

SOAH DOCKET NO. 582-10-2070
TCEQ DOCKET NO. 2009-1691-AIR

APPLICATION BY EAST TEXAS	§	BEFORE THE STATE OFFICE
PRECAST CO., LTD. FOR	§	
REGISTRATION AND APPROVAL TO	§	OF
USE THE AIR QUALITY STANDARD	§	
PERMIT FOR CONCRETE BATCH	§	ADMINISTRATIVE HEARINGS
PLANTS, REGISTRATION NO. 86593	§	

**EAST TEXAS PRECAST CO., LTD.'S, APPLICANT,
RESPONSE TO PROTESTANTS' EXCEPTION TO PROPOSAL
FOR DECISION AND MOTION FOR REHEARING**

COMES NOW, EAST TEXAS PRECAST CO., LTD., Applicant, and files this its Response to Protestants' Exception to Proposal for Decision and Motion for Rehearing and would show as follows:

PROCEDURAL BACKGROUND

On or about October 15, 2008, East Texas Precast Co., Ltd. ("ETP" herein) applied to the Texas Commission on Environmental Quality (TCEQ) for a standard permit registration pursuant to Texas Clean Air Act (TCAA), Texas Health & Safety Code § 382.05195. The application was declared administratively complete on November 3, 2008. The Notice of Application and Preliminary Decision for an Air Quality Standard Permit Registration for a Concrete Batch Plant (NAPD) was published March 23, 2009 in *The Waller Times*. On May 28, 2009, a public meeting was held in Prairie View, Waller County. The public comment period ended at the adjournment of the public meeting. On September 11, 2009, TCEQ issued the Executive Director's Response to Public Comment wherein it determined that "[p]rovided the CBP (Concrete Batch Plant) is operated within the terms of the standard permit, the proposed emissions are not expected to adversely impact human

health, air quality, the welfare of persons living in the area, or the environment.”¹ Accordingly, the deadline to request a contested hearing or reconsideration of the executive director’s decision was October 12, 2009.

According to TCEQ, it received timely hearing requests from the following persons: Esel Bell, Marshall Brown, Luther Francis, Clifton and Hazel Gilliard, Alice Good, Clara Gordon, Frank Jackson, Barbara Johnson, James Kirkwood, Erma Sadberry and Cleophus Sharp. On November 16, 2009, the Executive Director issued a response to the hearing requests wherein it recommended all requests for contested case hearing be denied. Specifically, all requestors reside more than 440 yards from the proposed facility and therefore lacked standing pursuant to TCAA §382.058(c). Similarly, also on November 16, 2009, the Office of Public Interest Counsel (OPIC) determined that either the aforementioned individuals did not reside in a permanent residence within 440 yards of the proposed plant² or their respective residence could not be found³. OPIC further recommended that their requests be denied, however, invited requesters to file a reply demonstrating they met the requirements of TCAA §382.058. On November 30, 2009, the Prairie View Association for Environmental Quality (“the Association”) filed a reply on behalf of five requestors: Marshall Brown, Clifton and Hazel Gilliard, Esel Bell, and Luther Francis. (*See Prairie View Association for Environmental Quality letter to TCEQ dated November 23, 2009 attached hereto as Exhibit “A”*). This letter was “submitted on behalf of each ‘Affected Person’ for **Reconsideration** and reply to the responses.” (*emphasis in original*). No other requesters were mentioned in Prairie View

¹See *The Executive Director’s Response to Public Comment at pg. 5*.

²Esel Bell, Marshall Brown, Clifton and Hazel Gilliard, Alice Good, Clara Gordon, Erma Sadberry, and Cleophus Sharp.

³Frank Jackson, Barbara Johnson, Luther Francis, and James Kirkwood

Association's reply nor did it indicate others were "Affected Persons" under the statute. Further, the Association's reply does not purport to be on behalf of the Association itself.

On December 17, 2009, after consideration of all relevant filings and answers to questions during its public meeting, TCEQ issued an Interim Order referring the hearing requests of Marshall Brown, Clifton and Hazel Gilliard, Esel Bell, and Luther Francis to SOAH "for a preliminary determination of their affectedness in accordance with the distance requirements of TCAA Section 382.058(c)." All other requests were denied. Notice of the contested hearing was published in *The Waller Times* on September 25, 2009. The hearing was heard before Administrative Law Judge, William B. Newchurch, on March 10, 2010.

