

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

April 8, 2010

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

Re: SOAH Docket No. 582-10-2070; TCEQ Docket No. 2009-1691-AIR; In Re: 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

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 documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than April 28, 2010. Any replies to exceptions or briefs must be filed in the same manner no later than May 10, 2010.

This matter has been designated **TCEQ Docket No. 2009-1691-AIR; SOAH Docket No. 582-10-2070**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,


William G. Newchurch
Administrative Law Judge

WGN:nl
Enclosures
cc: Mailing List

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STYLE/CASE: EAST TEXAS PRECAST CO

SOAH DOCKET NUMBER: 582-10-2070

REFERRING AGENCY CASE: 2009-1691-AIR

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ WILLIAM G. NEWCHURCH**

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xc: Docket Clerk, State Office of Administrative Hearings

**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
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PROPOSAL FOR DECISION

I. INTRODUCTION

East Texas Precast Co., Ltd., (East Texas) has applied for registration and approval by the Texas Commission on Environmental Quality (TCEQ or Commissions) to use the Commission's approved air quality standard permit for concrete batch plants. East Texas' plant would be at 44855 Old Houston Highway, Waller County, Texas. Esel D. Bell; Marshall V. Brown, P.E.; Luther V. Francis; and Clifton and Hazel Gilliard (Protestants) have requested a contested case hearing on East Texas' application.

The Commission referred the Protestants hearing requests to the State Office of Administrative Hearings (SOAH) for a limited hearing to determine whether they were affected in accordance with the distance requirement in Section 382.058(c) of the Texas Clear Air Act.¹ That statute provides that "only those persons actually residing in a permanent residence within 440 yards of the proposed plant may request a hearing under [Health & Safety Code §] 382.056 as a person who may be affected."

The Administrative Law Judge (ALJ) cannot find that any of the five Protestants has shown that he or she permanently resides within 440 yards of the proposed plant. For that reason, he recommends that the Commission deny their requests for a hearing and remand the Application to the Executive Director (ED) for uncontested processing.

¹ TEX. HEALTH & SAFETY CODE ANN. (Health & Safety Code) § 382.058(c).

II. PROCEDURAL HISTORY

On December 9, 2009, the Commission considered requests for hearing that had been filed in this case and determined to refer the requests of the five Protestants to SOAH for hearing. Notice of the preliminary hearing on the hearing requests was mailed to East Texas, the ED, the OPIC, and each of the five Protestants on January 11, 2010.² It was also published in *The Waller Times*, a newspaper generally circulated in Prairie View, Texas, on January 25, 2010.³

As indicated in the notices, the ALJ convened the preliminary hearing at the Prairie View City Hall, Council Chambers, 44500 Business 290, Prairie View, Texas 77446, on March 10, 2010. The hearing was concluded that same day. The following appeared at the preliminary hearing:

PARTY	REPRESENTATIVE
East Texas	Tracy Glenn, attorney
Protestants	Latosha Lewis Payne, attorney
ED	Tucker Henson and Erin Selvera
Office of Public Interest Counsel (OPIC)	Eli Martinez

III. JURISDICTION

The only challenge to jurisdiction concerns the sufficiency of the notice. The notice of the preliminary hearing indicated that the concrete batch plant was at 44855 Old Houston Highway, Hempstead, Waller County, Texas. However, the parties stipulated that the plant was within the corporate limits of the City of Prairie View, not Hempstead.⁴ It was undisputed that

² ED Ex. A.

³ ED Ex. B.

⁴ ED Exs. A & B.

the plant was in Waller County and the street address given in the notice was correct. The Applicant's counsel indicated that Hempstead was the official mailing address for the plant, which differed from the municipal boundaries. The Protestants did not dispute that representation, but still argued that all of public notices given concerning this application, including the notice of the preliminary hearing, were inadequate to show jurisdiction because they incorrectly indicated that the plant was in Hempstead instead of Prairie View.

