State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

January 9, 2009

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2009 JAN -9 PM 4: 11
CHIEF CLERKS OFFICE

Les Trobman, General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-08-4460; TCEQ Docket No. 2008-1009-AIR; In Re: Concerning the Application by Block Creek Concrete Products, LLC for Issuance of Air Quality Standard Registration No. 83958

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than January 29, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than February 9, 2009.

This matter has been designated **TCEQ Docket No. 2008-1009-AIR; SOAH Docket No. 582-08-4460**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

Tommy L. Broyles
Administrative Law Judge

TLB/ls
Enclosures
xc: Mailing List

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: BLOCK CREEK CONCRETE PRODUCTS, LLC

SOAH DOCKET NUMBER: 582-08-4460

REFERRING AGENCY CASE: 2008-1009-AIR

STATE OFFICE OF ADMINISTRATIVE HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ TOMMY L. BROYLES

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xc: Docket Clerk, State Office of Administrative Hearings

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2009 JAN -9 PM 4: 11

CHIEF CLERKS OFFICE

SOAH DOCKET NO. 582-08-4460
TCEQ DOCKET NO. 2008-1009-AIR

CONCERNING THE APPLICATION BY BLOCK CREEK CONCRETE PRODUCTS, LLC FOR ISSUANCE OF AIR QUALITY STANDARD REGISTRATION NO. 83958	§ § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

I. INTRODUCTION

Block Creek Concrete Products, LLC, (Block Creek or Applicant) applied for an Air Quality Standard Registration, Number 83958, to authorize construction of a permanent specialty concrete batch plant to be located at 444 FM Old Number 9 Highway A, near Comfort, Kendall County, Texas. The primary purpose of the plant is to manufacture concrete for septic tanks, water storage tanks, and electrical pads. The materials to be mixed include, but are not limited to, sand, aggregate, cement, and water. The concrete is mixed and poured into the appropriate forms on site. The ALJ recommends the Texas Commission on Environmental Quality (Commission) find there is no protesting party with a jurisdictional interest, so this matter should be referred to the Executive Director and processed as uncontested.

II. PROCEDURAL HISTORY

Block Creek's application was filed on January 23, 2008, and was declared technically complete by the Executive Director of the Commission (ED) on February 7, 2008. Requisite notices were published and the Commission referred the hearing requests of Mickey V. Bush and Dennis Spinelli to the State Office of Administrative Hearings (SOAH) for determination of whether they are affected parties in accordance with the distance limitation found in Section 382.058(c) of the Texas Clean Air Act (TCAA).[1] The Commission further instructed that only if one of these individuals was found to satisfy the distance requirement should this case proceed to

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[1] TEXAS HEALTH AND SAFETY CODE §382.058(C).

a contested case hearing on the relevant and material issues. A hearing concerning these hearing requests was conducted on October 20, 2008.

On October 28, 2008, Applicant requested that if no legal standing be found, this matter be dismissed from the SOAH docket and remanded to the ED pursuant to 30 TEX. ADMIN. LAW §80.101. The ALJ then issued Order No. 2, *Notice of Intent to Deny Party Status and to Remand to the Executive Director*. On December 14, 2008, the ED filed a motion suggesting that the matter should be returned to the Commission with a proposal for decision (PFD). Applicant again requested the matter be dismissed and remanded. The ALJ then prepared this PFD.[2]

III. APPLICABLE LAW

The rule at 30 TEX. ADMIN CODE § 55.201 provides that an affected person may request a contested case hearing. To qualify as an affected person, a person must have "a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application."[3] More specific to this case, the Texas Clean Air Act has limited a justiciable interest in concrete batch plants to, "only those persons actually residing in a permanent residence within 440 yards of the proposed plant."[4]

IV. DISCUSSION

Mr. Spinelli was the only protestor to appear and pursue his request for hearing and party status at the SOAH hearing. Block Creek challenged Mr. Spinelli's contention that he is an affected person, asserting that the house on Mr. Spinelli's property is more than 440 yards northeast of the proposed plant and that Mr. Spinelli does not permanently reside at that location.

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[2] The ALJ defers to the ED's request, absent clear delegation of authority for the ALJ to rule on this issue from the Commission.

[3] 30 TEX. ADMIN CODE § 55.201

[4] TEXAS HEALTH AND SAFETY CODE § 382.058(c).

Block Creek asserts that Mr. Spinelli has previously and legally claimed his dwelling in Boerne as his permanent residence.

During the hearing, extensive evidence was provided regarding the distance between the proposed plant and the closest portion of Mr. Spinelli's house. Disputes were raised concerning the point from which distance should be measured at both the Block Creek plant and Mr. Spinelli's house. Mr. Spinelli argued that "the plant" must include Applicant's entire property, but Applicant offered the testimony of staff experts suggesting Commission policy is to define "the plant" by its emission points (silo, mobile batch truck, and concrete storage bins). The ALJ finds the evidence and policy supports Applicant's contentions. Had the Texas Legislature intended the distance to be from anywhere on Applicant's property, it would have so indicated by referring to "property" instead of "plant." Moreover, because the emission points are the subject of environmental concern, it follows that the distance should be measured from these points.

