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

February 14, 2011

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

Re: SOAH Docket No. 582-10-2489; TCEQ Docket No. 2009-1842-AIR
Contested Case Hearing for Application by Aggregate Industries-WCR., Inc. for Air Quality Permit No. 83755
The Executive Director's Replies to Exceptions to the ALJ's Proposal for Decision

Dear Ms. Castañuela:

Enclosed please find the original and eight copies of the Executive Director's Replies to Exceptions to the ALJ's Proposal for Decision for the above-referenced matter. Please return one file-stamped copy to my assistant.

If you have any questions, please call me at 239- 0891.

Sincerely,

Amy L. Browning
Staff Attorney
Environmental Law Division

Enclosures

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

APPLICATION BY	**§**	**BEFORE THE STATE OFFICE**
AGGREGATE	**§**	
INDUSTRIES – WCR, INC. FOR	**§**	**OF**
PROPOSED AIR	**§**	
QUALITY PERMIT NO. 83755	**§**	**ADMINISTRATIVE HEARINGS**

EXECUTIVE DIRECTOR'S REPLIES TO EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION

TO HONORABLE ADMINISTRATIVE LAW JUDGE PENNY WILKOV:

COMES NOW the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) and files the Executive Director's Replies to Exceptions to the Administrative Law Judge's Proposal for Decision (PFD) and in support thereof shows the following:

I. TCEQ's Evaluation of the Selected Screening Background Concentration for Comal County and its Impact on the Air Dispersion Modeling Submitted to TCEQ by the Applicant for Permit 83755 is Correct

Both OPIC and the Protestants continue to assert that the Executive Director's staff failed to properly evaluate the screening background concentration for Comal County selected by the Applicant in its application for permit 83755. Therefore, the Protestant's argue the air quality analysis, on which the screening background concentration is based, is flawed, and the draft permit if issued would violate state and federal air quality regulations.[1]

[1] *See generally*, "Discussion," in The Office of Public Interest Counsel' Exceptions to the Proposal for Decision; *see also*, Section II, "Air Dispersion Modeling and Related Issues," of Protestant Groups I and II's Exceptions to the Administrative Law Judge's Proposal for Decision and Order Reply to PFD; Protestant's Exhibit11.

Evident throughout the administrative record is that the guidance documents that OPIC asserts in his brief as "too" deferential are in actuality both federal and state guidance documents promulgated by U.S. EPA and TCEQ, specifically the EPA's AP-42 Emissions Factors and the TCEQ's September 2 and 4 1998 Memoranda from Dom Ruggieri, procedures used by TCEQ staff to evaluate screening background concentrations used in air quality analyses.[2] Despite this, both the OPIC and the Protestants assert in their Exceptions to the Proposal for Decision that the TCEQ's review of the air dispersion modeling submitted by the Applicant should have been based in part on Protestant's Exhibit 11. Protestant's Exhibit 11 is another 1998 memorandum from Dom Ruggieri that discusses screening background concentrations. OPIC asserts that it is "apparent" Protestant's Exhibit 11 should have been part of the proper methodology by which to determine a screening background concentration, and the Protestants assert that Protestant's Exhibit 11 was not properly considered by the ED's staff due to a lack of expertise.[3]

Regardless of OPIC's and the Protestant's assertions, Protestant's Exhibit 11 is not (1) a document that is considered by the Agency in its review of the air dispersion modeling generally, and; (2) not a document created for the purpose of evaluating air dispersion modeling for permit 83755, or any other permit's specific air dispersion

[2] The Office of Public Interest Counsel's Exceptions to the Proposal for Decision at 4; The Executive Director's Closing Arguments at 10-13.
[3] The ED asserts that any objections to the expert qualifications of his testifying experts has passed. Instead, the ED points to the record, which states that the air quality analysis for permit 83755 was reviewed by a collection of experienced engineers, *see*, Hearing on the Merits transcript at 770:10-22; Protestant Groups I and II's Exceptions at11; Office of Public Interest Counsel's Exceptions at 4.

modeling. Moreover, Protestant's Exhibit 11 is not a document considered by the TCEQ to be a guidance document, despite its characterization as such by OPIC and the Protestants.