In pertinent part, Health & Safety Code § 382.056(b)(1) provides: "The notice [of intent to obtain a permit] must include: (1) a description of the location or proposed location of the facility . . ." Health & Safety Code §§ 382.056(i) and 382.058(a) require that same information to be included in the notice of opportunity to ask for a hearing on any permit application and specifically on an application for construction of a concrete plant under a permit by rule, standard permit, or exemption. The requirements for the notice of the hearing itself are found in Health & Safety Code § 382.031 (b) and are less specific, requiring the notice to describe briefly and in summary form the purpose of the hearing and the date, time, and place of the hearing.⁵

The ALJ concluded that the notices were sufficient because they properly indicated the street address and county where the East Texas facility is located. When asked by the ALJ, the Protestants did not contend that there was another location in Waller County with the address of 44855 Old Houston Highway. Moreover, each of the Protestants was at the preliminary hearing and had actual notice. Under these circumstances, the ALJ found that the indication in the notice that the facility was in Hempstead rather than Prairie View did not harm the Protestants. In the absence of other objections, the ALJ concluded that the Commission and SOAH had jurisdiction.

In referring the issue of whether the Protestants were affected persons under Section 382.058(c), the Commission also contingently referred other issues. The Commission's Order stated:

⁵ See also, TEX. GOV'T. CODE ANN. (Gov't Code) §§ 2001.051 and 2001.052 for similar general notice of hearing requirements for any contested case hearings by any state agency.

Only if the ALJ determines that a requester referred by the Commission is determined to satisfy the distance requirement in TCAA Section 382.058(c), then the ALJ shall proceed with a hearing on the following issues:

- a) Will emissions from the proposed facility negatively affect the requestor's health;
- b) Will emissions from the proposed facility negatively affect the requestor's use and enjoyment of their property; and
- c) Will emissions from the proposed facility create nuisance conditions?⁶

As set out below, the ALJ could not determine that any of the Protestants satisfied the distance requirement. With exceptions not applicable to this case, the ALJ only has jurisdiction over matters referred to SOAH by the Commissioners.⁷ Because the Commission's referral of other issues was contingent on the ALJ finding that at least one referred requester satisfied the distance requirement, the ALJ concluded that he had no jurisdiction over and did not consider those other issues.

In addition to the five Protestants, several other people and entities appeared at the preliminary hearing to seek party status. Nothing in the Commission's Order specifically referred those other hearing request to the ALJ for determination. Moreover, the ALJ understood the order as referring no issue, including whether others might be affected by the Application, unless at least one of the five referred hearing requesters satisfied the distance requirement of Section 382.058(c). Based on that, the ALJ ruled that he had no jurisdiction to consider those other requests for party status, though he did allow incidental evidence concerning the locations of the residences of those other requesters to be admitted.

⁶ 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. 86593; TCEQ Docket No. 2009-1691-AIR (Dec. 17, 2009.)

⁷ Water Code § 5.311 (a).

IV. EVIDENCE CONCERNING EMISSIONS AND EFFECTS

The preliminary hearing primarily concerned the distances between the Protestants' home and East Texas' proposed plant. It was not a full hearing on emissions from the proposed plant and the adverse effects, if any, that they might cause. Nevertheless, the Protestants offered some evidence to show that they could be affected, as defined by Water Code § 5.115.

East Texas currently operates to some extent. No one argued or offered evidence to indicate that operation is unauthorized, but there is no evidence concerning the nature of its authorization. That existing operation has led some of the Protestants to conclude that they are already being impacted by emissions from East Texas.

Marshall V. Brown has lived for over 30 years at 301 Sycamore Street, Prairie View, Texas. Luther Francis lives at 201 Hill Street and Hazel Gilliard lives at 300 Sycamore St. in Prairie View. Mr. Brown testified that all five of the Protestants' residences were located to the north of the East Texas's property and across Old Houston Highway.

Mr. Brown, Mr. Francis, and Ms. Gilliard testified to their lay perceptions that emissions from East Texas' existing operation were reaching their property and adversely affecting their yard, homes, and vehicles. They also noted their and their neighbors' health problems and their unconfirmed fears that those problems might be related to East Texas' current and proposed emissions.

East Texas responded to those concerns. Richard Schultz is manager of the East Texas plant and has worked there in different roles for many years. He forcefully denied that East Texas was or would be the source of the emissions that might affect the Protestants. He testified and offered photographic evidence of uncontrolled particulate emissions from a sand pit adjacent to the East Texas facility that is not owned by or affiliated with the East Texas facility.⁸

⁸ Applicant Exs. E and G.

Mr. Schultz also testified that uncontrolled burning regularly occurs on property to the south of the East Texas facility by a person not affiliated with East Texas.

