

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

February 2, 2011

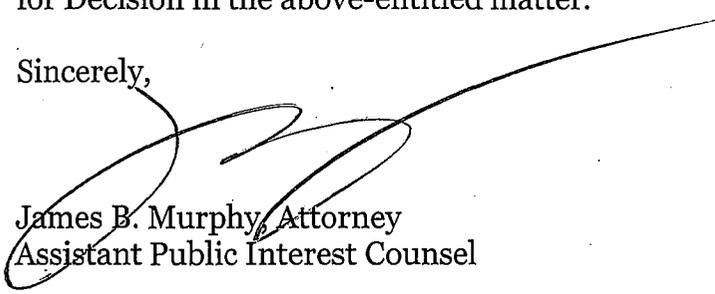
LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

Re: **AGGREGATE INDUSTRIES-WCR, INC.**
SOAH DOCKET NO. 582-10-2489
TCEQ DOCKET NO. 2009-1842-AIR

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Exceptions to the Proposal for Decision in the above-entitled matter.

Sincerely,



James B. Murphy, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 P.O. BOX 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

P.O. Box 13087

Austin, Texas 78711-3087

512-239-1000

Internet address: www.tceq.state.tx.us

**TCEQ Docket No. 2009-1842-AIR
SOAH Docket No. 582-10-2489**

**Application of Aggregate
Industries-WCR, Inc., for Air
Quality Permit No. 83755 in
Comal County, Texas**

**Before the State Office of
Administrative Hearings**

**The Office of Public Interest Counsel's Exceptions to the Proposal for
Decision**

To the Honorable Penny A. Wilkov:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files these Exceptions to the Proposal for Decision (PFD) in the above-referenced matter and respectfully shows the following.

I. Introduction

The PFD inadequately addresses problems with Applicant's air dispersion modeling. OPIC's exceptions solely address this issue.

II. Applicable Law

Applicant bears the burden to prove, by a preponderance of the evidence, its application and the draft permit comply with all applicable statutory and regulatory requirements on each of the issues referred by the Commission. 30 TEX. ADMIN. CODE (TAC) §§ 55.211(b), 80.17(a). When the ED participates as a party in a permit hearing before SOAH, he may only provide information to complete the administrative record and may not assist an applicant in meeting its burden of proof. 30 TAC § 80.108(d)-(e).

The Commission shall grant a permit to construct a facility such as Applicant's rock crushing operation if the Commission finds:

(1) the proposed facility for which a permit . . . is sought will use at least the best available control technology, considering the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility; and

(2) no indication that the emissions from the facility will contravene the intent of this chapter [the Texas Clean Air Act], including protection of the public's health and physical property.

TEX. HEALTH AND SAFETY CODE § 382.0518(b). Under the Commission's rules, an applicant for an air quality permit must include in its application information that demonstrates the facility will use at least best available control technology (BACT), including consideration of the technical practicability and economic reasonableness of reducing or eliminating the emissions, and will achieve the performance specified in the permit application. *See* 30 TAC § 116.111. In addition,

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.

30 TAC § 101.4.

Commission rules also require compliance with various Environmental Protection Agency (EPA) standards, including the National Primary and Secondary Ambient Air Quality Standards (NAAQS). 30 TAC §§ 101.20 and 101.21. The applicable NAAQS for 24-hour PM₁₀ is 150 µg/m³ and for annual PM₁₀ is 50 µg/m³.¹ The Commission may require computerized air dispersion modeling to determine air quality impacts from a proposed new facility and demonstrate compliance with the NAAQS, which the Commission did for this application. 30 TAC § 116.111(a)(2)(J).

¹ *See, e.g.*, Ex. ED 18, at 000355 ¶ 2.0.

III. Discussion

The PFD shows too much deference to agency guidance documents establishing an inaccurate screening background concentration. The proposed facility is located in an area with numerous quarries, rock crushers, and other industrial sources of particulate matter. Applicant's proposed facility is large and produces significant amounts of particulate matter, with an authorized annual throughput of 2,000 tons per hour and 5,000,000 tons per year. Yet, the PFD supports Applicant's use of a screening background concentration the Commission determined was representative of conditions that existed in all of Comal County back in the mid-1990s. Neither the Applicant nor the Commission applied the methodology used to create the Commission guidance document establishing the screening background concentration value for Comal County. As a result, Applicant relies on a fiction that its air dispersion modeling accurately represents conditions at the facility site, when the guidance documents establish a value that does not appear appropriate for a growing area with high levels of particulate matter emissions due to multiple industrial sources. OPIC concludes that Applicant's proposed operations are too large for its proposed location.

