

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 7, 2013

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

RE: EOG RESOURCES, INC.
SOAH DOCKET NO. 582-12-6347
TCEQ DOCKET NO. 2012-0971-AIR

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Amy Swanholm".

Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**SOAH DOCKET NO. 582-12-6347
TCEQ DOCKET NO. 2012-0971-AIR**

APPLICATION BY EOG	§	BEFORE THE STATE OFFICE
	§	
RESOURCES FOR AIR QUALITY	§	OF
	§	
PERMIT NO. 95412	§	ADMINISTRATIVE HEARINGS

OPIC'S EXCEPTIONS TO THE PFD

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE WILKIV:

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

I. NUISANCE

OPIC excepts to the PFD's conclusions regarding potential nuisance conditions generated by the proposed sand processing plant. There has been no adequate TCEQ review of whether, in relation to silica, the proposed sand processing facility will comply with TWC § 5.130 and 30 TAC § 101.4. The PFD acknowledges this, but still concludes that none is necessary, instead resting on EOG and the ED's interpretation of 30 TAC § 101.4, a position not supported by guidance or legislative history. The ED's interpretation that it need not conduct any further evaluation for potential nuisance conditions could potentially lead to situations where the TCEQ has permitted facilities that create nuisance conditions-which it must then remedy through possibly lengthy and costly enforcement measures. Evaluating an application more thoroughly would prevent such issues before they arise.

Further, the PFD does not discuss doubts raised by the ED's witness, Angela Curry and discussed in OPIC's Closing Argument. Because she based her determination on the modeling provided to her by the air dispersion modeling team, she also did not have any information on other "non-facility" silica sources, such as potential emissions from the quarry or nearby roads.¹ The absence of this information calls into question her assumption that the modeling was representative of the worst-case scenario.² Eliminating this assumption, she stated, would potentially change the outcome of her conclusion.³

II. OPIC'S CLOSING ARGUMENTS

OPIC has attached its closing arguments to this brief and would respectfully request that the ALJ and Commissioners consider the arguments raised there. OPIC asks that the ALJ and Commissioners consider the ED's practice of excluding from consideration all potential air pollution "sources" outside the definition of "facility" even when rules with which a permittee must comply as well as the TCEQ's statutory mandate to protect human health and welfare are NOT limited to consideration of only those emissions from a "facility".

III. CONCLUSION

EOG has not met its burden to show that the proposed sand processing plant would be protective of human health. The modeling did not accurately depict all potential silica sources. Further, there has been no substantive evaluation of whether

¹ Tr. at 596-598.

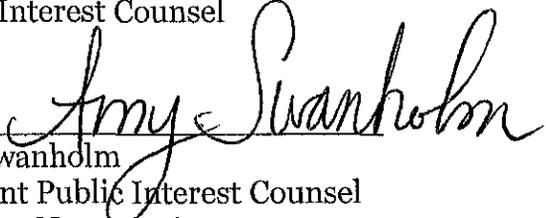
² Tr. at 594.

³ Tr. at 593, 608-609.

EOG would comply with the requirement that the sand processing plant not create nuisance conditions. Therefore OPIC must recommend that the application be denied.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By: 
Amy Swanholm
Assistant Public Interest Counsel
State Bar No. 24056400
(512)239-6363 PHONE
(512)239-6377 FAX

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2013 the original and correct copies of the Office of the Public Interest Counsel's *Exceptions to the PFD* were filed with the State Office of Administrative Hearings, 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 or by deposit in the U.S. Mail.


Amy Swanholm



Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 28, 2013

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

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APPLICATION BY EOG § BEFORE THE STATE OFFICE
RESOURCES FOR AIR QUALITY § OF
PERMIT NO. 95412 § ADMINISTRATIVE HEARINGS

OPIC'S CLOSING ARGUMENT

I. INTRODUCTION

A. Summary of Argument

For an air quality permit to be granted, the application must include "information which demonstrates that emissions from the facility...will comply with all rules and regulations of the commission and with the intent of the Texas Clean Air Act (TCAA), including protection of the health and property of the public.¹ "Facility" is defined as "a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered to be a facility."²

TCEQ rules also generally prohibit any person from discharging, "from any source," air contaminants that "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."³ "Source" is defined as "a point of origin of air contaminants; whether privately or publicly owned or operated" and "air contaminants" are "particulate matter, radioactive material, dust,

¹ 30 TAC § 116.111(a)(2)(A)(i).

² TEXAS HEALTH AND SAFETY CODE (TXHSC) § 382.003(6).

