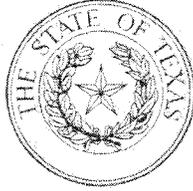


# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

September 11, 2015

Tucker Royall, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

Re: **SOAH Docket No. 582-15-0460; TCEQ Docket No. 2014-1401-AIR; In Re:  
Application of Southern Crushed Concrete LLC for Air Quality Standard  
Permit No. 119443L001**

Dear Mr. Royall:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than October 1, 2015. Any replies to exceptions or briefs must be filed in the same manner no later than October 12, 2015.

This matter has been designated **TCEQ Docket No. 2014-1401-AIR; SOAH Docket No. 582-15-0460**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Casey A. Bell".

Casey A. Bell  
Administrative Law Judge

CAB/mm  
Enclosures  
cc: Mailing List

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**STYLE/CASE:** SOUTHERN CRUSHED CONCRETE LLC

**SOAH DOCKET NUMBER:** 582-15-0460

**REFERRING AGENCY CASE:** 2014-1401-AIR

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**STATE OFFICE OF ADMINISTRATIVE  
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**ADMINISTRATIVE LAW JUDGE**

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SOAH DOCKET NO. 582-15-0460  
TCEQ DOCKET NO. 2014-1401-AIR

APPLICATION OF SOUTHERN § BEFORE THE STATE OFFICE  
CRUSHED CONCRETE LLC FOR AIR §  
QUALITY STANDARD PERMIT NO. § OF  
119443L001 §  
§ ADMINISTRATIVE HEARINGS

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**SOAH DOCKET NO. 582-15-0460  
TCEQ DOCKET NO. 2014-1401-AIR**

<b>APPLICATION OF SOUTHERN</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>CRUSHED CONCRETE LLC FOR AIR</b>	<b>§</b>	
<b>QUALITY STANDARD PERMIT NO.</b>	<b>§</b>	<b>OF</b>
<b>119443L001</b>	<b>§</b>	
	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

**A. Summary**

Southern Crushed Concrete, LLC (SCC or Applicant) submitted to the Texas Commission on Environmental Quality (TCEQ) an application (the Application) seeking registration under the Air Quality Standard Permit for a Temporary Concrete Batch Plant (the CBP Standard Permit) under Texas Health and Safety Code § 382.05195 and 30 Texas Administrative Code (TAC) § 116.611. The registration would authorize Applicant to construct and operate a temporary concrete batch plant (the Plant), which would operate up to 12 hours per day, six days per week, and occupy the site for no more than 180 consecutive days. Plant throughput would be authorized at a maximum of 200 cubic yards per hour and 2,400 cubic yards per day. The Plant would be located at 5001 Gasmer Drive, Houston, Harris County (the Gasmer Yard). Air contaminants authorized under the Permit include dust, aggregate, cement, and particulate matter (PM), including PM with aerodynamic diameters of 10 micrometers or less (PM<sub>10</sub>) and 2.5 micrometers or less (PM<sub>2.5</sub>).

The Application is opposed by the Willow Waterhole Greenspace Conservancy (the Conservancy or Protestant). The TCEQ Office of Public Interest Counsel (OPIC) takes the position that the Permit would be unenforceable as to Applicant under the particular circumstances at the plant location and, therefore, also opposes the Application under current

conditions. The Executive Director of the TCEQ (ED) recommends issuance of the CBP Standard Permit.

The Administrative Law Judge (ALJ) recommends that the Application be granted. While the Conservancy pointed out some inconsistencies and errors in the Application and raised valid concerns with respect to existing stockpiles and compliance with TCEQ's nuisance rule, the preponderance of the evidence shows that the Application meets the applicable statutory and regulatory requirements for issuance of the registration to use the CBP Standard Permit for the Plant.

## **B. Description of Project and Site<sup>1</sup>**

### **1. The Gasmer Yard**

#### **a. Site Description**

SCC proposes to construct and operate the Plant on property known as the Gasmer Yard.<sup>2</sup> The Gasmer Yard is an 18-acre site owned by SCC and located in a commercial/light industrial area<sup>3</sup> in southwest Houston at 5001 Gasmer Drive.<sup>4</sup> The Gasmer Yard is depicted on the aerial photograph/plot plan submitted as part of the Application;<sup>5</sup> a larger-scale aerial photograph of the Gasmer Yard is included in Protestant's Exhibit No. 1C.<sup>6</sup> Gasmer Drive borders the yard on the north, and South Main Street borders the yard on the south. Commercial/industrial

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<sup>1</sup> As explained at the hearing, the ALJ has borrowed directly from the parties' briefing throughout this Proposal for Decision (PFD).

<sup>2</sup> App. Ex. 1 (Prefiled testimony of SCC General Manager James Miller, Jr.) at 3.

<sup>3</sup> App. Ex. 1A (ED's Response to Comments) at 9 ("Observations made by the TCEQ investigator identified the immediate area around the proposed site as industrial/commercial.").

<sup>4</sup> App. Ex. 1 at 3.

<sup>5</sup> App. Ex. 2D (Application) at 16.

<sup>6</sup> Protestant Ex. 1C (Google Earth image of Gasmer Yard).

operations border the yard on the east, and the Willow Waterhole Stormwater Detention Facility borders the yard on the west. The aerial photographs of the Gasmer Yard in the record depict the general layout of the site.<sup>7</sup>

**b. Site History**

SCC has conducted construction material-related operations at the Gasmer Yard since the early 1990s.<sup>8</sup> SCC previously operated a pug mill (soil stabilization plant) and a portable concrete crushing facility at the Gasmer Yard. Neither of these facilities is currently located at the site, save for some portable conveying and screening equipment that was used for the concrete crushing operation.<sup>9</sup> The portable concrete crushing operation left the site in 2009, and the pug mill left the site in 2014.<sup>10</sup>

**c. Stockpiles**

Given SCC's historical operations, there are two existing material stockpiles at the Gasmer Yard. One stockpile is comprised of milled asphalt in particle sizes of approximately two inches in diameter. The other is a concrete rubble stockpile.<sup>11</sup> Since 2009, SCC has moved material from the existing concrete rubble stockpile off-site to other locations in Houston as needed.<sup>12</sup> There is also an existing pile of what could be brick at the Gasmer Yard.<sup>13</sup> SCC will not use these stockpiles for the operation of the Plant because crushed concrete, milled asphalt, and brick are not components of a concrete batching operation.<sup>14</sup>

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<sup>7</sup> App. Ex. 2D at 16; Protestant Ex. 1C.

<sup>8</sup> Tr. at 41.

<sup>9</sup> App. Ex. 1 at 3; Tr. at 40, 68.

<sup>10</sup> Tr. at 41.

<sup>11</sup> App. Ex. 1 at 3; Tr. at 123-24.

<sup>12</sup> Tr. at 76-77.

<sup>13</sup> *Id.* at 67-68.

<sup>14</sup> App. Ex. 1 at 4; Tr. at 77-78, 124-25.

The Plant will have two associated material stockpiles: (1) an aggregate stockpile and (2) a sand stockpile.<sup>15</sup> The aggregate pile will be composed of gravel, approximately one inch in diameter and washed prior to delivery to the site.<sup>16</sup> The sand will also be washed prior to delivery to the site.<sup>17</sup> Cleaning and washing these materials prior to their use in the Plant's operation is necessary to achieve the required strength for the concrete's planned end use.<sup>18</sup> These stockpiles are not currently located at the site.<sup>19</sup>

**d. Entrance and Exit**

The majority of the Gasmer Yard is unpaved, and the northern portion of the tract—approximately 300-350 feet from Gasmer Drive—SCC maintains as a grass “infield.”<sup>20</sup> That infield is bisected by two entrance/exit “driveways” that extend north from the unpaved area of the yard out to Gasmer Drive.<sup>21</sup> The east entrance/exit driveway is roughly centered at the site, while the west entrance/exit driveway is parallel to and runs alongside the Gasmer Yard's western property boundary.<sup>22</sup>

The Gasmer Yard's entrance/exit driveways are paved with concrete and equipped with a fixed water sprinkler system that SCC will use for dust suppression.<sup>23</sup> SCC will also sweep them with its company-owned street sweeper once or twice per day when the Plant is operating.<sup>24</sup> SCC will use a dedicated water truck with a spray-bar system to control dust emissions from

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<sup>15</sup> App. Ex. 1 at 5; App Ex. 2D at 20; App. Ex. 2 (Prefiled Testimony of Monique Wells) at 28.

<sup>16</sup> App. Ex. 1 at 5-6; Tr. at 114.

<sup>17</sup> App. Ex. 1 at 5; Tr. at 115.

<sup>18</sup> Tr. at 114-15.

<sup>19</sup> App. Ex. 1 at 3; Tr. at 156.

<sup>20</sup> Tr. at 119.

<sup>21</sup> *Id.* at 119-20.

<sup>22</sup> App. Ex. 2D at 16; Protestant Ex. 1C.

<sup>23</sup> App. Ex. 1 at 9; Tr. at 119-20.

<sup>24</sup> App. Ex. 1 at 9.

unpaved traffic areas as needed.<sup>25</sup> Vehicle traffic for the Plant operation will use these paved driveways to enter and exit the site.

## 2. The Proposed Plant

The revised plot plan that SCC submitted to TCEQ as an update to the Application identifies the proposed location of the Plant and associated stockpiles within the Gasmer Yard.<sup>26</sup> The footprint of the Plant is an approximate 50-foot by 70-foot rectangle that will be oriented north-south, with the northern edge approximately 1200 feet south of Gasmer Drive.<sup>27</sup> The southern edge of the Plant will be located approximately 320 to 350 feet from the southern property line, and the eastern edge of the Plant will be located more than 100 feet from the eastern property line.<sup>28</sup> The sand and aggregate stockpiles will be located near the Plant and at least 100 feet from the property line.<sup>29</sup>

The Application includes a process description and a process flow diagram identifying the Plant equipment, and SCC General Manager Jim Miller explained the equipment and the process in his prefiled testimony.<sup>30</sup> The washed sand and aggregate will be delivered to the site by truck and unloaded into stockpiles for storage. Bulk cement will be delivered to the site by tanker truck and will be pneumatically loaded through a fill pipe into a cement silo. The sand and aggregate will be loaded into a hopper by a front-end loader and conveyed to overhead storage bins. When a concrete mixer truck is loaded, the washed sand and aggregate will be conveyed from the overhead storage bins to the loading point, where it will be loaded into the mixer truck via gravity feed. The cement will gravity feed into a cement weigh hopper and then

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<sup>25</sup> *Id.* at 8-9.

