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February 1, 2011

***Via Federal Express***

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:

Pursuant to Judge Wilkov's January 13, 2011 letter, enclosed is an original plus seven copies of PROTESTANT GROUPS I AND II'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION AND ORDER. All parties have been forwarded a copy of the enclosed pursuant the Certificate of Service attached to the filing.

Should any questions arise regarding the enclosed, counsel may be reached at (713) 524 - 1012.

Sincerely,

BLACKBURN CARTER, P.C.

by   
Velia Andaverde, Legal Assistant

Enclosure

c: The Honorable Penny A. Wilkov  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15th Street, Ste. 502  
Austin, Texas 78701

See Certificate of Service attached to filing.

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 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 Exceptions to the Administrative Law Judge’s Proposal for Decision issued in the above referenced case on January 13, 2011.

Protestants disagree with Administrative Law Judge Penny Wilkov’s (“ALJ”) Proposal for Decision (“PFD”), which recommends that the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) issue Aggregate Industries – WCR, Inc. (“Aggregate” or “Applicant”) Air Quality Permit Number 83755 in Comal County, Texas. Protestants file the following exceptions and respectfully request that the Commission reject the ALJ’s recommendation and deny issuance of the requested air quality permit for the proposed rock crushing facility.

Protestants exceptions primarily focus on the following issues: (I) inadequacy of the air dispersion modeling conducted by the Applicant, including improper application of EPA guidance document AP-42 (“AP-42”) and incorrect selection of 75 micrograms per cubic meter (“µg/m<sup>3</sup>”) as the screening background concentration for Comal County; (II) improper health effects review and unacceptable offsite maximum concentration of limestone in violation of the 1-hour effective screening level (“ESL”); and (III) ALJ’s improper disregard of the nuisance conditions associated

with the proposed facility. Protestants specifically except to Findings of Fact Nos. 39, 41, 44, 45, 46, 49, 52, 53, 54, 66, 106, 107, 121, 133, 136 and 137; and to Conclusions of Law Nos. 32, 33, 36, 37, 39, 40, 41, 43, 48, 49 and 50.

## **I. SUMMARY OF EXCEPTIONS**

Although not reflected in the PFD, several Protestants own land directly next to the proposed project site. The Feys and Hoffmanns own property bordering the project site, while Vandeline Sahm and the Reehs own land directly across FM 482 from the project site. Protestants Aguirre and Protestant Curtis own homes in the Magnolia Springs subdivision, diagonally across from the site (behind the Hoffmanns). Moreover, Protestant Groups I and II represent a mere fraction of the several hundred original requests submitted for a contested case hearing. The concerns of the requesters were validated at hearing when an overwhelming amount of evidence was presented that demonstrated the proposed rock crushing operation will cause adverse health effects and pose dangerous nuisance conditions to the nearby residents and property owners.

Specifically, evidence at hearing established that: (1) the Applicant did not correctly follow EPA guidance for selecting emission factors to model PM-10 concentrations; (2) screening background concentrations are derived in large part by population yet the Applicant selected a background concentration calculated back in 1998 – unrepresentative of current conditions; (3) the offsite maximum concentration of limestone was detected at the Fey household and is twice the allowable limit; and (4) Applicant’s own air dispersion modeler for the crushing operation projected an offsite PM-10 maximum concentration of 630 micrograms per cubic meter (“ $\mu\text{g}/\text{m}^3$ ”), more than four times National Ambient Air Quality Standards (“NAAQS”), posing dangerous nuisance conditions.

For various reasons, the PFD absolves the Applicant of its failures and ignores the adverse health effects posed by the rock crushing operation. However, the PFD is premised on multiple errors ranging from incorrect interpretation of the TCEQ rules and guidance, to complete misstatements of critical facts presented at hearing. For example, with regard to the Applicant's health effects review, the ALJ's analysis incorrectly locates the offsite maximum concentration for limestone over a 1-hour period at the Union Pacific rail line. The actual location, however, is at the *Fey household*. This unquestionably alters the ALJ's review and negates the current finding that the maximum concentration is allowable pursuant to a Modeling and Effects Review for Air Permits ("MERA").