Applicant used an outdated screening background concentration established in TCEQ guidance documents to perform its air dispersion modeling, and therefore failed to meet its burden of proof on the issue of compliance with the NAAQS. In order to demonstrate compliance with the 24-hour PM_{10} limit of $150 \mu\text{g}/\text{m}^3$ and the annual PM_{10} limit of $50 \mu\text{g}/\text{m}^3$, Applicant conducted and the Commission audited air dispersion modeling on PM_{10} . There are three broad categories of sources included in the modeling: the proposed facility and other on-site facilities, nearby off-site facilities, and

a screening background concentration.² The sum of these sources is then compared to the NAAQS limit to determine whether the proposed facility will exceed the NAAQS limit at any off-site receptor or location.³

The screening background concentration represents the concentration of a pollutant in the ambient air due to both point and non-point sources, natural and human created. The Commission provides guidance on what value to use to represent the screening background concentration for each Texas county in the form of two interoffice memos from Dom Ruggeri, Team Leader for the Air Dispersion Modeling Team, dated September 2, 1998 and September 4, 1998.⁴ The memos were based on a statewide review of the highest monitored values during 1992–97, countywide point source emissions, and county population figures as a surrogate for non-point source emissions.⁵ For Comal County where the proposed facility will be located, the September 4 memo provides a value of 75 $\mu\text{g}/\text{m}^3$ for 24-hour PM_{10} and a value of 25 $\mu\text{g}/\text{m}^3$ for annual PM_{10} .⁶ Applicant's modeling expert followed the process outlined in these two memos.⁷

Neither the September 2 nor September 4 memo provides the rationale for how the figures were calculated. In response to a request from the assistant to Protestant's expert Richard Bost, the Commission provided a document titled "Rationale for Screening Background Concentrations" dated July 1998 (Rationale Memo).⁸ For

² Ex. ED 16, at 10:4–10:24 (Menendez).

³ Ex. ED 16, at 12:16–12:26 (Menendez).

⁴ Ex. ED 16, at 13:6–13:14 (Menendez); Ex. ED 20 (Sept. 2 Memo); Ex. ED 21 (Sept. 4 Memo).

⁵ Ex. ED 21, at 000367.

⁶ Ex. ED 21, at 000374.

⁷ Tr. (248:14–249:5 and 295:11–295:20) (Knollhoff).

⁸ Ex. Prot. 11.

counties without monitors such as Comal County, the Rationale Memo provides a formula of actual or allowable emissions plus 0.01 times the county population.⁹

It is apparent from the Rationale Memo and the September 2 and September 4 memos that background screening concentration values increase as population increases. Although Applicant expert David Scott Knollhoff testified that he is aware of studies showing an inverse relationship between population growth and an increase in screening background concentration, he is unable to point to those studies or provide the rationale for those studies.¹⁰ Regardless, Commission guidance establishes a positive correlation between population growth and an increase in screening background concentration.¹¹ Given that the guidance memos clearly state that population is a relevant factor in calculating screening background concentrations, Applicant should have asked the Commission for additional guidance or otherwise adjusted for the dramatic population increase in Comal County since the mid-1990s.¹²

Applicant's modeling expert did not request or rely on the Rationale Memo or otherwise adjust for population.¹³ Commission expert Daniel Menendez agrees that population is a factor in the development of the background screening concentration values for each county, but does not apply the formula when auditing permit applications.¹⁴

The September 2 and September 4 memos are unreliable without reference to the Rationale Memo. Population is a stated variable in producing the background screening

⁹ Ex. Prot. 6, at 1; Tr. (750:19–751:12) (Menendez) (correlating Rationale Memo with Sept. 2 and Sept 4 memos).

¹⁰ Tr. (295:21–297:9) (Knollhoff).

¹¹ Ex. Prot. 6, at 1.

¹² Ex. Prot. 6, at 1; Tr. (761:22–762:15) (Menendez) (reliance on guidance documents does not guarantee compliance with the Texas Clean Air Act and Commission rules).