Both OPIC and the Protestants repeatedly ignore that the air dispersion modeling submitted by the Applicant, relying on AP-42 Emissions Factors (which the Protestants correctly describe as a compilation of estimations),[4] represents a worst-case *estimated* operating scenario for the proposed rock crusher.[5] Moreover, relying on the *estimated* AP-42 Emissions Factors, the Applicant has demonstrated that its proposed operations will not exceed the NAAQS for the criteria pollutant at issue, particulate matter.[6] The documents relied on by the ED's staff to evaluate the air dispersion modeling for permit 83755, including the evaluation of whether the screening background concentration for Comal County selected by the Applicant was sufficiently protective, are the *expected and accepted* methods by which his staff determined that the Applicant's proposed facility would be in compliance with all applicable state and federal air quality regulations.[7]

Therefore, the screening background concentration for Comal County as selected and submitted in the Applicant's air quality analysis was appropriately evaluated by the ED's staff, utilizing the expected and accepted methodology provided to the Agency by the EPA.

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[4] Protestant Groups I and II's Exceptions at 6.
[5] The Executive Director's Closing Arguments at 21.
[6] *Id.* at 14.
[7] The Executive Director's Closing Arguments at 13; Hearing on the Merits transcript at 770:10-22.

II. The Executive Director's Review of the Permit Indicates that Nuisance Conditions are not Expected to Occur if the Applicant's Facility is Operated in Accordance with the Conditions and Representations of the Draft Permit.

Both OPIC and the Protestants continue to assert that the draft permit as recommended for approval by the ED and the ALJ will not prevent the proposed facility from creating a nuisance. OPIC requests in his Exceptions to the Proposal for Decision that a condition be added to the permit to specify that Best Management Practices be applied to the quarry operations located at the Applicant's plant in order to prevent potential nuisance conditions.[8]

Simply put, the commission lacks the jurisdictional authority to regulate quarry operations in an air quality authorization for a rock crusher.[9] As such, the commission lacks the jurisdictional authority to order conditions in a draft permit regulating any air emissions resulting from quarrying operations.[10] OPIC argues otherwise in his Exceptions, stating that the "Commission has authority to impose such a condition based on the prohibition of nuisances from any source, which includes quarries and front end loaders, under 30 TAC §101.4."[11] 30 TAC § 101.4 does not stand for the

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[8] Office of Public Interest Counsel's Exceptions at 8.
[9] Proposal for Decision in Aggregate Industries-WCR, Inc. at 26, *discussing* that BACT includes, "the implementation of best management practices (BMP) to reduce fugitive emission from road and traffic areas are required (*sic*),"; at 29 *quoting*, "a mine, *quarry*, or a road is not a facility and therefore not subject to the permit. . . (emphasis added)."
[10] Proposal for Decision in Aggregate Industries-WCR, Inc. at 33, *stating*, "TCEQ does not have jurisdiction to enforce limitations on quarry operations within an air quality permit, and it is inappropriate to include such limitations within an air quality permit."
[11] Office of Public Interest Counsel's Exceptions citing 30 TAC § 101.4, Nuisance.

proposition that OPIC propounds. A plain reading of § 101.4 shows instead it is a general prohibition on actions by owners or operators that cause a nuisance because of air pollutants that are emitted from sources at their facility.[12]

Furthermore, because a quarry is not a *facility*, and the commission's authority to issue any air quality authorization, with resultant permit conditions and representations, is limited to *facilities*, the commission is further statutorily prohibited from inserting conditions into the draft permit for 83755 that serve to regulate any operations occurring outside the *facility*.[13] Based on the foregoing, the commission also does not have the authority to prospectively require controls to prevent possible future nuisance conditions from any thing that is not within its statutory control, i.e., not a facility, despite OPIC's assertions to the contrary. Therefore, OPIC's recommendation to delete Conclusion of Law number 23 from the ALJ's proposed order is inappropriate, and should be disregarded by the Commission. The general and special conditions, and representations of air quality permit 83755, prohibit nuisance conditions and provide appropriate remedies should the prohibition against causing a nuisance be violated.