³ 30 TAC § 101.4.

fumes, gas, mist, smoke, vapor, or odor, including any combination of those items, produced by processes other than natural.”⁴

In regards to silica, a carcinogen and air contaminant regulated through the TCEQ’s Effects Screening Level (ESL) program, the application and associated modeling used by the TCEQ to evaluate the proposed sand processing plant only took into account potential air pollution sources from the “facility”, as opposed to emissions from all sources potentially created by EOG’s sand processing plant. The exclusion of potential air pollution sources prohibited TCEQ staff from fully evaluating all factors necessary for a Tier III ESL review, fails to meet several TCEQ regulations, and ultimately paints an inaccurate picture of potential air emissions from the proposed sand processing plant.

Furthermore, the Protestants have presented evidence showing that if all potential silica sources had been included in the modeling, emissions of certain air pollutants would exceed acceptable levels and potentially harm the public. As the applicant bears the burden of proof in this hearing, OPIC must recommend denial of the application.

B. Description of Proposed Cooke County Sand Pit Project

EOG Resources, Inc. (EOG or Applicant) has applied to the TCEQ for a New Source Review (NSR) Authorization under Texas Clean Air Act (TCAA), TEXAS HEALTH & SAFETY CODE (TxHSC) § 382.0518.

This permit, if issued, would authorize EOG to construct an industrial sand processing plant, including material loading operations, screens, conveyance systems, a dryer, stockpiles, and truck loading operations. The facilities would operate 8,760 hours per year—except for the

⁴ TxHSC § 382.003(12) and (2).

dryer baghouse and associated dryer, the dry plant transfer dust collector baghouse and associated dry feed bins, dry screens and conveyors, the surge bin dust collector and the product silo dust collectors, and associated product load facilities, which would each be limited to a maximum operating schedule not to exceed 7,884 hours per year in any rolling 12-month period. The throughput of the plant would be limited to a maximum of 500 tons per hour (tph) and 4,380,000 tons per year (tpy) at the vibrating scalping screen, 300 tph and 2,628,000 tpy at the wash screen, and 158 tph and 1,182,600 tpy at the dryer. The plant is proposed to be located at 14596 N FM 373 Saint Jo, Cooke County.

Contaminants that would be authorized under this permit include organic compounds (VOCs), nitrogen oxides (NO_x), sulfur dioxide (SO₂), carbon monoxide (CO), and particulate matter (PM), including PM with diameters of 10 micrometers or less (PM₁₀) and 2.5 micrometers or less (PM_{2.5}).

C. Procedural History

The permit application for Air Quality Permit Number 95412 (Application) was received on March 25, 2011, and declared administratively complete on April 7, 2011. The Notice of Receipt and Intent to Obtain an Air Quality Permit (NORI or first public notice) for this permit application was published on April 15, 2011, in the *Muenster Enterprise*, and on May 27, 2011, in the *Saint Jo Tribune*. The Notice of Application and Preliminary Decision for an Air Quality Permit (NAPD or second public notice) and Notice of Hearing for this permit application was published on June 8, 2012, in the *Gainesville Daily Register*, *Muenster Enterprise*, and *Saint Jo Tribune*. A public meeting was held on August 23, 2011, in Muenster, Cooke County. The notice of public meeting was mailed to the interested parties on the Chief Clerk's mailing list on July 13, 2011, and an amended notice of public meeting was mailed to interested parties on the Chief Clerk's mailing list on August 10, 2011. A second public meeting was held on July 11, 2012, in Gainesville, Cooke County. The notice of second public meeting was mailed to the interested

parties on the Chief Clerk's mailing list on July 3, 2012. The public comment period ended at the close of the second public meeting on July 11, 2012.

EOG requested a direct referral of the matter to SOAH, and the preliminary hearing was convened on July 12, 2012. Notice of the preliminary hearing was sent out with the notice of second public meeting. The hearing on the merits was held in Austin, Texas, on April 17-19, 2013, continued in Gainesville, Texas, on April 22-23, 2013, and concluded on April 25, 2013, in Austin, Texas.

II. ARGUMENT

OPIC's Closing Argument focuses on several discrete issues that raise public interest concerns. As OPIC's argument involves public interest concerns not necessarily exclusive to one rule or statutory citation, references to topic headings included in the outline issued in ALJs' Order No. 11 (Agreed Outline) have been provided in footnote throughout the argument for ALJs' and other parties' reference.