Additionally, with regard to whether the emissions from the facility will *contribute* to nuisance conditions, the ALJ inappropriately excluded road emissions from the analysis. Although Protestants do not dispute that road emissions are to be excluded for purposes of modeling emissions from a "facility,"<sup>1</sup> that exclusion does not apply towards a determination of whether a nuisance condition will occur from as a result of the entire rock crushing operation. In fact, it is just the opposite. TCEQ guidance explicitly directs an applicant to *include* road emissions for a nuisance evaluation. Compounding the flaws with the nuisance evaluation, the ALJ took the position that TCEQ cannot conduct prospective nuisance enforcement cases contrary. Nowhere did the Applicant or ALJ cite legal authority for such a prohibition. More importantly, the definition of "nuisance"<sup>2</sup> coupled with the Commission's act of specifically designating "whether the facility will contribute to a nuisance" as an issue prior to issuing an air quality permit, strongly counters the ALJ's position.

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<sup>1</sup> 30 T.A.C. § 116.10(4).

<sup>2</sup> 30 T.A.C. § 101.4.

With regard to Applicant's air dispersion modeling, the ALJ acquiesced to Applicant's use of default AP-42 emission factors and the default 1998 screening background concentration despite doing so potentially masks exposure to substantial amounts of PM-10 to nearby residents. Interestingly, the ALJ does not generally dispute the arguments presented by Protestants, but rather determines that since AP-42 and the 1998 screening background levels are commonly relied upon by the Executive Director ("ED"), it would be improper to require anything different this time from Aggregate. However, the PFD overlooks two crucial distinctions. First, although AP-42 guidance is commonly relied upon by applicants, an applicant must still properly follow the instructions – a task failed by Aggregate. Second, for the first time ever, the air dispersion modeling team was introduced to TCEQ's established rationale for calculating screening background concentrations, which hinges in large part on population of the County. This document exposes the fallacy with using the default screening background concentration from 1998. Disregarding the potential health consequences simply because the ED testified that is what they have done in the past requires a deliberate neglect of the failure to follow AP-42 and the compelling, never before seen TCEQ guidance.

In light of the foregoing inconsistencies, all of which were extensively relied upon for support of the ALJ's recommendation, the current recommendation is invalid. Regardless, given the overwhelming evidence that the facility will in fact contribute to nuisance conditions and will create adverse health effects, the Protestants respectfully request that the Commission deny Applicant's air quality permit application.

For organizational purposes, Protestants have grouped exceptions to reflect the presentation of issues as outlined in the PFD.

## II. AIR DISPERSION MODELING AND RELATED ISSUES

- A. **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?**
- B. **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?**

Under Texas law, “[b]efore work is begun on the construction of a new facility ... the person planning the construction or modification must obtain a permit ... from the commission.”<sup>3</sup> In order to obtain the requisite permit, an applicant must demonstrate to the Commission by a preponderance of evidence<sup>4</sup> 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.”<sup>5</sup> As Aggregate’s witness Dr. Fraiser testified, “NAAQS are established based on health effects data. Air quality is assumed not to be adversely affected when the NAAQS have been met.”<sup>6</sup> Accordingly, demonstrating Aggregate’s proposed rock crushing facility complies with this pertinent provision of the TCAA requires a showing that projected emissions for pollutants will meet the NAAQS.<sup>7</sup>

Aggregate submitted to the TCEQ that the projected ground level maximum concentration for PM-10 from the proposed rock crushing facility over a 24-hour period will be 64 µg/m<sup>3</sup>. Aggregate then selected 75 µg/m<sup>3</sup> as a background concentration for the 24-hour PM-10 standard in Comal County. Added together, Aggregate’s 139 µg/m<sup>3</sup> of projected PM-10 concentration appears on its face to be compliant with the 24-hour average PM-10 NAAQS of

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<sup>3</sup> *Id.* at § 382.0518(a).

<sup>4</sup> 30 TAC § 80.17(a).

<sup>5</sup> TEX. HEALTH & SAFETY CODE § 382.0518(b)(2).

<sup>6</sup> Aggregate Exhibit 52 at 8:12 – 15 (Fraiser Prefiled).

<sup>7</sup> 30 TAC § 101.21; 40 CFR § 50.6(a).

