

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

June 13, 2016

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: VULCAN CONSTRUCTION MATERIALS, LLC
TCEQ DOCKET NO. 2016-0788-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 "Aaron Tucker".

Aaron Tucker, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2016-0788-AIR

IN THE MATTER	§	BEFORE THE
OF THE APPLICATION OF	§	
VULCAN CONSTRUCTION	§	TEXAS COMMISSION ON
MATERIALS, LLC FOR AIR	§	
QUALITY PERMIT NO. 92565L004	§	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

Vulcan Construction Materials, LLC (Vulcan or Applicant) has applied to the TCEQ for a New Source Review Authorization under Texas Clean Air Act (TCAA) § 382.0518. This permit would authorize the Applicant to construct and operate a rock crushing plant. The rock crushing plant is currently authorized by Permit No. 92565L002, which is a portable rock crusher, and no portable facility had been subject to public notice at the proposed site within the previous two years; therefore, public notice was required. The Applicant represented that no changes to the currently permitted plant operations, emission controls, character of emissions, emission rates, or previous representations would occur.

The plant would consist of crushers, screens, hoppers, conveyors, engines, and stockpiles and would be located at 1111 Gilbert Pit Road near Millsap, Parker County. Contaminants authorized under this permit include particulate matter, including particulate matter (PM) with

diameters of 10 micrometers or less (PM10) and 2.5 micrometers or less (PM2.5), carbon monoxide (CO), nitrogen oxides (NOX, defined as the sum of NO and NO2, collectively expressed as NOx), sulfur dioxide (SO2), and organic compounds (VOC).

B. Procedural Background

The TCEQ received this application on November 10, 2015. On November 13, 2015, 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 on November 19, 2015 in the *Weatherford Democrat*. The Notice of Application and Preliminary Decision for an Air Quality Permit (NAPD) was published on January 29, 2016 in the *Weatherford Democrat*. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on April 18, 2016. The deadline to request a contested case hearing was May 18, 2016.

The Commission received comments and requests for a contested case hearing from two individuals, Marc K Hoster and Keith Hoster.

II. APPLICABLE LAW

This application was filed on or after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015).

Under Title 30, Texas Administrative Code (TAC) § 55.201(c), a hearing request by an affected person must be in writing, must be timely filed, may not be based on an issue raised solely in a public comment which has been withdrawn, and, for applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

Section 55.201(d) states that 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 by the requestor 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 ED's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; 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;
- (6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and

- (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

Under § 55.203(d), to determine whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the Commission may also consider the following:

- (1) the merits of the underlying application and supporting documentation in the administrative record, including whether the application meets the requirements for permit issuance;
- (2) the analysis and opinions of the ED; and
- (3) any other expert reports, affidavits, opinions, or data submitted by the ED, the applicant, or hearing requestor.

Under 30 TAC § 55.211(c)(2)(A)(i), a hearing request made by an affected person, on an application filed before September 1, 2015, shall be granted if the request 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 ED's RTC; and that are relevant and material to the commission's decision on the application.

For an application filed on or after September 1, 2015, § 55.211(c)(2)(A)(ii) provides that a hearing request made by an affected person shall be granted if the request raises disputed issues of fact that were raised by the affected person during the comment period, that were not withdrawn by filing a withdrawal letter with the Chief Clerk prior to the filing of the ED's RTC, and that are relevant and material to the Commission's decision on the application. Under § 55.211(c)(2)(B)-(D), the hearing request, to be granted, must also be timely filed with the Chief Clerk, pursuant to a right to hearing authorized by law, and comply with the requirements of § 55.201.

III. DISCUSSION

A. Determination of Affected Person Status

Marc K Hoster

Marc Hoster filed a timely comment and hearing request on December 17, 2015. He is concerned that the proposed Facility will: (1) adversely affect air quality near his home, and (2) result in noise pollution. Noise pollution is outside the scope of this permitting action and outside the jurisdiction of the Commission. However, Mr. Hoster's remaining concern about nearby air quality raises issues about health and safety. While Mr. Hoster states that the rock crusher will be "across the street from [his] home," the Weatherford address listed in his hearing request is nearly 10 miles away. *See* Exhibit A. Using only the address listed in the request, OPIC finds that Mr. Hoster is too far away from the facility to be affected. Given the description of the affected property in the request, however, the Weatherford address may not be the affected property. If Mr. Hoster can provide additional information in a reply documenting that the location of the affected property is different from the Weatherford address, OPIC may reconsider its position.

