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February 11, 2011

Via TCEQ's E-Filing System

LaDonna Castañuela, Chief Clerk
Office of the Chief Clerk - MC 105
Texas Commission on Environmental Quality
12100 Park 35 Circle
Austin, Texas 78753

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

Dear Ms. Castañuela:

Enclosed is PROTESTANT GROUPS I AND II'S REPLY TO EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION AND ORDER. As noted on the Certificate of Service attached to the filing, all parties have been forwarded a copy of the enclosed. In compliance with the instructions posted on the TCEQ's e-filing site, a hard copy of this filing will not be forwarded to your office given that this filing is under 20 pages. However, in the event that you would like for us to forward copies of the enclosed, our office may be reached at (713)524-1012.

Thank you for your time and assistance with this filing.

Sincerely,

BLACKBURN CARTER, P.C.

by 
Velia Andaverde, Legal Assistant

Enclosure

c: The Honorable Penny A. Wilkov
See Certificate of Service

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

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

**PROTESTANT GROUPS I AND II’S REPLY TO EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE’S PROPOSAL FOR DECISION AND ORDER**

TO THE ADMINISTRATIVE LAW JUDGE:

COME NOW Protestant Groups I and II (“Protestants”) and file their Reply to Exceptions to the Administrative Law Judge’s Proposal for Decision issued in the above referenced case on January 13, 2011. Protestants maintain their disagreement with Administrative Law Judge Penny Wilkov’s (“ALJ”) Proposal for Decision (“PFD”), and respectfully request that the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) reject the ALJ’s recommendation and deny Aggregate Industries – WCR, Inc.’s (“Aggregate” or “Applicant”) application for Air Quality Permit Number 83755 in Comal County, Texas. In addition to the Exceptions previously filed by Protestants, the following exceptions address specific exceptions filed by the Executive Director (“ED”) and Applicant.

The Executive Director

Although the ED agrees with the substance of the ALJ’s proposed Findings of Fact and Conclusions of Law, the ED raised a number of “administrative matters”. Specifically, the ED proposes that “and screening background concentrations” be deleted from Finding of Fact No. 42.¹ If adopted by the ALJ, Finding of Fact No. 42 will read as follows:

¹ED Exceptions at 3.

“An important part of the modeling is the background concentration, which is a measurement of all of the off-property emission sources already existing in the area, including nearby existing emission sources (other limestone processing facilities, for instance).”

Protestants do not necessarily disagree with the ED’s proposed change. The proposed language omits crucial language and inaccurately describes how background concentrations for Comal County is established.

For example, the ED and ALJ correctly state that the background concentration is a measurement of all off-property emission sources. However, the ED and ALJ make no mention that the background concentration used by Aggregate for Comal County was also derived, in large part, pursuant to the TCEQ mandate that population be used as a surrogate for non-point sources of emission.² Accordingly, to appropriately reflect TCEQ policy and the evidence presented at hearing, Protestants respectfully request Finding of Fact 42 read as follows:

An important part of modeling is the background concentration, which is a measurement of all of the off-property emission sources already existing in the area, including nearby existing emission sources (other limestone processing facilities, for instance) *and population as a surrogate for non-point sources of emissions.*

Aggregate Industries – WCR, Inc

Finding of Fact No. 44 in the PFD reads as follows:

“Finding of Fact No. 44. As for screening background concentrations, for counties that do not have an air monitor, like Comal County, TCEQ sets screening background concentrations, which are based on the nearby monitor data located in Selma, Bexar County, Texas (Selma Monitor).”³

² ED Exhibit 21.

³ PFD at Finding of Fact No. 44.

In a separate, but similar fashion to proposed Finding of Fact 42, this proposed language completely misrepresents TCEQ policy and is directly contrary to the evidence presented at the contested case hearing. Contrary to the PFD, screening background concentrations for counties without an air monitor, like Comal County, are *not* based on nearby monitor data. According to TCEQ documents, screening background concentrations are calculated pursuant to an established formula uninfluenced by any monitor data.⁴ TCEQ guidance specifically states, “For counties without monitors. Summed the higher of actual/allowable plus 0.01 times the *population*.”⁵ In other words, the Selma monitor had no bearing whatsoever on TCEQ’s screening background concentration for Comal County.

In their Closing Argument and Exceptions to the PFD, Protestants have extensively addressed the importance of correctly determining PM-10 background concentrations in Comal County for air modeling purposes. Simply put, utilizing population data from 1998 grossly underestimates PM-10 screening background concentration levels in Comal County, potentially masking severe adverse health effects caused by the proposed rock crushing facility.

Proposed Finding of Fact No. 44 exposes the ALJ’s fundamental misunderstanding or oversight that population is an integral piece for calculating the representative background concentration. In its exceptions to the PFD, the Applicant merely requests a minor “clarification” to Finding of Fact No. 44. The Applicant’s proposed changes amount to nothing more than an acceptance of the incorrect characterization of TCEQ policy, which is not surprising considering the misstatement of policy is extremely beneficial to the Applicant’s request for an air quality permit.

⁴ Protestants Exhibit 6.

⁵ *Id.* (emphasis added). The final calculation is then plugged into the chart contained in TCEQ Guidance (Protestants Exhibit 6) to determine the appropriate background concentration for the county.

Conclusion

For the foregoing reasons, Protestants respectfully maintain their prior request that the Commission reject the recommendation of the PFD and deny the application for an air quality permit. Furthermore, Protestants request the Commission adopt Protestant's proposed Amended Findings of Fact and Conclusions of Law with Regard to Screening Background Concentrations, attached as Exhibit 1.