As set out below, the ALJ cannot conclude that the Protestants' homes are within 440 yards of the proposed plant, as required for them to obtain a hearing. For that reason, the ALJ sees no need to address the disputes concerning the sources of the emissions or whether the Protestants would be affected by the Application.

V. THE LEGAL STANDARD FOR PARTY STATUS

Health & Safety Code § 382.058 provides

- (a) A person may not begin construction on any concrete plant that performs wet batching, dry batching, or central mixing under a standard permit under Section 382.05195 or a permit by rule adopted by the commission under Section 382.05196 unless the person has complied with the notice and opportunity for hearing provisions under Section 382.056.
- (b) This section does not apply to a concrete plant located temporarily in the right-of-way, or contiguous to the right-of-way, of a public works project.
- (c) For purposes of this section, only those persons actually residing in a permanent residence within 440 yards of the proposed plant may request a hearing under Section 382.056 as a person who may be affected.

Commission rule 30 TAC § 80.17⁹ provides, with certain exceptions not applicable to this case, that: "The burden of proof is on the moving party by a preponderance of the evidence..." The ALJ concludes that the Protestants, who have moved for a hearing and admission as parties, have the burden of proving that they are entitled to a hearing under section 382.058(c).

⁹ Adopted by reference in SOAH rule 1 TAC § 155.1(d).

In at least one prior concrete batch plant case, *Block Creek*, the Commission determined that a hearing requester was not an affected person within the meaning of Health & Safety Code § 382.058(c) when, “The structures on [the requester’s] property that serve as living quarters are greater than 440 yards from the plant (**emission points**) in the Registration.” (Emphasis added.)¹⁰

The Protestants argue that *Block Creek* is too little precedent to be controlling for purposes of determining that the requesters’ residences must be within 440 yards of the plant’s emission points. They contend that § 382.058(c) could be interpreted as only requiring that residents be within 440 yard of the center of the plant or even from the plant’s property line. The ALJ does not agree.

Administrative construction of a statute may be considered in construing a statute.¹¹ Additionally, the *Block Creek* case presented a very similar issue to that in this case, and the Commission reached its conclusion in that case less than one year ago. Moreover, as the below analysis shows, the Commission’s determination in *Block Creek* was consistent with the rules of statutory construction applicable to Health & Safety Code § 382.058(c).

The Protestants argue that § 382.058(c) should be liberally construed to favor the admissions of parties. They note that the policy, purpose, and intent of the Texas Clean Air act are to safeguard the state’s air resources, protect public health, welfare, property, and esthetic enjoyment, and to vigorously enforce the Act.¹² They argue that granting hearings should be favored because hearings promote those objectives.

¹⁰ 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 (Finding of Fact No. 7)(Mar. 27, 2009).

¹¹ TEX. GOVERNMENT CODE ANN. (Gov’t Code) § 311.023(6).

¹² Health & Safety Code § 382.002.

It is true that in interpreting a statute, a tribunal should diligently attempt to ascertain the Legislature's intent.¹³ However, the ALJ finds that in enacting § 382.058(c), the Legislature's indicated an intent to significantly limit hearings on applications for standard concrete batch permits, not to liberally allow them. On applications for other types of environmental permits, affected persons are granted contested case hearings whether or not they live within 440 yards of the proposed plant.¹⁴ Given that, including the distance requirement in § 382.058(c) indicates that the Legislature intended it to be strictly applied.

What did the Legislature intend by using the phrase "proposed plant," within 440 yards of which someone must permanently reside to obtain a hearing? The Protestants contend that the Legislature might have meant the Applicant's property line; the center of its property; or roads, piles, or a tower on its property. ED argues that "proposed plant" has a more specific meaning: the stationary point of origin of air contaminants proposed in the application, not including a mine, quarry, well test, or road. The ALJ agrees with the ED.

Words and phrases used in codified statutes and rules adopted under them must be construed according to the technical or particular meaning that they have acquired, whether by legislative definition or otherwise. They must also be read in context and construed according to the rules of grammar and common usage.¹⁵

Chapter 382 does not define "proposed plant" or even "plant," though both are frequently used throughout the chapter. Catherine Chinni is the TCEQ environmental permit specialist who reviewed the Application in this case. At the hearing, Ms. Chinni and the ED's counsel pointed to the definition of "facility" contained in Commission rule 30 TAC § 116.10(6). They indicated that TCEQ Staff has long used that as the definition of "proposed plant" when applying Health & Safety Code § 382.058(c). With a small twist, the ALJ agrees with that interpretation.