Keith Hoster

Keith Hoster submitted timely comments on December 14, 2015 and filed a timely hearing request on May 18, 2016. He is concerned that the proposed Facility will: (1) adversely affect air quality near his home, (2) negatively impact his family's health, (3) result in particulate matter and contaminates on his personal and real property, and (4) adversely affect the health of his livestock. All of Mr. Hoster's concerns raise issues about health and safety within the scope of the law. While Mr. Hoster states that he "lives across the road from the proposed site of a new rock crusher," the Gordon address listed in his hearing request is nearly 15 miles away. *See*

Exhibit A. Using only the address listed in the request, OPIC finds that Mr. Hoster is too far away from the facility to be affected. Given the description of the affected property in the comments and request, however, the Gordon address may not be the affected property. If Mr. Hoster can provide additional information in a reply documenting that the location of the affected property is different from the Gordon address, OPIC may reconsider its position.

In the event the Commission finds the requestors are affected persons, OPIC offers the following analysis set forth below.

B. Issues Raised in the Hearing Requests

The hearing requests raise the following issues:

1. Whether the proposed Facility will adversely affect the health and safety of requestors and their family.
2. Whether the proposed Facility will adversely affect the use and enjoyment of requestors' property.
3. Whether the proposed Facility will generate noise pollution.
4. Whether the proposed Facility will adversely affect the health of requestors' livestock.

C. Issues Raised in the Comment Period

Issues Nos. 1-3 raised in the hearing requests were raised in the comment period by the requestors and have not been withdrawn. 30 TAC §§ 55.201(c) & (d)(4)(B), 55.211(c)(2)(A). Issue No. 4 regarding livestock was not raised during the comment period.

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). All the issues raised by the requestors 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)(B) and 55.211(c)(2)(A)(ii). 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 as well as 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 noise is outside the scope of the TCAA. Issue No. 4 in § III.B is relevant and material because it relates to the effects of air quality on animal life. Accordingly, Issue No. 4 is appropriate for referral to SOAH.

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 the health and safety of requestors and their family.
2. Whether the proposed Facility will adversely affect the use and enjoyment of requestors' 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 six months from the first date of the preliminary hearing until the proposal for decision is issued.

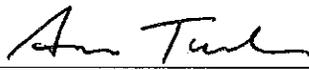
IV. CONCLUSION

For the reasons set forth above, OPIC respectfully recommends denying the hearing requests of Marc K Hoster and Keith Hoster because they are not affected persons. Should the

Commission disagree and find the requestors are affected persons, OPIC recommends referring Issues No. 1 and 2 referenced in § III.G for a contested case hearing.

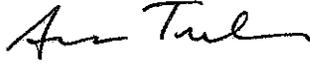
Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2016 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

For the July 6, 2016 Agenda: Application for Rock Crushing Plant Vulcan Construction Materials, LLC, Permit Number 92565L004