<sup>26</sup> App. Ex. 2D at 35; App. Ex. 1 at 11.

<sup>27</sup> App. Ex. 1 at 11.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; App. Ex. 2D at 35.

<sup>30</sup> App. Ex. 2D at 20-21.

drop through the loading point into the concrete mixer truck.<sup>31</sup> The concrete mixer truck loading point will be sheltered by an intact three-sided curtain, or shroud, that extends below the mixer-truck receiving funnel.<sup>32</sup> The suction shroud at the loading point will be vented to the central baghouse with a proposed dust collector system having a designed maximum flow rate of 6,500 actual cubic feet per minute.<sup>33</sup> Emissions from the cement silo, including emissions from loading and unloading operations at the silo, will be vented via a central dust collector to a baghouse.<sup>34</sup> The baghouse will have a fabric filter system with a control efficiency, as represented by the manufacturer, of at least 99.9% and an outlet grain loading rate of 0.01 grains per standard cubic foot.<sup>35</sup> Emissions from the sand and aggregate bin outlets, conveyors, and transfer points will be controlled by a fixed water-sprinkler system.<sup>36</sup> SCC will control emissions from the sand and aggregate stockpiles by utilizing a water truck to apply water to the stockpiles and prevent potential dust emissions.<sup>37</sup> Further, any material spills will be immediately cleaned and contained or dampened to minimize dust emissions.<sup>38</sup> SCC will employ the water truck to control emissions from in-plant roads and traffic areas, and will use both the fixed (not truck-mounted) sprinkler system and street sweeper to control emissions from the paved entrance/exit driveways.<sup>39</sup> SCC will power the Plant with electricity from the local electric power provider, so it will not use stationary compression ignition internal combustion engines for equipment operations.<sup>40</sup>

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<sup>31</sup> App. Ex. 1 at 5; App. Ex. 2D at 20.

<sup>32</sup> App. Ex. 1 at 12; App. Ex. 2D at 12.

<sup>33</sup> App. Ex. 2D at 12, 21, 27, 29; App. Ex. 1 at 12.

<sup>34</sup> App. Ex. 1 at 5; App. Ex. 2D at 21.

<sup>35</sup> App. Ex. 2D at 27, 29.

<sup>36</sup> App. Ex. 1 at 9.

<sup>37</sup> *Id.*; App. Ex. 2D at 11.

<sup>38</sup> App. Ex. 1 at 9; App. Ex. 2D at 11.

<sup>39</sup> App. Ex. 1 at 8-9.

<sup>40</sup> App. Ex. 2D at 12; App Ex. at 10.

SCC will be authorized to produce 200 cubic yards per hour and 2,400 cubic yards per day pursuant to its representations in the Application, although the CBP Standard Permit limits production to 300 cubic yards an hour and 6,000 cubic yards a day.<sup>41</sup> SCC's general manager testified that actual production rates at the Plant are expected to be at or below 100 cubic yards per hour and 800 cubic yards per day.<sup>42</sup>

### C. Procedural History, Application Notice, Notice of Hearing, and SOAH Jurisdiction

SCC submitted the Application to the TCEQ on April 23, 2014.<sup>43</sup> The Application included a completed Form PI-1S, Registrations for Air Standard Permit; a TCEQ Core Data Form; a CBP Standard Permit Registration Checklist; maps of the Gasmer Yard; emission calculations for the Plant; Table 11, Fabric Filters; Table 20, Concrete Batch Plants; a list of recordkeeping requirements; information from the manufacturer of the central dust collector to be used at the Plant; a plot plan showing the location of the Plant on the Gasmer Yard; and the required application fee.

The ED declared the Application administratively complete on May 1, 2014.<sup>44</sup> The Notice of Receipt and Intent to Obtain an Air Quality Permit for this permit application was published in English on May 29, 2014, in the *Houston Chronicle* and in Spanish on May 30, 2014, in *El Observador*. The TCEQ Air Permits Division completed its technical review of the Application on July 15, 2014,<sup>45</sup> and the ED determined that the application met all of the requirements for the Permit. The ED issued the Notice of Application and Preliminary Decision for an Air Quality Permit, which included the draft permit, and it was published in

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<sup>41</sup> App. Ex. 2D at 22, 28; App. Ex. 2 at 21-22; App. Ex. 2B (CBP Standard Permit) at 10.

<sup>42</sup> App. Ex. 1 at 6.

<sup>43</sup> App. Ex. 2D; App. Ex. 2 at 10.

<sup>44</sup> App. Ex. 2H (May 1, 2014 TCEQ Letter Declaring Application Administratively Complete).

<sup>45</sup> App. Ex. 2J (July 1, 2014 TCEQ Letter Declaring Application Technically Complete).

English on July 24, 2014, in the *Houston Chronicle* and in Spanish on July 25, 2014, in *El Observador*.<sup>46</sup>

A public meeting was held on July 29, 2014, in Houston, Texas. Notice of the public meeting was mailed on July 15, 2014, to all persons who submitted comments on the Application to the TCEQ. After the public meeting, at the request of the TCEQ Air Permits Division, SCC submitted an updated plot plan to supplement the Application. The public comment period ended on August 25, 2014. On September 22, 2014, in response to public comment and requests for a contested case hearing, SCC requested direct referral of the Application to the State Office of Administrative Hearings (SOAH) for a hearing. The ED's Response to Public Comment was issued on October 30, 2014, and made no changes to the preliminary determination that the Application met the requirements for permit issuance.<sup>47</sup>

On December 15, 2014, ALJ Casey A. Bell conducted a preliminary hearing in Houston, Texas. At the preliminary hearing, SCC offered three exhibits, which were admitted for the purpose of establishing notice and jurisdiction. The ED also offered an exhibit which was admitted for the purpose of establishing notice and jurisdiction. The ALJ found that notice of the hearing was both timely and adequate and that SOAH had jurisdiction over this proceeding.<sup>48</sup> Also at the preliminary hearing, the ALJ took evidence and heard argument from the parties on various requests for party status. After taking the requests under advisement and receiving additional briefing on the issues, the ALJ, by order issued January 28, 2015, granted party status to the Conservancy (appearing on behalf of its member Jorge Ramon) and Joseph Shahda (appearing on behalf of Elsie Bonilla and Denniz Ramirez) and denied the remainder of the

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<sup>46</sup> *Id.* at 5.

<sup>47</sup> App. Ex. 1A at 19.

<sup>48</sup> Order No. 2 (Jan. 28, 2015).

requests for party status.<sup>49</sup> By order issued March 2, 2015, the ALJ aligned the Conservancy and Mr. Shahda as protesting parties pursuant to 30 TAC § 80.109(c).<sup>50</sup>

The hearing on the merits was held June 9-10, 2015, in a hearing room at the SOAH facilities in Austin, Texas. The parties began submitting post-hearing briefing on July 13, 2015, and the record closed on July 27, 2015, with the filing of reply briefs. Neither Ms. Bonilla nor Ms. Ramirez, nor their authorized representative Mr. Shahda, entered an appearance at or otherwise participated in the hearing on the merits or post-hearing briefing. Although SCC sought summary disposition of these parties at the close of the hearing, the ALJ asked for briefing regarding the proper procedural vehicle for handling the non-appearance of these parties, and none was submitted. Because the Conservancy was the only protestant to appear and participate in the hearing and post-hearing briefing, it is referred to as a singular protestant in this case.

#### **D. Applicable Law**

##### **1. Standard Permit for a Concrete Batch Plant**

Under authority provided to it by the Texas Clean Air Act<sup>51</sup> (TCAA), the TCEQ can issue permits to construct new facilities that may emit air contaminants.<sup>52</sup> Moreover, under such authorization, the TCEQ can issue standard permits for similar facilities.<sup>53</sup> A standard permit for new or existing similar facilities may be issued if the TCEQ finds that it is enforceable, that compliance can be adequately monitored by the TCEQ, and that the facilities will use best available control technology.<sup>54</sup> To issue such a permit, the TCEQ must publish notice of its

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<sup>49</sup> *Id.*

<sup>50</sup> Order No. 5 (Mar. 2, 2015).

<sup>51</sup> Tex. Health & Safety Code ch. 382.

<sup>52</sup> Tex. Health & Safety Code § 382.051(a)(1).

<sup>53</sup> *Id.* § 382.051(b)(3).

<sup>54</sup> *Id.* § 382.05195(a)(1)-(3).

intent to do so, hold a public meeting, allow for public comment, and issue written responses to all comments received.<sup>55</sup> The TCAA requires the TCEQ to establish by rule the procedures for the application for, and issuance and amendment of, a standard permit.<sup>56</sup> The TCEQ may delegate to the ED the authority to issue, amend, renew, or revoke an authorization to use a standard permit.<sup>57</sup>

A registration to use a standard permit must be submitted on the required PI-1S form and must document:

- (a) the basis of emission estimates;
- (b) quantification of all emission increases and decreases associated with the project being registered;
- (c) sufficient information as may be necessary to demonstrate that the project will comply with 30 TAC § 116.610(b);
- (d) information that describes efforts to be taken to minimize any collateral emissions increases that will result from the project;
- (e) a description of the project and related process; and
- (f) a description of any equipment being installed.<sup>58</sup>

A project that meets the requirement for a standard permit issued by the TCEQ is entitled to the standard permit, as long as it:

- (a) meets the emission limitations of 30 TAC § 106.261;

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<sup>55</sup> *Id.* § 382.05195(b)-(d).

<sup>56</sup> *Id.* § 382.05195(e).

<sup>57</sup> Tex. Health & Safety Code § 382.05195(i).