¹³ Gov't Code § 312.005.

¹⁴ Water Code § 5.115 and 5.556.

¹⁵ Government Code §§ 311.002 and 311.011(a) and (b).

The definition of “facility” in Health & Safety Code § 382.003(6) is nearly identical to that in rule 116.10(6) and applies to the use of that word throughout Chapter 382 of the Health & Safety Code. It states:

“Facility” means a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered to be a facility.

Fleshing out that definition, Health & Safety Code § 382.003 (12) provides: “‘Source’ means a point of origin of air contaminants, whether privately or publicly owned or operated.”

The Staff’s use of the definition of facility is some evidence that the term “proposed plant” has acquired a technical or common meaning. Even more persuasively, the context of Health & Safety Code Chapter 382 indicates that “plant” and “facility” are synonymous. In the context of chapter 382, “facility” and “plant” are frequently used interchangeably.¹⁶ For an example that is particularly instructive in the current situation, Health & Safety Code § 382.0516(b) states:

... for an application that relates to an existing or proposed **concrete batch plant**, on receiving an application for a construction permit, an amendment to a construction permit, an operating permit, or an authorization to use a standard permit, the commission shall send notice of the application:

- (1) to the county judge of the county in which the **facility** is or will be located; and
- (2) if the **facility** is or will be located in a municipality or the extraterritorial jurisdiction of a municipality, to the presiding officer of the municipality's governing body.

(Emphasis added.)

¹⁶ Health & Safety Code §§ 382.003(9)(F), 382.051(a)(6), 382.05194, 382.053(c), and 382.062.

Using the definitions of “facility” and “source” to interpret “proposed plant,” the ED argues that Health & Safety Code § 382.058(c) requires a person seeking party status and a contested case hearing on an application for a standard permit for a concrete batch plant to show that he or she permanently resides within 440 yards of a stationary point of origin of air contaminants proposed in the application, not including a mine, quarry, well test, or road. The ALJ agrees with the ED.

The exclusion of roads from the definition of facility—and the inferred meaning of proposed plant—is important in this case. There is evidence of roads, or at least areas used by vehicles, on East Texas’ property that are significantly closer to the Protestants’ residences than the proposed stationary emission points.¹⁷ At the hearing, the ALJ found it confusing when Ms. Chinni testified that she understood that roads, though not part of the “proposed plant,” are governed by the standard permit. In fact, Health & Safety Code § 382.05198 requires the permit to contain provisions to minimize emissions from roads and other surfaces used by vehicles:

(a) The commission shall issue a standard permit for a permanent concrete plant that performs wet batching, dry batching, or central mixing and that meets the following requirements:

...

(11) each **road**, parking lot, or other area at the plant site that is used by vehicles must be paved with a cohesive hard surface that is properly maintained, cleaned, and watered so as to minimize dust emissions . . .

Despite that, roads are specifically excluded from the definition of “facility.” Reconciling the statutes, the ALJ concludes that roads and other areas used by vehicles may be *at* a “facility” but are not *part* of the “facility.”

¹⁷ Applicant Ex. A.

VI. PROTESTANTS HAVE NOT SHOWN THEY RESIDE WITHIN 440 YARDS OF THE PROPOSED PLANT

The evidence does not show that any of the referred requesters resides within 440 yards of East Texas's proposed emission points. The Protestants did not even offer evidence concerning the location of the emission points.

Prof. Brown is a professor of architecture at Prairie View A&M University. He has had experience working on major construction projects, engaged in surveying for 20 years, and taught university courses related to surveying. Prof. Brown was a credible expert witness on surveying.

Prof. Brown used the freely available and widely used Google Earth software¹⁸ to prepare aerial photos and estimate distances between the Protestants' residences and certain points on East Texas's property.¹⁹ Google Earth estimated that Prof. Brown's home was 336 yards, the Gilliard's home was 406 yards, and Esel Bell's home was 424 yard north of East Texas' property line.²⁰

Prof. Brown testified that Google Earth was a tool that could be relied on to measure distances within a certain range of reliability. He repeatedly declined, however, to testify that Google Earth's data or calculations of distances were accurate. He did attempt to confirm the distance that Google Earth estimated from the Applicant's northern property line to one of the Protestants' property.