150 µg/m<sup>3</sup>.<sup>8</sup> However, scratching just below the surface of these projections exposes two critical errors. First, Aggregate failed to properly follow EPA guidance document AP-42, causing a critical error in its air dispersion modeling. Second, a closer look at Aggregate's proposed background concentration levels of PM-10 in Comal County reveals that Aggregate completely ignored existing, publicly available TCEQ guidance documents, and, by doing so, caused an additional critical error with Aggregate's projected concentrations.

Taken together, Aggregate's projections are scientifically unreliable and dangerously underestimate total PM-10 concentrations that will be created by the proposed rock crusher. In contrast, the evidence presented by Protestants at hearing demonstrated that an accurate projection of PM-10 concentrations will unquestionably exceed the NAAQS.<sup>9</sup>

i. Aggregate used inaccurate emission factors, likely underestimating projected concentrations of PM-10

All emission factors used in Aggregate's modeling were simply plucked from EPA guidance document AP-42,<sup>10</sup> which is merely a compilation of *estimations*<sup>11</sup> for quantifying the contribution of anticipated emissions from each particular piece of equipment, such as a crusher, screen or conveyor.<sup>12</sup> The authors of AP-42 make absolutely clear that emission factors from AP-42 are "*truly for estimation purposes and are no substitute for exact measurements taken at a source.*"<sup>13</sup> Because the factors are estimations, authors of AP-42 explicitly warn modelers against simply using the emission factors listed in the document.

The authors' clear recommendation for exact measurements from similar existing sources is further established in the "Introduction" section of AP-42. The authors explain:

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<sup>8</sup> 40 CFR § 50.6(a).

<sup>9</sup> Protestant Exhibit 1 at 18:8 – 12 (Bost Prefiled).

<sup>10</sup> TR. 198:3 – 16 (Knollhoff).

<sup>11</sup> Protestant Exhibit 13 at "Notice" (emphasis added).

<sup>12</sup> TR. 121:9 – 122:3 (Nichols).

<sup>13</sup> Protestant Exhibit 13 at "Notice" (emphasis added).

“If representative source-specific data cannot be obtained, emissions information from equipment vendors, particularly emission performance guarantees or actual test data from similar equipment, is a better source of information for permitting decisions than an AP-42 emission factor. When such information is not available, use of emission factors may be necessary as a *last resort*. Whenever factors are used, one *should be aware of their limitations* in accurately representing a particular facility...”<sup>14</sup>

The introduction plainly states that, for permitting decisions, data from existing sources is the best source. The authors further direct modelers that “[c]are should be taken to assure that the subject source type and design, controls, and raw material input are those of the source(s) analyzed to produce the emission factor.”<sup>15</sup> To the detriment of local citizens’ health, Aggregate ignored the warnings and simply plucked the estimated emission rates from AP-42 without any evaluation as to whether they were actually representative of the proposed rock crushing facility.

- a. AP-42 emission factors used by Aggregate were established with data from granite rock crushers, not limestone, which makes the factors non-representative to the proposed facility

Aggregate’s oversight in not using actual data is crucial because the AP-42 emission factors ultimately used do not represent the nature of emissions from the proposed rock crushing facility. For example, consider the following testimony of Mr. Bost at hearing:

**Q:** (By Mr. Blackburn) And I believe that it's your opinion that the emission factors that were used were unreliable. Did I -- am I correct in stating it that way?

**A:** (By Mr. Bost) Yes. I considered that the use of these [factors] without evaluation, accepting as such was an unscientific process, and because of their dependence upon granite and the differences of regions, you know, there's -- reliability has not been established for the data result associated with these. So I considered the use of these scientifically unreliable. That is, they are not -- *you don't know whether they are predictive of real life actual conditions* or not. And as such, you don't have a basis for saying that they're reliable.<sup>16</sup>

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<sup>14</sup> Protestant Exhibit 14 at 3 (AP-42 Introduction) (emphasis added, except word “are” underlined in original).

<sup>15</sup> Protestant Exhibit 14 (AP-42 Introduction).

<sup>16</sup> TR. 604:9 – 605:11 (Bost) (emphasis added); *see also* Protestant Exhibit 1 at 12:1 – 3 (Bost Prefiled).

