

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

September 12, 2011

Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: J. R. THOMPSON, INC.
TCEQ DOCKET NO. 2011-1524-AIR

Dear Ms. Chao:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

DOCKET NO. 2011-1524-AIR

APPLICATION BY	§	BEFORE THE
J. R. THOMPSON, INC.	§	TEXAS COMMISSION ON
PROPOSED AIR QUALITY	§	ENVIRONMENTAL QUALITY
PERMIT NO. 92504L001	§	

**OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUESTS**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to hearing requests in the above-referenced matter.

I. Introduction

On May 7, 2010, J. R. Thompson, Inc. ("Thompson" or the "Applicant") applied to the TCEQ for proposed Air Quality Permit No. 92504L001. This permit would authorize the construction and operation of a rock crushing plant. The proposed site is located in Cooke County, on the east side of County Road 343, approximately 2 miles south of FM 1630, near Muenster.

Thompson's application was declared administratively complete May 24, 2010. The first newspaper notice was published June 11, 2010 in the *Muenster Enterprise*. The second newspaper notice was published December 17, 2010 in the same newspaper. On March 3, 2011, TCEQ conducted a public meeting in Muenster. The public comment period closed March 3, 2011. The TCEQ Executive Director's (ED) Response to

Comments (RTC) was mailed July 25, 2011, and the deadline for hearing requests was August 24, 2011.

The TCEQ received timely hearing requests from the following people: Kenneth and Marilyn Bierschenk, Wayne and Cathy Luttmer, Michelle Sandmann, and Concerned Neighbors of Proposed Rock Crusher (CNRPC).

For the reasons stated herein, OPIC recommends the Commission grant all of the hearing requests.

II. Applicable Law

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under Title 30, Texas Administrative Code (TAC) § 55.201(d), a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify 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) request a contested case hearing;
- (4) list 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 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) provide any other information specified in the public notice of application.

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. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to 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.

Under 30 TAC § 55.205(a), a group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (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.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) 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;
- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

III. Analysis of Hearing Requests

A. Whether the requestors are affected persons

Kenneth and Marilyn Bierschenk

The Bierschenks are concerned about dust emissions, chemical exposure, exacerbation of existing health conditions, and damage to gardens, crops, and livestock. According to a map prepared by ED staff and attached hereto, the Bierschenks reside approximately one mile from the proposed plant site. Given their proximity to the proposed plant and their concerns regarding air quality, health effects, and property damage, the Bierschenks have a personal justiciable interest in this matter which is not common to the general public. Additionally, their stated interests are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of air emissions. Therefore, Kenneth and Marilyn Bierschenk should be considered affected persons in this matter.

Wayne and Cathy Luttmmer

The Luttmers are concerned about air emissions levels and possible health effects for humans and livestock. According to the ED's map, the Luttmers reside approximately .68 miles from the proposed plant site. Given their proximity to the proposed plant and their concerns regarding air quality and potential health effects for humans and livestock, the Luttmers have a personal justiciable interest in this matter which is not common to the general public. Additionally, their stated interests are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of air emissions. Therefore, Wayne and Cathy Luttmmer should be considered affected persons in this matter.

Michelle Sandmann

Michelle Sandmann is requesting a hearing as an individual requestor and as a representative of CNRPC. According to the ED's map, Mrs. Sandmann resides approximately .87 miles from the proposed plant. She is concerned about exposure to the plant's air emissions, health effects, and nuisance conditions. Given her proximity to the proposed plant and her concerns regarding air quality, health effects, and nuisance conditions, Mrs. Sandmann has a personal justiciable interest in this matter which is not common to the general public. Additionally, her stated interests are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of air emissions. Therefore, Michelle Sandmann should be considered an affected person in this matter.

CNRPC

To qualify as an affected person under 30 TAC § 55.205, CNRPC must satisfy three requirements. First, CNRPC must have at least one member who would otherwise have standing to request a hearing in their own right.¹ As discussed above, OPIC finds that Michelle Sandmann is an affected person, and as the representative of CNRPC, Mrs. Sandmann satisfies the first requirement of group standing for CNRPC.

