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Toby Baker, *Commissioner*
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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 9, 2014

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: TEX-MIX PARTNERS, LTD.
TCEQ DOCKET NO. 2014-0525-AIR**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Isabel Segarra".

Isabel G. Segarra Treviño, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2014-0525-AIR

**IN THE MATTER
OF THE APPLICATION OF
TEX-MIX PARTNERS, LTD., FOR
PERMIT
NO. 109839**

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§

**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

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

Tex-Mix Partners, Ltd. (Applicant or Tex-Mix) has applied to TCEQ for a standard permit registration under the Texas Clean Air Act (TCAA),¹ to authorize construction and operation of a permanent concrete batch plant. The proposed site is located on the east side of Highway 281, approximately 0.5 mile south of the intersection with Rebecca Creek Road, Bulverde, Comal County. The standard permit registration would authorize the facility to emit the following air contaminants: dust, aggregate, cement, and particulate matter – including particulate matter with aerodynamic diameters of 10 micrometers or less (PM₁₀) and 2.5 micrometers or less (PM_{2.5}).

¹ TEX. HEALTH & SAFETY CODE § 382.05195.

B. Procedural Background

TCEQ received this application on April 30, 2013. On May 3, 2013, 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 in English on May 24, 2013 in the *San Antonio Express-News* and in Spanish on May 25, 2013 in *El Norte*. The ED completed the technical review of the application, and prepared a draft permit. The Notice of Application and Preliminary Decision for an Air Quality Permit (NAPD) was published on July 25, 2013 in the *San Antonio Express-News* and in Spanish in *El Norte*. A public meeting was held in Spring Branch on June 27, 2013. Notice of the public meeting was sent out to interested persons on June 14, 2013. The public comment period ended on August 26, 2013. On February 26, 2014, the ED filed its Response to Comments (RTC). The ED issued its decision on March 6, 2014 resulting in no amendments to the permit application. The deadline to request a contested case hearing was April 7, 2014.

TCEQ received timely comments and requests for a contested case hearing from Annette and Emery Gass. OPIC recommends granting this hearing request. Numerous people filed hearing requests,² some of these requestors stated that they are located within 440 yards of the facility; however, from the best information available to OPIC, these requestors are located more than 440 yards from the facility.³ For these reasons, and as more fully discussed below, OPIC recommends granting only the hearing request of Annette and Emery Gass.

² OPIC also received timely hearing requests from Rita Acker, Becky P. and Sid W. Atkinson, Angela and Robert Butler, Erica Colston, Janie Colston and William Colston, Sr, Lillya Colston, William Colston, Donna and Ron Deage, Rhonda Gass Luman, Diana Hager, June and Johnny Henke, Diane Kime, Marilyn Pozero, Juanita and Steve Proffitt, Sharon Smith, Trudy and Jay Thomas, Barbara Welch, Kristen and William Wessale, and James Wollmann.

³ Tex-Mix Partners, Ltd., Standard Permit Registration No. 109839, Map Requested by TCEQ Office of Legal Services for Commissioners (ED's Map) (Attached as Exhibit A).

II. APPLICABLE LAW

This application was declared administratively complete on May 3, 2013. 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.⁴

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.⁵

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."⁶ This justiciable interest does not include an interest common to the general public.⁷ Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons.⁸ 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;

⁴ TEX. HEALTH & SAFETY CODE § 382.056(n).

⁵ 30 TEX. ADMIN. CODE (TAC) Ch. 55.201(d).

⁶ 30 TAC Ch. 55.203(a).

⁷ Id.

⁸ 30 TAC Ch. 55.203(b).

- (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.⁹

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] § 382.056 as a person who may be affected.”¹⁰

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.¹¹

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.¹²

⁹ 30 TAC Ch. 55.203(c).

¹⁰ TEX. HEALTH & SAFETY CODE § 382.058(c).

¹¹ 30 TAC Ch. 55.211(c).

¹² 30 TAC Ch. 55.209(e).

III. DISCUSSION

A. Determination of Affected Person Status

Annette and Emery Gass filed a timely request for a contested case hearing. The Gasses state that they live at 12471 U.S. Highway 281 North, Spring Branch, Texas 78070. Mr. Gass has chronic obstructive pulmonary disease (COPD). His treatment includes medications, oxygen from six to eight hours a day, and avoiding outdoor exposure on air quality alert days. The Gasses grow and sell hay made from grass and alfalfa grown on their property. They also keep cattle and three fish stock ponds on their property, which they fish for personal consumption. The Gasses request a hearing to address the following concerns: 1) how the proposed facility will impact Mr. Gass' COPD, 2) how dust particles from the proposed facility will impact the Gasses' livestock and wildlife on the property, 3) how the run-off water from the proposed facility will impact livestock water consumption and watering.

