



JACKSON WALKER L.L.P.
ATTORNEYS & COUNSELORS

Aldean E. Kainz
(512) 236-2080 (Direct Dial)
(512) 391-2125 (Direct Fax)
akainz@jw.com

February 14, 2011

Ms. LaDonna Castañuela (MC-105)
Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle, Building F
Austin, Texas 78711-3087

Via Electronic Filing and Hand Delivery

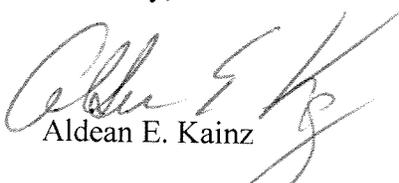
RE: **SOAH Docket No. 582-10-2489**; TCEQ Docket No. 2009-1842-AIR;
Application of Aggregate Industries – WCR, Inc. for Air Quality Permit
No. 83755 in Comal County, Texas

Dear Ms. Castañuela:

In accordance with Judge Wilkov's letter dated January 13, 2011, enclosed please find Applicant's Reply to Exceptions to the Administrative Law Judge's Proposal for Decision for filing in the above-referenced matter. We are providing an original and seven copies of the brief in accordance with 30 TAC §1.10(d).

Please let us know if you have any questions.

Sincerely,



Aldean E. Kainz

cc: Hon. Penny Wilkov
Administrative Law Judges
State Office of Administrative Hearings
300 West 15th Street, Suite 502
Austin, Texas 78701

Via Electronic Filing

James Blackburn
Mary Carter
Adam Friedman
Charles Irvine
Blackburn Carter, P.C.
4709 Austin Street
Houston, Texas 77004
jbb@blackburncarter.com
mcarter@blackburncarter.com
charles@blackburncarter.com
afriedman@blackburncarter.com

Via Email and U.S. Mail

William Jackson
SAFE
2331 Rock Grove
New Braunfels, Texas 78132
Wjackson010@satx.rr.com

Via Email and U.S. Mail

Alexis Lorick (MC-173)
Amy L. Browning (MC-173)
Environmental Staff Attorney
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711
abrownin@tceq.state.tx.us

Via Email and U.S. Mail

James B. Murphy (MC-103)
Public Interest Counsel
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711
jmurphy@tceq.state.tx.us

Via Email and U.S. Mail

**TCEQ DOCKET NO. 2009-1842-AIR
SOAH DOCKET NO. 582-10-2489**

APPLICATION OF AGGREGATE	§	BEFORE THE
INDUSTRIES-WCR, INC. FOR	§	
AIR QUALITY PERMIT NO. 83755	§	TEXAS COMMISSION ON
IN COMAL COUNTY, TEXAS	§	
	§	ENVIRONMENTAL QUALITY

**APPLICANT’S REPLY TO EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE’S PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Applicant Aggregate Industries-WCR, Inc. (“Applicant”) hereby files their Reply to Exceptions to the Administrative Law Judge’s Proposal for Decision (“PFD”) filed by Protestant Groups I and II (“Protestants”) and the Office of Public Interest Counsel (“OPIC”), and respectfully states as follows:

**I.
INTRODUCTION**

The Protestants’ and OPIC’s exceptions to the PFD merely restate positions that have already been extensively briefed by the parties, carefully reviewed and rejected by the ALJ, and addressed in detail in the PFD and Proposed Order. The Protestants and OPIC continue to press the same arguments regarding the Applicant’s air dispersion modeling, and the Protestants continue to misinterpret the data concerning potential health and environmental effects. Each of these issues has already been thoroughly briefed by the parties and considered by the ALJ. As shown by the overwhelming weight of the evidence, the Applicant’s application and air modeling for this rock crushing facility meet or exceed all applicable requirements, and the draft permit is consistent with the law and protective of air quality, human health, welfare, and the environment. The Applicant respectfully requests that the Commission adopt the ALJ’s PFD and

Proposed Order, as amended by the Applicant's exceptions and Executive Director's proposed revisions, and grant the Applicant's permit application.