The second requirement for group standing is the interests the group seeks to protect must be germane to the organization's purpose.² CNRPC states the group seeks to preserve the health of the member families, the use and enjoyment of their property, and the natural habitat. The purpose of CNRPC (Concerned Neighbors of Proposed Rock Crusher) seems evident from the name of the group, and OPIC finds that CNRPC is seeking to protect interests germane to that purpose, thereby satisfying the second requirement for group standing.

Finally, group standing requires that neither the claim asserted nor the relief requested requires the participation of the individual members in the case.³ Nothing in CNRPC's hearing request indicates that the interests asserted or the relief requested will require the participation of the individual members in this case. Therefore, OPIC finds that CNRPC satisfies the third and final requirement for group standing, and CNRPC should be considered an affected person in this matter.

¹ 30 TAC § 55.205(a)(1).

² 30 TAC § 55.205(a)(2).

³ 30 TAC § 55.205(a)(3).

B. Which issues raised in the hearing requests are disputed

All of the issues raised in the hearing requests are disputed.

C. Whether the dispute involves questions of fact or of law

All of the disputed issues involve questions of fact.

D. Whether the issues were raised during the public comment period

All of the issues were raised during the public comment period.

E. Whether the hearing requests are based on issues raised solely in a public comment which has been withdrawn

None of the hearing requests are based on issues raised solely in a public comment which has been withdrawn.

F. Whether the issues are relevant and material to the decision on the application

The hearing requests in this matter have raised many specific questions and concerns. Some of these questions and concerns may be grouped into broader issues for the purpose of determining whether the issues are relevant and material to the Commission's decision on this application.

Air Quality

All of the hearing requestors have raised questions and concerns which fall under the larger issue of air quality. The purpose of the Texas Clean Air Act is to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions

of air contaminants.⁴ The issue of air quality is therefore relevant and material to the Commission's decision on this application.

Health Effects

All of the requestors have raised the issue of human health effects resulting from the proposed air emissions. The Texas Clean Air Act is intended to protect public health and general welfare.⁵ The issue of human health effects is therefore relevant and material to the Commission's decision on this application.

Crop Damage

At least one requestor is concerned that emissions will damage crops. This concern regarding crop damage raises the issue of impacts to physical property. The Texas Clean Air Act is intended to protect physical property.⁶ Therefore, the issue of crop damage is relevant and material to the Commission's decision on this application.

Livestock

Some of the requestors are concerned about the welfare of livestock. Livestock may be considered property, and the Texas Clean Air Act states that one of the purposes of the Act is the protection of property.⁷ Therefore, the issue is relevant and material to the Commission's decision on this application.

⁴ TEX. HEALTH & SAFETY CODE § 382.002.

⁵ *Id.*

⁶ See TEX. HEALTH & SAFETY CODE §§ 382.002 and 382.0518.

⁷ TEX. HEALTH & SAFETY CODE § 382.002.

Nuisance

At least one requestor has raised the issue of nuisance conditions. TCEQ rule prohibits air emissions which interfere with the normal use and enjoyment of animal life, vegetation, or property.⁸ The issue of nuisance is therefore relevant and material to the Commission's decision on this application.

Compliance History

A question has been raised regarding the likelihood that Applicant will comply with permit conditions. This question concerns the issue of compliance history. The Commission is required to consider Thompson's compliance history when deciding whether to grant this permit.⁹ Therefore, the issue of compliance history is relevant and material to the Commission's decision on this application.

Notice

Questions have been raised regarding the adequacy and accuracy of the newspaper notices and the posted signs. Newspaper notice and sign posting for air permit applications are regulated by TCEQ rule, and notice affects jurisdiction over a case. Notice issues are therefore relevant and material to the Commission's decision on this application.

Noise

Some of the hearing requestors raise the issue of noise pollution. The TCEQ does not have the authority to regulate noise levels at a rock crushing plant. Therefore, this issue is not relevant and material to the Commission's decision.

⁸ 30 TAC § 101.4.

⁹ See TEX. WATER CODE § 5.754.

Traffic and Roads

All of the requestors raise the related issues of traffic and road conditions. However, under the Texas Clean Air Act, the TCEQ lacks jurisdiction to regulate traffic on public roads, and therefore, these issues are not relevant and material to the Commission's decision.