Respectfully submitted,

BLACKBURN CARTER, P.C.

by:  _____

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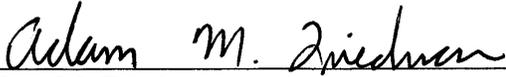
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FOR PROTESTANT GROUPS I AND II

CERTIFICATE OF SERVICE

On this 11th day of February, 2011, a true and correct copy of the foregoing instrument was served on all attorneys of record by the undersigned via the method designated below for each party.


Adam M. Friedman

ADMINISTRATIVE LAW JUDGE:

Penny A. Wilkov
Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street, Ste. 502
Austin, Texas 78711
Via U.S. First Class Mail

FOR THE CHIEF CLERK:

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Exhibit A

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

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

**PROTESTANTS GROUP I AND II’S AMENDED PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH REGARD TO
SCREENING BACKGROUND CONCENTRATIONS**

TO THE ADMINISTRATIVE LAW JUDGE:

COME NOW Protestant Groups I and Group II (“Protestants”) and recommend that the following proposed Findings of Fact and Conclusions of Law be adopted in the above numbered and styled matter.

FINDINGS OF FACT

Whether the air dispersion modeling of proposed particulate matter emissions was accurate and appropriate including whether the classification of surrounding land uses, consideration of cumulative effects, the NAAQS for PM-2.5, and use of emission factors were accurate.

Whether the proposed facility will have adverse effects on air quality or cause violations of the Texas Clean Air Act, or other applicable state or federal requirements.

1. The purpose of the TCAA is to “safeguard the state’s air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility.” TEX. HEALTH & SAFETY CODE § 382.002(a).
2. The proposed rock crushing facility and operation is not in compliance with the Texas Clean Air Act (“TCAA”).
3. The proposed rock crushing facility and operation poses a significant hazard to public health and general welfare.

4. Aggregate has not proven by the preponderance of evidence that there is no indication that the emissions from the facility will contravene the intent of [the TCAA], including protection of the public's health and physical property.
5. Aggregate must demonstrate that the proposed rock crushing facility meets the National Ambient Air Quality Standards ("NAAQS").
6. Primary and Secondary NAAQS for a 24-hour average are 150 micrograms per cubic meter ("µg/m³").
7. NAAQS are established on health effects data.
8. Failure to show compliance with NAAQS prohibits issuance of an air quality permit.
9. Aggregate conducted air dispersion modeling that projected a ground level maximum concentration of 64 µg/m³.
10. Aggregate's air dispersion modeling is scientifically unreliable.

Screening Background Concentrations

11. An important part of modeling is the background concentration, which is a measurement of all of the off-property emission sources already existing in the area, including nearby existing emission sources (other limestone processing facilities, for instance) and population as a surrogate for non-point sources of emissions.
12. For counties that do not have an air monitor, like Comal County, TCEQ sets screening background concentrations, which are calculated by summing the higher of actual/allowable emissions plus the population.
13. Screening background concentrations are based, in large part, on a statewide review of population as a surrogate for non-point source emissions.
14. Pursuant to TCEQ guidance document dated September 4, 1998, Aggregate selected 75 µg/m³ as a screening background level for PM-10 concentrations on a 24-hour average.
15. Aggregate's selected screening background concentration for Comal County was established pursuant to TCEQ's Rationale for Screening Background Concentrations created in July of 1998.

16. Population in Comal County has increased greatly since 1992 -1998.
17. U.S. Census data indicates population in Comal County as of 2009 has increased 107.6% with a 4.4% annual growth rate since 1992.
18. Screening background concentrations of PM-10 for Comal County relied on by Aggregate does not account for population increase since 1998.
19. Aggregate's selected screening background concentration for Comal County is not representative of true background conditions for PM-10 over a 24-hour average.
20. Aggregate selected 25 $\mu\text{g}/\text{m}^3$ as a screening background level for PM-10 concentrations on an annual average.
21. Aggregate's selected screening background concentration for Comal County is not representative of true background conditions for PM-10 on an annual average.
22. Record evidence indicates that a minimum of 90 $\mu\text{g}/\text{m}^3$ is more representative of true background conditions for PM-10 on a 24-hour average.
23. Representative background conditions summed with Aggregate's air dispersion modeling projections results in a failure to satisfy primary and secondary NAAQS for both a 24-hour and annual average.

PROPOSED CONCLUSIONS OF LAW

24. As to the application referred by the Commission to SOAH, Aggregate has the burden of proving that its air permit application to construct and operate a rock crushing facility satisfies all designated issues and complies with applicable law by a preponderance of the evidence. 30 TAC § 80.17(a).
25. Issuance of the air quality permit is contrary to the purpose of the Texas Clean Air Act which is to "safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility." TEX. HEALTH AND SAFETY CODE § 382.002(a).

26. TEX. HEALTH AND SAFETY CODE § 382.0518 requires that “before work is begun on the construction of a new facility ... the person planning the construction or modification must obtain a permit ... from the commission.”
27. Aggregate’s air quality permit application violates TEX. HEALTH AND SAFETY CODE § 382.0518(b)(2) because it indicates that the emissions from the facility will contravene the intent of the Texas Clean Air Act.
28. 40 CFR § 50.6(a) establish National Primary and Secondary Ambient Air Quality Standards for PM-10 over a 24-hour average at 150 µg/m³.
29. 30 TAC § 101.21 establish National Primary and Secondary Ambient Air Quality Standards as described in the Federal Clean Air Act will be enforced in Texas.
30. The air quality permit application violates Chapter 382, *et seq.*, of the Texas Health and Safety Code (Texas Clean Air Act) because Aggregate failed to demonstrate compliance with the National Primary and Secondary Ambient Air Quality Standards for PM-10 over a 24-hour average.