Mr. Bost explained that because the emissions factors were based on granite (as opposed to limestone, which Applicant proposes) and because there are regional differences, the use of the factors was not scientifically reliable.

- b. The ALJ disregards health concerns masked by the Applicant's use of incorrect, non-representative emission factors, failing to whether EPA guidance AP-42 was improperly followed.

Despite the non-representative nature of the AP-42 emission factors used by Aggregate for projecting the proposed rock crushing facility, the ALJ determined that, “the AP-42 emission factors [are] a reliable and customary methodology for calculating rock crushing emissions.”<sup>17</sup> Protestants do not disagree that the AP-42 guidance document, itself, is customary and often relied upon for conducting air dispersion modeling. However, Protestants do contend that Aggregate never sought source-specific data before blindly using emission factors listed in AP-42. Aggregate's failure to do so was proven at hearing and the reasoning of the ALJ completely ignores this critical error.

Protestants' witness Mr. Bost testified that there are at least five limestone crushing facilities within a 25-mile radius of Aggregate's proposed rock crusher. He further testified that, “[o]ne could easily have obtained or arranged for obtaining measured PM-10 concentration data from one or more of these facilities reflecting actual operations and actual emissions specific to the type of limestone found in Texas in this region.”<sup>18</sup> In fact, Protestants offered into evidence on cross-examination the EPA database of monitored PM-10 emissions for rock crushing facilities in Comal County and neighboring Bexar County.<sup>19</sup> These sources of data, which are superior to the AP-42 rates, were readily available to Aggregate—and yet were not used.

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<sup>17</sup> PFD at 17.

<sup>18</sup> Protestant Exhibit 1 at 21:11 – 13 (Bost Prefiled).

<sup>19</sup> Protestant Exhibit 15 (Facility/Monitor Locator Map – View Data).

Instead of addressing the potential adverse health impacts that are masked by the Applicant's failure to seek source-specific data, the ALJ states, "to compel Applicant to deviate from standard accepted air modeling practices and apply other untested methodologies to replace or supplement AP-42 emission factors would impose, without TCEQ guidance, more stringent and less reliable requirements."<sup>20</sup> Protestants' are uncertain which methodologies are untested or more stringent. Source-specific data, if available, reflect raw monitored emission factors from a similarly situated facility, which makes them more reliable, and, for that reason, are also the *preferred* emission factors for air dispersion modeling according to AP-42.

The ALJ relies in part on argument offered by the ED that, "use of the AP-42 emission factors is the accepted method for TCEQ engineers when evaluating a permit application of this type."<sup>21</sup> However, the exact testimony of ED witness, Mr. Buller, was, "the protocol of the TCEQ is to use the emission factors as published in the AP-42 *unless other factors are provided.*"<sup>22</sup> Mr. Buller's testimony does not provide justification for the Applicant to neglect its obligation to seek source-specific data, but rather reinforces the importance of doing so. If the TCEQ relies only on emission factors provided by an applicant, it is crucial that the applicant correctly follow AP-42, obtain the most accurate emission factors and then provide them to the TCEQ. Aggregate failed to provide the TCEQ, or at least attempt to ascertain such data. Consequently, the Applicant has covered up potentially significant adverse health effects to nearby residents.

The recommendation to issue the air quality permit rewards poor modeling while simultaneously jeopardizing the health of innocent nearby residents. Furthermore, Aggregate's failure to model actual conditions directly resulted in a failure to satisfy its burden to prove that

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<sup>20</sup> PFD at 17.

<sup>21</sup> PFD at 17, *citing* Tr. at 631 and 656.

<sup>22</sup> TR. 656:15 – 17 (Buller) (emphasis added).

there will not be a NAAQS violation—and that its proposed facility will not be harmful to human health. The PFD is contrary to the purpose of the Texas Clean Air Act (“TCAA”), 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.”<sup>23</sup> At an absolute minimum, the Applicant should be required to investigate source-specific data at nearby, similarly situated facilities before the TCEQ decides whether to issue this air quality permit.

