or be considered in, a contested case hearing.

⁸ Mr. Kinard not only did not provide information on his property’s distance relative to the proposed rock crushing facility, he also requested a “public hearing” instead of a “contested case hearing”—in violation of TCEQ contested case hearing request rules. *See* 30 TEX. ADMIN. CODE § 55.201(d)(5) (the Notice of Receipt of Application and Intent to Obtain Air Permit specifically requires a requestor to state, “[I/we] request a contested case hearing”).

2. Alfred Corum Is Deceased

Alfred Corum submitted a hearing request on May 21, 2009, but passed away on October 27, 2010.⁹ Accordingly, the issues raised in Mr. Corum's hearing request should not form the basis for, or be the subject of, a contested case hearing.

3. A Number of the Requestors Have Failed to Meet the Commission's Threshold Requirements for Submitting a Hearing Request

The majority of the other Requestors did not provide sufficient information in their hearing requests to establish that they are "affected persons," as explained below.

- George Harlan – George Harlan represented in his hearing request that he resides at 213 Royal Drive in Marlin. This residence is approximately 10.5 miles, as the crow flies, from the proposed rock crushing facility. Mr. Harlan alleges, however, that he owns property on the northwest side of the proposed rock crushing property. No address for this property is listed and no approximate distance from the proposed rock crushing facility is given, in violation of the content requirements listed in 30 Tex. Admin. Code § 55.201(d)(2). Further, Mr. Harlan merely alleges that the rock crushing operations would create "dust and other problems," but does not explain how or why he believes he will be adversely affected by the rock crushing operations in a manner not common to members of the general public. As a result, Mr. Harlan has failed to establish that he is an "affected person."
- Jim & Kay Woliver – Mr. and Mrs. Woliver represented in their hearing request that they reside at 1780 F.M. 1771, but failed to indicate their residence's distance from the proposed rock crushing facility, in violation of the content requirements listed in 30 Tex. Admin. Code § 55.201(d)(2). Applicant, however, is aware that the Woliver's residence is roughly seven miles from the proposed rock crushing facility, sufficiently far enough away to prevent the Woliver's from being "affected persons."
- Paul & Evelyn Bostick – Mr. and Mrs. Bostick submitted separate hearing requests, though the content of their requests is nearly identical. Mr. and Mrs. Bostick represented in their hearing requests that they live on F.M. 2413, but no specific address was given nor did the Bostick's indicate in their hearing requests their residence's distance relative to the proposed rock crushing facility, in violation of the content requirements listed in 30 Tex. Admin. Code § 55.201(d)(2). As a result, it is unknown how close the Bostick's property is to the

⁹ Obituary available at <http://www.tributes.com/show/Alfred-Corum-89824685>.

proposed facility and, for that reason, the Bostick's have not provided the Commission with sufficient information to be classified as "affected persons."

- Arthur & Brenda Ogle – Mr. and Mrs. Ogle represented in their hearing request that they live at 5077 F.M. 413. F.M. 413 runs perpendicular to and is $\frac{3}{4}$ of a mile south of County Road 246 (where the proposed rock crushing facility will be located), but F.M. 413 stretches on for miles. Because the Ogle's failed to indicate in their hearing request their residence's distance from the proposed rock crushing facility, in violation of the content requirements listed in 30 Tex. Admin. Code § 55.201(d)(2), it is unknown how close the Ogle's property is to the proposed facility.¹⁰ For that reason, the Ogle's have not provided the Commission with sufficient information to be classified as "affected persons."
- Robin Swinnea – Like Mr. Kinard, Ms. Swinnea lists her address in her hearing request as a post office box in Reagan, Texas, though Ms. Swinnea does claim in her hearing request that she owns property "located right across from the proposed rock crusher site." However, Ms. Swinnea gives no exact address or location for that property, or a distance from the proposed rock crushing facility, in violation of the content requirements listed in 30 Tex. Admin. Code § 55.201(d)(2). As such, the information provided in Ms. Swinnea's hearing request does not provide the Commission with sufficient information to classify her as an "affected person."