A. TCEQ's ESL Program

The TCEQ is charged with administering the Texas Clean Air Act (TCAA), the purpose of 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."⁵

⁵ THSC 382.002

To determine whether a specific source will comply with the TCAA, TCEQ requires an applicant to submit air dispersion modeling showing potential emissions from the project. The modeling must accurately show what pollutants would be emitted by the proposed project.⁶ TCEQ permit reviewers evaluate the air dispersion modeling and then compare it to applicable state and federal standards to determine whether the requested activity may be permitted, proposed emission controls are adequate, and whether additional emissions controls may be necessary.

The EPA has established national standards for certain air pollutants, or National Ambient Air Quality Standards (NAAQS).⁷ If the applicant's modeling shows that the proposed project would emit these criteria pollutants in amounts less than the NAAQS, then TCEQ may approve the permit application. For those pollutants that the EPA has not set specific emissions factors or limits, through the NAAQS or other federal standard, TCEQ must still evaluate their potential impact. TCEQ regulates many potentially harmful air contaminants through Effects Screening Levels (ESLs).⁸

If the proposed project would emit an amount less than the established ESL, TCEQ does not expect any adverse impacts. However, if an applicant proposes to emit levels that would exceed an established ESL level, this does not necessarily mean adverse impacts would occur. Instead the TCEQ must conduct further evaluation.⁹

Applicant has proposed to emit silica, a substance classified as a known human carcinogen by the National Institute of Occupational Safety and Health (NIOSH) and

⁶ 30 TAC 101.3.

⁷ 40 CFR § 50.2; 30 TAC 101.21.

⁸ See Applicant's Exhibit (App. Ex.) 37, "TCEQ Guidelines to Develop Toxicity Factors" prepared by Toxicology Division, Chief Engineer's Office, RG-442, October 2012 (RG-442).

⁹ ED ex. 37 at 17 (737).

regulated through TCEQ's ESL program. Silica ESL levels, measured in PM₄ (particulate matter measuring 4 microns or less), have been set at:

- short-term exposure: 14 µg/m³ (micrograms per cubic meter)
- long-term exposure: 0.27 µg/m³.

Short term and long term exposure is evaluated by examining the maximum off-property ground-level concentrations (GLC_{MAX}) predicted by an applicant's modeling. When determining whether an applicant's modeling would exceed these ESL levels, the short-term ESL level (based upon acute exposure health and welfare data) is compared to the applicant's modeled 1-hour GLC_{MAX}. The long-term ESL level (based on chronic exposure data) is compared to the applicant's worst-case annual GLC_{MAX}.¹⁰ If this amount exceeds the ESL, an applicant must also provide the maximum ground-level concentration at a nonindustrial receptor (GLC_{NI}).¹¹

Comparing these levels, EOG's air dispersion modeling showed that the proposed project would exceed both the crystalline silica ESL levels for short-term and long-term exposure.¹² EOG's short-term GLC_{MAX} exceeded the short-term ESL by 1.17 times. The GLC_{NI} also exceeded the short-term ESL 1.07 times. EOG's long-term or annual GLC_{MAX} exceeded the long-term ESL level 1.63 times.¹³ Per TCEQ guidance, the ED conducted a more in-depth, or Tier III review of EOG's predicted level of silica emissions. Despite the predicted long-term exposure level at almost twice the long-term ESL, the ED concluded that no adverse health effects would be expected.¹⁴

¹⁰ App. Ex. 37 at 19-20.

¹¹ *Id.*

¹² ED ex. 37 at 12 (740); ED ex. 16 (213).

¹³ *Id.*

¹⁴ *Id.*

The ED followed its procedure when conducting the Tier III ESL evaluation for silica. However, ED staff conducting the review did not have enough information about all possible silica sources to effectively complete the Tier III review. Protestants have identified several potential silica sources not included in EOG's modeling, and not evaluated by the ED. Inclusion of these sources may have led the ED to reach a different conclusion.

B. EOG's Modeling

The ED's conclusions were based on the projected levels of silica emissions predicted by EOG's modeling. EOG contends the modeling submitted was sufficient. Protestants argue, among other issues, that EOG's modeling did not include all potential sources of PM₄. At this time, OPIC chooses not to specifically discuss modeling, beyond noting that EOG has only included emissions sources it believed were within the statutory definition of "facility."¹⁵ Instead OPIC focuses its argument on whether the exclusion of non-facility silica sources was proper.

C. All Potential Sources should be Considered for a Complete Tier III ESL Evaluation¹⁶

During the hearing, significant time was spent reviewing what potential sources of silica were or were not included in the applicant's modeling. Protestants argue that every "source" should have been accounted for, while EOG argues that only those sources arising from the "facility" need be included in the modeling. The TCAA defines "facility" as "a discrete or identifiable structure, device, item, equipment, or enclosure

¹⁵ Tr. at 72, 121-128, 326-329, 331-332, 336-337, 399-400.