- ii. The ALJ incorrectly relies on the TCEQ air dispersion modeling team and the Selma monitoring data as grounds for accepting Applicant’s improper and outdated screening background concentration.

Aggregate’s inaccurate air dispersion modeling is compounded by its egregious error in selecting decades-old data for the Comal County screening background concentration of PM-10. Aggregate selected 75 µg/m<sup>3</sup> as its screening background concentration for the 24-hour standard in Comal County.<sup>24</sup> Aggregate simply copied the screening background concentration from TCEQ guidance dated September 4<sup>th</sup>, 1998.<sup>25</sup> The September 4, 1998 guidance explicitly states that screening background concentrations were determined based on statewide review of, in part, “population, as a surrogate for non-point source emissions.”<sup>26</sup> Yet, despite the drastic population increase in Comal County since 1998, at no point did Aggregate’s permit engineer or lead air dispersion modeler (Mr. Gary Nicholls and Mr. Knollhoff) consider that using a background concentration established *12 years ago* was inaccurate and no longer representative of current

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<sup>23</sup> TEX. HEALTH & SAFETY CODE § 382.002(a).

<sup>24</sup> Applicant Exhibit 32 at 18:1 – 3 (Knollhoff Prefiled).

<sup>25</sup> TR. 282:10 – 12 (Knollhoff).

<sup>26</sup> ED Exhibit 21 at 1.

conditions in Comal County. Importantly, no witness testifying for Aggregate at the hearing even knew how the 75  $\mu\text{g}/\text{m}^3$  was calculated.<sup>27</sup>

Aggregate's use of outdated information masks the vast amount of PM-10 emissions nearby citizens will be exposed to if this proposed rock crusher is permitted. The ALJ disregards this health hazard because "[a]lthough the [guidance] was written 12 years ago, it is still the standard guidance for estimating background concentrations for counties without an air monitor, as confirmed by the TCEQ Air Dispersion Modeling Team's approval of Aggregate's modeling."<sup>28</sup> However, as explained in the following section, the confirmation by TCEQ - relied on heavily for the ALJ's recommendation - lends no support for deeming the 1998 background concentrations appropriate.

- a. TCEQ Air Dispersion Modeling Auditor failed to evaluate whether the background concentration value was accurate

At the time TCEQ's auditor, Daniel Menendez, conducted TCEQ's only evaluation of Aggregate's selected screening background concentrations for PM-10, he was unaware that the TCEQ Guidance document, "Rationale for Screening Background Levels," even existed.<sup>29</sup> This fact is not surprising, considering Mr. Menendez had never worked with air dispersion modeling prior to joining TCEQ, and he had only been with the agency for one year when he submitted his memorandum of audit regarding Aggregate's modeling.<sup>30</sup> Like the Applicant, Mr. Menendez's evaluation did not address the drastic population change in Comal County that has occurred since 1998, or the additional PM-10 emissions permitted after 1998. Accordingly, his approval does nothing to rehabilitate the shortcomings of Aggregate's invalid screening background levels.

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<sup>27</sup> TR 175:16 – 21 (Nicholls); TR. 211:10 – 13 (Knollhoff).

<sup>28</sup> PFD at 20.

<sup>29</sup> TR. 727:19 - 728:4 (Menendez).

<sup>30</sup> TR. 710:5 – 711:5 (Menendez).

b. TCEQ policy maintains that population increase indicates a PM-10 background concentration increase.

In an attempt to justify the Applicant's use of 75 µg/m<sup>3</sup> as opposed to a background concentration representative of current conditions, the ALJ stated, "[h]ow Comal County's population growth has impacted the background concentration level was the source of speculation but not conclusively demonstrated."<sup>31</sup> However, the ALJ's position is inconsistent with the applicable TCEQ guidance. TCEQ guidance documents explicitly establish that according to TCEQ policy, population increases result in an increase in the screening background concentration for PM-10. Until the TCEQ amends its policy, the Applicant or ALJ cannot unilaterally dismiss population as an integral variable for determining background concentrations of PM-10.

If the Applicant wishes to challenge this TCEQ policy, the Applicant is responsible for demonstrating that population increase does not influence background concentrations. The ALJ's conclusion that population impacts on PM-10 concentration was not conclusively established merely suggests that the Applicant failed to meet its burden of proof.

