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January 29, 2009

Chairman Buddy Garcia  
Commissioner Larry R. Soward  
Commissioner Brian W. Shaw, Ph.D.  
Texas Commission on Environmental Quality  
12100 Park 35 Circle, Bldg. F  
Austin, TX 78753

**Re: Minor Exceptions to the ALJ's Proposal for Decision  
Application of Block Creek Concrete Products LLC  
SOAH Docket No. 582-08-4460  
TCEQ Docket No. 2008-1009-AIR**

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
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CHIEF CLERKS OFFICE

Dear Commissioners:

The following minor exceptions to the Administrative Law Judge's ("ALJ's") Proposal for Decision ("PFD") are presented on behalf of the applicant, Block Creek Concrete Products LLC, and its small business owners Burt and Susie Seidensticker. The applicant wishes to supplement the findings and conclusions in the proposed Order and briefly clarify one aspect of the PFD as set forth below.

First, the Seidenstickers are in fundamental agreement with the ALJ's PFD and proposed Order, which appropriately conclude that Mr. Dennis Spinelli – the only protesting party to actually appear at the hearing – is not an affected person within the meaning of 30 TEX. ADMIN. CODE § 55.203. Based on the Commission's interim Order and referral to SOAH, however, it is respectfully requested that Conclusion of Law No. 3 be supplemented to include the Texas Clean Air Act citation that is underlined below:

*"3. Based on the above Findings of Fact, Dennis Spinelli is not an affected person within the meaning of TEX. HEALTH & SAFETY CODE § 382.058(c) and 30 TEX. ADMIN. CODE § 55.203."*

Second, as a matter of understandable judicial economy, the ALJ did not reach the question of Mr. Spinelli's "permanent residence" because it was clear that all living quarters on his ranch property are more than 440 yards from the concrete batch plant. Aside from the distance, however, the preponderance of the credible evidence also demonstrated that

Mr. Spinelli was not actually residing in a permanent residence<sup>1</sup> on his ranch property near Comfort, Texas when he initially requested a contested case hearing approximately one year ago. The evidence indicates (and Mr. Spinelli did not deny under oath) that he owned a restaurant in distant Boerne, Texas, that he owned a residence adjacent to the restaurant in Boerne, that he claimed a homestead tax exemption on his residence in Boerne, and that he was registered to vote in Boerne. Nonetheless, Mr. Spinelli has been asserting that the cabana located on his ranch property (which is some distance from the main house at the ranch) is a permanent residence in which he actually resides. He presumably does so because the cabana is the closest structure to the concrete batch plant (which was operating when Mr. Spinelli bought his ranch). Mr. Spinelli's recent attempt to move his permanent residence sufficiently close to the concrete batch plant to confer standing has proven unsuccessful because, as the ALJ correctly found, even the cabana is more than 440 yards away from the plant. This "gaming" of the TCEQ hearing process (at the direct and substantial expense of a mom and pop operation) should be called-out in the agency's final Order. Accordingly, it is respectfully requested that the following Finding of Fact be included in the proposed Order:

"8. Mr. Spinelli was not actually residing in a permanent residence on his nearby property when he initially requested a contested case hearing."

Third, the PFD seems to indicate that Mr. Spinelli's consultant had rendered a competing expert opinion concerning the distance from Mr. Spinelli's house to the actual concrete batch plant. By way of clarification, Mr. Spinelli's consultant (who is not a licensed professional land surveyor or an air quality permitting consultant) had roughly estimated (using dated and inherently inaccurate Google<sup>®</sup> satellite imagery) that the cabana on Mr. Spinelli's property (not the main ranch house) was within 440 yards of some *disturbed soil* on the Seidensticker's property. Mr. Spinelli's consultant had assumed (mistakenly) that the area of disturbed soil comprised the concrete batch plant. The factual evidence demonstrated, however, that the Seidenstickers have their own permanent residence on the property, use the property for personal, recreational and business activities other than concrete batching, and perform all of their concrete batching operations in areas located further south (*i.e.*, away) from the spot arbitrarily selected by Mr. Spinelli's consultant. Additionally, during cross-examination, Mr. Spinelli's consultant commendably acknowledged that he had not accessed the property, was not an expert on air quality permitting matters, and would consider a ground survey by a professional surveyor to be a more reliable method of determining distance. Insofar as the applicant called a licensed professional land surveyor, an air quality permitting expert, and a TCEQ inspector to testify during the hearing – all of whom previously accessed the property – Mr. Spinelli did not actually provide any equivalent, competing expert testimony concerning the distance. No changes to the proposed Order are suggested in response to this point of clarification.

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<sup>1</sup> Tex. Health & Safety Code § 382.058(c) requires that Mr. Spinelli must be a person "actually residing in a permanent residence within 440 yards of the proposed plant." The statute does *not* say, "reside within 440 yards" or "reside in a permanent structure within 440 yards." Rather, it must be Mr. Spinelli's "permanent residence."

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Block Creek Concrete Products LLC – and Burt and Susie Seidensticker – respectfully request that the Commissioners adopt the ALJ's PFD and proposed Order (subject to the minor exceptions set forth above), deny the hearing request of Mr. Dennis Spinelli, and otherwise approve the pending application and air quality standard permit.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John J. Vay". The signature is written in a cursive style with a large initial "J".

John J. Vay

cc: Certificate of Service

**Certificate of Service**

I hereby certify that on January 29, 2009, a true and correct copy of the foregoing *Minor Exceptions to the ALJ's Proposal for Decision* was filed with the Chief Clerk of the Texas Commission on Environmental Quality (original and eleven copies) and served on the Administrative Law Judge and all parties in the manner indicated below:

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