¹⁶ Agreed Outline II.F.

that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered to be a facility."¹⁷ TCEQ rules state that in order to be granted an air permit, the application must include "information which demonstrates that emissions from the facility...will comply with all rules and regulations of the commission and with the intent of the Texas Clean Air Act (TCAA), including protection of the health and property of the public."¹⁸

"Source" is defined as "a point of origin of air contaminants, whether privately or publicly owned or operated." "Air contaminants" are "particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor, including any combination of those items, produced by processes other than natural."¹⁹ The definition of "source" has none of the exclusions constraining the definition of "facility."

An application that only includes "sources" from a "facility" may be sufficient to satisfy 30 TAC § 116.111 and other rules specifically limited by the definition of "facility." However, several TCAA requirements and TCEQ protocol do not limit TCEQ's review to only emissions and air contaminant sources from a "facility."

First, TCEQ is required by TEXAS WATER CODE (TWC) § 5.130 to consider the cumulative risks from air pollutants on the public. TCEQ's ESL guidance discusses cumulative risk to include consideration of aggregate exposure, or, potential exposure to one chemical, such as silica, from multiple sources.^{20 21}

¹⁷TEXAS HEALTH AND SAFETY CODE (TXHSC) § 382.003(6).

¹⁸ 30 TAC § 116.111(a)(2)(A)(i).

¹⁹ TXHSC § 382.003(12) and (2).

²⁰ RGG-442 at 6.

²¹ Agreed Outline Section I.D.3.h.

Second, TCEQ's nuisance rule is not limited to "facility" sources.²² EOG must show that it will not create nuisance conditions by showing compliance with 30 TAC § 101.4, prohibiting any person from discharging, "from any source," air contaminants that "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."²³ In short, TCEQ rules prohibit any person²⁴ from harming human health and welfare and creating a nuisance. The modeling provided to ED witness Angela Curry, the toxicologist who performed the Tier III ESL review for crystalline silica, only included potential silica emissions from "sources."²⁵ And she did not look at any sources of silica outside of those provided by EOG's modeling.²⁶ She also stated that she made no specific evaluation of whether silica would or would not create a nuisance.²⁷

Therefore there has been no adequate TCEQ review of whether, in relation to silica, the proposed sand processing facility will comply with TWC § 5.130 and 30 TAC § 101.4.

Further, TCEQ's ESL guidance also states that the modeling data used to evaluate potential effects of non-criteria pollutants like silica should be based on the worst-case scenario.^{28 29} Worst-case scenario would include all sources, not just sources fitting into the definition of "facility."³⁰ But the data used by the ED to evaluate whether silica

²² Agreed Outline I.D.3.d, III.H.

²³ 30 TAC § 101.4.

²⁴ "Person" is defined as "an individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity." TxHSC § 382.003(10).

²⁵ Tr. at 582, lns. 2-3, 336-337.

²⁶ Tr. at 596-598.

²⁷ Tr. at 610-614.

²⁸ ED ex. 33 (496).

²⁹ Agreed Outline II.F.1.

³⁰ Tr. at 579-584.

would pose a health risk to the public came from the Applicant's modeling,³¹ which did not include all potential sources of silica.³² However, when evaluating potential harm to the public, all silica sources are a concern.³³

ESL guidance also states that a Tier III review includes evaluating whether existing levels of the same constituent would, along with the proposed emissions, result in a condition of air pollution.³⁴ According to this guidance, the toxicology division shall evaluate whether statewide modeling or ambient monitoring indicates the presence of significant concentrations of a constituent from existing sources. If significant concentrations are present, the additional emissions from the new project may result in a condition of air pollution.³⁵

In relation to silica, this was not adequately evaluated by the TCEQ. Justin Cherry of the TCEQ's air dispersion modeling team, states that when looking at off-site silica concentrations included in the modeling, no information on background silica levels was considered. Only on-site sources from the "facility" were considered.³⁶

Angela Curry based her determination on the modeling provided to her by the air dispersion modeling team. Therefore she also did not have any information on other "non-facility" silica sources, such as potential emissions from the quarry or nearby roads.³⁷ Without this, she did not have enough information to make an informed decision on whether silica levels from all area sources would create adverse health effects. The absence of this information further calls into question her assumption that

³¹ Tr. at 582, lns. 2-3.

³² Tr. at 72, 121-128, 326-329, 331-332, 336-337, 399-400.

