

Bryan W. Shaw, Ph.D., *Chairman*  
Buddy Garcia, *Commissioner*  
Carlos Rubinstein, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**  
*Protecting Texas by Reducing and Preventing Pollution*

April 29, 2010

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

**RE: QUALITY READY MIX, LTD.**  
**SOAH DOCKET NO. 582-10-1698**  
**TCEQ DOCKET NO. 2009-1483-AIR**

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Exception to the Proposal for Decision and Proposed Order in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "James B. Murphy".

James B. Murphy, Attorney  
Assistant Public Interest Counsel

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 P.O. BOX 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

P.O. Box 13087 Austin, Texas 78711-3087 512-239-1000 Internet address: [www.tceq.state.tx.us](http://www.tceq.state.tx.us)



**SOAH DOCKET NO. 582-10-1698  
TCEQ DOCKET NO. 2009-1483-AIR**

<b>IN THE MATTER OF THE</b>	§	<b>BEFORE THE</b>
<b>APPLICATION OF QUALITY</b>	§	
<b>READY MIX, LTD., FOR AIR</b>	§	<b>TEXAS COMMISSION ON</b>
<b>QUALITY STANDARD PERMIT,</b>	§	
<b>REGISTRATION NO. 85181</b>	§	<b>ENVIRONMENTAL QUALITY</b>

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S EXCEPTION TO THE  
PROPOSAL FOR DECISION AND PROPOSED ORDER**

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 Exception to the Proposal for Decision (PFD) and Proposed Order issued by the Honorable Administrative Law Judge Thomas H. Walston on April 9, 2010 in the above-referenced matter and respectfully shows the following.

**I. INTRODUCTION**

Quality Readymix, Ltd., LLP (Applicant) has applied to the TCEQ for a standard permit registration under the Texas Clean Air Act (TCAA), TEX. HEALTH & SAFETY CODE § 382.05195, which would authorize construction of a permanent concrete batch plant located approximately one mile north of Farm-to-Market Road 3377 on County Road 441/15, Mathis, San Patricio County. The proposed facility will emit the following air contaminants: particulate matter including (but not limited to) aggregate, cement, road dust, and particulate matter less than 10 microns in diameter (PM<sub>10</sub>).

On December 3, 2009, the Commission issued an interim order granting the hearing requests of Mary Jane Robertson and Ronald Tate, referring the issue of Michael Lumpkin's party status, and referring four issues to the State Office of Administrative Hearings (SOAH) for

a contested case hearing. A preliminary hearing convened on February 11, 2010 in Mathis. After jurisdiction was established, Applicant and OPIC were designated as parties. Judge Walston took evidence on whether Ms. Robertson, Mr. Tate, and Mr. Lumpkin qualified for party status. On April 9, 2010, Judge Walston issued a PFD and proposed order denying the party status of Ms. Robertson, Mr. Tate, and Mr. Lumpkin.

## II. APPLICABLE LAW

In order to be admitted as a party in a contested case hearing, a person must have a personal justiciable interest that is not common to members of the general public in the matter being considered. 30 TEX. ADMIN. CODE (TAC) §§ 55.203(a), 80.109(a). “[O]ne who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application” is considered an “affected person.” 30 TAC § 55.203(a). 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.

30 TAC § 55.203(c).

The TCAA limits who may request a contested case hearing on a concrete plant registered under a standard permit: “[O]nly 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 § 382.058(c).

Registration to use a standard permit must include a description of the project and related process. 30 TAC § 116.611(a)(5). “All representations with regard to construction plans, operating procedures, and maximum emission rates in any registration for a standard permit become conditions upon which the facility[,] or changes thereto, must be constructed and operated.” 30 TAC § 116.615(2).

### III. DISCUSSION

OPIC recommends the Commission not adopt the PFD and proposed order and instead grant party status to Ms. Robertson and Mr. Tate. In the alternative, OPIC recommends the Commission modify the proposed order to include a provision requiring Applicant to amend its application with the location of the facility represented by Applicant at the preliminary hearing.

The issue at the preliminary hearing was whether any person seeking party status satisfied the 440-yard (1,320-foot) distance restriction imposed by TEX. HEALTH & SAFETY CODE § 382.058(c). As stated in the PFD, the key factor is the precise location of the proposed facility, which will be built on an approximate 63-acre tract.

In the application, Applicant states the location of the facility as Latitude (N) 97°, 50’, 27”; Longitude (W) 28°, 7’, 19”. These latitude and longitude coordinates appear to be reversed from the proposed location. In addition to the coordinates, Applicant submitted with the application a 1969 survey map of the 63-acre tract, with the location of the facility hand drawn as slightly northwest of the center of the property. *See* Tate/Robertson Exhibit 1.

At the preliminary hearing, Applicant submitted a 2010 survey map of the tract, with the location of the facility in a different location from the map submitted in the application. *See* Applicant's Exhibit 2. The 2010 survey map showed the facility as located in the northwest corner of the property, with coordinates of N 69°, 04', 53" W. The surveyor did not attend the hearing, but Mr. Henry Lozano, on behalf of Applicant, and Mr. Kevin Stone, who owns the tract where the proposed plant would be located, both testified that the plant location on the 2010 survey map corresponded to the coordinates provided in the application. In addition, Applicant submitted a satellite image of the area, which also showed the location of the proposed facility in the northwest corner of the property and the Robertson/Tate residence as approximately 2,000 feet from the proposed facility.<sup>1</sup> *See* Applicant's Exhibit 1.