¹³ Tr. (290:25–291:20) (Knollhoff).

¹⁴ Tr. (729:4–729:9 and 749:24–750:10) (Menendez).

concentration values, and yet neither Applicant nor Commission staff verified that the values would still be representative with the current population in Comal County.¹⁵ The September 2 memo specifies that data should be representative of the conditions at the proposed facility, and currentness is a factor in whether data is representative.¹⁶ As testified to by Protestant expert Richard Bost, population in Comal County has grown dramatically since the 1992–97 time period when the values 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} were developed.¹⁷ According to Mr. Bost—the only expert to adjust for current population—use of current population in the formula from the Rationale Memo would produce a value of 90 $\mu\text{g}/\text{m}^3$ for 24-hour PM_{10} .¹⁸ Applicant’s modeling produced a value of 64 $\mu\text{g}/\text{m}^3$ for 24-hour PM_{10} for the maximum off-site concentration from the proposed facility.¹⁹ Therefore, use of a current, reliable background screening concentration value causes a violation of the NAAQS limit of 150 $\mu\text{g}/\text{m}^3$ for 24-hour PM_{10} .²⁰

Although Applicant attempts to minimize the importance of the document “Rationale for Screening Background Concentrations” dated July 1998 (Rationale Memo),²¹ Commission staff make clear that the document is from the Commission and is the basis for the screening background concentration value found in the guidance memos from Dom Ruggeri and used by Applicant in its modeling.²² Simply because the Commission does not regularly update the Ruggeri memos or apply the formula from the Rationale Memo does not insulate Applicant from properly conducting its air

¹⁵ Ex. ED 21, at 000367; Tr. (290:25–291:20) (Knollhoff); Tr. (729:4–729:9) (Menendez).

¹⁶ Ex. ED 20, at 000359; Tr. (753:25–755:4) (Menendez).

¹⁷ Ex. Prot. 1, at 15:8–16:11.

¹⁸ Ex. Prot. 1, at 17:14–18:12.

¹⁹ Tr. (240:14–240:22) (Knollhoff).

²⁰ Ex. Prot. 1, at 18:8–18:12.

²¹ Ex. Prot. 6, at 1.

²² Tr. (750:19–751:12) (Menendez). *See also* Ex. ED 20 (Sept. 2 Memo); Ex. ED 21 (Sept. 4 Memo).

modeling by relying on current data. The September 4 Ruggeri memo states on its cover page that population is a factor in the values for each county, and yet Applicant conducted no investigation of population's relevance to screening background concentration in its application.²³

Applicant's reliance on guidance documents, such as the September 2 and September 4 memos, is entitled to respect by reviewing courts, but only to the extent that the guidance has the power to persuade. *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 1662–63 (2000). *See also American Cyanamid Co. v. Geye*, 79 S.W.3d 21, 26–27 (Tex. 2002) (applying federal deference doctrines in Texas). Deference is not proper for guidance documents and internal memos because they are not subject to public comment and the rulemaking process. *Id.* As a result, the only method of challenging a procedure from such guidance documents is during individual permit actions; otherwise, procedures in guidance documents are shielded from meaningful review and comment. In this case, without application of the formula from the Rationale Memo, the September 2 and September 4 memos are unreliable and do not have the power to persuade. The guidance becomes persuasive only when current population figures are used.

The PFD agrees with Applicant's argument that its air dispersion modeling is conservative, but the PFD fails to acknowledge several areas where the modeling excludes sources of emissions. First, the modeling does not include emissions from the quarrying operations proposed at Applicant's proposed site or at other nearby quarries. The area surrounding the proposed site contains numerous large quarrying and rock crushing operations and several other industrial operations emitting particulate

²³ Tr. (246:3–247:2) (Knollhoff).

matter.²⁴ It is undisputed quarry operations, including blasting and loading, produce emissions.²⁵ None of these emissions are captured by the modeling, except to the extent they may fall within the flawed screening background concentration value used by Applicant.²⁶

Applicant's reliance on Best Management Practices (BMPs) in the Draft Permit's Special Conditions does not save the modeling because BMPs do not control emissions from quarry operations at the proposed site. The requirement to implement BMPs does not apply clearly to operations at the quarry.²⁷ Special Condition 4 relating to visible emissions may not cover emissions from blasting and loading operations because it applies to work areas associated with the "facility," which does not include the quarry.²⁸ No other requirements in the draft permit clearly require watering or other measures to reduce emissions from the quarry operations.²⁹ As a result, OPIC recommends a Special Condition clearly imposing BMPs on the quarry operation or a revision to Special Condition 4 to clarify its applicability. 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. Based on this authority to control nuisances from any source, OPIC recommends the Commission delete Conclusion of Law No. 23 regardless of its decision to approve or deny the application.