<sup>58</sup> 30 Texas Administrative Code (TAC) § 116.611.

- (b) commences construction or operation prior to the effective date of a revision to the standard permit if the project would no longer qualify for the standard permit under such revision;
- (c) complies with any applicable provisions of the Federal Clean Air Act (FCAA) concerning New Source Performance Standards, Hazardous Air Pollutants, and the applicable maximum achievable control technology standards or National Emissions Standards for Hazardous Air Pollutants promulgated by the United States Environmental Protection Agency pursuant to the FCAA; and
- (d) obtains allocations to operate if subject to the Mass Emissions Cap and Trade Program.<sup>59</sup>

If the project is a “new major stationary source” or “major modification,” it does not qualify for a standard permit and must seek a new source review permit pursuant to 30 TAC § 116.110. Further, an applicant for a standard permit may not circumvent by artificial limitations the requirements of 30 TAC § 116.110. Finally, if it involves a proposed “affected source” as defined by the FCAA, the project must comply with other requirements.<sup>60</sup> There is no evidence that the Plant would be a “major new stationary source,” a “major modification,” or an “affected source.”

The TCEQ issued the CBP Standard Permit in 2001, and it was amended in 2003 and 2012.<sup>61</sup> The CBP Standard Permit defines the types of facilities that qualify for registration, including production rates, emissions controls, site layout, and operating conditions.<sup>62</sup> The CBP Standard Permit does not include maximum allowable emission rates. Prior to receiving authorization to use the CBP Standard Permit for the Plant, SCC must demonstrate through its representations made in the Application, including maximum emission rates, construction plans and operating procedures, that the Plant will meet the requirements for the CBP Standard Permit,

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<sup>59</sup> 30 TAC § 116.610(a)(1)-(6).

<sup>60</sup> *Id.* § 116.610(b)-(d).

<sup>61</sup> ED Ex. 1 (Prefiled testimony of Don Nelon) at 6; ED Ex. 3 (CBP Standard Permit).

<sup>62</sup> ED Ex. 3

including the general conditions that apply to all standard permits.<sup>63</sup> SCC cannot vary from such representations if the change would affect its right to the CBP Standard Permit. If there is any change in the operating conditions of the Plant that involves emission controls, character of the emissions, or an increase in the discharge of the emissions as represented in the Application, SCC must notify the ED within 30 days after such a change is made.<sup>64</sup>

## 2. Burden and Standard of Proof

The burden is on SCC to prove by a preponderance of the evidence that the Application complies with all applicable statutory and regulatory requirements.<sup>65</sup> The ED's participation in a contested case hearing is limited to two issues: (1) to provide information to complete the administrative record; and (2) to support the ED's position developed in the underlying proceeding.<sup>66</sup>

## II. ANALYSIS OF CONTESTED ISSUES AND HEARING EVIDENCE

After it was declared administratively complete, the Application underwent a technical review by Don Nelon, a Natural Resources Specialist in the Mechanical, Agricultural, and Construction Section of the TCEQ Air Permits Division.<sup>67</sup> As part of his technical review, Mr. Nelon ensured that the Application included the required forms, including the PI-1S, a Table 11, a Table 20, a standard permit checklist, a process description, a process flow diagram, a process flow chart, and a plot plan. He reviewed the forms, confirmed the checklist was answered appropriately, verified the site location, checked SCC's compliance history, and

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<sup>63</sup> The general conditions include requirements for compliance with the TCAA, the representations made in the application for the permit, construction progress, start-up notification, sampling, equivalency of methods, recordkeeping, maintenance of emission control, all applicable rules, and distance limitations and setback requirements. See 30 TAC § 116.615; App. Ex. 2B at 1-2.

<sup>64</sup> 30 TAC § 116.615(2).

<sup>65</sup> *Id.* §§ 80.17(a) and 55.210(b).

<sup>66</sup> Texas Water Code (Water Code) § 5.228(c); 30 TAC § 80.108.

<sup>67</sup> ED Ex. 1 at 2, 4.

ensured public notice was proper.<sup>68</sup> After completing the technical review, Mr. Nelson found that the Application met the requirements of the CBP Standard Permit and recommended its approval.<sup>69</sup>

Protestant asserted that the Application did not meet the CBP Standard Permit requirements for several reasons. First, it claimed that the Application contained numerous errors and inaccurate or inconsistent representations. Protestant also contended that the description of the Plant in the Application failed to meet the buffer distance requirements of the CBP Standard Permit. Finally, Protestant argued that the Application failed to show that the Plant would meet the requirements of the TCEQ's nuisance rule. As more fully explained below, none of Protestant's arguments outweigh the preponderance of the evidence in the record that the Application meets all applicable statutory and regulatory requirements for registration of the Plant under the CBP Standard Permit.

**A. Whether the Registration Application Meets TCEQ Requirements**

**1. Project Description Issues**

**a. Temporary Concrete Batch Plant**

According to Protestant, the Application is unclear on whether it seeks authorization to register the Plant as a temporary concrete batch plant. Pursuant to the CBP Standard Permit, a temporary concrete batch plant is one that occupies a designated site for no more than 180 consecutive days or that supplies concrete to a single project.<sup>70</sup> Protestant charged that the Application was inconsistent in its representations as to the temporary status of the Plant. They pointed out that the PI-1S form states that the Plant will not operate more than 180 days at the

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<sup>68</sup> *Id.* at 5.

<sup>69</sup> *Id.* at 13-14.

<sup>70</sup> ED Ex. 3 at 3.

Gasmer Yard, but that Table 20 and the emissions calculations submitted in the Application indicate the Plant will operate 12 hours a day, six days a week, and 52 weeks a year.

In reviewing the Application and both the prefiled and hearing testimony, it is understandable that Protestant is confused regarding the specifics of the temporary status of the Plant. However, the ED determined based on Mr. Nelon's technical review that the Plant will be authorized to remain at the Gasmer Yard for no more than 180 days based on SCC's representations in the Application.<sup>71</sup> It does appear from the testimony that as of the hearing SCC planned for the Plant to supply concrete to a single project, but as Protestant's expert witness admitted, SCC could operate the Plant for longer than 180 days at the Gasmer Yard if it supplies concrete for only one project and if it gives proper notice and complies with the CBP Standard Permit conditions.<sup>72</sup> In the Application and supporting materials, there is no indication that SCC seeks registration for a permanent concrete batch plant.<sup>73</sup> The preponderance of the evidence shows that by the Application SCC seeks registration under the CBP Standard Permit for a temporary concrete batch plant.<sup>74</sup>

**b. Location of the Plant and Plot Plan**

Protestant also claimed confusion with respect to the location of the Plant within the Gasmer Yard. It is undisputed that there was a transcribing error for the latitude coordinates in the PI-1S form. Those coordinates were correctly entered on the Core Data Form included in the Application. However, the PI-1S form calls for the latitude coordinates of the street address where the Plant will be located, not the specific location of the Plant at such address.<sup>75</sup> Mr. Nelon clarified that the Air Permits Initial Review Team (APIRT) at the TCEQ uses the

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<sup>71</sup> ED Ex. 7 (SCC Standard Permit Source Analysis & Technical Review).

<sup>72</sup> Tr. at 248-249.

<sup>73</sup> *Id.* at 241-242; App. Ex. 2D.

<sup>74</sup> App. Ex. 2D at 1, 3-4.

<sup>75</sup> Protestant Ex. 1-H (TCEQ Form PI-1S Instructions) at 3.

latitude and longitude to verify if the coordinates come close to the street address provided in the Application for the project.<sup>76</sup> In this case, APIRT was able to verify the general location of the proposed Plant for purposes of public notice, so the error on the PI-1S form was inconsequential.

Protestant also argued that errors in the plot plan submitted with the Application made it uncertain that the Plant would meet the requirements of the CBP Standard Permit. Mr. Nelon used the plot plan to ensure that the setback requirements in Section (8)(D) of the CBP Standard Permit will be met.<sup>77</sup> The plot plans provided by SCC represented that the suction shroud baghouse will be at least 100 feet from the eastern property line and that the stockpiles will be at least 50 feet from the southern property line of the Gasmer Yard.<sup>78</sup> Therefore, Mr. Nelon found that the proposed location of the Plant met the distance requirements of the CBP Standard Permit.<sup>79</sup> There are two plot plans in evidence, one that was submitted initially with the Application and another referred to at the hearing as an updated plot plan, submitted to Mr. Nelon by SCC's consultant Monique Wells at Mr. Nelon's request during the technical review process.<sup>80</sup> However, both plot plans indicate that the baghouse and stockpiles will meet the distance requirements of the CBP Standard Permit.

Protestant further contended that the plot plans submitted by SCC do not accurately reflect the size of the stockpiles that SCC represented would be used for the Plant's operation. Protestant posited that given the size (two acres) of the stockpiles estimated by SCC and the locations where they are depicted on the updated plot plan, they will violate the 50-foot setback requirement. Ms. Wells admitted that the stockpiles shown on the updated plot plan are not to scale, but Mr. Miller testified and SCC represented in the Application that the stockpiles, regardless of their size, will meet the 50-foot setback requirement in the CBP Standard Permit.<sup>81</sup>

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<sup>76</sup> Tr. at 298-99.

<sup>77</sup> Tr. at 351.

<sup>78</sup> App. Ex. 2D at 12, 16, 35.

<sup>79</sup> ED Ex. 1 at 10-11.

<sup>80</sup> App. Ex. 2D at 16, 33-35.

<sup>81</sup> *Id.* at 12; App. Ex. 1 at 12.

