Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 10, 2010

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

Re: East Texas Precast Co., Ltd. Application for Air Quality Standard Permit Registration No. 86593
SOAH Docket No. 582-10-2070; TCEQ Docket No. 2009-1691-AIR
Executive Director's Reply to Protestants' Exceptions to Proposal for Decision and Motion for Rehearing

Dear Ms. Castañuela:

Enclosed please find an original plus seven copies of the Executive Director's Reply to Protestants' Exceptions to Proposal for Decision and Motion for Rehearing for the matter listed above for filing.

If you have any questions, please do not hesitate to call me at (512) 239-0891.

Sincerely,

Amy L. Browning
Staff Attorney
Environmental Law Division

Enclosures

Cc: Service list

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

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

EXECUTIVE DIRECTOR'S REPLY TO PROTESTANTS' EXCEPTIONS TO THE PROPOSAL FOR DECISION AND MOTION FOR REHEARING

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

COMES NOW the Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or "Commission") and files the Executive Director's Reply to Protestants' Exceptions to the Proposal for Decision and Motion for Rehearing, and in support thereof shows the following:

I. Introduction / Background

On October 15, 2008, East Texas Precast Co., LTD. ("East Texas") submitted an application to the TCEQ for an Air Quality Standard Permit, Registration Number 86593, which would authorize construction of a concrete batch plant at 44855 Old Houston Highway, Waller County, Texas. Many hearing requests were submitted during the public comment period, and these requests were considered at the December 9, 2009 Commissioners' Agenda. The Commission referred five requests (submitted by Esel D. Bell, Marshall V. Brown, P.E., Luther V. Francis, and Clifton and Hazel Gilliard (hereinafter, "Protestants")) to the State Office of Administrative Hearings ("SOAH") to determine whether the Protestants are affected in accordance with the distance requirements in section 382.058(c) of the Texas Clean Air Act

("TCAA").[1] The preliminary hearing in this matter was held on March 10, 2010 in Prairie View, Texas. The ALJ issued a proposal for decision (PFD) on April 8, 2010.[2] Proposed revisions to the PFD were filed by the Executive Director, and exceptions to the PFD were filed by the Protestants on April 28, 2010. The Protestants' exceptions to the PFD included a "Motion for Rehearing."

II. Protestants' Motion for Rehearing is Untimely

A Motion for Rehearing may be filed on any decision in an administrative hearing held before the Commission.[3] The Protestants' have included their motion as part of their exceptions to the PFD issued by the ALJ in this matter. The Commission has not yet considered the ALJ's PFD, or made a decision in an administrative hearing on this matter. Therefore, there is not yet a Commission decision regarding the ALJ's PFD for the Commission to rehear. Thus, the Protestants' motion is untimely, and should be denied.

III. ALJ Properly Refused to Designate Additional Parties as Affected Persons

Protestants' allege that the ALJ improperly failed to consider the hearing requests of the Prairie View Association for Environmental Quality (PVAEQ) and the City of Prairie View. The ALJ evaluated the hearing requests of Esel D. Bell, Marshall V. Brown, P.E., Luther V. Francis, and Clifton and Hazel Gilliard, the only hearing requestors who were referred by the

[1] TEX. HEALTH & SAFETY CODE § 382.058(c).
[2] Administrative Law Judge's Proposal for Decision, Application by East Texas Precast, Co., Ltd. for Registration and Approval to Use the Air Quality Standard Permit for Concrete Batch Plants, Registration No. 86593; TCEQ Docket No. 2009-1691-AIR, SOAH Docket No. 582-10-2070 (April 8, 2010).
[3] 30 TEX. ADMIN. CODE §80.272

Commission.[4] The Commission's Order specifically limited the hearing to a determination of the affected party status of these five hearing requestors, after the Commission considered all timely hearing requests that were filed.[5] Absent a finding of affected person status of any one of these parties, the ALJ was constrained by the Commission from considering any other issue, including the possible affected party status of any other interested party.[6] The ALJ did not find any of the referred parties to be interested persons meeting the distance requirements of Section 382.058(c) of the TCAA.[7] Therefore, the ALJ did not err by not considering the hearing requests of other parties, including the PVAEQ and the City of Prairie View.

III. Conclusion.

Based upon the record and foregoing reply, there is not yet a decision by the Commission that is ripe for a Motion for Rehearing, and the Executive Director respectfully requests that the Commission deny the Protestants Motion for Rehearing in accordance with 30 TEX. ADMIN. CODE § 80.272.

WHEREFORE, PREMISES CONSIDERED, the Executive Director respectfully recommends that the Protestants' Motion for Rehearing be denied, that the Commission grant the revisions to the Findings of Facts previously filed by the Executive Director, and issue the proposed order.

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[4] Administrative Law Judge's Proposal for Decision.
[5] *AN INTERIM ORDER concerning the application by East Texas Precast, Co., Ltd. for registration and approval to use the Air Quality Standard Permit for Concrete Batch Plants, Registration No. 83569; TCEQ Docket No. 2009-1691-AIR (Dec. 17, 2009).*
[6] Administrative Law Judge's Proposal for Decision.
[7] *Id.*

Respectfully submitted,

Texas Commission on Environmental Quality

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REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

On this 10th day of May, 2010, a true and correct copy of the foregoing instrument (TCEQ Executive Director's Reply to Protestants' Motion for Rehearing) was served on all persons on the attached mailing list by the undersigned via deposit into the U.S. Mail, inter-agency mail, facsimile, electronic mail, or hand delivery.

Amy L. Browning

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

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