On April 8, 2010, Judge Newchurch issued his Proposal For Decision and Order, wherein he determined none of the five Protestants demonstrated "he or she resides within [sic] 440 yards of the proposed plant," recommended the Commission deny their requests for a hearing and remand the Application to the Executive Director (ED) for uncontested processing. Protestants now take exception to Judge Newchurch's evidentiary rulings, his denial of their motion to designate the Prairie View Association for Environmental Quality, City of Prairie View, Carolyn Simpson and John Brandon as parties to the hearing, and his failure to consider Marshall Brown's testimony as representative of the Association, whose membership includes Carolyn Simpson and John Brandon.

I. RESPONSE TO MOTION FOR REHEARING

The Interim Order issued by the Commission referred *only* the hearing requests filed by Marshall Brown, Clifton and Hazel Gilliard, Esel Bell, and Luther Francis. All other hearing requests

were denied. Protestants along with “Other Hearing Requestors⁴” now seek to challenge the ALJ’s refusal to name these “Other Hearing Requestors” as parties to the contested hearing and seek a rehearing on same. However, none of these third parties challenged the Commission’s Interim Order. In fact, the only parties who filed a reply and reconsideration of the Executive Director’s and Office of Public Interest Counsel’s recommendations were the five Protestants, who were parties to the contested hearing and offered extensive testimony over ETP’s objections concerning their “Affected” status pursuant to § 382.058(c). Notably, the Association issued the reply on behalf of *only* these five Protestants and made no mention of any other party. In fact, according to the Association, its letter, signed only by the five Protestants, was “submitted on behalf of each “**Affected Person**” for **Reconsideration** and reply to the responses. (*Exhibit A*). Neither the Association, the City of Prairie View, Carolyn Simpson, nor John Brandon challenged the Executive Director’s or OPIC’s recommendation. Nor did these parties challenge the Interim Order. Further, Marshall Brown never requested a contesting hearing on behalf of the Association nor challenged the recommendations made nor any order issued on behalf of same. Based upon the arguments and responses, or lack thereof as the case may be, an Interim Order was issued defining the issues to be considered by the ALJ and denying all hearing requests other than the five Protestants. Protestants’ Exceptions and Motion for Rehearing are nothing more than an untimely attempt to challenge the Interim Order. However, the time for such challenges has long passed. Therefore, the ALJ’s refusal to now consider the standing of “Other Hearing Requestors” was proper.

Notably, Protestants now assert the Commission should set this matter for rehearing because

⁴Prairie View Association for Environmental Quality, City of Prairie View, John Brandon, and Carolyn Simpson.

the Association includes members who reside within 440 yards of ETP's emissions. As shown below, no Protestant could provide any evidence as to the location of any emission point on ETP's property. Thus, this assertion is disingenuous. Protestants also rely on the hearing request of Frank Jackson, Mayor of the City of Prairie View, whose request was considered and denied. Protestants claim the City of Prairie View should have been named as a party because it was represented by Mayor Jackson who timely made the request. First, Exhibit 1 to Protestants' Motion for Rehearing does not indicate that Mayor Jackson's request was made on behalf of anyone other than himself, individually. In fact, Mr. Jackson refers to the impact to him, not the City. (*See Exhibit 1*). Second, Mayor Jackson, as representative of the City, did not challenge the Executive Director's Response to Public Comment. On or about September 11, 2009, Mayor Jackson received the Executive Director's response and was given an opportunity, like all persons identified in the service list, to either request a contested case hearing or seek reconsideration. Mayor Jackson failed to do so. Nor did the Mayor challenge the Commission's findings in the Interim Order. "Other Hearing Requestors" seek to do so now in the form of a Motion for Rehearing. Such a request is improper and the "Other Hearing Requestors" have no standing. Therefore, the ALJ's Proposal for Decision and Order should be approved by the Commission.

II. THE ALJ'S EVIDENTIARY RULINGS WERE PROPER

Protestants next argue the ALJ's evidentiary rulings concerning "opinions and documents" relating to ETP's environmental consultant should not have been considered. First, Protestants wholly fail to identify with any degree of specificity which opinion or documents to which it takes exception. Such a broad and generalize objection and/or exception is not sufficient.

Similarly Protestants' exception to ETP's representative's, Richard Schultz⁵, testimony is equally vague. Protestants contend Mr. Schultz was not designated as an expert and therefore his opinions should not have been considered. However, Protestants point to no opinion offered by Mr. Schultz that required expertise or an expert designation.