Of the five Protestants, Luther Francis' home is closest to the northern perimeter of the East Texas property. Prof. Francis is a retired professor of engineering at Prairie View A&M University. Although not a licensed surveyor, he has had extensive experience in surveying, beginning in the military, and he has taught the subject for 20 years at the university. He lent his

¹⁸ At times Prof. Brown referred to it as Google Maps.

¹⁹ Protestants Exs. A, B & C.

²⁰ Protestants Ex. A.

survey equipment to Prof. Brown and estimated the distance from his residence to his property line. However, Prof. Francis was not directly involved in surveying or estimating the distance between his property and East Texas' property. Prof. Francis did express his confidence in Prof. Brown's distance estimations, apparently based on his knowledge of Prof. Brown's expertise and character.

Prof. Brown testified that, with the help of several assistants, he used a survey chain to roughly measure the distance from Prof. Francis' home to the northern perimeter of the East Texas property. He did this in an attempt to test the accuracy of the Google Earth distance calculations. The measurement with the chain indicated that the distance to the northern perimeter was 237 yards. Prof. Brown testified that this was within a few feet of the distance that Google Earth estimated from East Texas' property to Prof. Francis' home; thus, the 237-yard field measurement is also noted on an aerial photo produced by Google Earth.²¹

There is, however, no evidence that emission points at East Texas' proposed plant are on East Texas' property line. Aside from Prof. Brown, none of the other witnesses for the Protestants offered testimony concerning the distances from the emission points to the Protestants residences. Prof. Brown used Google Earth to estimate distances of 440 yards from the five Protestants' homes to points on East Texas' property.²² Prof. Brown testified that what he believed were East Texas' emission points were within those 440-yard distances. They included what he thought were roadways and storage areas and East Texas' "tower".²³

However, Prof. Brown testified that he had never been on East Texas' property and was not sure of the locations of any of its emission points. Additionally, as discussed above, roads

²¹ Protestants Ex. B. Protestants Ex. C shows Prof. Francis' home as 144 yards from East Texas property line, but that is contrary to Prof. Brown's chain measurement of 237 yard and his testimony that Google Earth estimated a similar distance. Prof. Brown testified that the 144 yards indicated on Protestants Ex. C was inaccurate.

²² Protestants Ex. B. This also includes estimated distances from the homes of three people—Bell Miller, John Brandon, and Carolyn Simpson—who are not among the five Protestants whose hearing requests the Commission referred to the ALJ.

²³ Protestants Ex. C.

are not part of the proposed plant, even if at the facility. The “tower” and storage areas are landmarks on East Texas’ property that are visible from offsite.²⁴ But there is no evidence that any of them is a “structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment.” Thus, there is no evidence that they are part of the facility or proposed plant.

The TCEQ’s Ms. Chinni testified that the Protestants residences were not within 440 yards of the emission points, but it was not clear how she determined that. It appeared that all of her information was based solely on what she learned from other Commission staff members.

The best evidence of the locations of those emission points is shown on the facility site plan prepared by East Texas’ environmental consultant.²⁵ The consultant did not testify, but other evidence indicated that the site plan was reasonably accurate. The plant manger, Mr. Schultz, testified that the emissions would come from existing pieces of equipment, he was very familiar with their locations, and they are correctly shown on the site plan.²⁶ A distance scale is shown on the site drawing and indicates that one inch equals approximately 200 feet. All of the emission points are at least five inches from the northern perimeter of East Texas’ property as shown on the site plan, which would equate to 1,000 feet or approximately 333 yards in on-the-ground distance.

Additionally, Mr. Schultz testified that the entire north-to-south distance of the East Texas property was 3/8 of a mile and the emission points were about in the middle, or 3/16 of a mile from the northern boundary, which would be 330 yards.²⁷ Mr. Schultz later estimated that the emission points were 850 to 1,000 feet from the highway to the north of the property. That would 283.33 to 333 yards.

²⁴ Protestants Ex. 17-20.

²⁵ Applicant Ex. A.

²⁶ Labeled as emission points 1 through 9 on Applicant Ex. A.

²⁷ The ALJ takes official notice that there are 1,760 yards in a mile; hence, 3/16 of a mile is 330 yards. An objection to that official notice should be filed as an exception to the PFD.