The content deficiencies in these hearing requests not only prevent the Requestors from establishing that they are "affected persons," but also violate TCEQ rules. The Notice of Receipt of Application and Intent to Obtain Permit published in the *Marlin Democrat* specifically states that a hearing requestor must submit the following in a hearing request:

1. your name, mailing address, daytime phone number, and fax number, if any;
2. applicant's name and permit number;
3. the statement "[I/we] request a contested case hearing";
4. a specific description of how you would be adversely affected by the application and air emissions from the facility in a way not common to the general public;
5. the location and distance of your property relative to the facility.

¹⁰ The Applicant attempted to use online mapping tools to pinpoint the Ogle's exact address, but was ultimately unsuccessful.

Failing to provide “information specified in the public notice of application” violates TCEQ hearing request rules.¹¹ Because these Requestors did not include specific descriptions of how they would be adversely affected by the Application and air emissions from the proposed rock crushing facility in a way not common to the general public, and/or did not include information on the location and distance of their property relative to the proposed rock crushing facility, these Requestors did not only fail to establish that they are “affected persons,” they also failed to comply with TCEQ hearing request rules.

For these reasons, the issues and concerns contained in these Requestors’ hearing requests should not form the basis for, or be the subject of, a contested case hearing.

B. TO THE EXTENT THAT A HEARING IS GRANTED, A LIMITED NUMBER OF ISSUES RAISED IN THE REQUESTS FOR CONTESTED CASE HEARING SHOULD BE REFERRED

The majority of the Requestors have not satisfied the content requirements listed in 30 Tex. Admin. Code § 55.201(d)(2), and have failed to provide the Commission with sufficient information to classify them as “affected persons.” The following chart lists each of the Requestors¹² and indicates with a “✓” where the Requestor may have satisfied the threshold requirement of demonstrating that he or she is an affected party, and indicates with a “x” where the Requestor did not.

<i>Requestor</i>	<i>Demonstrated “affected party” status?</i>
Paul & Evelyn Bostick	x
Arthur & Brenda Ogle	x
Jim & Kay Woliver	x

¹¹ See 30 TEX. ADMIN. CODE § 55.201(d)(5).

¹² Alfred Corum is not included as a Requestor in this chart because of his October 27, 2010 passing.

Robin Swinnea	x
George Harlan	x
David Kinard	x
Zill Harlan	✓
Alvena White	✓
Bobby White	✓
Judith Cobb	✓

Once the Commission determines that a hearing request is timely, substantially complies with the content requirements, and was submitted by an “affected person,” the Commission applies a three-part test to the issues raised in such a request to determine if any of the issues should be referred to SOAH for a contested case hearing. The three-part test is as follows:

1. the issue must involve a disputed question of fact;
2. the issue must have been raised during the public comment period; and
3. the issue must be relevant and material to the Commission’s decision on the application.¹³

In its responses to hearing requests in this case and in other similar cases, the Executive Director appears to take the position that if the Commission determines that any requestor is an affected person, then all issues raised in any hearing request—even those submitted by non-affected persons—can be referred to SOAH.¹⁴ Such an application of Commission rules detracts from the purpose of the “affected person” requirement, which is to afford those who follow Commission rules for submitting hearing requests and that are actually affected by a proposed

¹³ 30 TEX. ADMIN. CODE § 50.115(c) (2011) (emphasis added).

¹⁴ See, e.g., Executive Director’s Responses to Hearing Requests in Midway Industrial Park (Docket No. 2010-2075-AIR), Slick Machines Rock Crusher (Docket No. 2010-0660-AIR), and Canyon Lake Ready Mix (Docket No. 2007-1000-AIR).

activity to participate in the decision-making process. Allowing issues raised by non-affected persons to be considered at a contested case hearing inappropriately broadens the scope of the hearing.

The following issues were raised by the Requestors who may have satisfied the threshold requirements of submitting timely and content-appropriate hearing requests, and who may have provided sufficient information to permit the Commission to conclude that they are “affected persons.”