Protestants' exceptions have no merit. This is readily apparent given their failure to address the ALJ's reliance on precedence in making a determination the Protestants are without standing. Specifically, the ALJ's decision relied, in part, on the *Block Creek* case. Protestants do not challenge such reliance. Nor do Protestants challenge the Executive Director's or the ALJ's definition of "proposed plant," which refers to stationary points of origin of air contaminants proposed in the application and excludes, among other things, roads.

More importantly, Protestants presented no evidence concerning the location of emission points. In fact, Protestants do not know where the emission points are located on ETP's property. Protestants rely solely on the testimony of Luther Francis and Marshall Brown. They do not dispute that Mr. Francis readily admitted he was not directly involved in the surveying or estimating of the distance between any property, including his own, and ETP. Rather, Mr. Francis relied on the hearsay opinion of Mr. Brown. Over the objections of ETP's counsel, Mr. Brown was allowed to offer extensive testimony regarding his beliefs concerning Protestants' property distance from ETP's property, not emission points. He relied solely on Google Earth and admittedly could not vouch for the accuracy of such tools. Moreover, Mr. Brown had never been on ETP's property and did not know where the emissions points were located. These facts are not disputed. Thus, even if the ALJ's

⁵Protestants fail to even identify the witness who's testimony is objectionable. ETP presumes Protestants refer to Richard Schultz.

evidentiary rulings concerning ETP's environmental consultant and the testimony of Mr. Schultz were improper, Protestants still did not meet their burden in establishing any permanent residence was within 440 yards of ETP's emission points. In fact, Mr. Schultz's testimony regarding the location of emission points is the best evidence, as determined by the ALJ, of emission points on ETP's property. Mr. Schultz is the plant manager of ETP and familiar with the layout as well as where all equipment is located on the premises. Mr. Schultz, based on his experience and personal knowledge of the ETP facility, competently testified the facility site plan prepared by ETP's environmental consultant was accurate. Protestants offered absolutely no evidence to refute the locations to which Mr. Schultz testified, nor any evidence suggesting the facility site plan was not an accurate depiction of ETP's property.

In light of the overwhelming uncontroverted evidence establishing Protestants' residences were not within 440 yards of any emission point on ETP's property and Protestants' clear failure to meet their respective burden of proof, ETP request the Commission adopt the ALJ's Proposal for Decision and Order.

WHEREFORE PREMISES CONSIDERED, EAST TEXAS PRECAST CO., LTD. respectfully request that Protestants and Other Hearing Requestors' Exceptions to Proposal for Decision and Motion for Rehearing be denied, and request the Commission adopt the Administrative Law Judge's, William G. Newchurch Proposal for Decision and Order, and for whatever other relief EAST TEXAS PRECAST CO., LTD may show itself entitled.

Respectfully submitted,

COKINOS BOSEN & YOUNG

BY:



TRACY B. GLENN

Bar No. 24000063

ELIZABETH M. DEBAILLON

Bar No. 05705800

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ATTORNEYS FOR EAST TEXAS PRECAST

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on the 10th day of May 2010 upon the following counsel of record:

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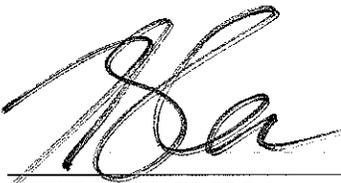
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Latesha Lewis Payne
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Honorable William G. Newchurch
State Office of Administrative Hearings
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Austin, Texas 78711



TRACY B. GLENN

PRAIRIE VIEW ASSOCIATION FOR ENVIRONMENTAL QUALITY

Post Office Box 365
Prairie View, Texas 77446

November 23, 2009

Ms. LaDonna Castaneula, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk
Post Office Box 13087 - Mail Code 105
Austin, TX 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 NOV 30 PM 2:42
CHIEF CLERKS OFFICE

ATTN: Agenda Docket Clerk

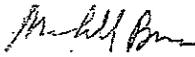
RE: Docket No. 2009-1691-AIR
East Texas Precast Co., Ltd.
Requests filed on Permit No. 86593

This letter is submitted on behalf of each "Affected Person" for Reconsideration and reply to the responses. Seven copies of maps and photo- illustrations are enclosed.

The requesters will be present at the Public Meeting, December 9, 2009 in Austin, Texas.

If additional information is required, please contact any of the persons listed below.

