

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Jon Niermann, *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

October 9, 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: COASTAL READY MIX, INC.
TCEQ DOCKET NO. 2015-1263-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 "Rudy Calderon".

Rudy Calderon, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



TCEQ DOCKET NO. 2015-1263-AIR

**IN THE MATTER
OF THE APPLICATION OF
COASTAL READY MIX, INC FOR
STANDARD PERMIT
REGISTRATION
NO. 123775**

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§

**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

Coastal Ready Mix, Inc. (Coastal or Applicant) has applied to the TCEQ for a Standard Permit registration under Texas Clean Air Act (TCAA) § 382.05195. This registration will authorize the Applicant to construct and operate a permanent concrete batch plant (Facility). The Facility would be located near Kountze, Hardin County. The following driving directions were provided: from the intersection of Wheeler Road and Highway 69 travel north 4.4 miles, and the property is on the east side of Highway 69. Contaminants authorized under the Standard Permit include road dust, aggregate, cement, and particulate matter (PM), including PM with aerodynamic diameters of 10 micrometers or less (PM₁₀) and 2.5 micrometers or less (PM_{2.5}).

B. Procedural Background

The TCEQ received this application on September 17, 2014. On October 6, 2014, the Executive Director (ED) of TCEQ declared the application administratively complete. The

Notice of Receipt and Intent to Obtain an Air Quality Permit (NORI) was published in English on October 15, 2014 in the *Hardin County News* and in Spanish on October 12, 2014 in *El Perico*. The ED completed the technical review of the application, and found that the requirements for the registration had been satisfied. The Notice of Application and Preliminary Decision for an Air Quality Permit (NAPD) was published on December 17, 2014 in English in the *Hardin County News* and in Spanish on December 14, 2014 in *El Perico*. A public meeting was held in Lumberton, TX on March 26, 2015. The public comment period ended at the close of the public meeting. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on July 6, 2015. The deadline to request a contested case hearing was August 5, 2015.

The Commission received numerous comments and four timely requests for a contested case hearing. Requests were received from Mike Greene, Jerry Richardson, Quinton David Sheffield, and Henry Stephenson. From the best information available to OPIC, all the requestors reside within 440 yards of the Facility. Executive Director's Map, Exhibit A. OPIC recommends granting the hearing requests of the all the requestors.

II. APPLICABLE LAW

This application was declared administratively complete on October 6, 2014. Because this application was declared administratively complete after September 1, 1999, it is subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999). 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).

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.” This justiciable interest does not include an interest common to the general public.

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.

The TCAA provides that for a concrete plant registered under a Standard Permit “only those persons actually residing in a permanent residence within 440 yards [$\frac{1}{4}$ mile] of the proposed plant may request a hearing under [TEX. HEALTH & SAFETY CODE] § 382.056 as a person who may be affected.” TEX. HEALTH & SAFETY CODE (THSC) § 382.058(c).

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

Section 382.058(c) of the Texas Health and Safety Code limits affected person status to only those individuals actually residing within 440 yards of the proposed facility. OPIC finds that all of the requestors reside within 440 yards of the Facility and filed timely requests that substantially comply with the procedural requirements for a contested case hearing. OPIC finds that Mike Greene, Jerry Richardson, Quinton David Sheffield, and Henry Stephenson are affected persons.

Mike Greene

Mr. Greene is concerned (1) that the proposed Facility will adversely affect his health, specifically his heart condition and high blood pressure, (2) that the Facility will adversely affect the use and enjoyment of his property, (3) that Facility can expand at the site, and (4) that the Facility could increase its hours of operation. Mr. Greene raises issues about health and safety, and, the use of his property. Because Mr. Greene is within 440 yards of the Facility and raises issues that are not common to the general public, OPIC finds that Mr. Greene is an affected person.

Jerry Richardson

Mr. Richardson is concerned (1) that the proposed Facility will adversely affect his family's health, specifically his wife who suffers from environmental allergies and his young children, (2) that the Facility will contaminate his groundwater supply, and (3) that the Facility will over pump groundwater and cause nearby wells to run dry. Groundwater contamination and over-pumping are, respectively, outside the scope of this permitting action and outside the jurisdiction of the Commission. However, Mr. Richardson's remaining concern raises issues about health and safety. Because Mr. Richardson is within 440 yards of the Facility and raises issues that are not common to the general public, OPIC finds that Mr. Richardson is an affected person.