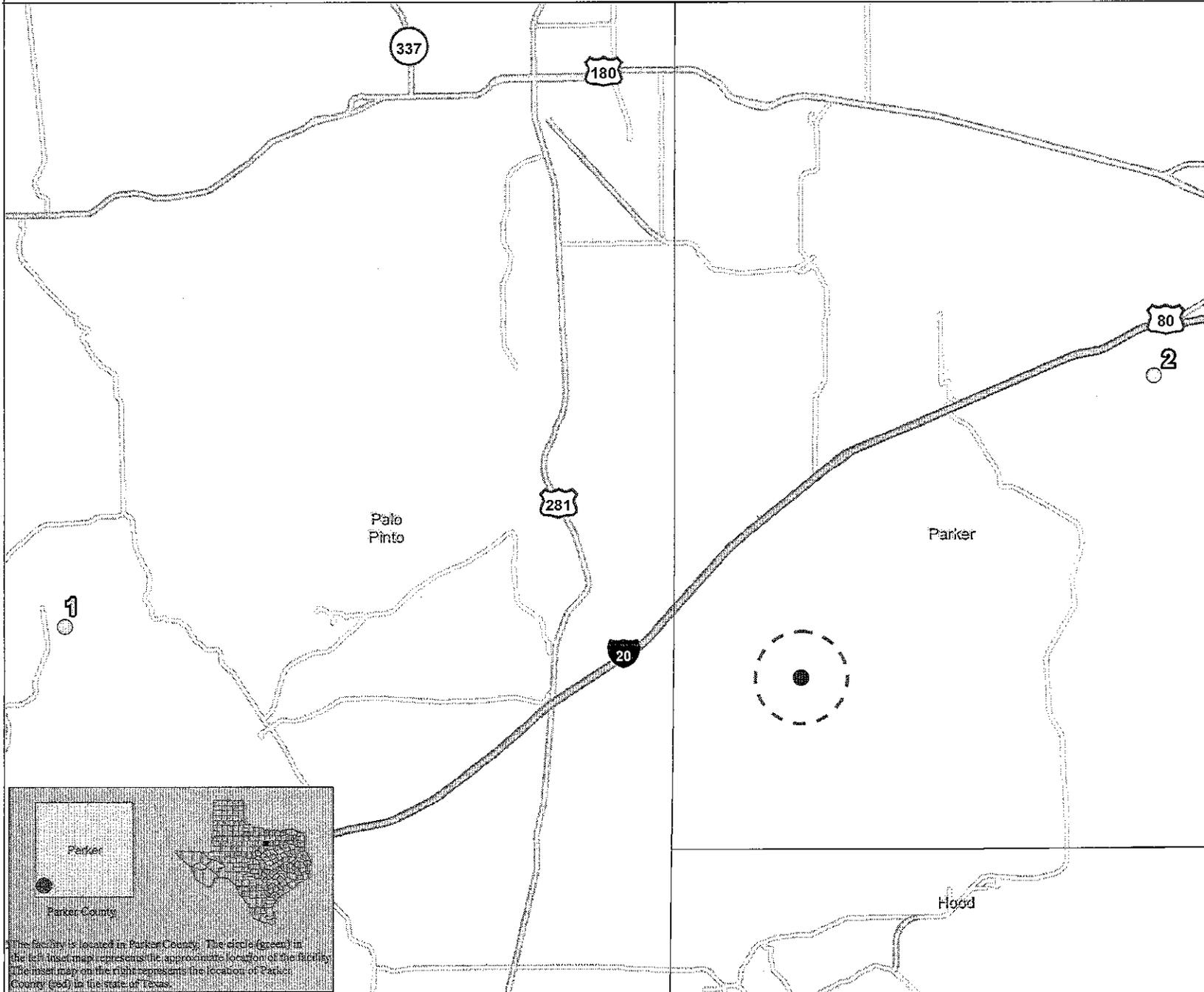
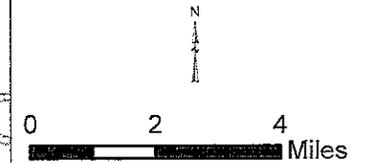
Map Requested by TCEQ Office of Legal Services
for Commissioners' Agenda



Protecting Texas by
Reducing and
Preventing Pollution

Texas Commission on Environmental Quality
GIS Team (Mail Code 197)
P.O. Box 13087
Austin, Texas 78711-3087

Date: 6/2/2016

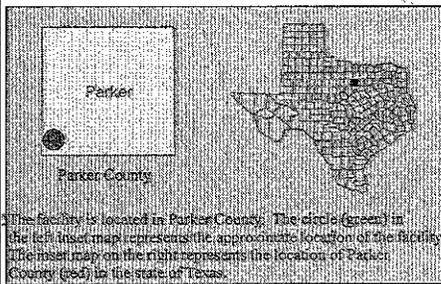


- Facility
- 1 mi. Radial Distance from Facility
- ==== Interstate
- ==== Major Highways
- Intermediate Roads
- County Boundary
- Requester

ID	NAME
1	Keith Hoster
2	Marc K. Hoster

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) 239-0800.



MAILING LIST
VULCAN CONSTRUCTION MATERIALS, LLC
TCEQ DOCKET NO. 2016-0788-AIR

FOR THE APPLICANT:

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FOR ALTERNATIVE DISPUTE

RESOLUTION

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TCEQ Alternative Dispute Resolution,
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