II. **REPLIES TO EXCEPTIONS**

A. The Applicant's Air Dispersion Modeling Used Appropriate Emission Factors and Screening Background Concentrations.

1. Use of AP-42 Emission Factors is Customary and Protective.

The Protestants continue to take issue with the Applicant's use of the latest compilation of air pollutant emission factors, known as "AP-42," developed and maintained by the Emission Factor and Inventory Group (EFIG) of the EPA's Office of Air Quality Planning and Standards. Yet, the use of the AP-42 emissions factors is commonly accepted for this type of application and is recommended for use by the TCEQ.¹ Larry Buller, P.E., who has been a permit engineer with the TCEQ and has reviewed more than 200 permits since June 2003,² testified that AP-42 is scientifically reliable and the TCEQ has never asked that anything else be used.³ He further testified that "AP-42 has been used 100% of the time" when he has reviewed applications for rock crushing permits.⁴ Moreover, even the Protestants' witness acknowledged that AP-42 is a compendium of emission factors that can be used for the purposes of "providing guidance,"⁵ that he was aware the TCEQ approved the use of AP-42 emission factors,⁶ and that his own company uses AP-42 "when we deem appropriate."⁷ In all, AP-42 was shown to be not only scientifically reliable, but also the authoritative source for emission factors for rock crushing permits.

¹ Exhibit APP-8 (Nichols), p. 29:9-11.

² Transcript, pp. 630:21 – 631:7 (Buller).

³ Transcript, p. 631:14-23 (Buller).

⁴ Transcript, p. 631:8-13 (Buller).

⁵ Transcript, p. 527:16-18 (Bost).

⁶ Transcript, p. 528:6-7 (Bost).

⁷ Transcript, p. 524:2-3 (Bost).

Further, the Protestants' complaints about AP-42 were shown to be unwarranted. For instance, their argument that rock type affects the accuracy of the AP-42 emission factors is directly contrary to EPA guidance, which states that the "research conducted to date infused on fugitive dust emissions from crushed stone operations have consistently supported the conclusion that *rock type is not a major variable.*"⁸ Further, contrary to the Protestants' statements, the Applicant did investigate source-specific data at nearby, similarly situated facilities. Dave Knollhoff, the certified consulting meteorologist who conducted the Applicant's air dispersion modeling, used the TCEQ's Point Source Database (TCEQ's database of existing emission sources) to identify nearby off-site sources, and then supplemented that information by acquiring and including additional emissions, source parameters, and source location data for several other nearby emission sources that were not represented in the Point Source Database.⁹ Mr. Knollhoff's Modeling Report clearly identifies seven additional sources of particulate matter emissions (e.g., a cement terminal, rock crushers, hot mix asphalt plant, a surface coating facility and a chemical lime plant),¹⁰ and he thoroughly assessed the permitted emission levels from each facility as part of his modeling report. Thus, not only did Mr. Knollhoff consider emissions from other facilities, he used knowledge of the area to consider even more facilities than those shown in the TCEQ database, resulting in a more conservative analysis.

The great weight of the evidence in this proceeding demonstrates that use of the AP-42 emission factors is not only customary, but protective. The Applicant adhered to the longstanding and widely accepted policy for rock crushing applications by using AP-42, and analyzed emissions from nearby off-site sources to ensure that the air dispersion modeling was

⁸ Exhibit APP-68, p. 17.

⁹ Exhibit APP-32 (Knollhoff), pp. 14:30 – 15:1-4.

¹⁰ Exhibit APP-34 (Modeling Report), pp. APP-00145 – APP-00149.

thorough and conservative. As a result, the ALJ correctly concluded that the Applicant's use of the AP-42 emission factors in this case was appropriate.

2. *The Applicant's Modeling Used a Conservative and Appropriate Screening Background Concentration.*

The Protestants and OPIC allege in their exceptions that the Applicant's air dispersion modeling used an outdated screening background concentration. However, this allegation is based on a flawed and speculative theory that attempts to tie particulate matter emissions to population increases. A review of actual air quality data—both national and local—does not show any such correlation.