Sincerely,

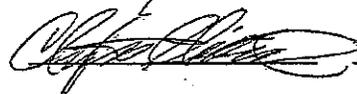

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301 SYCAMORE

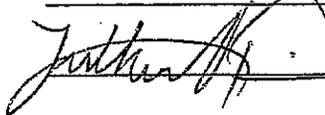
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 Esel Bell



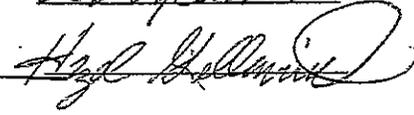


EXHIBIT A

MAILING LIST
EAST TEXAS PRECAST CO., LTD.
DOCKET NO. 2009-1691-AIR; PERMIT NO. 86593

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FOR PUBLIC INTEREST COUNSEL:

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FOR ALTERNATIVE DISPUTE

RESOLUTION:

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Texas Commission on Environmental Quality
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See attached list of Requesters/Interested Persons.

**REPLY: Affected Persons That Reside Within 440 Yards of
the East Texas Precast Plant, Prairie View, Texas**

Exhibit A Revised Map

In the spring of 2009 (after submitting an application to expand the plant) the East Texas Precast Plant began to make changes in the plant by expanding or rearranging the site, to a present size that is larger than the plant's previous size. The Stack House (Emissions Point) has been relocated to a position farther south, away from some of the affected homes, but closer to other homes. Exhibit A Map shows the dimensions from the location of the original Emissions Point to the homes of the affected persons.

Most of the contaminated cement dust is produced by a number of large trucks that travel over the dust-filled driveway located on the west side and the center of the plant site. Some dimensions were measured to the original Stack House location.

The three homes that are located closest to the plant were not included on the requester's list for some unknown reason.



EAST TEXAS PRE-CAST CO. LTD.
PERMIT NO. 86593

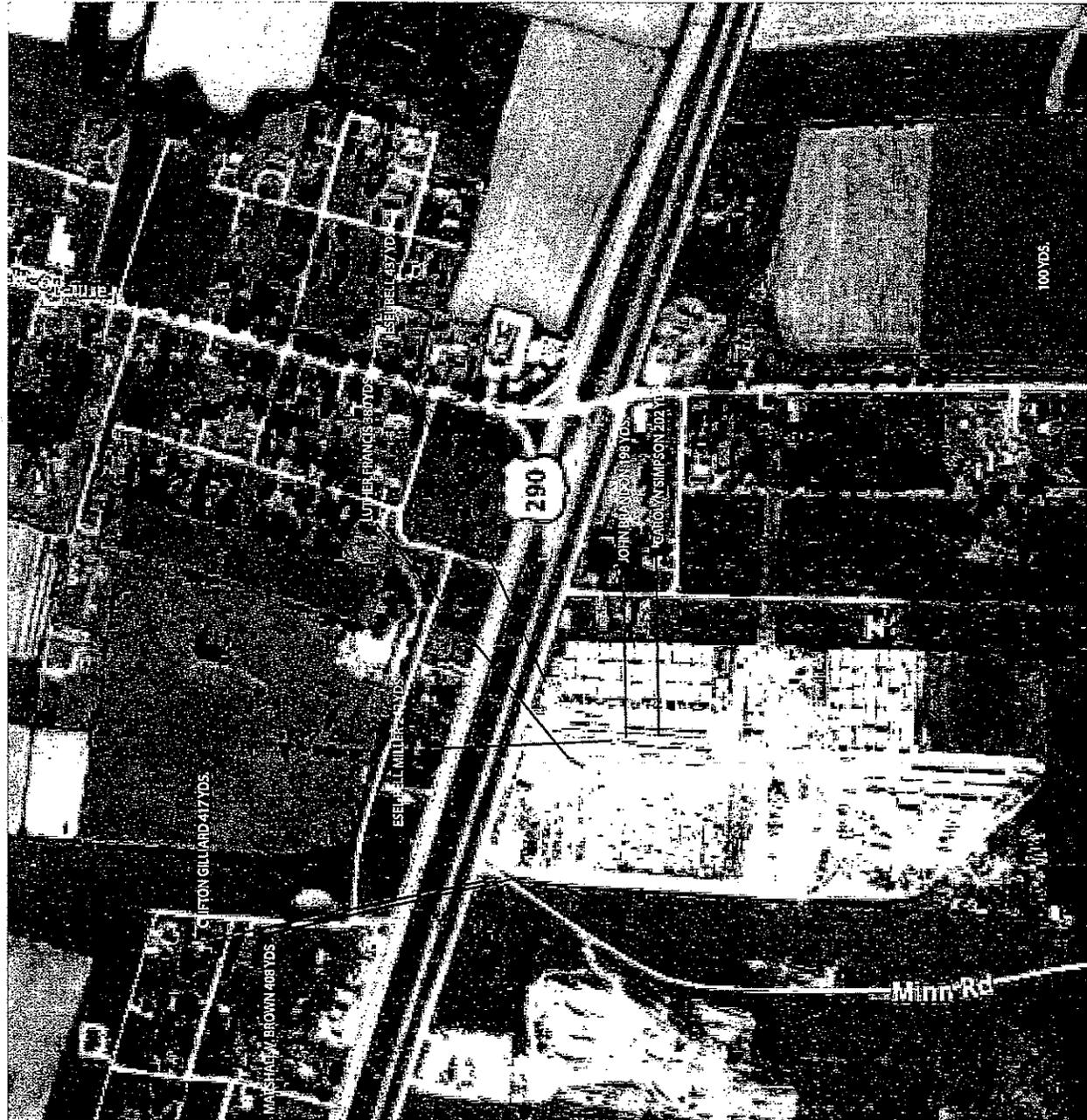
PRAIRIE VIEW ASSOCIATION FOR
ENVIRONMENTAL QUALITY
P.O. BOX 365
PRAIRIE VIEW, TEXAS 77446