That means that Prof. Francis' home is at least 520.33 yards from the nearest emission point on East Texas' property, 237 yards from his home to the property line and at least 283.33 yards, or 850 feet, from the property line to the nearest emission point. The homes of the other Protestants are even further away from the emission points.

The ALJ concludes that none of the Protestants' permanent residences is within 440 yards of East Texas' proposed plant. Thus, under Health & Safety Code § 382.058(c), none of the Protestants is entitled to a hearing, and their requests for a hearing should be denied.

VII. CONCLUSION

The ALJ recommends that the Commission adopt the attached proposed order, deny the Protestants' request for a hearing, and remand the Application to the ED for uncontested processing.

SIGNED April 8, 2010.



**WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER
CONCERNING THE APPLICATION OF EAST TEXAS PRECAST CO., LTD.,
FOR REGISTRATION NO. 86593 AND APPROVAL TO USE
THE AIR QUALITY STANDARD PERMIT FOR CONCRETE BATCH PLANTS,
TCEQ DOCKET NO. 2009-1691-AIR
SOAH DOCKET NO. 582-10-2070**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application (Application) of East Texas Precast Co., Ltd., (East Texas) for Registration No. 86593 and approval to use the air quality standard permit for concrete batch plants. A Proposal for Decision (PFD) was presented by William G. Newchurch, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a preliminary hearing in this case on March 10, 2010, in Prairie View, Texas.

After considering the Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. East Texas' plant would be at 44855 Old Houston Highway, Waller County, Texas.
2. Esel D. Bell; Marshall V. Brown, P.E.; Luther V. Francis; and Clifton and Hazel Gilliard (Protestants) requested a contested case hearing on East Texas' Application.
3. On December 9, 2009, the Commission considered requests for hearing that had been filed in this case and referred only the five Protestants' hearing requests to SOAH for a

limited hearing to determine whether they were affected in accordance with the distance requirement in TEX. HEALTH & SAFETY CODE (Health & Safety Code) § 382.058(c).

4. Notice of a preliminary hearing on the application was mailed to East Texas, the Executive Director (ED), the Office of Public Interest Counsel (OPIC), and each of the five Protestants on January 11, 2010. It was also published in *The Waller Times*, a newspaper generally circulated in Prairie View, Texas, on January 25, 2010.
5. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
6. The notice of the preliminary hearing indicated that the concrete batch plant was at 44855 Old Houston Highway, Hempstead, Waller County, Texas.
7. The East Texas plant is within the corporate limits of the City of Prairie View, not Hempstead.
8. As indicated in the notices, the ALJ convened the preliminary hearing at the Prairie View City Hall, Council Chambers, 44500 Business 290, Prairie View, Texas 77446, on March 10, 2010. The preliminary hearing was concluded that same day.
9. The following appeared at the preliminary hearing:

PARTY	REPRESENTATIVE
East Texas	Tracy Glenn, attorney
Protestants	Latosha Lewis Payne, attorney
ED	Tucker Henson and Erin Selvera
OPIC	Eli Martinez

10. Each of the Protestants was present at the preliminary hearing personally and through counsel; hence, each of them had actual notice of the preliminary hearing.
11. Marshall V. Brown, has lived for over 30 years at 301 Sycamore Street, Prairie View, Texas. Luther Francis lives at 201 Hill Street, and Clifton and Hazel Gilliard live at 300 Sycamore St. in Prairie View.
12. All five of the Protestants' residences are located to the north of the East Texas property and across Old Houston Highway.
13. Of the five Protestants, Luther Francis' home is closest to the East Texas property. It is approximately 237 yards to the north of East Texas' property line.
14. East Texas' emissions would come from existing pieces of equipment.
15. The emission points are 283.33 to 333 yards south of the northern boundary of East Texas' property.
16. Mr. Francis' home is at least 520.33 yards from the nearest emission point on East Texas' property: approximately 237 yards from his home to the property line and at least 283.33 yards from the property line to the nearest emission point.
17. The homes of the other Protestants are even further away from the emission points than Mr. Francis' home.
18. None of the five Protestants' permanent residences is within 440 yards of East Texas' emission points.
19. In referring the issue of determining whether the Protestants were affected under Health & Safety Code § 382.058(c), the Commission also contingently referred other issues only

if the ALJ determined that a requester referred by the Commission was determined to satisfy the distance requirement in section 382.058(c).