It appears that the Gasses' residence is within 440 yards¹³ of the proposed facility as required by TEX. HEALTH & SAFETY CODE § 382.058(c). The Gasses raise valid concerns about the proposed facility; OPIC concludes they are entitled to a contested case hearing based on the location of their residence in relation to the facility.

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 Annette and Emery Gass with respect to their health, agricultural crops, livestock, and wildlife present on their property;
2. Whether the proposed facility will adversely affect livestock water consumption and watering.

¹³ Attached as Exhibit A.

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.¹⁴

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.¹⁵ 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 Chapters 55.201(d)(4) and 55.211(c)(2)(A). 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.¹⁶ Relevant and material issues are those governed by the substantive law under which this permit is to be issued.¹⁷

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

¹⁴ 30 TAC Chapters 55.201(c) & (d)(4), 55.211(c)(2)(A).

¹⁵ 30 TAC Ch. 55.211(c)(2)(A).

¹⁶ *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").

¹⁷ *Id.*

enjoyment of air resources by the public and the maintenance of adequate visibility.”¹⁸ 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.”¹⁹

Issue No. 1 raises relevant and material issues related to air quality and effects on human health, animal life, and vegetation. Accordingly, Issue No. 1 is appropriate for referral to SOAH.

Issue No. 2 is not relevant and material because this issue does not pertain to air quality and is outside the jurisdiction of the Commission in processing this air permit registration.

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 will adversely affect residents’ health, agricultural crops, livestock, and wildlife present on the property.

H. Maximum Expected Duration of Hearing

Commission Rule 30 TAC Ch. 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 Ch. 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.

¹⁸ TEX. HEALTH & SAFETY CODE § 382.002.

¹⁹ 30 TAC Ch. 101.4.

IV. REQUESTS FOR RECONSIDERATION

Any person may file a request for reconsideration of the ED's decision.²⁰ The request must be in writing and filed with the Chief Clerk no later than thirty days after the Chief Clerk mails the ED's decision and response to comments.²¹ The request must expressly state that the person is requesting reconsideration of the ED's decision and give reasons why the decision should be reconsidered.²²

In addition to requesting a hearing, several individuals also requested reconsideration of this application. Becky P. and Sid W. Atkinson raise an issue with the notice; specifically, the Atkinsons are concerned about the circulation of the *San Antonio Express-News Newspaper* in the Bulverde area. Juanita and Steve Proffitt cite health concerns in their request for reconsideration. Kristen and William Wessale also submitted a request for reconsideration citing dissatisfaction with responses in the ED's RTC.

OPIC recommends denying the Atkinson's request for reconsideration. The *San Antonio Express-News Newspaper* is a newspaper published in San Antonio, Texas with statewide circulation. The unincorporated area of Bulverde affected by this application is an estimated twenty miles north of San Antonio. The use of the *San Antonio Express-News Newspaper* complies with the circulation requirements pursuant 30 TAC Ch. 39.5(g) because it is the newspaper with the highest circulation in the area.

OPIC recommends denying the Proffitt's and the Wessale's requests for reconsideration. While the Proffitt's raise valid health concerns, these do not address specific deficiencies with the application. Further, OPIC finds that the ED's RTC addressed the issues raised, using the best available information, to the fullest extent possible. To the extent that any such requests

²⁰ 30 TAC Ch. 55.201(e).

²¹ Id.

²² Id.

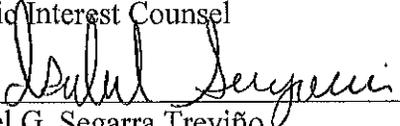
raise substantive issues affecting human health or the environment that could be addressed under the TCAA, an evidentiary hearing would be required to develop a record on such issues. Therefore, at this time, OPIC cannot recommend granting these requests for reconsideration.

V. CONCLUSION

OPIC recommends granting Annette and Emery Gass's hearing request and denying all remaining requests. OPIC recommends referring Issue No. 1 referenced above in § III.G to SOAH, with a hearing duration of six months. Furthermore, OPIC also recommends denial of all requests for reconsideration.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2014 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.


Isabel G. Segarra Treviño

Response to Requests for Contested Case Hearing

Tex-Mix partners, Ltd.