PROPERTY LESS THAN 440 YDS.

CAROLYN SIMPSON
MARSHALL BROWN PE

CITY: PRAIRIE VIEW
COUNTY: WALLER
STATE: TEXAS

EXHIBIT A MAP



Reply to Response 4

“ The East Texas Precast Plant should not impact the quality life of residents living near the plant.”

The people who reside near the plant have been negatively impacted by plant emissions, particularly the elderly and children. The citizens of Prairie view are experiencing high levels of cancer, Alzheimer, strokes, heart failure, kidney failure, respiratory problems, nose-bleeds, and palsy. Many citizens have succumbed to some of these diseases, before the age of sixty-five, and some were less than sixty. We believe that the tremendous amounts of diseases occurring in this small community are related to the East Texas Precast Plant.

The applicant is out of compliance with EPA Regulation 40 C.F.R. & 50.2

Reply To: “The applicant represents the facility will not operate at night; the 10 hours of operation will be conducted during day-light hours. **(Not in compliance with application)** Reply: The plant often operates at 4:00 to 5:00 A.M. during the week. The bright lights and noise during early morning hours deprive residents of tremendous amounts of sleep and rest. Dust emissions and smoke from burning that produced a toxic odor often causing nausea, breathing difficulty, and dizziness.

Exhibit C Reply to: “The Standards Permit requires water controls and paved roads on site.” Out of Compliance: The plant’s roads are not paved, thus creating dust emissions.

Exhibit D Reply to Response 9: “The TCEQ has jurisdiction over stock-piles, establishment of maintenance, and buffer zones. Exhibit C reveals stock-piles of concrete beams and dilapidated equipment full of dust emissions, less than 10 feet from property lines of homes on the East side of the plant site. **There is no Buffer.**”

Exhibit B Shows:

- Dust emissions in front of the plant.
- Cement dust on roadway at north side of the plant site.
- Cement dust on foliage at the north side of the site.