The Protestants and OPIC fault the Applicant for following the TCEQ's most recent, publicly available guidance on screening background concentrations, which is contained in a memorandum dated September 4, 1998. For Comal County, the guidance document supplies screening background concentrations of $75 \mu\text{g}/\text{m}^3$ for 24-hour PM_{10} and $25 \mu\text{g}/\text{m}^3$ for annual PM_{10} .¹¹ The TCEQ guidance states that if the total concentration is less than 90 percent of the National Ambient Air Quality Standard (NAAQS), "the demonstration is complete."¹² No further analysis is required at that point because the numbers provided are designed to be conservative.¹³ Thus, based on TCEQ guidance, all that was required was to use the screening background concentrations provided.

Nevertheless, the Applicant did not simply copy the $75 \mu\text{g}/\text{m}^3$ screening background concentration from the TCEQ guidance. Mr. Knollhoff testified that to conduct the air

¹¹ Exhibit ED-21, p. 000374.

¹² Exhibit ED-20, p. 000360.

¹³ See Transcript, p. 212:5-12 (Knollhoff) ("There are two types of background concentrations that are available. The screening background concentration is one of those. It is typically the *most conservative number* to be utilized within the modeling demonstration. The other route to go if the screening background concentrations are too high is to refine the background concentration with monitored values.") (emphasis added); see also Transcript, p. 707:13-15 (Menendez) (confirming that the Applicant used a "conservative screening background concentration").

dispersion modeling, he first reviewed the most recent background concentration data from the nearest air quality monitor for PM₁₀, which is located in Selma, Bexar County, Texas, approximately eight miles from the project site. At the time the Applicant submitted its application, the most recent data for the Selma monitor was for 2006.¹⁴ The 2006 data from the Selma monitor produced a number lower than the conservative TCEQ guidance number of 75 µg/m³ for 24-hour PM₁₀.¹⁵ Thus, even though the actual data from the monitor nearest to Comal County indicated a lower background concentration, the Applicant used the higher, more conservative value provided in the TCEQ guidance. The TCEQ confirmed that using this value was reasonable and conservative.¹⁶

Incredibly, OPIC continues to incorrectly state that the Protestants' witness Richard Bost adjusted for population growth and calculated a background concentration of 90 µg/m³. OPIC's assertion is overwhelmingly contradicted by Mr. Bost's actual testimony in which he stated that this number was for "illustration purposes,"¹⁷ that "[t]he purpose of the illustration wasn't to give you a definitive calculation of what the value was,"¹⁸ and that he "did not propose it as -- as the value that should be used."¹⁹ Further, he could not remember during his deposition or at the hearing any of the calculations he performed to reach that number.²⁰ Rather, he stated that he "basically back calculated into the 90".²¹ It appears Mr. Bost simply pulled a number out of thin air to prop up his unfounded theory on population, but which has no basis in fact. There is no credible evidence to support that 90 µg/m³ is an appropriate value. Accordingly, there is no

¹⁴ Exhibit APP-32 (Knollhoff), p. 16:7-8.

¹⁵ Exhibit APP-32 (Knollhoff), p. 16:7-9.

¹⁶ Transcript p. 704:16-17 (Menendez).

¹⁷ Transcript, p. 568:12-13 (Bost).

¹⁸ Transcript, p. 569:6-7 (Bost).

¹⁹ Transcript, p. 568:13-14 (Bost).

²⁰ Transcript, pp. 568:25 – 569:6 (Bost).

²¹ Transcript, p. 568:21-24 (Bost).

justification for OPIC's request to remand this application for evidence on what reductions in throughput are necessary to comply with the NAAQS when a value of $90 \mu\text{g}/\text{m}^3$ is used for the background concentration.

Furthermore, the novel theory on which OPIC and the Protestants rely, was completely discredited during the hearing. National trends show that there is no correlation between PM and population.²² In addition, actual readings for the Selma monitor show that there is not a correlation between PM and population near the Comal County area. In their exceptions to the PFD, the Protestants attempt to enter new evidence into the record of more recent air quality data from the Selma monitor. Noticeably, however, they did not include the most recent data publicly available from EPA AirData for 2008, which is $55 \mu\text{g}/\text{m}^3$ for 24-hour PM_{10} for the Selma monitor, and is significantly lower than the conservative screening background concentration of $75 \mu\text{g}/\text{m}^3$ authorized by TCEQ guidance and used by the Applicant in this case. Once again, actual air quality data shows that the Applicant used a conservative number and that there has not been a continual increase in PM as population growth has occurred. While there was a mention that the Selma monitor reading for 2009 was $84 \mu\text{g}/\text{m}^3$, even with this reading, the Applicant's application meets the NAAQS.