Water Quality

Some of the requestors have raised concerns related to water quality. The Commission's consideration of an air quality permit application does not include issues related to water quality. Therefore, this issue is not relevant and material to the Commission's decision on the application.

G. Maximum expected duration for the contested case hearing

For the contested case hearing, OPIC estimates a maximum duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

IV. Conclusion

OPIC finds that all of the hearing requestors qualify as affected persons. We also find that all of the requestors have raised disputed issues of fact that are relevant and material to the Commission's decision on this application. Therefore, OPIC respectfully recommends the Commission grant their hearing requests.

OPIC further recommends that the following issues be referred to the State Office of Administrative Hearings for a contested case hearing:

1. Whether the correct address for the proposed facility was provided in the newspaper notices.
2. Whether the site entrances and exits were properly identified in the application and made clear in the newspaper notices.
3. Whether the signs at the proposed site were posted properly and for the required length of time.
4. Whether all proposed emissions were accurately determined.
5. Whether the proposed emissions adequately account for haul roads and blasting.
6. Whether all emission points have been correctly identified.
7. Whether BACT emission levels were appropriately determined.
8. Whether the permit ensures emissions will be limited to BACT levels.
9. How will production weights be measured and recorded?
10. Whether dust control conditions in the permit are enforceable.
11. Whether the proposed plant will adversely impact air quality.
12. Whether the facility will be operated in a manner to avoid nuisance conditions.
13. Whether the application contains inconsistent statements regarding proposed operations.
14. Whether Applicant's compliance history raises an issue regarding Applicant's ability to comply with a material term of the permit.
15. Will the proposed plant cause or contribute to a violation of any National Ambient Air Quality Standard?
16. Whether Applicant's air dispersion modeling was performed appropriately.
17. Will emissions from the proposed plant, particularly silica emissions, adversely affect public health?

18. Will the proposed plant adversely impact physical property, including crops?

19. Will the proposed plant adversely impact livestock?

For the contested case hearing, OPIC recommends a duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2011, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.



Garrett Arthur

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TCEQ DOCKET NO. 2011-1524-AIR

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J.R. Thompson, Inc.
Permit No. 92504
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