Map Requested by TCEQ Office of Legal Services
for Commissioners' Agenda



Protecting Texas by
Reducing and
Preventing Pollution

Texas Commission on Environmental Quality
GIS Team (Mail Code: 197)
P.O. Box 13987
Austin, Texas 78711-3087

May 6, 2014

Projection: Texas Centric Mapping System
Albers (TCMS-A), meters
Scale: 1:8,282

Facility
 440 yd radial distance
from the facility

Requestor Locations

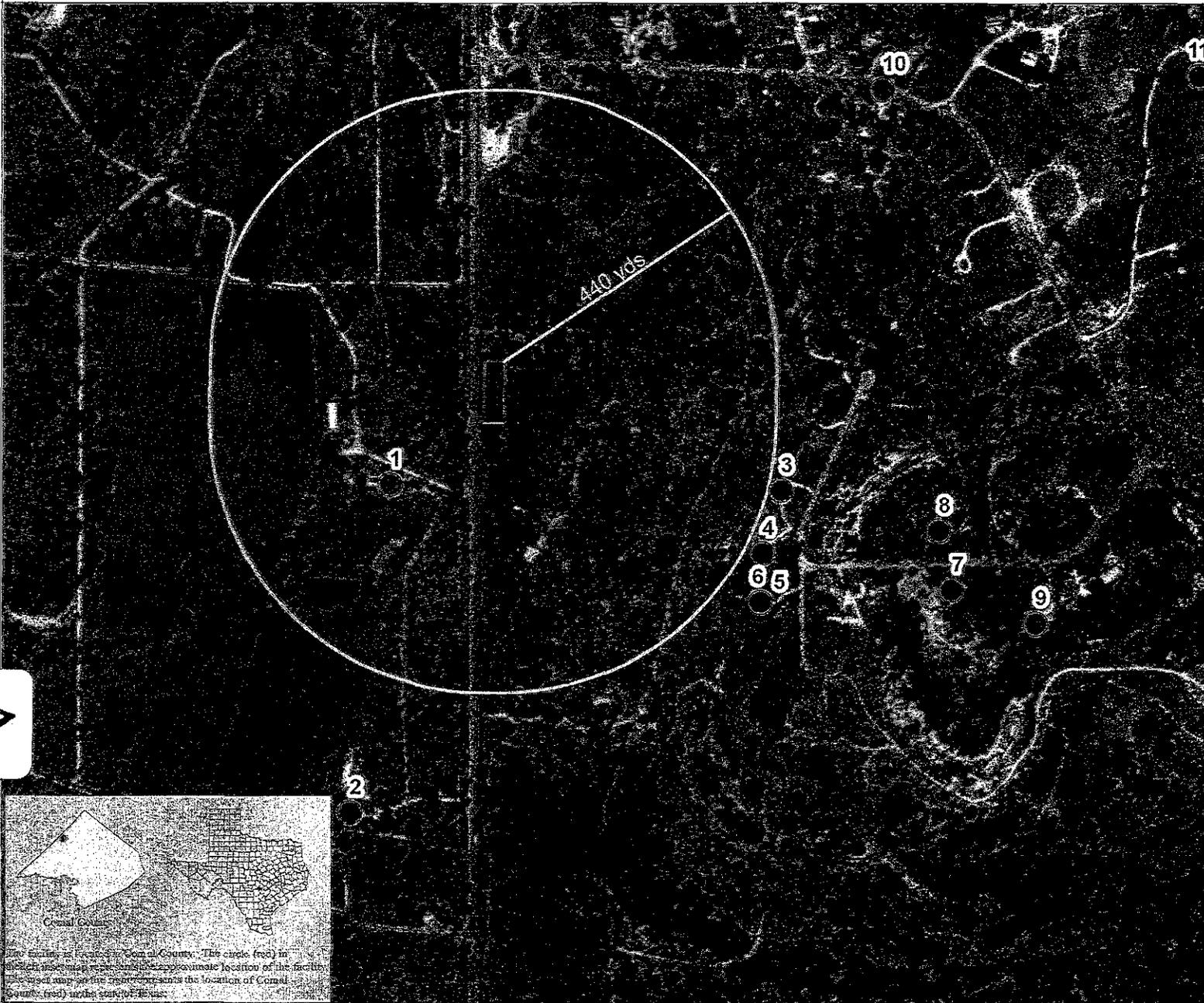
- | | |
|----|---|
| 1 | A. Gass, E. Gass |
| 2 | Acker |
| 3 | J. Colston, W.H. Colston
E. Colston, L. Colston, |
| 4 | W. Colston |
| 5 | Hager |
| 6 | Proffitt |
| 7 | A. Butler, R. Butler |
| 8 | K. Wessale, W. Wessale |
| 9 | Smith |
| 10 | B. Atkinson, S. Atkinson |
| 11 | Welch |

Yards
0 150 300

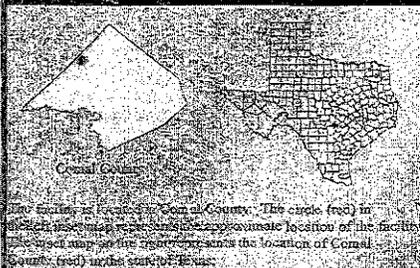
Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestor information from the requestor. The background imagery of this map is from the current Environmental Systems Research Institute (ESRI) map service, as of the date of this map.

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.

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MAILING LIST
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TCEQ DOCKET NO. 2014-0525-AIR

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