Based on the totality of the evidence presented, the ALJ was correct to discount the unsubstantiated theory of the Protestants' witness. Mr. Bost did not provide any actual calculations for background concentration, and the theory he proffered does not fit with actual monitoring data readily available from the EPA. The evidence in this case demonstrates that the Applicant's air dispersion modeling used a conservative and appropriate screening background

²² See Exhibits APP-66 (National Trends in Particulate Matter Levels), APP-67 (PM_{10} National Average 24-hour Concentration Data).

concentration and that the predicted air emissions from the facility will comply with the NAAQS.

B. The Applicant Performed Appropriate Analyses for Health Effects Review and Nuisance Showing the Proposed Facility Will Be Protective of Human Health and the Environment.

1. The Applicant Conducted a Thorough and Appropriate Health Effects Review Even Though Not Required for this Application.

The Protestants overstate the significance of the predicted limestone concentrations modeled by the Applicant. Noticeably, the Protestants failed to mention that an analysis of limestone concentrations is not required for this air quality permit.²³ As Dr. Lucy Fraiser testified, no health effects review is required for rock crushing facilities because emissions from rock crushers are not expected to have adverse effects.²⁴ Nevertheless, the Applicant employed Dr. Fraiser, a toxicologist with more than 20 years' experience, to conduct a health effects review of the application. After a thorough analysis, Dr. Fraiser testified that several case-specific factors warrant against concluding that there will be any adverse impacts due to limestone.²⁵ Notably, the effects screening level (ESL) for limestone is not based on any specific health effects associated with limestone,²⁶ which is a key reason a health effects review is not generally required for a rock crushing facility.²⁷ In addition, the maximum predicted off-site ground-level air concentrations are likely substantially overstated due to the conservative operating schedule assumed in the air dispersion modeling.²⁸ Moreover, as Dr. Fraiser testified,

²³ See Exhibit APP-45 (TCEQ APDG 5874, "Modeling Effects and Review Applicability"), p. APP-02206.

²⁴ Exhibit APP-52 (Fraiser), p. 10:16-27; see also Exhibit APP-G (Executive Director Response to Comment), p. 5 (stating that facilities like rock crushers do not require a toxicology impacts review "because the PM emissions are not expected to have adverse impacts.").

²⁵ Exhibit APP-52 (Fraiser), pp. 23:1– 24:1-7.

²⁶ Exhibit APP-52 (Fraiser), pp. 23:31 – 24:1-3; p. 24:25-28.

²⁷ See Exhibit APP-G (Executive Director Response to Comment), page 5 (stating that facilities like rock crushers do not require a toxicology impacts review "because the PM emissions are not expected to have adverse impacts.").

²⁸ Exhibit APP-52 (Fraiser), p. 23:16-26.

the “most important factor” considered in determining whether exceedances are allowable is the degree of confidence in the toxicity database for limestone.²⁹ As she stated, confidence in the toxicity database for limestone is very low.³⁰ After considering all of the relevant factors, Dr. Fraiser concluded that, in her professional opinion, the predicted limestone concentrations from the proposed facility would not adversely impact the health, welfare, or physical property of any of the Protestants in this case.