The bottom line is that overwhelming evidence at hearing demonstrated that actual PM-10 concentrations for a 24-hour time period that will result from the proposed facility will exceed NAAQS. Therefore, the proposed rock crushing facility has not satisfied all prerequisites for obtaining a permit.<sup>32</sup> Permitting a facility while cognizant of the adverse health effects simply because TCEQ has not updated its guidance is unacceptable and contrary to the intent of the Texas Clean Air Act.

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<sup>31</sup> PFD at 20.

<sup>32</sup> 30 TAC § 101.21; 40 CFR § 50.6(a).

c. Selma monitor provides no support for use of 75 µg/m<sup>3</sup> as a screening background concentration.

The ALJ also references 2006 data from the Selma monitor, approximately eight miles away from the project site, as support for the recommendation that 75µg/m<sup>3</sup> was a conservative background concentration level for PM-10 over a 24-hour period. Specifically, the ALJ states, “the 2006 data from the Selma monitor produced a number lower than the conservative TCEQ guidance number of 75µg/m<sup>3</sup>. Thus ... the Applicant used the higher, more conservative value provided by TCEQ guidance.”<sup>33</sup> However, looking solely at the 2006 monitoring data is misleading. For example, according to EPA AirData, the Selma monitor in 2004 and 2007 detected background concentrations of 97 µg/m<sup>3</sup> and 104 µg/m<sup>3</sup>, respectively. Data from both years were readily available at the time of hearing yet were never presented by the Applicant or ED.

In sum, TCEQ guidance that was offered into evidence at the hearing explains in detail how the screening background concentration of 75 µg/m<sup>3</sup> for Comal County was derived. It is indisputable that population of Comal County is one of two variables used in the calculation. The Applicant has not satisfied its burden demonstrating the proposed facility will comply with NAAQS. Prior to issuing the air quality permit, the Applicant should, at a minimum, be required to complete the relatively easy task of calculating the more appropriate screening background concentration for 24-hour and annual time periods.

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<sup>33</sup> PFD at 18.

### III. ADVERSE HEALTH AND ENVIRONMENTAL IMPACTS

#### A. Whether the proposed facility's emissions will adversely impact the requestors' health, welfare, or physical property including whether the health effects review for the permit was properly conducted?

Emissions from the proposed facility will adversely impact health. Aggregate modeled a number of measurements of limestone concentration over a 1-hour period and the two maximum measurements – one onsite and one offsite – are more than twice the allowable limit. Aggregate did not even conduct the necessary health effects review outlined by TCEQ guidance for the offsite maximum concentration. Interestingly, the ALJ still concluded that there is no showing that adverse health effects will occur, but it is clear that the basis of the ALJ's position is dependent on a critical misunderstanding with regard to the location of the maximum offsite concentration. On multiple occasions, the ALJ maintains that the maximum offsite concentration of limestone over a 1-hour period is on the Union Pacific rail line.<sup>34</sup> However, the actual location is away from the rail line and at the Fey Household.<sup>35</sup> Obviously, the ALJ's approval of the Applicant's health effects review is unfounded and requires additional review.

- i. Aggregate's health effects review for the offsite maximum concentration of 107 µg/m<sup>3</sup>, which is double the ESL and directly adjacent to Protestant Fey's household, shows that the facility's limestone concentrations exceed allowable amounts

The 1-hour limestone effective screening level ("ESL") standard is 50 µg/m<sup>3</sup>.<sup>36</sup> The maximum predicted offsite limestone concentration is 107 µg/m<sup>3</sup>,<sup>37</sup> more than twice the ESL standard. According to TCEQ's "Modeling Effects Review Applicability" ("MERA"), concentrations of a magnitude at a level that is two-fold greater than the ESL trigger evaluation

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<sup>34</sup> PFD at 44; PFD at 45.

<sup>35</sup> TR. 401:1 – 16 (Fraiser).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 21:21 – 23.

of case-specific factors for determining whether the exceedances are allowable.<sup>38</sup> Thus, the offsite concentration requires further evaluation.