20. None of the Protestants satisfied the distance requirement contained in section 382.058(c); hence, the ALJ did not consider any of the contingently referred issues.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction to consider East Texas' application under Chapter 382 of the Health & Safety Code.
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. (Government Code) § 2003.047.
3. In pertinent part, Health & Safety Code § 382.056(b)(1) provides: "The notice [of intent to obtain a permit] must include: (1) a description of the location or proposed location of the facility . . ." Health & Safety Code §§ 382.056(i) and 382.058(a) require that same information to be included in the notice of opportunity to ask for a hearing on any permit application and specifically on an application for construction of a concrete batch plant under a permit by rule, standard permit, or exemption.
4. Health & Safety Code § 382.031(b) requires the notice to describe briefly and in summary form the purpose of the hearing and the date, time, and place of the hearing. Gov't Code §§ 2001.051 and 2001.052 contain similar and additional notice requirements.
5. Health & Safety Code § 382.058 provides:

(a) A person may not begin construction on any concrete plant that performs wet batching, dry batching, or central mixing under a standard permit under Section 382.05195 or a permit by rule adopted by the commission under Section 382.05196 unless the person has complied with the notice and opportunity for hearing provisions under Section 382.056.

(b) This section does not apply to a concrete plant located temporarily in the right-of-way, or contiguous to the right-of-way, of a public works project.

(c) For purposes of this section, only those persons actually residing in a permanent residence within 440 yards of the proposed plant may request a hearing under Section 382.056 as a person who may be affected.

6. Based on the above Findings of Fact and Conclusions of Law, the notice of the hearing was legally sufficient.
7. In interpreting a statute, a tribunal should diligently attempt to ascertain the Legislature's intent. Gov't Code § 312.005.
8. On applications for other types of environmental permits, affected persons can be granted contested case hearings whether or not they live within 440 yards of the proposed plant. *E.g.*, Water Code § 5.115 and 5.556.
9. Including a distance restriction in Health & Safety Code § 382.058(c) indicates that the Legislature intended it to be strictly applied.
10. Chapter 382 does not define "proposed plant" or even "plant," though both are frequently used throughout the chapter.
11. Words and phrases used in codified statutes and rules adopted under them must be construed according to the technical or particular meaning that they have acquired, whether by legislative definition or otherwise. They must also be read in context and construed according to the rules of grammar and common usage. Gov't Code §§ 311.002 and 311.011(a) and (b).

12. The definition of “facility” in Health & Safety Code § 382.003(6) applies to the use of that word throughout Chapter 382 of the Health & Safety Code. It states:

"Facility" means a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered to be a facility.
13. Fleshing out that definition, Health & Safety Code § 382.003 (12) provides: “‘Source’ means a point of origin of air contaminants, whether privately or publicly owned or operated.”
14. In the context of chapter 382, “facility” and “plant” are frequently used interchangeably. *E.g.* Health & Safety Code §§ 382.003(9)(F), 382.051(a)(6), 382.0516(b), 382.05194, 382.053(c), and 382.062.
15. The context of Health & Safety Code Chapter 382 indicates that “plant” and “facility” are synonymous.
16. The TCEQ and its Staff have long interpreted “proposed plant” as meaning “facility” when applying Health & Safety Code § 382.058(c). *See 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 (Finding of Fact No. 7)(Mar. 27, 2009).*
17. Based on the above Conclusions of Law, Health & Safety Code § 382.058(c) requires a person seeking party status and a contested case hearing on an application for a standard permit for a concrete batch plant to show that he or she permanently resides within 440 yards of a stationary point of origin of air contaminants proposed in the application, not including a mine, quarry, well test, or road.

18. With certain exceptions not applicable to this case, Commission rule 30 TAC § 80.17 provides, that: “The burden of proof is on the moving party by a preponderance of the evidence”
19. The Protestants have moved for a hearing and admission as parties and have the burden of proving that they are entitled to a hearing under Health & Safety Code § 382.058(c).
20. None of the Protestants’ permanent residences is located within 440 yards of East Texas’ proposed emission sources or proposed plant.
21. Under Health & Safety Code § 382.058(c), none of the Protestants is an affected person entitled to a hearing, and their requests for a hearing should be denied.

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

**Bryan W. Shaw, Ph.D., Chairman
For the Commission**