Mr. Nelon testified that there has been flexibility in the requirements for the plot plan in the application for a CBP Standard Permit because of the ability for an applicant to make changes, and that the TCEQ has not required some of the information called for in the instructions for the PI-1S form.<sup>82</sup> The TCEQ Air Permits Division has the discretion to determine whether a plot plan submitted with an application for registration under the CBP Standard Permit is acceptable.<sup>83</sup> In this case, Mr. Nelon did not require the plot plan to be to scale, but simply to identify the distances between the stockpiles and the property lines and the baghouse and the property lines.<sup>84</sup> He also did not require that all emission points on the property be identified on the plot plan.<sup>85</sup> Mr. Nelon testified that it was determined that for the CBP Standard Permit, that information was not necessary.<sup>86</sup>

Although Protestant correctly pointed out that the plot plans provided to the TCEQ by SCC show the Plant in slightly different locations on the Gasmer Yard, the difference does not matter because SCC represents in the Application that the CBP Standard Permit distance requirements will be met. There is no evidence in the record that SCC cannot or will not comply with its representations in this regard. SCC admits that the stockpiles on the plot plans are not to scale, but given the size of the Gasmer Yard, it is clear that SCC can keep stockpiles the size represented in the Application more than 50 feet from the property lines. While Protestant is also correct that SCC did not follow all of the instructions for the PI-1S form, the instructions are not rules that must be met in order to qualify for registration under the CBP Standard Permit. Mr. Nelon and his supervisor determined that SCC's plot plan was sufficient, and the preponderance of the evidence shows that the Plant and the stockpiles used for its operation will meet the distance requirements of the CBP Standard Permit. Further, the absence on the plot plan of the existing stockpiles that will not be used in the Plant's operation and the fact that the

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<sup>82</sup> Tr. at 301-303, 307-308.

<sup>83</sup> Tr. at 308.

<sup>84</sup> *Id.* at 318-19.

<sup>85</sup> *Id.* at 319.

<sup>86</sup> *Id.* at 320.

plot plan is not to scale do not tend to prove in any way that the Plant would not meet the requirements for the CBP Standard Permit.

**c. Use of Fly Ash and Silo Count**

Protestant argued that conflicting representations in the process description and process flow diagram submitted with the Application show that the Plant will not meet the requirements from registration under the CBP Standard Permit. It is undisputed that that the process description and the process flow diagram indicate that there will be two silos on the Plant, one to store bulk cement and one to store fly ash.<sup>87</sup> It is also undisputed that Table 20 in the Application states there will be only one silo.<sup>88</sup> The process description states that fly ash will be received and stored in a silo, but the process diagram does not show that fly ash will be received at the Plant.<sup>89</sup> According to the testimony, SCC does not currently plan to use fly ash, based on the type of applications the concrete will be used for, but if SCC decides to supply concrete for other applications such as roadways, the Plant will use fly ash.<sup>90</sup>

The CBP Standard Permit allows for the use of fly ash and cement, as well as the use of one or two silos.<sup>91</sup> SCC clarified through testimony that it plans not to use fly ash, but that the plan could change. If it does, the CBP Standard Permit allows for such a change. SCC represented in the Application that it will meet the requirement for using fly ash, and the Application was approved by the ED based on SCC's representation.<sup>92</sup> Protestant failed to produce any evidence to controvert SCC's representations regarding its use of fly ash, and moreover failed to show that the uncertainty regarding the use of fly ash or the need for more

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<sup>87</sup> App. Ex. 2D at 20-21.

<sup>88</sup> *Id.* at 28.

<sup>89</sup> *Id.* at 20-21.

<sup>90</sup> App. Ex. 1 at 6.

<sup>91</sup> ED Ex. 3 at 23-24.

<sup>92</sup> App. Ex. 2D at 10; Tr. at 349-50

than one silo has any bearing on whether the Application meets the requirements for the CBP Standard Permit.

**d. Dust Collection System**

Pointing out unclear language in the process description, Protestant contended that the Application is deficient and should be remanded. The process description does appear to indicate that the Plant will use silo-mounted dust collectors, while the process flow diagram, the emissions calculations, and the dust collector vendor brochure all show that a central dust collector will be used.<sup>93</sup> Ms. Wells conceded in her hearing testimony that the language in the process description was not perfect, but she explained that what she meant was that the central baghouse will collect dust from the silos.<sup>94</sup>

Mr. Nelson did not indicate any confusion with respect to the Plant's dust collection system. In light of Ms. Wells' testimony, it is clear that the Plant will use a central baghouse/dust collector, although there does not appear to be any prohibition in the CBP Standard Permit against using silo-mounted dust collectors if an applicant could show that it would still meet the permit requirements. Protestant's argument regarding the dust collection system represented in the Application as a basis for denying the Application is unsubstantiated.

**e. Pug Mill at the Gasmer Yard**

Protestant argued that the Application was inaccurate because it stated that a pug mill was in operation at the Gasmer Yard.<sup>95</sup> However, Mr. Miller's testimony shows that this representation was accurate at the time the Application was filed in April 2014, and there is no

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<sup>93</sup> App. Ex. 2D at 20-21, 27-28, 22-24, and 31.

<sup>94</sup> Tr. at 177-78.

<sup>95</sup> App. Ex. 2D at 20.

evidence to the contrary.<sup>96</sup> Mr. Miller also testified that the pug mill was removed from the Gasmer Yard later in 2014.<sup>97</sup> The preponderance of the evidence shows that the Application's representation regarding the pug mill was accurate, and the fact that there has been no amendment to the Application to reflect the pug mill's removal from the site is irrelevant to whether the Application meets the requirements of the CBP Standard Permit.

## 2. Emission Estimates

A person seeking to use the CBP Standard Permit must submit a registration to do so.<sup>98</sup> The registration must include the basis of emission estimates and quantification of all emission increases and decreases associated with the project being registered.<sup>99</sup> SCC submitted emission estimates for the Plant with the Application.<sup>100</sup> Protestant raised two issues with respect to the emission estimates: (a) it claimed neither Mr. Nelson nor anyone else at the TCEQ reviewed the emission calculations submitted by SCC, and (b) the emission calculations were faulty given the inconsistencies and inaccuracies in the Application.

The CBP Standard Permit does not set out any specific allowable or appropriate thresholds or limitations for emissions for facilities authorized to use it.<sup>101</sup> An applicant for registration under the CBP Standard Permit must show it is qualified based on the production rate of the proposed concrete batch plant and the method of emission control at the plant.<sup>102</sup> Therefore, the ED does not review emission calculations submitted with a registration for authorization under the CBP Standard Permit. In developing the CBP Standard Permit, the TCEQ determined what types of facilities would qualify for authorization based on maximum

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<sup>96</sup> Tr. at 41.

<sup>97</sup> *Id.*

<sup>98</sup> App. Ex. 2B at 5.

<sup>99</sup> 30 TAC § 116.611(a)(1)-(2).

<sup>100</sup> App. Ex. 2D at 22-26.

<sup>101</sup> App. Ex. 2B

<sup>102</sup> App. Ex. 2 at 30.

production rates, emission controls, site layout, and operating conditions.<sup>103</sup> Given the factors upon which qualification for the CBP Standard Permit is based, and the fact that there is no emission threshold or maximum allowable emission rates included in the CBP Standard Permit, it is reasonable that the ED did not review and analyze the emission calculations submitted by SCC. Moreover, the uncontroverted testimony from SCC's consultants shows that the emission calculations and estimates submitted with the Application were reliable and conservative.<sup>104</sup>

### 3. Compliance with Standard Permit Conditions

For all types of standard permits issued by the Commission, there are general conditions that apply to all holders.<sup>105</sup> Additionally, there are specific conditions that are set out in the standard permit conditions established by the TCEQ for use by multiple similar facilities. The Application includes a checklist to which SCC claimed it attached information in the Application showing how both the general and the specific conditions would be met.<sup>106</sup> Protestant claimed that the Application fails to meet these conditions in several respects.

First, Protestant asserted that SCC failed to submit a current Form PI-1S Registration for Air Standard Permit with the Application, in violation of CBP Standard Permit administrative requirements.<sup>107</sup> While it does appear that there may have been a more recently updated Form PI-1S Form available when the Application was submitted in April 2014, Protestant does not argue and the evidence does not show that there were any material differences in the version used by SCC and the more updated version. Further, Protestant makes no argument and there is no evidence to indicate that the differences in the form were a cause of SCC's alleged failure to show that the Application met the requirements of the CBP Standard Permit.

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<sup>103</sup> *Id.*

<sup>104</sup> App. Ex. 3 (Tim Prince Prefiled Testimony) at 16; App Ex. 2 at 24, 26-29.

<sup>105</sup> 30 TAC § 116.615.

<sup>106</sup> App. Ex. 2D at 6.

<sup>107</sup> App. Ex. 2B at 5.

Second, Protestant argued that SCC failed to include a completed and current Table 11 with the Application. There is no dispute that SCC did not attach to Table 11 the details regarding the principle of operation or an assembly drawing, to scale, of the abatement device, referenced in the note at the bottom of the table. However, Table 11 was completely filled out by SCC's consultant. Further, both SCC's consultant and Mr. Nelson explained that Table 11 is used for many different types of air permit applications, and that these drawings are not necessary or requested by the TCEQ for the technical review of the CBP Standard Permit.<sup>108</sup>

Finally, Protestant asserted that despite SCC's indication to the contrary in the aforementioned checklist, there was no information submitted to show how warning devices will alert operators in sufficient time to prevent adverse impacts on pollution abatement equipment or other parts of the loading operation or how SCC will test warning devices or shut-off systems.<sup>109</sup> Neither Protestant nor its expert witness offered an explanation as to what information should have been provided by SCC to explain how it would meet these requirements. They certainly cited no requirement in TCEQ's rules concerning warning devices. SCC stated in its Application through a checklist that it would meet these requirements of the CBP Standard Permit. It is unclear what additional information Protestant feels should be submitted to show how the requirements would be met. SCC's representations, which are binding, are sufficient to meet the regulatory requirements for the CBP Standard Permit regarding the warning devices and shut-off systems.

#### **4. Core Data Form**

As part of the Application, SCC prepared a TCEQ Core Data Form because the Plant will be a new facility that does not already have a regulated entity number (RN).<sup>110</sup> The information

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<sup>108</sup> Tr. at 185, 308.

<sup>109</sup> Protestant Ex. 1 (Prefiled testimony of Jerry Demo) at 10; App. Ex. 2B at 7-8. Protestant's witness also claimed that the Application failed to include information to show how SCC will comply with the distance requirements for the stockpiles; this contention is addressed more fully in the next section.