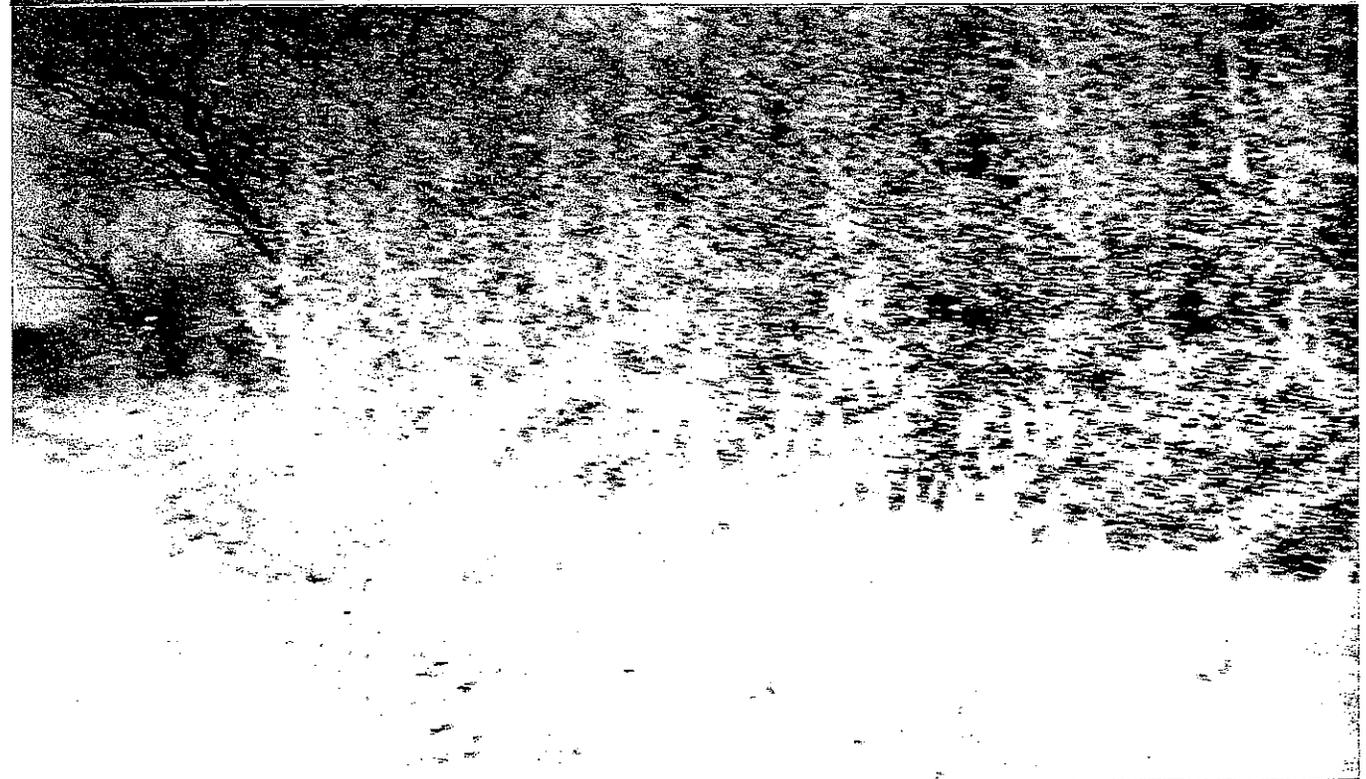


Exhibit C: Reply to Response II

The center driveway and the west driveway show the appearance after a heavy rain; the driveway surfaces do not appear to be paved.