Not only is the concentration more than twice the ESL, but it was also detected at “almost the Fey house”<sup>39</sup> (or “nearby” the Fey house).<sup>40</sup> Aggregate provided no evidence of the case-specific evaluation that is required by MERA. The MERA explicitly states:

“[t]o be considered allowable, concentrations more than 2 fold greater than the ESL must meet the following conditions:

- a. The potential for public exposure is almost nonexistent
- b. Air dispersion modeling predicts a low frequency of concentrations that exceed the ESL
- c. The predicted concentrations are overestimated and not likely to occur.”<sup>41</sup>

At hearing, Applicant’s expert toxicologist, Dr. Fraiser, conceded, “I would say that location [where 107 µg/m<sup>3</sup> was detected] does not meet [the MERA] criteria.”<sup>42</sup> Dr. Fraiser added that her prefiled testimony “did not say that the potential for public exposure is almost nonexistent at the location where the 107 occurs.”<sup>43</sup>

Although the ALJ correctly articulates the Protestants’ evidence and argument that the Applicant failed to demonstrate that a ground level concentration value that is twice the ESL is allowable, the ALJ incorrectly discounts the evidence by concluding that “[t]he evidence showed that the location is the Union Pacific rail line, which is restricted to the public, meaning that the public exposure is almost non-existent.”<sup>44</sup> The evidence at hearing was undisputed that the offsite maximum concentration was *not* located at the Pacific rail line. Accordingly, the ALJ’s analysis of the Applicant’s health effects review is inapplicable and does not provide support for

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<sup>38</sup> *Id.* at 21:14 – 20; *Id.* at 22:2 – 8.

<sup>39</sup> TR. 401:13 – 16 (Fraiser).

<sup>40</sup> TR. 400:1 – 13 (Fraiser).

<sup>41</sup> Applicant Exhibit 52 at 22:9 – 21 (Fraiser Prefiled)(emphasis added).

<sup>42</sup> TR. 401:17 – 21 (Fraiser).

<sup>43</sup> TR. 402:11 – 21 (Fraiser).

<sup>44</sup> PFD at 45.

issuing the air quality permit, which translates into a failure by the Applicant to satisfy its burden to demonstrate no adverse health effects will occur from the proposed rock crusher.

**B. Whether the emissions from the facility will contribute to nuisance conditions?**

The ALJ improperly dismisses the overwhelming evidence that dangerous nuisance conditions accompany the proposed rock crushing facility. First, without citing any legal authority, the ALJ concluded that, the “TCEQ cannot perform a prospective nuisance enforcement case without any evidence that a nuisance has occurred.”<sup>45</sup> The ALJ’s recommendation essentially discards the entire issue designated by the Commission regarding nuisance conditions and is inconsistent with the scope of the designated issue and contrary to the definition of nuisance under 30 TAC 101.4.

- i. 30 T.A.C. 101.4 prohibits a proposed rock crushing operation when such operation causes nuisance conditions.

TCEQ regulations define nuisance as follows:

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.<sup>46</sup>

Consistent with the scope of the nuisance definition, the Commission specifically designated as an issue, “[w]hether the emissions from the facility *will contribute* to nuisance conditions.”<sup>47</sup>

The relevant inquiry can be stated as whether the emissions from the proposed rock crusher will combine with emissions from *any source whatsoever*, culminating in a nuisance condition for the nearby citizens.

To this end, Applicant’s own expert air dispersion modeler, Mr. Hunt, testified that the results from his modeling indicated that emissions from the rock crushing operation would result

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<sup>45</sup> PFD at 53.

<sup>46</sup> 30 TAC § 101.4 (emphasis added).

<sup>47</sup> TCEQ Interim Order at Issue G (January 25, 2010) (emphasis added).

in as much as  $630 \mu\text{g}/\text{m}^3$  of PM-10 in the atmosphere on a 24-hour average.<sup>48</sup> This includes the projected contribution of PM-10 emissions from the proposed facility plus road sources that are onsite. *Unbelievably, Aggregate's own witness is testifying that the PM-10 concentration in the atmosphere resulting from combined emissions from the roads and facility is more than four times the NAAQS.* This staggering amount of projected concentrations is even after taking into account the controls Aggregate would utilize to suppress emissions,<sup>49</sup> but does not include Comal County background concentrations.<sup>50</sup> In other words, adding the background concentration of PM-10 increases the projected concentration to  $705 \mu\text{g}/\text{m}^3$ , assuming  $75 \mu\text{g}/\text{m}^3$  is accurate.

