Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Zak Covar, Commissioner
Richard A. Hyde, P.E., *Executive Director*

Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 6, 2015

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: HOLCIM TEXAS LIMITED PARTNERSHIP
TCEQ DOCKET NO. 2015-0460-AIR

Dear Ms. Bohac:

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

Sincerely,

Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

DOCKET NO. 2015-0460-AIR

APPLICATION BY HOLCIM TEXAS LIMITED PARTNERSHIP AIR PERMIT NOS. 8996 & PSDTX454M4	**§ § § §**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO HEARING REQUEST

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 the hearing request in the above-captioned matter.

I. Background

On June 2, 2014, Holcim Texas Limited Partnership ("Holcim" or "Applicant") applied to TCEQ to modify the air permits for its Portland Cement Plant located at 1800 Dove Lane in Midlothian, Ellis County. Holcim seeks to control total hydrocarbons (THC) by adding selective catalytic reduction (SCR) to Kiln 1 and a regenerative thermal oxidizer (RTO) to Kiln 2. This proposed project will result in an overall reduction of THC from the Midlothian plant. However, this project will also cause collateral emission increases of sulfuric acid and particulate matter.

The application was declared administratively complete on June 4, 2014, and the first newspaper notice was published June 11, 2014 in the *Midlothian Mirror* and June 16, 2014 in *La Prensa Comunidad.* The first notice was republished June 30, 2014 in *La Prensa Comunidad* and July 2, 2014 in the *Midlothian Mirror* to correct formatting errors in the initial publication. The second newspaper notice was published October

22, 2014 in the *Midlothian Mirror* and October 30, 2014 in *La Prensa Comunidad.* TCEQ held a public meeting November 3, 2014 in Midlothian, and the public comment period closed December 1, 2014. The Executive Director's (ED) Response to Comments (RTC) was mailed February 19, 2015, and the deadline to request a contested case hearing was March 23, 2015.

Downwinders at Risk, Grace Darling, Patricia Brown, and Sue Pope submitted timely hearing requests. All of the hearing requestors except Sue Pope subsequently withdrew their hearing requests. For the reasons stated herein, OPIC respectfully recommends the Commission deny Sue Pope's hearing request.

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 § 55.211(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 Request

A. Whether the requestor is an affected person

Sue Pope states that she is a rancher in Midlothian and lives less than a mile from the Holcim property. She also states that three schools are in close proximity to the plant property. Ms. Pope feels it is very important that the best available technology (SCR) be employed at the plant. She states that Holcim's emissions are a major source of air pollution in her community, and they affect her health, welfare, and enjoyment of her property.

Although Ms. Pope states in her hearing request that she lives less than a mile from the Holcim property, a map prepared by ED staff shows Ms. Pope at a location over 3 miles from the facility. If Ms. Pope can clarify the record regarding her location relative to the Holcim plant, OPIC encourages her to do so in a reply to this response.

The intervening distance between Ms. Pope and the Holcim plant diminishes the likelihood that the regulated activity will impact her health, safety, or use of property.[1] The intervening distance also makes it difficult to distinguish Ms. Pope's interest from an interest common to members of the general public.[2] By rule, Ms. Pope must show that she is an "affected person" who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application and

[1] *See* 30 TAC § 55.203(c)(4).
[2] *See* 30 TAC § 55.203(a).

distinguish that interest from an interest common to the general public.[3] She has failed to do so, and therefore, OPIC cannot find that she is an affected person in this matter.

B. Which issues raised in the hearing request are disputed

All of the issues raised in Ms. Pope's hearing request 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 request is based on issues raised solely in a public comment which has been withdrawn

The hearing request is not 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

BACT

Ms. Pope wants Holcim to use the best available control technology (BACT). Under the Texas Clean Air Act, Holcim is required to use BACT.[4] The issue of BACT is therefore relevant and material to the Commission's decision on this application.

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[3] *Id.*

[4] *See* TEX. HEALTH & SAFETY CODE § 382.0518(b)(1).

Air Pollution

Ms. Pope states that Holcim's emissions are a major source of air pollution, and they affect her health, welfare, and enjoyment of her property. Under the Texas Clean Air Act, the Commission may issue this permit amendment only if it finds no indication that the emissions from the facility will contravene the intent of the Texas Clean Air Act, including protection of the public's health and physical property.[5] Further, 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, consistent with the protection of public health, general welfare, and physical property.[6] Therefore, air pollution is an issue which is relevant and material to the Commission's decision on this application.

IV. Conclusion

Having found that Sue Pope does not qualify as an affected person in this matter, OPIC respectfully recommends the Commission deny her hearing request. OPIC does not recommend a hearing. However, if the Commission chooses to refer this case for a hearing at the State Office of Administrative Hearings (SOAH), the following relevant and material issues could appropriately be referred.

- Whether Applicant proposes and the draft permit requires BACT?
- Whether Applicant proposes and the draft permit allows emissions which will cause or contribute to a condition of air pollution?
- Whether Applicant proposes and the draft permit allows air emissions which will adversely impact health, welfare, or physical property?

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[5] *See* TEX. HEALTH & SAFETY CODE § 382.0518(b)(2).
[6] *See* TEX. HEALTH & SAFETY CODE § 382.002(a).

If this matter is referred to SOAH, OPIC recommends a hearing duration of six months from the first day of the preliminary hearing to issuance of the proposal for decision.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2015, 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 T. Arthur

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TCEQ DOCKET NO. 2015-0460-AIR

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