Additionally, the Protestants, while acknowledging that the ALJ is correct in concluding that road emissions are not to be included in the modeling analysis, still

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[12] 30 TEX. ADMIN. CODE § 101.4 (1976) (Tex. Comm'n on Env. Quality) (General Rules, Nuisance) "*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 (emphasis added)."
[13] TEX. HEALTH & SAFETY CODE § 382.003(6) (Vernon Ann 2010).

assert that the TCEQ Air Quality Modeling guidelines (AQMG) require modeling to determine if emissions from roads will cause a nuisance.[14] This is a misstatement of the guidance. The AQMG simply acknowledge that road emissions must meet the nuisance provision of 30 TAC § 101.4.[15] The sentence selected by the Protestants is part of section of the modeling guidelines that discusses why road emissions should be excluded from the modeling analysis, including that road emissions should not be included for short-term averaging periods, and that road emissions should not be included for an annual averaging period if "the engineer omits them from the modeling demonstration because the applicant will use best management practices to include them."[16] The proposed draft permit requires the implementation of best management practices, which require that all in-plant roads designated as being paved in the application would be paved with a cohesive hard surface which can be cleaned. All unpaved roads, work areas and stockpiles must be sprayed with water and/or an environmentally sensitive chemical upon detection of visible particulate emissions.[17]

Lastly, the Protestants continue to rely on a single data point in a flawed modeling analysis to postulate that the proposed facility will result in nuisance conditions. Specifically, the Protestants rely on a portion of Applicant's witness, Mr. Michael Hunt's testimony, which states that emissions from "the rock crushing

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[14] Protestant Groups I and II's Exceptions at 18.
[15] ED-15 at 59 (000270).
[16] *Id*. at 58 (000269).
[17] ED-1 at 16: 9-14 (000016); ED – 12, Draft Permit Special Conditions 6G and 6H (000171). *See also*, 30 TAC §116.116(a).

operation would result in as much as 630 µg/m^3,"of particulate matters emissions.[18] Mr. Hunt testified several times during the hearing that the number the Protestants rely on is, in fact, not reliable.[19] Counsel for the Protestants even acknowledged Mr. Hunt's qualification of this number on the record.[20] By focusing on this incorrect data point, Protestants also ignore the other modeling data, including the modeling data audited by the Mr. Menendez, which demonstrated that the facility would not contribute to a nuisance condition when operated within the conditions and representations of the draft permit.[21] Therefore, the proposed permit was properly reviewed by the Executive Director's staff, who concluded that the facility would not cause a nuisance when operated in accordance with the representations of the permit application and the general and special conditions of the draft permit.[22]

III. Conclusion

Based on evidence admitted and disputed issues identified in the record, all procedures and analysis required for an air quality permit review were followed in accordance with applicable rules and guidance. Therefore, the Executive Director recommends that the Commission adopt the ALJ's Proposal for Decision and proposed findings of fact and conclusions of law consistent with the changes recommended in the ED's Proposed Revisions to the ALJ's PFD.

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[18] Protestant Groups I and II's Exceptions at 17.
[19] Hearing on the Merits at 325:22-25; 326:1-16; 327:18-25; 328:7-11.
[20] *Id.* at328:9-12.
[21] ED-18 (000355-000356); ED-19 (000357-000358).
[22] *Id.*

Respectfully Submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G., Executive Director

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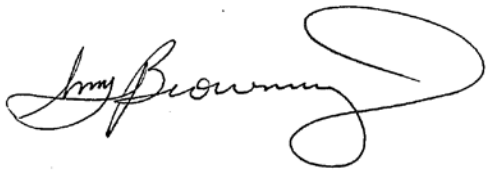

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REPRESENTING THE
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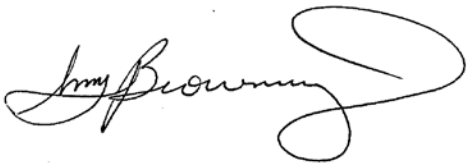
CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing **Executive Director's Replies to Exceptions to the ALJ's Proposal for Decision** has been served via hand delivery, facsimile, electronic mail, first class mail, interagency mail, and/or overnight mail on this 14th day of February, 2011, on the attached service list.



Amy Browning
Staff Attorney, Environmental Law Division

SERVICE LIST
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TCEQ DOCKET NO. 2009-1842-AIR
AGGREGATE INDUSTRIES-WCR, INC. CONTESTED CASE HEARING

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