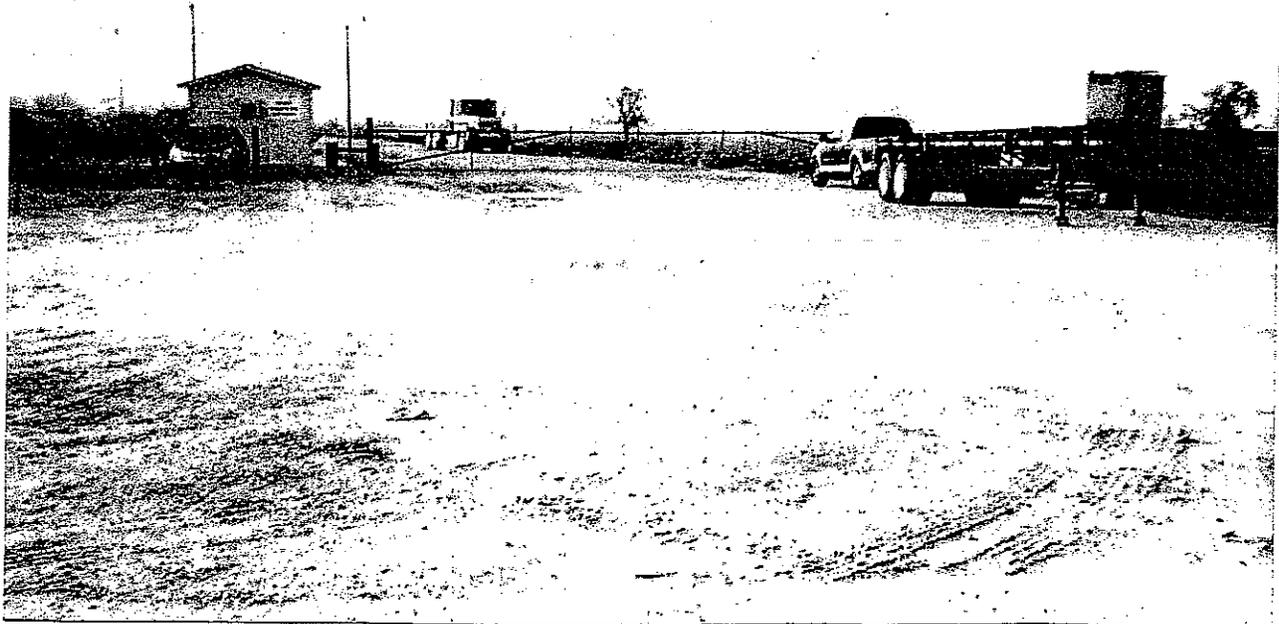
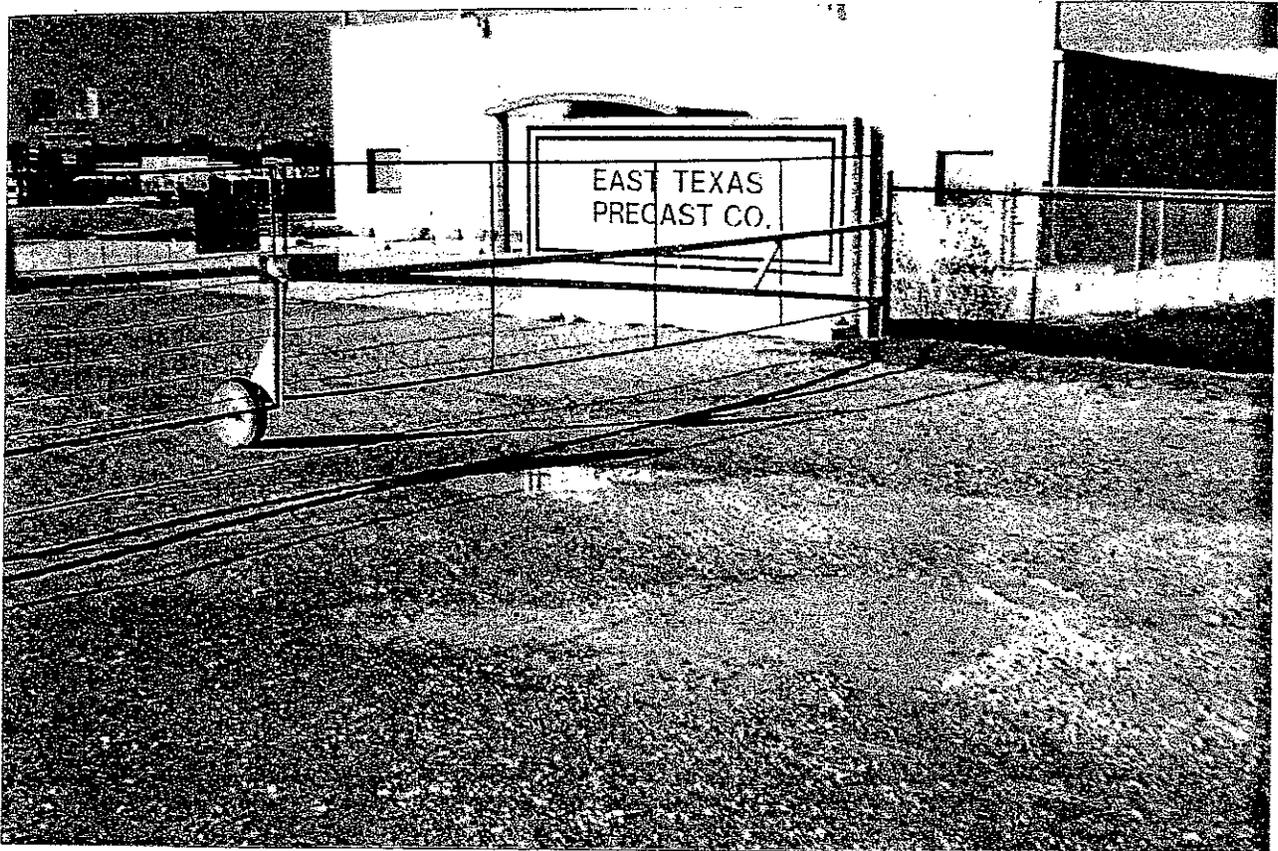


EXHIBIT C: Cement dust on the roadway



EXHIBIT D: REPLY TO RESPONSE 9

The TCEQ has jurisdiction over stockpiles, establishment of maintenance, and buffer zones. The existing buffer zone is less than 10 feet from property lines of homes adjacent to the plant.



Reply to Response 13: Facility Location

See Exhibit "E" Map

The map shows the cities of Prairie View, Texas and Hempstead, Texas are 6 miles apart.