Ms. Robertson and Mr. Tate submitted a copy of the map prepared by the Executive Director for use by the Commission in evaluating the hearing requests. *See* Robertson/Tate Exhibit 2 (ED's Map). The ED's Map showed the location of the proposed facility in the center of the 63-acre tract with an oval indicating 440-yards from that location. Ms. Robertson and Mr. Tate explained that the location of their residence was incorrect on the map, and indicated the correct location of their residence as further to the north. However, their residence remained well within the 440-yard oval provided on the map.

Because the evidence in this matter is disputed as to the location of the proposed facility, OPIC recommends the Commission defer to the ED's Map and the findings in the interim order referring the matter to SOAH. The ED's Map is based on the information provided in the application, and shows the Robertson/Tate residence as well within 440 yards of the proposed facility. Although the new 2010 survey Applicant submitted at the preliminary hearing shows the proposed facility location as more than 440 yards from the Robertson/Tate residence, it is not

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<sup>1</sup> Note that there is no dispute Mr. Lumpkin's residence is more than 440 yards from the proposed facility location.

clear from the map that the coordinates listed in the application correspond to the facility location. The coordinates do not match, and the surveyor was not present to explain the map, although Mr. Lozano and Mr. Stone testified the map was correct and consistent with the coordinates in the application. The uncertainty in the evidence weighs in favor of deferring to the ED's Map, which is based on the information provided in the application and demonstrates Ms. Robertson and Mr. Tate are affected persons entitled to party status.

The uncertainty here also weighs in favor of resolving disputed matters on facility location in favor of protestants. From the protestant perspective, all of the information as to the location of a proposed facility is in the control of the applicant. Protestants rely solely on the information in the application to make a determination of whether to seek party status. Protestants do not have any means of lawfully entering an applicant's property to measure distances or prepare their own surveys. The discovery mechanisms allowing entry onto property are triggered only when party status is granted. The only evidence a protestant has as to whether she has met the distance limitation is the ED's Map and the representations in the application. As a result, it is appropriate to place the burden on Applicant to prove that the protestants are not entitled to party status when the deciding issue is the location of a yet-to-exist facility. Applicant has not met such a burden here.

Regardless of the Commission's decision on the party status of Ms. Robertson and Mr. Tate, OPIC is concerned that the location of the proposed facility in this matter is a moving target for protestants. The location of the facility in the map submitted with the application is inconsistent with the location Applicant presented at the preliminary hearing. If Applicant is not required to locate the facility where Applicant represented when at the preliminary hearing, Applicant may be able to evade the contested case hearing process while locating the facility

within 440 yards of protesting neighbors. This outcome is possible because the location of the facility presented in the application is binding under Commission rule, whereas the representations made at the preliminary hearing are not binding on Applicant.

30 TAC § 116.615(2) makes representations made in a standard permit registration application, including the location of the proposed facility, binding on the applicant. There is no corresponding requirement in Commission rule as to representations made at a preliminary hearing. In this matter, Applicant has not amended its application with the new 2010 survey map it submitted at the preliminary hearing. As a result, Applicant is bound only to the coordinates in provided in the application and the 1969 survey map. The ED's Map based on this information shows the Robertson/Tate residence as within 440 yards of the proposed facility. Therefore, if Applicant is only required to comply with representations made in the application, it may locate the proposed facility within 440 yards of the Robertson/Tate residence, while at the same time avoiding a contested case hearing by submitting inconsistent information at the preliminary hearing.

To prevent such a result, and if the Commission denies party status to Ms. Robertson and Mr. Tate, OPIC recommends the Commission include an ordering provision requiring Applicant to amend its application with the 2010 survey map and state the map represents the final location for construction of the facility.

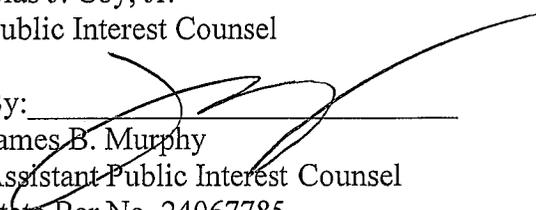
#### **IV. CONCLUSION**

OPIC recommends the Commission not adopt the PFD and proposed order and instead grant party status to Ms. Robertson and Mr. Tate. In the alternative, OPIC recommends the Commission modify the proposed order to include a provision requiring Applicant to amend its

application with the 2010 survey map and the location of the facility represented by Applicant at the preliminary hearing.

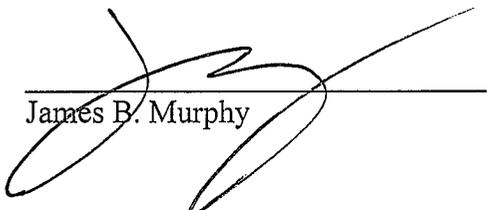
Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 29, 2010 the original and seven true and correct copies of the Office of Public Interest Counsel's Exception to the Proposal for Decision 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.

  
James B. Murphy



**MAILING LIST**  
**QUALITY READY MIX, LTD.**  
**SOAH DOCKET NO. 582-10-1698**  
**TCEQ DOCKET NO. 2009-1483-AIR**

The Honorable Thomas H. Walston  
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