³³ Tr. at 583, ln 8.

³⁴ Ex. ED-33 (498).

³⁵ *Id.*

³⁶ Tr. at 522-523.

³⁷ Tr. at 596-598.

the modeling was representative of the worst-case scenario.³⁸ Eliminating this assumption, she stated, would potentially change the outcome of her conclusion.³⁹

The ED followed current procedure when conducting the Tier III ESL evaluation for silica. However, ED staff conducting the review did not have enough information about all possible silica sources to effectively complete the Tier III review as instructed by TCEQ guidance. Further, TWC § 5.130 and 30 TAC § 101.4 compliance is not limited to “facility” sources only. Protestants have identified several potential silica sources not included in EOG’s modeling, and not evaluated by the ED. Inclusion of these sources may have led the ED to reach a different conclusion.

IV. OTHER ISSUES⁴⁰

A. Paving In-plant Roads

The draft permit does not require EOG to pave roads on the property, instead requiring that all in-plant roads, traffic areas, and active work areas be cleaned or sprayed with water upon detection of visible particulate matter.⁴¹ However EOG witness Lisa Hoover stated that applying best management practices to the road would require paving it. And, according to AP-42, paving is the best means of controlling air pollution.⁴² She also stated that EOG’s intention is to pave all in-plant roads.⁴³

Should the ALJs decide to grant EOG’s application for a sand processing plant, OPIC recommends amending Special Condition No. 19 of the Draft Permit to include

³⁸ Tr. at 594.

³⁹ Tr. at 593, 608-609.

⁴⁰ Agreed Outline IV.

⁴¹ Ex. ED-21 at 246 (Special Condition No. 19).

⁴² Tr. at 976.

⁴³ *Id.*

language requiring EOG to pave all in-plant roads and language harmonizing this requirement with existing language in the draft permit.

V. ASSESSMENT OF TRANSCRIPT COSTS⁴⁴

OPIC takes no position on this issue and defers to those parties who have incurred transcript costs. Commission rules specifically provide that "[t]he commission will not assess reporting or transcription costs to statutory parties who are precluded by law from appealing any ruling, decision, or other act of the commission." 30 TAC § 80.23(d)(2). This rule is directly applicable to OPIC. OPIC's enabling statute states that "[t]he counsel shall...be a party to all proceedings before the commission..." and "[a] ruling, decision, or other act of the commission may not be appealed by the counsel." Tex. Water Code §§ 5.273, 5.275. Therefore, pursuant to 30 TAC § 80.23(d)(2), the Commission cannot assess any reporting or transcription costs to OPIC.

V. CONCLUSION

EOG has not met its burden to show that the proposed sand processing plant would be protective of human health. The modeling did not accurately depict all potential silica sources. Therefore OPIC must recommend that the application be denied.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

⁴⁴ Agreed Outline V.

By: Amy Swanholtm
Amy Swanholtm
Assistant Public Interest Counsel
State Bar No. 24056400
(512)239-6363 PHONE
(512)239-6377 FAX

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Amy Swanholtm
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MAILING LIST
EOG RESOURCES, INC.
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The Honorable Penny Wilkov
Administrative Law Judge
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
Tel: 512/475-4993 Fax: 512/322-2061

Casey A. Bell
Richards, Rodriguez & Skeith, LLP
816 Congress Avenue, Suite 1200
Austin, Texas 78701
Tel: 512/476-0005 Fax: 512/476-1513
Representing: EOG Resources, Inc.

Jim Blackburn
Mary W. Carter
Blackburn Carter, PC
4709 Austin Street
Houston, Texas 77004
Tel: 713/524-1012 Fax: 713/524-5165
Representing: Red River Motorcycle Trails

Lawrence Dunbar
Dunbar Harder, PLLC
1 Riverway, Suite 1800
Houston, Texas 77056
Tel: 713/782-4646 Fax: 713/782-5544
Representing: Red River Motorcycle Trails

Jeffrey Mundy
The Mundy Law Firm, PLLC
8911 N. Capitol of Texas Highway, Ste. 2105
Austin, Texas 78759
Tel: 512/334-4300 Fax: 512/334-4256
Representing: Red River Motorcycle Trails

Mary E. Del Omo
PO Box 676
Muenster, Texas 76252
Tel: 603/377-0595
*Representing: Red River Agriculture and
Wildlife Tourism*

Kathy Nielsen
12094 Joyce Lane
Roanoke, Texas 76262
Tel: 817/497-9788
Representing: Self

Doug Brown, Staff Attorney
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

Bridget C. Bohac
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