- Alvena White – Ms. White generally alleges that rock crushing operations will adversely affect her health and her livestock.
- Bobby White – Mr. White wishes to know the specifics of the “location of the rock-crushing operation, the truck routes for hauling the crushed rock, and the proposed proximity to property lines.” The Executive Director’s Response to Public Comments addressed Mr. White’s comment by providing UTM coordinates for the proposed site and by indicating that TCEQ regulations governing the Application relate only to air quality and do not include vehicle traffic to and from the proposed rock crushing facility. Mr. White also generally alleges that airborne particles resulting from rock crushing operations will affect his mother’s health.
- Zill Harlan – Mr. Harlan alleges that dust from rock crushing operations will stop-up his water collection system and will decrease the value of his property. Neither are issues that are relevant or material to the Commission’s decision on the application, however, so these issues can not properly be referred to SOAH. Mr. Harlan also comments that his livestock will be forced to eat dusty grass, which he believes will be unhealthy for them, and he generally states that the dust will affect his and his wife’s health. These issues are potentially relevant and material, and could therefore be referred to SOAH.
- Judith Cobb – Ms. Cobb generally alleges that rock crushing operations will adversely affect her and her husband’s health.

Significantly, each of the above-listed hearing Requestors submitted their hearing request before the Executive Director filed his Response to Public Comments, which directly addresses each of the above issues. As such, it could be the case that disputed questions of fact ***do not*** remain. Because the Commission “***may not***” refer an issue to SOAH unless the Commission

determines that the issue involves a disputed question of fact,¹⁵ it is not clear that any issues—validly raised or not—should be referred to SOAH.¹⁶ In the event that the Commission does decide that disputed questions of fact remain and that a contested case hearing is necessary, the only issues that should be referred to SOAH are those raised by the above-listed Requestors, specifically whether the rock crushing operations will adversely affect the health of these individuals, or the welfare of their livestock.¹⁷

III. CONCLUSION

The majority of the hearing requests are deficient and therefore should not be used as the basis for, or be the subject of, a contested case hearing. In the event that a contested case hearing is granted by the Commission, Connors urges that the Commission refer, in accordance with 30 Tex. Admin. Code § 55.211(b)(3)(A), only those issues raised by the Requestors that established “affected person” status—whether the rock crushing operations will adversely affect the health of these individuals, or the welfare of their livestock. In the event that a contested case hearing is granted by the Commission, Connors further urges that the Commission refer the Application to

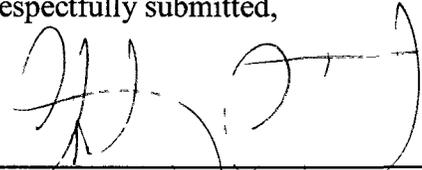
¹⁵ *See id.* (emphasis added).

¹⁶ Not one of the Requestors specifically requested a “contested case hearing,” but instead requested “public hearings.” This not only violates TCEQ contested case hearing request rules, *see* Tex. Admin. Code § 55.201(d)(5) (the Notice of Receipt of Application and Intent to Obtain Air Permit specifically requires a requestor to state, “[I/we] request a contested case hearing”), but it also may indicate that the Requestors actually were requesting a public meeting as opposed to a contested case hearing. A public meeting was held on March 11, 2010. Not one contested case hearing request was submitted after the public meeting or after the Executive Director mailed his final decision letter—an indication that the Requestors’ actually sought a public meeting, and were satisfied once one was held.

¹⁷ The following issues were raised by Requestors who did not establish “affected person” status, and should not be considered in any event. However, if the Commission determines that any of the following Requestors did in fact satisfy the threshold “affected person” requirement, the following issues should not be considered in a contested case hearing because they are not relevant and material to the Commission’s decision on the Application: Jim and Kay Woliver – truck traffic concerns and effect of rock crushing on land values; Paul and Evelyn Bostick – effects from blasting; and Arthur and Brenda Ogle – alternate locations for the rock crushing facility.

the alternative dispute resolution director and specify that SOAH issue a proposal for decision within four months of the SOAH preliminary hearing.

Respectfully submitted,

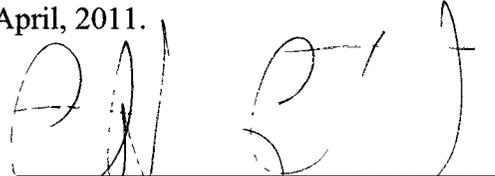


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Applicant's Response to Request for Contested Case Hearing has been served via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, and/or Certified Mail, Return Receipt Requested, on all parties whose names appear on the attached mailing list on this the 18th day of April, 2011.



Christopher C. Thiele

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JOYCE FARR
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