<sup>110</sup> App. Ex. 2D at 7-8; Tr. at 249.

from the form is put into the TCEQ database.<sup>111</sup> Protestant's expert witness claimed that the Core Data Form in the Application was faulty in several respects. First, in Section II, Number 22 of the Core Data Form, SCC checked the box for "No Change" when it should have checked the box for "New Regulated Entity." Also in Section III, in Numbers 30, 32, and 34, SCC entered a standard industrial classification (SIC) code and a North American industry classification system (NAICS) code for a crushing operation and described the primary business of the new facility in Number 34 as "crushing of concrete and aggregate material." Finally, in Number 39, SCC failed to check the box marked "Stormwater" to indicate that its stormwater permit for the Gasmer Yard will be affected by the registration to authorize the Plant under the CBP Standard Permit.

SCC admitted that the "New Regulated Entity" box should have been checked in Section II, Number 22. However, it is clear from the Application as a whole that SCC is seeking authorization for a new regulated entity, and if in fact no change was sought, it would not have filled out Section III of the Core Data Form, which it did. SCC noted in Section I, Number 1 that it was submitting the Core Data Form for a "New Permit, Registration or Authorization." In several other places in the Application, SCC makes it clear that the Plant would be a new facility requiring a new RN.<sup>112</sup> There is no confusion that SCC seeks to register a new facility through the Application, regardless of this minor error in the Core Data Form, and even Protestant's expert witness agreed there was no basis for denying the Application because of such error.<sup>113</sup>

According to the hearing testimony of SCC's general manager and consultant, the Core Data Form used SIC and NAICS codes for SCC's primary business, which is concrete crushing, instead of the SIC and NAICS codes for the concrete batch plant that SCC proposes for the Gasmer Yard.<sup>114</sup> SCC and its consultant incorrectly interpreted what the Core Data Form was asking for in terms of the SIC and NAICS codes. However, there is no confusion that the Core

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<sup>111</sup> Tr. at 249.

<sup>112</sup> App. Ex. 2D at 1, 3, 7.

<sup>113</sup> App Ex. 4 (Deposition of Jerry Demo) at 60-61.

<sup>114</sup> Tr. at 26, 31-32, 140-42.

Data Form was submitted as part of an application for registration to authorize the Plant under the CBP Standard Permit, nothing else in the Application refers to concrete crushing, and a concrete crusher could not be authorized under the CBP Standard Permit. Incorrect SIC and NAICS codes in the Core Data Form do not tend to prove in any way that the Application does not meet the requirements for the CBP Standard Permit.

As for the issue of whether authorizing the Plant to use the CBP Standard Permit would affect the Gasmer Yard stormwater permit, SCC's general manager and consultant agreed that if the Application is approved and the Plant is constructed, the Gasmer Yard stormwater plan will likely need to be amended to account for the Plant's presence and operation. However, such potential changes are not part of this proceeding because the Application does not seek to update or change the Gasmer Yard stormwater permit. Protestant's expert confirmed that effects on stormwater were not something the TCEQ considered in evaluating whether to grant the Application.<sup>115</sup>

#### **B. Enforceability of Representations in the Application**

As previously discussed, the representations made in the Application regarding construction plans, operating conditions and maximum emission rates become conditions under which the Plant must be constructed and operated.<sup>116</sup> However, SCC could change those conditions after the CBP Standard Permit is issued unless the change would affect its right to claim the CBP Standard Permit. Changes in the method of emission control, the character of the emissions, or an increase in the discharge of the emissions that do not affect its right to claim the CBP Standard Permit would require SCC to give the ED notice of such changes within 30 days after they are made.<sup>117</sup>

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<sup>115</sup> App. Ex. 4 at 67.

<sup>116</sup> 30 TAC § 116.615(2).

<sup>117</sup> *Id.*

Protestant claimed and its expert witness testified that inconsistent representations in the Application are not enforceable.<sup>118</sup> Moreover, Protestant asserted that SCC failed to meet its burden to show compliance with the CBP Standard Permit because of such inconsistencies. SCC conceded that it included conservative representations in the Application to maximize operational flexibility, which in some cases are inconsistent with other representations in the Application. Regardless of which representation is selected, however, SCC argued that the Plant qualifies for the CBP Standard Permit. SCC further explained that the most restrictive representation that it made in the Application regarding construction plans, operating procedures, and maximum emission rates will be enforceable.

Protestant argued that SCC's representation that the stockpiles used for the Plant will be two acres in size and the plot plan showing stockpiles that Protestant claims are approximately one-tenth of an acre in size are irreconcilably inconsistent. Protestant's expert testified that if the stockpiles on the plot plan were drawn to scale to be two acres in size, they would likely extend to within 50 feet of the property line in violation of the CBP Standard Permit.<sup>119</sup> The CBP Standard Permit does not have a maximum size for stockpiles. Further, the TCEQ does not require plot plans to be drawn to scale when submitted with applications for standard air permits.<sup>120</sup> SCC's general manager and consultant clearly testified that the company had been conservative in its estimates of stockpile size, both for emission calculation purposes and so that it need not submit notification to the TCEQ if the stockpiles grow beyond their expected size of 0.2 acres.<sup>121</sup> The plot plan and representations by SCC in the Application are probative evidence that the 50-foot setback requirement of the CBP Standard Permit will be met.<sup>122</sup> The perceived inconsistencies between the represented size of the stockpiles and their location on the not-to-

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<sup>118</sup> Protestant Ex. 1 at 3.

<sup>119</sup> Protestant Ex. 1 at 11.

<sup>120</sup> Tr. at 318-319.

<sup>121</sup> *Id.* at 100, 186-188.

<sup>122</sup> App. Ex. 2D at 12, 35.

scale plot plan do not mean that the 50-foot setback rule will not be met or cannot be enforced, and are insufficient to rebut SCC's evidence that the distance requirements will be met.

Protestant then argued that the inconsistencies in the Application regarding the duration of operation of the Plant also show SCC's inability to prove it will meet the requirements of the CBP Standard Permit. Obviously, the Plant cannot operate 52 weeks a year, as represented in one part of the Application, and be onsite for only 180 days. However, looking at the Application as a whole, and considering the testimony provided by SCC's general manager and consultant, it is clear that the Application seeks and the ED would permit the Plant to operate for 180 days. Again, as recognized by SCC, the most restrictive representation regarding operating procedures will be enforced, and it is clear from the ED's technical review and Mr. Nelon's testimony that if granted, the CBP Standard Permit will only cover the Plant for 180 days of operation at the Gasmer Yard, subject to later modification.

On a broader scale, Protestant took issue with what it perceived to be SCC's cavalier attitude toward the accuracy and consistency of the statements and representations made in the Application. Based on what it considers serious mistakes in the forms submitted by SCC with the Application and SCC's reliance on its ability to correct those mistakes after the fact, Protestant claimed that the importance of accuracy in the Application mandates its remand to the TCEQ for correction.

The testimony from SCC's general manager and consultant showed that SCC made some errors in the forms, and that the inconsistencies cited by Protestant were not "competing" as characterized by Protestant, but based on conservative estimates and the desire to leave room for operational changes while still meeting the requirements of the CBP Standard Permit. The errors were not so serious as to call into question the Application's compliance with the regulatory requirements, and, as SCC recognizes, the most restrictive representation made in the Application will be enforced. The preponderance of the evidence shows that even the more restrictive representations made by SCC in the Application would meet the requirements of the

CBP Standard Permit, so that any change from one representation to another is not unlawful but would require notice to the TCEQ. Therefore, the issue of whether SCC chooses one arguably inconsistent representation over another is immaterial as to whether the Application meets the applicable regulatory requirements.

### **C. Other Disputed Issues**

#### **1. Distance Limitations of CBP Standard Permit**

##### **a. Stockpiles**

The CBP Standard Permit has requirements pertaining to the minimum distances from the property lines where the Plant will be located and specifically concerning equipment, vehicles, and stockpiles on the property. The requirement is found in Special Condition (8)(D):

The owner or operator shall maintain the following minimum plant buffer distances from any property line . . . :

- (i) The suction shroud baghouse exhaust shall be at least 100 feet from any property line.
- (ii) The owner or operator shall not locate or operate stationary equipment, stockpiles, or vehicles used for the operation of the concrete batch plant (except for incidental traffic and the entrance and exit to the site) within 50 feet from any property line.<sup>123</sup>

Protestant claimed that the stockpiles and westerly entrance/exit road on the Gasmer Yard at the time the Application was filed violated subsection (ii) of CBP Standard Permit Special Condition (8)(D). This position is based on Protestant's interpretation that the phrase "used for the operation of the concrete batch plant" applies only to vehicles and not to stationary equipment or stockpiles. Based on this interpretation, Protestant argued that because the

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<sup>123</sup> App. Ex. 2B at 10.

stockpiles that existed at the Gasmer Yard were within 50 feet of the property line in April 2014 when the Application was filed, the Application fails to meet this condition and should be denied. SCC and the ED, on the other hand, took the position that the phrase “used for the operation of the concrete batch plant” applies to vehicles, stationary equipment and stockpiles. The ED’s witness Mr. Nelson clearly testified that the stockpiles which are subject to the requirements of the CBP Standard Permit are those that are needed and used for the operation of the concrete batch plant, and that existing stockpiles that will not be used in the operation of the concrete batch plant are not subject to the CBP Standard Permit.<sup>124</sup>

Protestant invoked the “last antecedent rule” to support its interpretation of the provision in question and claimed SCC’s interpretation is grammatically incorrect. Under this rule, “a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.”<sup>125</sup> Protestant argued that because there was no comma separating the phrase at issue from the antecedent terms of “stationary equipment,” “stockpiles,” and “vehicles,” there was no evidence that the phrase in question was supposed to apply to all of the antecedents instead of just “vehicles,” the immediately preceding one. SCC and the ED countered that the TCEQ’s interpretation is controlling, and that rigid application of the “last antecedent rule” is improper under the circumstances.