Second, the modeling does not include emissions from a large quarry and rock crushing facility located to the southwest of Applicant's proposed facility and a from a

²⁴ Tr. (757:3–757:7) (Menendez).

²⁵ Tr. (179:9–182:3) (Nichols).

²⁶ Tr. (179:9–182:3) (Nichols).

²⁷ Tr. (68:13–69:6) (Refer); Ex. ED 8, at 000169.

²⁸ Tr. (68:13–69:6) (Refer); Ex. ED 8, at 000169. The first paragraph of the Special Conditions limits applicability of the permit to the "facility," which does not include the quarry.

²⁹ Ex. ED 8, at 000169.

county flood control project with associated rock crusher located on Applicant's proposed facility site. Although Mr. Knollhoff speculates that the nearby facility and related sources would not contribute to emissions at or surrounding the proposed facility because of wind patterns, Mr. Knollhoff did not include the facility in his analysis simply because he was not aware of it.³⁰ Similarly, at the time Applicant conducted its modeling, it was not aware of the county flood control project on its own property.³¹ Although it is a temporary project, it has already experienced delays and may be in operation at the same time as Applicant's quarry and facility.³² Accordingly, OPIC recommends the Commission delete Finding of Fact No. 49 because the cumulative effects analysis was not accurate and omitted a large source of emissions.

Third, modeling based on max throughput at maximum operating hours is not conservative; rather, it reflects actual operating conditions. Air quality permits authorize facilities to conduct operations at the level and during the hours specified in the permit. In practice, the facility may not operate at all times at maximum capacity, but the facility may at some point during its operations. The 24-hour NAAQS are set to protect against short term exposure, and an infrequent violation during maximum operating conditions is a violation nonetheless.

Applicant's reliance on after-the-fact cherry picking of monitoring data does not save its flawed modeling. Applicant argues that monitoring data at the Selma monitoring station shows that the value used in the September 4 Ruggeri memo is conservative. However, Applicant expert Mr. Knollhoff and Commission expert Mr. Menendez looked to the Selma station and found readings higher than the screening

³⁰ Tr. (242:24-243:16) (Knollhoff).

³¹ Tr. (178:4-178:20 and 179:5-179:8) (Nichols).

³² Tr. (178:4-178:20) (Nichols).

background concentration from the September 4 Ruggeri memo.³³ For example, in 2009, Mr. Menendez found a high, second high reading of 84 $\mu\text{g}/\text{m}^3$ at the Selma station.³⁴ In essence, neither Applicant nor the Commission conducted a comprehensive analysis of monitoring data to support the value used for screening background concentration.³⁵ As a result, OPIC recommends the Commission delete or modify Finding of Fact No. 48, because subsequent readings at the Selma station disclosed higher values than the screening background concentration Applicant used for its modeling.

Furthermore, Applicant's reliance on national trends of particulate matter emissions is not persuasive. National population trends compared with national particulate matter emissions proves little about the effect of population on particulate matter emissions in Texas, Comal County, or around the proposed facility site.³⁶ Local conditions are the basis for a NAAQS analysis, which is evident from the county-by-county background screening concentration values in the September 4 Ruggeri memo. If national trends or statewide data were sufficient, the Commission would not set out county-specific values. Regardless, Commission guidance establishes a positive correlation between population growth and particulate matter emissions, and Commission guidance is the basis for Applicant's air modeling. Applicant cannot argue against the findings in the guidance document—particulate matter increases as population increases—that Applicant relied on to conduct its modeling.³⁷ Protestant's expert Mr. Bost conducted the only analysis in this case on the effect of population in

³³ Tr. (243:17–244:5 and 298:22–300:9) (Knollhoff). Tr. (758:18–758:23) (Menendez).