The Protestants contend that the ALJ incorrectly concluded that the maximum off-site concentration for limestone was at the Union Pacific rail line rather than near the Fey house. However, the ALJ got this correct. The maximum off-site concentration is in fact located on the Union Pacific line. While this location is within the boundaries of the Applicant’s property, it is considered off-site because the railroad right of way is not owned by the Applicant.³¹ Regardless, contrary to what is stated in the Protestants’ exceptions, Dr. Fraiser did consider the potential for public exposure in her analysis for both the maximum predicted off-site concentration at the rail line,³² as well as the location near the Fey house discussed at the hearing.³³ Dr. Fraiser also testified that the modeling performed by Mr. Knollhoff and Michael Hunt, P.E., showed that all of the maximum impacts stay within the property boundaries in part because fugitive emissions are not expected to travel very far because the release height is not high.³⁴

In summary, there was substantial evidence presented in this case demonstrating that the potential limestone concentrations would not have an adverse effect on human health. The

²⁹ Exhibit APP-52 (Fraiser), p. 23:31-32.

³⁰ Exhibit APP-52 (Fraiser), p. 24:1-3.

³¹ Transcript, p. 396:10-21.

³² Exhibit APP-52 (Fraiser), p. 23:12-15.

³³ Transcript, p. 401:17-21 (Fraiser).

³⁴ Transcript, p. 430:1-21 (Fraiser).

Protestants did not present any evidence contradicting Dr. Frasier's analysis or conclusions. The ALJ's determination that the emissions from the Applicant's proposed facility will not adversely impact the Protestants' health is thoroughly supported by the record.

2. The Applicant Demonstrated that the Proposed Facility Will Not Contribute to Nuisance Conditions and that the TCEQ Has Enforcement Authority to Abate Any Nuisance.

The Protestants assert that a single modeling result by Mr. Hunt indicates nuisance conditions. However, this assertion is based on a mischaracterization of Mr. Hunt's testimony and a misunderstanding of the laws related to nuisance. As to nuisance, the TCEQ's rules state that:

No person shall discharge from any source whatsoever one or more air contaminants or combinations thereof, in such concentration and of such duration as are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property, or as to interfere with the normal use and enjoyment of animal life, vegetation, or property.³⁵

The Protestants' assertion that a single estimate of emissions can be used to predict the likelihood of a nuisance is incorrect. To have a nuisance, there must be an actual *discharge* from a *source*. A modeling result is not a discharge. Thus, at the most basic level, there has not been a nuisance in this case. As Larry Buller, P.E., testified, the TCEQ does not perform a nuisance review because nuisance is something that occurs, if at all, after a facility has been built, and it is impossible to predict the likelihood of a nuisance based on emissions from a facility.³⁶

³⁵ 30 Tex. Admin. Code (TAC) § 101.4.

³⁶ Transcript, pp. 672:19-25 – 673:1-2.

Q (MURPHY) Is there a nuisance review involved in your analysis?

A (BULLER) We do not review a nuisance.

Q And why is that?

A Nuisance is something that happens after it's been built, potentially.

Q Is it possible to predict the likelihood of a nuisance based on emissions from a facility?

A No, sir.

As Mr. Hunt testified, he attempted to determine potential short-term impacts with roads included in the modeling, so he ran the AERMOD air dispersion modeling program with road dust emissions included and the results indicated a maximum 24-hour PM₁₀ impact of 630 µg/m³. However, there was ample evidence presented at the hearing that this modeling result was unreliable and not likely to represent actual conditions at the facility. Notably, there is no reliable method for calculating 24-hour road emissions. The latest specific TCEQ guidance related to road emission calculations and modeling concludes that road dust emissions should only be evaluated on a long-term/annual basis and confirms that there is no reliable calculation method for shorter periods, including 24 hours.³⁷

The Applicant's evidence showed that by operating within the protective limits of the draft permit and by implementing best management practices, the emissions from all sources at the Applicant's site will not contribute to nuisance conditions. The Applicant's permit application should not be prospectively denied based on the remote possibility of a nuisance, especially when all of the witnesses who testified about nuisance noted that it was unlikely in this case and that the TCEQ has enforcement authority to abate any actual nuisance if one occurs.

