

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

February 13, 2012

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: P & L CAST STONE, INC.
TCEQ DOCKET NO. 2011-2114-AIR**

Dear Ms. Bohac:

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 Swarholm".

Amy Swarholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2011-2114-AIR

**IN THE MATTER OF THE
APPLICATION OF P&L CAST
STONE, INC. FOR AIR PERMIT
NO. 93109**

**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

P & L Cast Stone, Inc. ("Applicant") has applied to the TCEQ for a registration under the standard permit for a concrete batch plant issued under TEX.HEALTH & SAFETY CODE, commonly known as the Texas Clean Air Act (TCAA) § 382.05195. This would authorize construction of a new facility that will emit air contaminants.

This registration, if granted, would authorize the applicant to construct and operate a permanent concrete batch plant (CBP). The facility would be located at 4000 Haslet-Roanoke Road, Roanoke, Tarrant County. Contaminants authorized under this registration would be particulate matter (PM), including road dust, aggregate, and cement. Sizes of particulate matter emitted would have the potential to be less than or

equal to 10 microns in aerodynamic diameter (PM₁₀), and particulate matter less than or equal to 2.5 microns in aerodynamic diameter (PM_{2.5}).

B. Procedural Background

The registration application was received on July 19, 2010, and declared administratively complete on August 4, 2010. The Notice of Receipt and Intent to Obtain an Air Quality Permit (first public notice) for this permit application was published on August 18, 2010 in the *Fort Worth Weekly* and re-published on March 10, 2011 in the *Fort Worth Star Telegram*. The Notice of Application and Preliminary Decision (second public notice) was published on October 13, 2010 in the *Fort Worth Weekly* and re-published on May 28, 2011 in the *Fort Worth Star Telegram*.

On September 1, 2010, Senator Jane Nelson requested the TCEQ conduct a public meeting. Two public meetings were held on November 16, 2010 and June 30, 2011 at John M. Tidwell Middle School, 3937 Haslet-Roanoke Road, Roanoke, Texas 76262. The notice of public meeting was published on October 13, 2010 in the *Fort Worth Weekly* and May 23, 2011 in the *Fort Worth Star Telegram*. The public comment period ended on June 30, 2011. On October 5, 2011, the ED filed his decision and Response to Public Comment, which the Office of Chief Clerk mailed on October 12, 2011. The deadline to request a contested case hearing was November 14, 2011.

TCEQ received timely comments and requests for a contested case hearing from Pamela Bach on February 24, 2011, Ashley and Dusty Messick on February 22, 2011, and Scott Taylor on September 14, 2011. OPIC recommends granting the hearing request submitted by Pamela Bach and denying the remaining requests.

II. Applicable Law

The ED declared this application administratively complete on August 4, 2010. 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., § 5 (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. 30 TAC § 55.203(a). 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).

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, 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

TCEQ received hearing requests from Pamela Bach on February 24, 2011, Ashley and Dusty Messick on February 22, 2011, and Scott Taylor on September 14, 2011. All requests were timely submitted. OPIC recommends granting Pamela Bach's request, as her permanent residence is located less than 440 yards from the proposed facility. OPIC recommends denying the remaining hearing requests.

Pamela Bach requests a contested case hearing and states that she lives within 183 yards of the proposed facility. She is concerned that the proposed facility would impact the health of her grandchild, who suffers from severe allergies, as well as the health of others living nearby. She is also concerned about the proximity of a middle school to the proposed facility, and the impact this proposed facility would have upon children attending the school.

Ms. Bach's home is located less than 440 yards from the proposed facility, as required by TEX. HEALTH & SAFETY CODE § 382.058(c). See P & L Cast Stone Inc., Standard Permit Registration No. 93109, 2011-2114-AIR, Map Requested by TCEQ Office of Legal Services for Commissioners' Agenda (March 7, 2012) (ED's Map)

(Attached as Exhibit A). Therefore OPIC concludes she is entitled to a contested case hearing based on the location of his residence in relation to the proposed facility.

Ashley and Dusty Messick state that they live within 200 yards of the proposed facility and have a daughter with severe lung conditions and sensitivity to air pollutants. They are concerned about air contaminants from the proposed facility that may adversely impact their daughter and Ashley Messick.

The Messick home appears to be located more than 440 yards from the proposed facility. *See ED's Map*. Therefore OPIC concludes that they are not entitled to a contested case hearing based on the location of his residence in relation to the facility. TEX. HEALTH & SAFETY CODE § 382.058(c).

Scott Taylor has requested a contested case hearing, and raises concerns about traffic, air, noise and light pollution from the proposed facility, health risks associated with the proposed emissions, water usage associated with the proposed facility, and road damage from trucks travelling to and from the proposed facility.

Scott Taylor's home is located more than 440 yards from the proposed facility. *See ED's Map*. Therefore OPIC concludes that he is not entitled to a contested case hearing based on the location of his residence in relation to the facility.

TEX. HEALTH & SAFETY CODE § 382.058(c).

B. Issues Raised in the Hearing Request

The following issues have been raised in Pamela Bach's hearing request:

1. Whether the proposed facility would impact air quality and the health of individuals living nearby.
2. Whether the proposed facility would impact the individuals attending John M Tidwell Middle School.

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 requester and the ED on the issues raised in the hearing request.

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 appropriate for referral to SOAH.

F. Relevant and Material Issues

Pamela Bach’s hearing request raises 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, 248–51 (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. 477 U.S. at 248–51.

In general, most of the issues are relevant and material because they are governed by the substantive law under which this permit is issued and raise questions about the draft permit or application that ultimately relate to air quality. 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. The Commission may grant a preconstruction permit only if it finds there is “no indication that the emissions from the facility will contravene the intent of this chapter, including protection of the public’s health and physical property.” TEX. HEALTH & SAFETY CODE § 382.0518(b)(2). 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. Furthermore, “in considering the issuance of a permit to construct or modify a facility within 3,000 feet of an elementary, junior high, or senior high school, the commission shall consider possible adverse short-term or long-term side effects of air contaminants or nuisance odors from the facility on the individuals attending the school facilities.” TEX. HEALTH & SAFETY CODE § 382.052.

G. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

1. Whether the proposed facility would impact air quality and the health of individuals living nearby.
2. Whether the proposed facility would impact the individuals attending John M Tidwell Middle School.

H. Maximum Expected Duration of Hearing

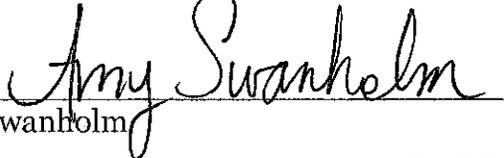
Commission Rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year 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 nine months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. Conclusion

OPIC recommends granting the hearing request from Pamela Bach on the issues referenced in Section III.G above, and denying the remaining requests. OPIC further recommends a hearing duration of nine months.

Respectfully submitted,

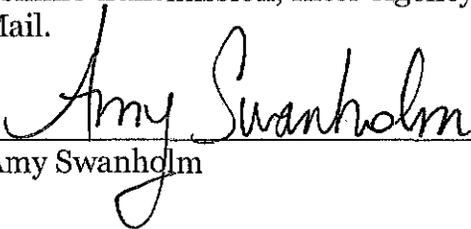
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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2012 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

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TCEQ DOCKET NO. 2011-2114-AIR

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