September 7, 2011

0 0.1 0.2 0.4 0.6 Miles



Projection: Texas Statewide Mapping System
 (TSMS)
 Scale 1:26,000

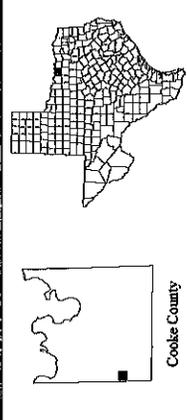
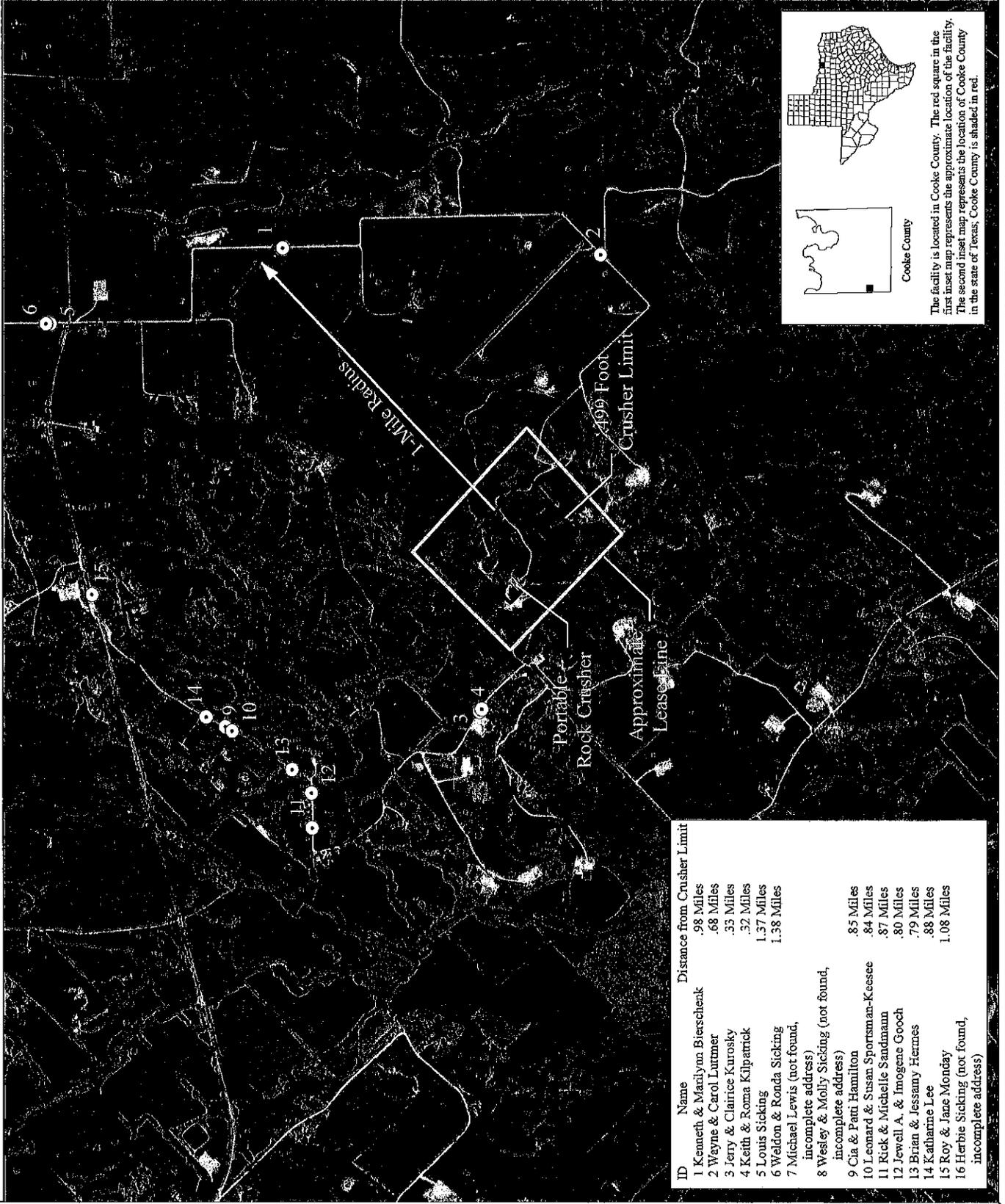
Legend

- Approximate Lease Line
- Portable Rock Crusher
- Rock Crusher Limit
- Approximate Locations of Requestors

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.

This map depicts the following:

- (1) The approximate location of the lease line. This is labeled "Approximate Lease Line".
- (2) The approximate location of the portable rock crusher. This is labeled "Portable Rock Crusher".
- (3) The approximate 499 foot boundary of the portable rock crusher limit. This is labeled "499 Foot Crusher Limit".
- (4) Circle and arrow denoting 1-mile radius. This is labeled "1-Mile Radius".



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

ID	Name	Distance from Crusher Limit
1	Kenneth & Marilyn Bierschenk	.98 Miles
2	Wayne & Carol Lurmer	.68 Miles
3	Jerry & Claire Kurosky	.33 Miles
4	Keith & Roma Kilpatrick	.32 Miles
5	Louis Sicking	1.37 Miles
6	Waldon & Ronda Sicking	1.38 Miles
7	Michael Lewis (not found, incomplete address)	
8	Wesley & Molly Sicking (not found, incomplete address)	
9	Cia & Patti Hamilton	.85 Miles
10	Leonard & Susan Sportsman-Keesee	.84 Miles
11	Rick & Michelle Sandmann	.87 Miles
12	Jewell A. & Imogene Gooch	.80 Miles
13	Brian & Jessamy Hernes	.79 Miles
14	Katharine Lee	.88 Miles
15	Roy & Jaze Monday	1.08 Miles
16	Herbie Sicking (not found, incomplete address)	

This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries. For more information concerning this map, contact the Information Resource Division at (512) 259-0800.

M McDougough CRF-34383