Protestant also claimed that its interpretation of Special Condition (8)(D)(ii) is consistent with the protectiveness review done by the TCEQ as part of the process for developing the CBP Standard Permit. In developing the distance requirements for the CBP Standard Permit, the TCEQ performed an air quality analysis model which included stockpiles, among other typical emission points at a concrete batch plant, and determined based on the modeling that the 50-foot distance limitation would be protective.<sup>126</sup> According to Protestant’s expert, the protectiveness review did not model emissions from stockpiles that were closer than 50 feet to the property

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<sup>124</sup> Tr. at 288.

<sup>125</sup> *8100 North Freeway Ltd. v. City of Houston*, 329 S.W.3d 858, 862 (Tex.App.-Houston [14<sup>th</sup> Dist.] 2010, no pet.).

<sup>126</sup> App. Ex. 2C (Amendments to the Concrete Batch Plants Air Quality Standard Permit) at 9, 11.

line.<sup>127</sup> SCC in response pointed out that the protectiveness review was done for a concrete batch plant only, and SCC seeks only to permit the Plant and not the entire Gasmer Yard site or any unrelated sources at the Gasmer Yard.

Finally, Protestant argued that its interpretation of Special Condition (8)(D)(ii) is proper because it avoids cumulative effects, which the ED has previously indicated was part of its determination of the overall production limits for concrete batch plants.<sup>128</sup> SCC responded that if the ED had found it necessary to create a buffer or distance requirement to protect against the cumulative effects of the concrete batch plant and another source such as an unrelated stockpile, he would have included that in another special condition, as he did for required distances between a concrete batch plant and a crushing or hot mix asphalt plant.<sup>129</sup>

Assuming that the “last antecedent rule” would be applicable to a special condition in a standard permit, as opposed to a statute or rule, it would only come into play if the ED’s interpretation was plainly erroneous or inconsistent with the language of the condition.<sup>130</sup> The ED’s interpretation is not plainly erroneous or inconsistent with the language of CBP Standard Permit Special Condition (8)(D)(ii). The interpretation proffered by Protestant directly contradicts that of the ED, who drafted and adopted the provision. The ED is in the best position to explain the meaning of the condition and how he meant for it to apply. Under the ED’s reading, determination of whether an application for registration under the CBP Standard Permit logically focuses only on the operation of the concrete batch plant and would not consider unrelated equipment and stockpiles that might happen to be located somewhere on the site, as it would if Protestant’s interpretation applied. Under these circumstances, the ED’s interpretation should be afforded serious deference, and it controls here. The buffer requirement in Special Condition (8)(D)(ii) does not apply to stockpiles that are not used in the operation of the Plant.

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<sup>127</sup> Protestant Ex. 1 at 6.

<sup>128</sup> App. Ex. 2C at 16-17.

<sup>129</sup> App. Ex. 2B at 9; App. Ex 2C at 16.

<sup>130</sup> *TGS-NoPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011).

Protestant further argued that even if SCC's position is found correct regarding the applicability of Special Condition (8)(D)(ii) to stockpiles that will not be used in the operation of the Plant, the Application fails to show that the existing stockpiles at the Gasmer Yard will not be used in the Plant's operation. Although the testimony from SCC's general manager and consultant that the existing stockpiles would not be used in the Plant's operation was clear and uncontradicted, Protestant took the position that SCC had to affirmatively state in the Application that the existing stockpiles would not be used. Otherwise, Protestant claimed, SCC could later decide to use those stockpiles, and there would be no representation in the Application to prevent them from doing so. Further, Protestant's expert witness testified that the material in one of the existing stockpiles looks like it is crushed, and that crushed brick could be used in a concrete batch plant.<sup>131</sup> SCC's general manager testified that one of the existing stockpiles could be brick.<sup>132</sup>

Protestant's argument is unconvincing. The preponderance of the evidence at the hearing, which is part of the record for consideration by the TCEQ in whether to grant the Application, showed that SCC will not use the existing stockpiles at the Gasmer Yard in the operation of the Plant.

**b. Vehicles and Roads**

The Application and other evidence showed that a road exists on the western edge of the Gasmer Yard and that it runs approximately 350 feet from the unpaved traffic areas of the yard north to Gasmer Drive.<sup>133</sup> SCC admitted in its closing argument that this road is within 50 feet of the western property line. Protestant asserted that because this road follows the property line for 350 feet, it does not qualify for the exception in Special Condition (8)(D)(ii) allowing for vehicles to operate in incidental traffic or for entrance and exit to the site within 50 feet of a

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<sup>131</sup> Tr. at 272-73.

<sup>132</sup> *Id.* at 67.

<sup>133</sup> *Id.* at 119-20.

property line. SCC contended that this driveway was only used for entrance and exit to the site, so it did not intend to install dust-suppressing fencing or any other barrier along the driveway as is required by the CBP Standard Permit for an applicant who seeks to operate a vehicle within 50 feet of a property line. The ED relied upon SCC's representation that the vehicles used for the operation of the Plant would not operate within 50 feet of the property line except for incidental traffic and entrance and exit to the site in approving the Application as to that particular condition.

It is unclear from the wording of the Special Condition whether "entrance and exit to the site" would cover a situation in which an entrance or exit driveway runs closer than 50 feet to a property line. The ED's witness Mr. Nelson appeared to have some concern as to whether dust-suppressing fencing would be needed along the western driveway if it was going to be used by vehicle traffic for operation of the Plant. However, the evidence did indicate that the other paved driveway on the site, which connects the unpaved vehicle traffic areas to Gasmer Drive, can and will be used to enter and exit the Gasmer Yard, and that this road is not within 50 feet of any property line other than the northern Gasmer Drive boundary. It is undisputed that this driveway would qualify for the exception in Special Condition (8)(D)(ii) for entrance and exit to the site. Therefore, given SCC's representations in the Application and the ability to use a driveway to enter and exit the Gasmer Yard that meets the conditions of the CBP Standard Permit, the Application should not be denied on this ground.

## **2. The Nuisance Rule and Visible Emissions**

Protestant claimed, given previous operations at the Gasmer Yard and existing conditions, operation of the Plant combined with the other operations and stockpiles at the Gasmer Yard will create a nuisance condition. Under the TCEQ's rule, no person can create or maintain a nuisance condition that interferes with a landowner's use and enjoyment of property or injures or adversely affects human health, animal life, vegetation, or property.<sup>134</sup> This

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<sup>134</sup> 30 TAC § 101.4.

prohibition against nuisance conditions applies to all facilities authorized under any air permit.<sup>135</sup> Protestant cites the use of the western entrance road, its contention that stockpiles will exist closer than 50 feet from the property line, and testimony from witnesses at the hearing regarding past nuisance conditions at the Gasmer Yard as support for its position that operation of the Plant will cause a nuisance condition. In response, both SCC and the ED took the position that if the Plant is operated in accordance with the conditions and requirements of the CBP Standard Permit, nuisance conditions should not occur.<sup>136</sup> SCC pointed to testimony from Protestant's expert witness that he did not expect visible emissions to leave the Gasmer Yard if SCC operates the Plant pursuant to the CBP Standard Permit.<sup>137</sup>

It was not necessary for SCC to establish the non-existence of nuisance conditions at the Plant as part of the Application. The evidence cited by Protestant relates to prior operations at the Gasmer Yard and, even if accurate, cannot form the basis of a finding that the Plant's operation will create or maintain a nuisance condition. It is mere speculation for Protestant to assert based on prior operations that the Plant will cause a nuisance condition. Importantly, the ED's technical review of the Application included a review of SCC's compliance history, and there is no evidence in the record of prior complaints made to the TCEQ regarding SCC operations at the Gasmer Yard. The CBP Standard Permit was developed to be protective of the public health and welfare, and it prohibits visible emissions from leaving the Gasmer Yard. There are several conditions in the CBP Standard Permit that are designed to prevent nuisance conditions. The preponderance of the evidence shows that operation of the Plant will comply with 30 TAC § 101.4.

In its post-hearing brief, OPIC expressed its concern regarding enforcement of the visible emission limitations in the CBP Standard Permit. OPIC alleged that given SCC's ongoing deconstruction of the existing stockpiles at the Gasmer Yard on an as-needed basis, visible

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<sup>135</sup> App. Ex. 5 (Deposition of Don Nelon) at 87.

<sup>136</sup> ED Ex. 5 at 48, 51.

<sup>137</sup> App. Ex. 4 at 54.

emissions can be expected to result from that activity. Given that the Plant will be in operation in the same area, OPIC anticipates “potential enforcement difficulties” for an investigator in determining whether the Plant is conforming with CBP Standard Permit General Condition (5)(H), which prohibits visible emissions from exceeding certain time durations.<sup>138</sup> OPIC cites to testimony from the hearing in which it alleged that SCC’s consultant could not explain how an investigator would tell the difference between visible emissions from the Plant and those from the existing stockpiles. OPIC took the position that because of this difficulty, General Condition (5)(H) would be unenforceable from a practical standpoint, and therefore the Application should be denied, or SCC should be required to remove the existing stockpiles from the Gasmer Yard prior to commencing operation of the Plant.

In response to OPIC’s concern, SCC argued that the TCEQ nuisance rule will be applicable and enforceable regardless of whether off-property emissions originate from the Plant or other unrelated stockpiles on the Gasmer Yard. SCC further noted that the testimony cited by OPIC in support of its worries regarding enforcement came from witnesses with no knowledge or experience in TCEQ enforcement policy or strategy. Finally, SCC contended that OPIC’s position could prohibit the use of the CBP Standard Permit at a site with sources of emissions other than the concrete batch plant, a result that could not have been intended given the special condition in the CBP Standard Permit establishing a buffer distance requirement between the concrete batch plant and on-site crushing or hot mix asphalt plants.