³⁴ Tr. (758:18–758:23) (Menendez).

³⁵ Tr. (243:17–244:5 and 298:22–300:9) (Knollhoff). Tr. (758:18–758:23) (Menendez).

³⁶ Exs. App. 66 and 67.

³⁷ Tr. (245:20–246:2 and 249:2–249:4) (Knollhoff).

the Comal County region and concluded that adjusting for current population results in a NAAQS violation at Applicant's proposed throughput.³⁸

In a situation where modeling demonstrates a NAAQS violation, as is the case here, the Commission may recommend changes to the draft permit's annual throughput to reduce the amount of emissions from the facility.³⁹ In the alternative to denying this application, OPIC recommends the Commission remand for additional evidence to determine what reductions in throughput would ensure compliance with the NAAQS for PM₁₀.

///

///

///

///

///

///

///

///

///

///

³⁸ Ex. Prot. 1, at 17:14-18:12.

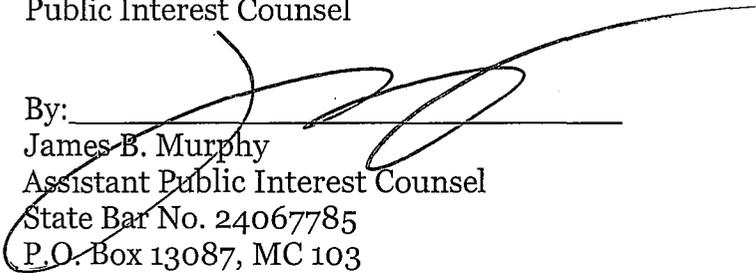
³⁹ Tr. (763:9-763:18) (Menendez).

IV. Conclusion

Applicant relied on outdated guidance documents in its air modeling and failed to adjust for current population data. Use of current population data produces air modeling demonstrating a violation of the NAAQS for PM₁₀. Accordingly, OPIC recommends the Commission deny the application and draft permit for Applicant's failure to meet its burden of proof. In the alternative, OPIC recommends a remand for additional evidence on reductions in throughput necessary to comply with the NAAQS for PM₁₀ when a value of 90 µg/m³ is used for a screening background concentration.

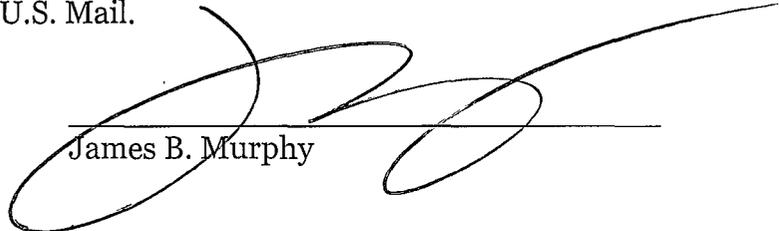
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By: 
James B. Murphy
Assistant Public Interest Counsel
State Bar No. 24067785
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-4014 Phone
(512) 239-6377 Fax

Certificate of Service

I hereby certify that on February 2, 2011, the original and seven true and correct copies of the Office of Public Interest Counsel's Exceptions to the Proposal for Decision was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.


James B. Murphy

MAILING LIST
AGGREGATE INDUSTRIES-WCR, INC.
SOAH DOCKET NO. 582-10-2489
TCEQ DOCKET NO. 2009-1842-AIR

The Honorable Penny Wilkov
Administrative Law Judge
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
512/475-4993 FAX: 512/322-2061

Courtney E. Cox
Pinar Dogru
Aldean Kainz
Christopher Pepper
Jackson Walker, LLP
100 Congress Ave., Suite 1100
Austin, Texas 78701
Tel: (512) 236-2000
Fax: (512) 236-2002
Representing: Aggregate Industries

Mary W. Carter
Charles Irvine
Adam Friedman
Blackburn Carter, PC
4709 Austin St.
Houston, Texas 77004
Tel: (713) 524-1012
Fax: (713) 524-5165
Representing: Protestants Group I & II

William B. Jackson
2331 Rock Grove
New Braunfels, Texas 78132
Tel: (830) 632-5826
*Representing: Securing a Future
Environment (SAFE)*

Amy Browning
Alexis Lorick
Texas Commission on Environmental
Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

LaDonna Castañuela
Texas Commission on Environmental
Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311