The second dispute regarded what portion of Mr. Spinelli's house may be considered his residence, if he is determined to actually reside on the property at issue. There are two separate structures on the property. The structure closest to Applicant's property is referred to as a cabana, and Applicant argued it was essentially a guest house. Mr. Spinelli testified that he uses both structures as his living quarters. There was no evidence controverting his testimony so the greater weight of evidence suggests the cabana should be considered as part of Mr. Spinelli's house. Accordingly, the distance from the plant should be measured to the closest portion of either structure. In this instance, this is the cabana.

Numerous opinions were offered into evidence concerning the closest distance from any portion of the Spinelli house to the emission points of the plant. H. Michael Coyle, P.E., testified on behalf of Mr. Spinelli that the distance was less than 440 yards. In making his expert opinion, Mr. Coyle relied on a survey of Applicant's property prepared by Brad Brian Spenrath, Registered Professional Land Surveyor. The meets and bounds and distances depicted on the

Spenrath survey were entered into AutoCAD. Mr. Coyle then obtained a Google earth aerial photo, converted it to a TIF file, and integrated the photo and survey data. To locate Mr. Spineli's property, Mr. Coyle relied on a recent meets and bounds description and then scaled the Google photo up to the survey.

Applicant offered the expert testimony of Mr. Spenrath, the same person referenced by Mr. Coyle and the surveyor who surveyed Applicant's property. Mr. Spenrath testified that he conducted a land survey and opined that at its closest points, all portions of the Spinelli house and the emission points from the plant were separated by a minimum of 452 yards. The ED offered testimony that also supported Mr. Spenrath's conclusions that no relevant points were within 440 yards.

After reviewing the methods behind the experts' opinions, the ALJ finds Mr. Spenrath's determination is most accurate on this issue. This weighing was not difficult as even Mr. Coyle admitted that he had taken no field measurements from the property and that an "on the ground" survey by a registered professional land surveyor would be more accurate than his rough depictions. Section 382.058(c) of the TCAA specifies a particular distance (440 yards) and the Commission instructed the ALJ to make a determination of party status based on that distance. Based on the evidence provided, the ALJ concludes that Mr. Spinelli's house is further than 440 yards from Applicant's plant and that he does not maintain a justiciable interest in this matter. Given this determination, the ALJ—and Commission—need not reach the question of whether Mr. Spinelli's house on the property at issue is his residence.

VI. RECOMMENDATION

No person or organization having been shown to be a "person affected" within the meaning of the TCEQ rules and entitled to a hearing on the permit amendment, the ALJ recommends that this matter be remanded to the ED as uncontested.

SIGNED January 9, 2009.

TOMMY L. BROYLES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

ORDER
CONCERNING THE APPLICATION BY
BLOCK CREEK CONCRETE PRODUCTS, LLC.
FOR ISSUANCE OF AIR QUALITY REGISTRATION NO. 83958
TCEQ DOCKET NO. 2008-1009-AIR
SOAH DOCKET NO. 582-08-4460

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of Block Creek Concrete Products, LLC (Block Creek) for issuance of Air Quality Registration No. 83958 to authorize construction of a permanent specialty concrete batch plant to be located at 444 FM Old Number 9 Highway A, near Comfort, Kendall County Texas. A Proposal for Decision (PFD) was presented by Tommy L. Broyles (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing on this matter on October 20, 2008. The record closed on December 15, 2008.

The following participated in the preliminary hearing: Block Creek; the Executive Director of the Commission (ED); Dennis Spinelli; and the Office of Public Interest Counsel of the Commission (OPIC). After considering the Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. On January 23, 2008, Block Creek filed an application for Air Quality Standard Registration Number 83958 (Registration) to authorize construction of a permanent specialty concrete batch plant to be located at 444 FM Old Number 9 Highway A, near Comfort, Kendall County, Texas.

2. The Executive Director found the application was authorized under Title 30 TEX. ADMIN CODE §382.05195, if constructed and operated as described in the Registration.

3. Public comments and hearing requests concerning the Registration were filed by interested persons and considered by the Commission.

4. By Interim Order, the Commission denied the request submitted by Jerry Winakur and referred the requests from Mickey V. Bush and Dennis Spinelli to SOAH for a hearing on whether they are affected parties in accordance with the distance limitation found in Section 382.058(c) of the Texas Clean Air Act.

5. On October 20, 2008, a hearing was convened by ALJ Broyles concerning whether Dr. Bush and Mr. Spinelli are affected parties.

6. Dr. Bush did not appear at the hearing, but Mr. Spinelli did appear.

7. The structures on Mr. Spinelli's property that serve as living quarters are greater than 440 yards from the plant (emission points) in the Registration.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over registrations pursuant to the TEX. HEALTH & SAFETY CODE § 382.05195.

2. SOAH has the authority to conduct evidentiary hearings and prepare proposals for decision on contested matters referred by the Commission pursuant to TEX. GOV'T CODE ANN. § 2003.047.

3. Based on the above Findings of Fact, Dennis Spinelli is not an affected person within the meaning of 30 TEX. ADMIN. CODE § 55.203.

III. ORDERING PARAGRAPHS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. In accordance with 30 TEX. ADMIN. CODE § 55.203, this matter is uncontested by a person with an affected interest and is remanded to the ED for further processing.

2. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.

3. The effective date of this Order is the date the Order is final, as provided by TEX. GOV'T CODE ANN. § 2001.144 and 30 TAC § 80.273.

4. The Commission's Chief Clerk shall forward a copy of this Order to all parties.

5. If any provision, sentence, clause, or phase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

_____

Buddy Garcia, Chairman
For the Commission