It is clear from the provisions of the CBP Standard Permit that the TCEQ contemplated the scenario in which a facility authorized under the CBP Standard Permit could be located on the same site or in close proximity to other sources of air emissions. There was no testimony from any witness at the hearing with personal knowledge regarding enforcement procedures with respect to the method by which TCEQ investigators could verify compliance with General Condition (5)(H)’s visible emission limitations at the Plant. However, the record does indicate that SCC will comply with the CBP Standard Permit’s requirements to control fugitive emissions

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<sup>138</sup> App. Ex. 2B at 8-9.

by staying within the production limits; venting the silo, hoppers and storage tanks to the baghouse and ensuring the dust collection system is operating properly; using a fabric filter and dust collector which exceed the CBP Standard Permit's required control efficiency and flow rate; equipping the baghouse exhaust with sufficient light to observe visible emissions at night; fully enclosing the conveying system to and from the silos; and using a warning device to prevent visible emissions from overflowing the silos. Further, SCC represented that it will use water to control fugitive emissions from all roads and traffic areas, the sand and aggregate stockpiles, and the aggregate bin outlets and material transfer points on the conveyor system.<sup>139</sup> Finally, SCC represented that it will comply with the CBP Standard Permit visible emission testing requirements and the recordkeeping required to document its actions to ensure all emission control measures are taken.<sup>140</sup> Moreover, SCC's general manager testified that the company is currently watering the roads and stockpiles at the Gasmer Yard to control fugitive emissions from those sources.<sup>141</sup>

Because the CBP Standard Permit allows for other emission sources on the same property as a concrete batch plant even as it limits visible emissions from the concrete batch plant, and given the representations made by SCC regarding its process and procedure for controlling visible emissions from both the Plant and the entire property, the preponderance of the evidence shows that the CBP Standard Permit can be enforced at the Gasmer Yard, and the TCEQ can adequately monitor compliance with the terms of the CBP Standard Permit for the Plant.

### III. ASSESSMENT OF TRANSCRIPT COSTS

A certified court reporter must make a verbatim record and transcript of any contested case hearing.<sup>142</sup> The TCEQ may assess reporting and transcription costs to one or more of the

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<sup>139</sup> App. Ex. 2D at 10-12, 20, and 27; App. Ex. 1 at 6-9.

<sup>140</sup> App. Ex. 2D at 9, 30; App. Ex. 1 at 13.

<sup>141</sup> Tr. at 79-81.

<sup>142</sup> 30 TAC § 80.23(a).

parties participating in the proceeding. However, under the TCEQ's rules, transcription costs may not be assessed against the ED or OPIC.<sup>143</sup> The TCEQ shall consider the following factors in assessing reporting and transcription costs:

- (A) the party who requested the transcript;
- (B) the financial ability of the party to pay the costs;
- (C) the extent to which the party participated in the hearing;
- (D) the relative benefits to the various parties of having a transcript;
- (E) the budgetary constraints of a state or federal administrative agency participating in the proceeding;
- (F) in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
- (G) any other factor which is relevant to a just and reasonable assessment of costs.<sup>144</sup>

SCC took the position that Protestant should pay for one-half of the transcript cost of \$2,534.00, or a total of \$1,267.00, and that it would pay for the other half. SCC argued that Protestant has the ability to pay for the transcript given that it hired a well-known law firm specializing in environmental law, had two lawyers present at the hearing, and filed lengthy post-hearing briefs. SCC further contended that Protestant's cross-examination took up most of the hearing time, and that Protestant benefited from the transcript given its extensive cites to the transcript in its briefing.

Protestant argued that SCC should cover the full cost of the transcript. Protestant pointed out that it is a small non-profit organization with much fewer financial resources than SCC. Protestant further noted that granting the Application will benefit SCC to a much greater extent

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<sup>143</sup> 30 TAC § 80.23(d)(2).

<sup>144</sup> *Id.* § 80.23(d)(1).

than a ruling in its favor. A favorable ruling for Protestant will mean the status quo is preserved, but there is no way to recover funds expended in opposition to the Application. Conversely, SCC will financially benefit by receiving a permit to operate the Plant if the Application is granted. The ED took no position on the assessment of transcription costs.

Under the circumstances, and in considering the factors, it is recommended that the TCEQ assess all of the transcript costs to SCC. As the applicant, SCC bore the burden of proof. It also participated in the hearing extensively; used the transcript throughout its briefing; has the financial resources to bear the costs; and, considering that approval of the Application is recommended, stands to benefit most from the transcript. While Protestant did make use of the transcript in its briefing, it is a non-profit membership-based entity that has already expended significant litigation costs in procuring its very capable legal counsel and expert witness to represent its interests in this case. Protestant presented a reasonable case with extensive evidence and well-organized, rational legal arguments, and expressed valid concerns with the Application. Protestant raised reasonable issues with SCC's case, but after full consideration of the evidence, those issues resolved in SCC's favor. For all these reasons, it is just and reasonable for SCC to bear all of the transcript costs.

#### IV. SUMMARY AND CONCLUSION

The ALJ proposes that the TCEQ adopt the attached order granting the Application and allocating all transcript costs to SCC. Based on the reasons stated in this Proposal for Decision, the ALJ rejects all proposed Findings of Fact and Conclusions of Law not included in the proposed order.

**SIGNED September 11, 2015.**



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CASEY A. BELL  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Approving the Application of  
SOUTHERN CRUSHED CONCRETE LLC for Air Quality  
Standard Permit Number 119443L001  
TCEQ Docket No. 2014-1401-AIR  
SOAH Docket No. 582-15-0460**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of Southern Crushed Concrete LLC (SCC) for Air Quality Standard Permit No. 119443L001 for a Temporary Concrete Batch Plant under Texas Health and Safety Code § 382.05195 and 30 Texas Administrative Code (TAC) § 116.611 (the CBP Standard Permit). Administrative Law Judge (ALJ) Casey A. Bell of the State Office of Administrative Hearings (SOAH) presented a Proposal for Decision (PFD) recommending that the Commission approve the application. After considering the PFD, the Commission adopts the following Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

#### **General and Procedural Findings**

1. On April 23, 2014, SCC filed an application with the Commission requesting a registration for authorization to use an air quality standard permit to construct and operate a temporary concrete batch plant at 5001 Gasmer Drive, Houston, Harris County (the Application).
2. The TCEQ Executive Director (ED) declared the Application administratively complete on May 1, 2014.
3. The Notice of Receipt and Intent to Obtain an Air Quality Permit was published in English in the *Houston Chronicle* on May 29, 2014, and in Spanish in *El Observador* on May 30, 2014, both newspapers of general circulation in Harris County, Texas.

4. On July 15, 2014, the TCEQ Chief Clerk notified SCC that the ED had completed a technical review of the Application and made a preliminary decision to issue the permit based on demonstrated compliance with all applicable rules and regulations.
5. The Notice of Application and Preliminary Decision for an Air Quality Permit, which included the Air Quality Standard Permit for Concrete Batch Plants (effective date December 21, 2012) (CBP Standard Permit), was published in the *Houston Chronicle* on July 24, 2014, and in *El Observador* on July 25, 2014, informing the public of the ED's decision
6. The TCEQ Chief Clerk held a public meeting to discuss the Application on July 29, 2014, in Houston, Texas. The public comment period ended on August 25, 2014.
7. On September 22, 2014, SCC submitted a request to the TCEQ Chief Clerk for direct referral of the Application to the State Office of Administrative Hearings (SOAH) for a contested case hearing.
8. The ED's Response to Public Comment was issued on October 30, 2014, and made no changes to the ED's preliminary determination that the Application met the applicable requirements for the CBP Standard Permit.
9. On November 7, 2014, the TCEQ Chief Clerk published notice that a preliminary hearing would be held in this case in Houston, Texas, on December 15, 2014.
10. On December 15, 2014, ALJ Casey A. Bell convened the preliminary hearing, assumed SOAH jurisdiction over this case without objection, and admitted evidence and heard argument regarding various requests for party status.
11. At the preliminary hearing, the following were made parties:
  - a. SCC;
  - b. ED; and
  - c. Office of Public Interest Counsel (OPIC).
12. By order issued January 28, 2015, the Willow Waterhole Greenspace Conservancy (the Conservancy or Protestant) was made a party to this case (appearing on behalf of its member Jorge Ramos) and Joseph Shahda (appearing as authorized representative of Elsie Bonilla and Denniz Ramirez) was made a party to this case.
13. By order issued March 2, 2015, the Conservancy and Mr. Shahda were aligned as protesting parties pursuant to 30 TAC § 80.109(c).
14. On June 9-10, 2015, the hearing on the merits convened at SOAH in Austin, Texas, with ALJ Casey A. Bell presiding. The record closed on July 27, 2015.

15. All parties appeared at the hearing on the merits, with the exception of Joseph Shahda on behalf of Elsie Bonilla and Denniz Ramirez, who retained party status but did not attend. The Conservancy was the only protestant to enter an appearance and participate in the hearing and post-hearing briefing.

**General Description of the Proposed Plant, the Site, and the Process**

16. The proposed temporary concrete batch plant (the Plant) will be located at an 18-acre site at 5001 Gasmer Drive in southwest Houston (the Gasmer Yard). The Plant will consist of a cement silo, hoppers, storage bins, stockpiles, and a central dust collector with a baghouse.
17. Washed and wet sand and aggregate will be unloaded into stockpiles for storage after delivery by truck. The sand and aggregate will be loaded into the hopper with a front-end loader and conveyed to the overhead storage bins. Bulk cement and potentially fly ash will be delivered by truck and pneumatically loaded through fill pipes into the cement silo. Emissions from the silo and loading activities at the silo will be collected by a dust collector and routed to the central baghouse.
18. The washed sand and aggregate will be conveyed from the overhead storage bins to the loading point, where it will be loaded via gravity feed into the mixer truck. The cement will gravity feed into a cement weigh hopper and then drop through the loading point into the concrete mixer truck. The loading point will be sheltered by a three-sided curtain that extends below the receiving funnel.
19. SCC has conducted construction material-related operations at the Gasmer Yard since the early 1990s. SCC has operated a pug mill and a portable concrete crushing facility at the Gasmer Yard in the past, though neither operation is currently on site at the Gasmer Yard.
20. The pug mill was on the Gasmer Yard when the Application was filed with the TCEQ, but it was removed from the property in late 2014.
21. Two stockpiles currently exist at the Gasmer Yard. One stockpile consists of milled asphalt ground to particles approximately two inches in diameter, and the other consists of concrete rubble.
22. Another pile of material which could be bricks exists at the Gasmer Yard.
23. None of the existing material piles at the Gasmer Yard will be used for the operation of the proposed Plant.
24. SCC currently uses water on the existing stockpiles at the Gasmer Yard to control fugitive dust emissions.
25. The Gasmer Yard has two entrance/exit roads that extend north from an unpaved area of Gasmer Yard to Gasmer Drive. The east entrance/exit driveway is roughly centered,

while the west entrance/exit driveway is parallel to and runs alongside the Gasmer Yard's western property boundary.