- A copy of the Standard Permit was placed in the Hempstead Library. This was misleading to the residents of Prairie View.
- The Public Notice in the news paper was misleading; residents of Prairie View thought the notice was for a plant that was located in the city of Hempstead, Texas, not in the city of Prairie View.
- The Hempstead Postal Service delivers mail to a Route Box Number Mailing Address. The Postal Service does not determine the city's property line.
- The East Texas Precast Co. pays property taxes to the city of Prairie View, because the plant is located in the city of Prairie View. Therefore, the application is misleading and possibly represents "Deceptive Trade Practice". For this reason, this application should be withdrawn.

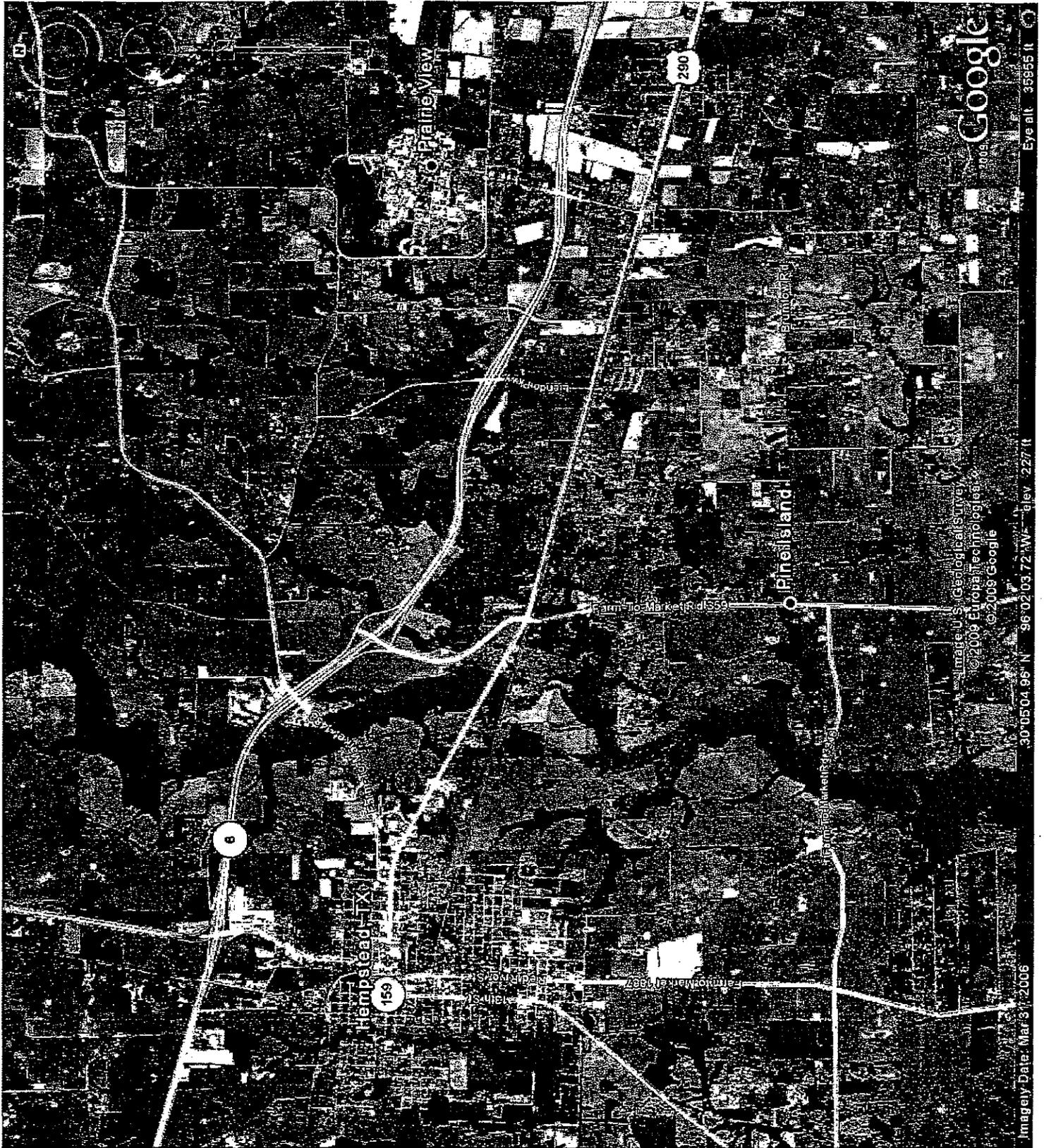


EXHIBIT E MAP