³⁷ Exhibit APP-28, p. APP-00374 (Interoffice Memorandum from John Steib, Director, Air Permits Division to the Air Permits Division staff regarding Policy for Road Emissions Evaluation (Feb. 25, 2000):

Road dust emissions should be calculated and impacts evaluated for long-term periods (annual) only. Since there is no reliable calculation methods for shorter time periods (24 hour, 3 hour, 1 hour), emissions from road dust should not be calculated or impacts analysis performed. Instead, all project reviews should include the application of Best Management Practices (BMP) to minimize the creation of road dust and prevent nuisance conditions. This practice follows previous precedent and current guidance from the Commissioners and also strictly follows the definition of 'facility' as outlined in the Texas Clean Air Act and 30 TAC Ch. 116. In all cases where road dust is a potential nuisance issue, BMP will be applied.

C. Protestants and OPIC Have Not Demonstrated a Basis For Additional Permit Special Conditions.

The additional special conditions proposed by the Protestants and OPIC in their exceptions are unwarranted. The draft permit prepared by the ED already includes several special conditions that would apply to the Applicant's permit, including the implementation of best management practices (BMPs) and restrictions on visible fugitive emissions. OPIC requests that the BMP requirements be expanded to cover quarry operations. However, because the Applicant is seeking a permit solely for the proposed "facility," a term that expressly excludes quarries, it is not appropriate to modify the permit to cover quarry operations.³⁸ The Protestants request that the Commission include unspecified "vegetation and protective measures" as conditions in the permit. However, requiring this as a special condition is inappropriate and unnecessary given that evidence of suitable and feasible vegetation was not presented at the hearing and that the Applicant may need flexibility to adapt to changing conditions over the life of the facility. Accordingly, neither OPIC nor the Protestants have established the need for any special conditions in addition to the extensive list already included in the permit.

**III.
CONCLUSION**

The Protestants and OPIC have not raised any issues that have not already been thoroughly considered by the ALJ in the PFD and Proposed Order. After considering all of the evidence and law presented in this case, the ALJ correctly recommends that the Applicant's air quality permit application be granted. The Applicant respectfully requests that the Commission issue an order adopting the ALJ's PFD and Proposed Order, as amended by Applicant's

³⁸ See Tex. Health & Safety Code § 382.003(6) ("'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.*") (emphasis added).

exceptions and the Executive Director's proposed revisions, and grant Air Quality Permit No. 83755 to the Applicant.

Respectfully submitted,

JACKSON WALKER L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701
512-236-2000
Fax No. 512-236-2002



Aldean E. Kainz - State Bar No. 11078050
Chris B. Pepper - State Bar No. 24034622
Cassandra Quinn - State Bar No. 24053435

ATTORNEYS FOR AGGREGATE
INDUSTRIES-WCR, INC.

CERTIFICATE OF SERVICE

This is to certify that on this 14th day of February, 2011, a true and correct copy of the foregoing document was served on the following parties as indicated below:

Hon. Penny Wilkov
Administrative Law Judges
State Office of Administrative Hearings
300 West 15th Street, Suite 502
Austin, Texas 78701

Via Electronic Filing

James B. Blackburn, Jr.
Mary W. Carter
Charles Irvine
Adam Friedman
Blackburn Carter, P.C.
4709 Austin Street
Houston, Texas 77004
jbb@blackburncarter.com
mcarter@blackburncarter.com
charles@blackburncarter.com
afriedman@blackburncarter.com

Via Email and U.S. Mail

William Jackson
SAFE
2331 Rock Grove
New Braunfels, Texas 78132
Wjackson010@satx.rr.com

Via Email and U.S. Mail

Alexis Lorick (MC-173)
Amy L. Browning (MC-173)
Environmental Staff Attorney
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087
ALorick@tceq.state.tx.us
abrownin@tceq.state.tx.us

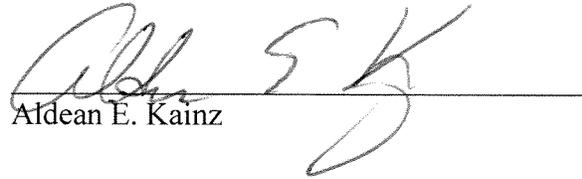
Via Email and U.S. Mail

James B. Murphy (MC-103)
Public Interest Counsel
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087
jmurphy@tceq.state.tx.us

Via Email and U.S. Mail

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

Via Electronic Filing


Aldean E. Kainz