The dangerously high level of PM-10 concentration projected by Aggregate was measured at a receptor off the Aggregate project site and only a little over 50 meters north of the Fey household.<sup>51</sup> The facility will have a direct adverse affect on the health of the Fey Protestants, and unquestionably qualifies as a nuisance to all adjacent landowners and residents. Pursuant to 30 TAC § 101.4, such a condition requires denial of Aggregate's air quality permit application.

- ii. TCEQ guidance states that road emissions are to be included for purposes of evaluating nuisance conditions associated with rock crushing operations

Second, the ALJ dismisses the dangerous nuisance conditions on the incorrect basis that, "TCEQ guidelines are clear that road emissions in permit modeling analyses for short-term averaging periods should not be included in modeling."<sup>52</sup> While the ALJ is correct that TCEQ guidance excludes road emissions when determining whether a "facility"<sup>53</sup> complies with

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<sup>48</sup> Applicant Exhibit 39 at 13:17 – 19 (Hunt Prefiled).

<sup>49</sup> TR. 374:25 – 375:17 (Hunt).

<sup>50</sup> TR. 339:19 – 21 (Hunt).

<sup>51</sup> TR. 326:17 – 327:16 (Hunt).

<sup>52</sup> PFD at 53 *citing* ED Exhibit 15, p. 58-59.

<sup>53</sup> 30 T.A.C. § 116.10(4).

NAAQS, TCEQ guidance differs with respect to emissions causing nuisance conditions. Specifically, the TCEQ Air Quality Modeling Guidelines explicitly states that, “road emissions must meet ... the nuisance provision in 30 T.A.C. Chapter 101 (§101.4).”<sup>54</sup> Accordingly, the Applicant’s air dispersion modeling that included emissions from roads and projected 630 µg/m<sup>3</sup> of PM-10 over a 24-hour period was conducted consistently with the applicable TCEQ guidance.

Classification of concentrations of an air pollutant more than four times the established standard for protecting public health and welfare as a “nuisance” understates the reality of danger faced by Protestants and other neighboring citizens. These levels represent a significant and dangerous exposure level that would pose serious health problems. Due to adverse health effects, it is illegal to exceed the NAAQS by even a small amount. To exceed the NAAQS by a factor of four is unconscionable and requires denial of Aggregate’s air quality permit application pursuant to 30 TAC § 101.4.

#### **IV. CONCLUSION**

The Applicant failed to meet its burden on multiple issues designated by the Commission. The evidence demonstrated that the proposed rock crushing facility will contribute to nuisance conditions and will also cause adverse health effects. To this end, the Applicant has failed to demonstrate that its air quality permit application satisfies the Texas Clean Air Act and the TCEQ regulations which are designed to be protective of air quality, human health and the environment. Accordingly, Protestants respectfully request that the Commission reject the ALJ’s recommendation and deny issuance of the air quality permit.

If the permit is issued as currently drafted, the Protestants will not be afforded any protection from the emissions and adverse health effects. The ALJ references on multiple occasions that Aggregate has proposed to construct a berm to mitigate nuisance conditions. To

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<sup>54</sup> ED Exhibit 15 at p.59.

the extent that this proposal provided support for the ALJ's recommendation to issue the permit, Protestants respectfully suggest that such a proposal is not reassuring considering there is no condition in the permit that requires construction. Furthermore, unspecified dimensions of a proposed berm raise serious concerns, including, but not limited to, potential flooding and unsightliness. On the other hand, in an effort to mitigate nuisance concerns, the ALJ noted that Aggregate "represented that surrounding vegetation would be continuously maintained to serve as a buffer between plan operations and property lines."<sup>55</sup> In the event that the Commission issue the permit, the Protestants strongly urge that the Commission include necessary vegetation and protective measures be included as conditions to the permit.

Respectfully submitted,

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<sup>55</sup> PFD at 33.

**CERTIFICATE OF SERVICE**

On this 1st 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

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