Quinton David Sheffield

Mr. Sheffield is concerned (1) that the dust and airborne pollutants from the proposed facility will affect his asthma and chronic sinusitis, as well as (2) that runoff from the facility will contaminate groundwater. Groundwater contamination is outside the scope of this air permitting action. However, Mr. Sheffield raises issues about health and safety. Because Mr. Sheffield is within 440 yards of the Facility and raises issues that are not common to the general public, OPIC finds that Mr. Sheffield is an affected person.

Henry Stephenson

Mr. Stephenson is concerned that the dust and particulate matter from the proposed Facility will affect his severe allergies. Mr. Stephenson raises issues about health and safety. Because Mr. Stephenson is within 440 yards of the Facility and raises issues that are not common to the general public, OPIC finds that Mr. Stephenson is an affected person.

B. Issues Raised in the Hearing Requests

The hearing requests raise the following issues:

1. Whether the proposed Facility will adversely affect health and safety, particularly children, the elderly, and individuals with preexisting serious health conditions (i.e. allergies, asthma, heart conditions, high blood pressure, and sinusitis).
2. Whether the proposed Facility will adversely affect the use and enjoyment of requestor's property.
3. Whether runoff from the proposed facility will contaminate groundwater.
4. Whether the proposed Facility will over pump groundwater and cause nearby wells to run dry.
5. Whether the proposed Facility may expand at the site.
6. Whether the proposed may increase its hours of operation.

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) & (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

There is no agreement between the hearing requestors and the ED on the issues raised in the hearing requests, thus, the issues remain disputed.

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). Issues No. 5 and No. 6 are questions of law and addressed by the Executive Director in his Response to Comments. With the exception of Issues No. 5 and No. 6, the remaining issues are issues of fact.

F. Relevant and Material Issues

The hearing requests raises issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 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. Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–51 (1986).

The 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.” THSC § 382.002. 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.

Issues No. 1 and No. 2 in § III.B are relevant and material issues because they relate to the effects of air quality on human health, and, the use and enjoyment of property. Accordingly, Issues No. 1 and No. 2 are appropriate for referral to SOAH. Issue No. 3 is not relevant and material because impacts on groundwater are outside the scope of the TCAA. Issue No. 4 is not relevant and material because it is outside the Commission's jurisdiction.

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 health and safety, particularly children, the elderly, and individuals with preexisting serious health conditions (i.e. allergies, asthma, heart conditions, high blood pressure, and sinusitis)?
2. Whether the proposed Facility will adversely affect the use and enjoyment of requestor's property?

H. Maximum Expected Duration of Hearing

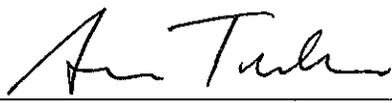
Commission Rule 30 TAC § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year 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 § 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 requests of Mike Greene, Jerry Richardson, Quinton David Sheffield, and Henry Stephenson because they are affected persons. Further, OPIC recommends referring Issues No. 1 and No. 2 referenced above in § III.G for a contested case hearing.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: 

Aaron B. Tucker

Assistant Public Interest Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2015 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.



Aaron B. Tucker

Executive Director's Map

Exhibit A

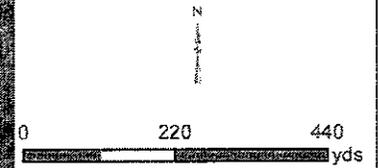
Coastal Ready Mix Hearings Requesters

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

Date: 9/28/2015



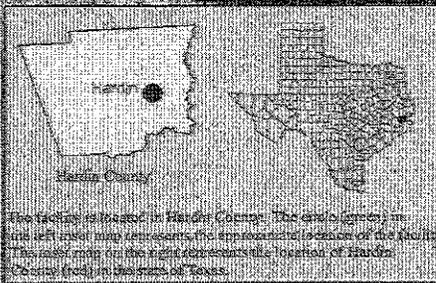
- Facility Footprint
- Facility Property Boundary
- 440 yd radial distance from footprint
- Requester

- ID Name
- 1 Sheffield
 - 2 Stephenson
 - 3 Greene
 - 4 Richardson

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.

CRF 461346



The facility is located in Hardin County. The circle's center in the left inset map represents the approximate location of the facility. This inset map on the right shows the location of Hardin County (red) in the state of Texas.

MAILING LIST
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TCEQ DOCKET NO. 2015-1263-AIR

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FOR ALTERNATIVE DISPUTE
RESOLUTION

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REQUESTERS:

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