26. The entrance/exit driveways are approximately 350 feet in length and are paved with concrete. Vehicles used in the operation of the Plant will use the centered driveway to enter and leave the Plant area.
27. A fixed sprinkler system is installed for dust suppression on the entrance/exit driveways.
28. The in-plant roads and traffic areas at the Gasmer Yard are unpaved, and SCC will use a water truck to control dust emissions from these areas at all times.
29. Emissions from the suction shroud at the loading point will be vented to the central baghouse fabric filter system operating at 6,500 actual cubic feet per minute of air.
30. The suction shroud baghouse exhaust will be located at least 100 feet from any property line at the Plant.
31. Emission from the sand and aggregate bin outlets, conveyors, and transfer points will be controlled by a fixed water sprinkler system.
32. SCC will use water to minimize dust emissions at all times from the sand and aggregate stockpiles.
33. SCC will immediately clean and contain or dampen spilled materials to minimize dust emissions.
34. If the Application is granted, the Plant will be authorized to remain at the Gasmer Yard for no more than 180 days.

#### **SCC's Application for Air Quality Standard Permit for a Concrete Batch Plant**

35. An air quality standard permit authorizes the construction or modification of facilities that are similar in operations, processes, and emissions.
36. The TCEQ originally issued the CBP Standard Permit in 2001 and amended it in 2003 and 2012.
37. SCC seeks authorization under the most recent revision to the CBP Standard Permit, which became effective December 21, 2012, for a temporary concrete batch plant.
38. With the Application, SCC submitted a completed Form PI-1S, Registrations for Air Standard Permit; a TCEQ Core Data Form; Table 11, Fabric Filters; Table 20, Concrete Batch Plants; a CBP Standard Permit Registration checklist; and the standard permit fee.
39. The TCEQ Air Permits Division developed the CBP Standard Permit Checklist to allow the Air Permits Division to confirm that a proposed temporary concrete batch plant would be constructed and operated in accordance with the requirements of the CBP Standard Permit.

40. SCC submitted an update to the Application on July 30, 2014, with an updated plot plan.
41. The TCEQ Core Data Form is not part of the ED's technical review of the Application and does not affect whether the Plant meets the technical criteria for authorization under the CBP Standard Permit.
42. SCC did not submit the most current version of Form PI-1S with the Application, but there are no differences between the version used by SCC and the current version that affected the Application's qualification for the CBP Standard Permit.
43. SCC did not attach details regarding the principle of operation or an assembly drawing of the abatement device, but the details and drawing are unnecessary to determine whether the Application met all applicable requirements for registration under the CBP Standard Permit.
44. The Application included a project description that identified the equipment to be installed at the Plant.
45. The Application indicates that the maximum production rate at the Plant would be 200 cubic yards per hour and 2,400 cubic yards per day; that the maximum hours of operation would be 12 hours per day and six days per week; that the sand and aggregate stockpiles used for operation of the Plant would be no greater than two acres in size; and that there would be one silo in the Plant.
46. Production rates at the Plant are expected to be at or below 100 cubic yards per hour and 800 cubic yards per day over an eight-hour work day.
47. The sand and aggregate stockpiles are expected to be approximately 0.2 acres in size.
48. SCC provided latitude/longitude coordinates to identify where the Plant is proposed to be located.
49. The updated plot plan in the Application shows where the Plant and the sand and aggregate stockpiles will be located on the Gasmer Yard.
50. The Application includes a description of the Plant, including a process description, a process flow diagram, and a description of the equipment to be installed.
51. SCC has not started construction or operation of the Plant.
52. SCC will vent all cement/fly ash/storage silos and weigh hoppers to the central baghouse.
53. SCC will maintain the central baghouse fabric filters and collection systems by (i) operating them properly with no tears or leaks, (ii) using fabric filter systems designed to meet a minimum control efficiency of at least 99.5 percent at particle sizes of 2.5 microns and smaller, and (iii) ensuring all filter systems meet visible emissions performance standards.

54. When transferring cement or flyash, SCC will (i) ensure that conveying systems to and from the storage silos are properly operated, remain totally closed, and are maintained without tears or leaks, and (ii) keep a standard of having no visible emissions for more than 30 seconds in any six-minute period from the conveying system during cement/flyash storage silo filling.
55. SCC will (i) install an automatic shut-off or warning device on each bulk storage silo; (ii) ensure that each automatic shut-off device shuts down loading operations prior to reaching capacity; (iii) ensure the warning device alerts operators in time to prevent adverse impact on the pollution abatement equipment or other parts of the loading operation; (iv) prevent particle build-up on visible warning devices; and (v) test warning devices monthly during operations.
56. SCC will ensure visible emissions do not leave the Gasmer Yard and will perform and record observations for visible emissions quarterly, during normal operations, and on the downwind property line for a minimum of six minutes.
57. If excess visible emissions are observed, SCC will take action to eliminate the excessive visible emissions and document the corrective action.
58. SCC will locate the Plant at least 550 feet from any crushing plant or hot mix asphalt plant at the Gasmer Yard.
59. SCC will not use concrete additives at the Plant that emit volatile organic compounds.
60. SCC will not use stationary internal combustion engines for electrical power or equipment operations at the Plant.
61. SCC will authorize any maintenance activities at the Plant under a separate authorization, unless the maintenance activity qualifies as a *de minimis* facility or source under 30 TAC § 116.119.
62. SCC will limit production at the Plant to 300 cubic yards in any one hour and 6,000 cubic yards per day.
63. Any stationary equipment used for operation of the Plant will be kept at least 50 feet from every property line.
64. The sand and aggregate stockpiles used for the operation of the Plant will be at least 50 feet from every property line.
65. Vehicles used for the operation of the Plant (except for incidental traffic and the entrance and exit to the site) will be kept at least 50 feet from every property line.
66. The Application included emission calculations for the Plant that provided emissions on hourly and tons-per-year from the stockpiles, all material handling drop points, and the central baghouse.

67. SCC used appropriate formulas consistent with TCEQ policy for calculating emissions.
68. The CBP Standard Permit does not include calculated emission thresholds or maximum allowable emission rates.
69. The emission calculations in the Application represent reliable and conservative estimates for the Plant's actual emissions from all emission points.
70. SCC will maintain written records at the Plant of the following: emission events; scheduled maintenance, startup and shutdown; production rates; repairs and maintenance of abatement systems; Material Safety Data Sheets for all additives and chemicals used; road cleaning, application of road dust control, or road maintenance for dust control; stockpile dust suppression; silo warning device tests; and quarterly visible emissions observations and any corrective actions required to control excess visible emissions.
71. SCC will keep the written records at the Plant for a rolling 24-month period and available to TCEQ personnel or any air pollution control program having jurisdiction.
72. SCC has a compliance history classification of satisfactory.
73. To the extent the Application contains inconsistent representations, the most restrictive representation is enforceable against SCC.

#### **Protectiveness Review**

74. In developing the CBP Standard Permit, the TCEQ conducted an extensive protectiveness review to determine the technical requirements, which included property-line distance requirements, compliance with the National Ambient Air Quality Standards for particulate matter, and maximum production rates at which a plant's operation would not be detrimental to human health and welfare or the environment.
75. The protectiveness review conducted as part of development of the 2012 CBP Standard Permit covered emissions sources from concrete batch plants, not other sources at a site that are not used for operation of the concrete batch plant.
76. TCEQ Regional Staff visited the Gasmer Yard during the technical review of the Application and took measurements from the footprint of the Plant to the nearest receptors.
77. The Plant is protective of public health and property because it will meet the plant buffer distances and emissions control requirements that the TCEQ considered when it issued the CBP Standard Permit, and the proposed maximum operations at the Plant are lower than the operating scenario that the TCEQ considered when it performed the protectiveness review for the CBP Standard Permit.
78. If the Plant is operated in accordance with the terms of the CBP Standard Permit, nuisance conditions should not occur.

79. If SCC constructs and operates the Plant consistent with the maximum operational scenario represented in the Application and fully complies with the CBP Standard Permit, the Plant should not have an adverse effect on public health or physical property.

### **Transcript Costs**

80. The non-expedited transcription costs for this case were \$2,534.00, which Applicant has paid.
81. Protestant is a non-profit member organization with fewer financial resources than SCC.
82. SCC will reap financial benefits from the granting of the Application, and Protestant will not recoup its litigation costs regardless of whether the Application is granted or denied.

### **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction to consider the Applicant's application pursuant to Texas Health and Safety Code § 382.05195.
2. SOAH has jurisdiction to conduct a hearing and to prepare a Proposal for Decision in this matter. Tex. Gov't Code § 2003.047.
3. Notice was provided pursuant to Texas Health and Safety Code § 382.056, Texas Government Code §§ 2001.051 and 2001.052, and 30 TAC § 39.601, *et seq.*
4. In a contested case hearing involving an air quality permit application that has been directly referred to SOAH, the burden of proof is on the applicant to demonstrate that the application satisfies all statutory and regulatory requirements by a preponderance of the evidence. 30 TAC §§ 55.210, 80.17(a).
5. Standard permit application representations with regard to construction plans, operating procedures, and maximum emission rates in any registration for a standard permit become conditions upon which the facility or changes thereto must be constructed and operated. 30 TAC § 116.615(2).
6. It is unlawful for any person to vary from standard permit application representations if the change will affect that person's right to claim the standard permit. 30 TAC § 116.615(2).
7. A person can vary from standard permit application representations if the change will not affect the person's right to claim the standard permit. 30 TAC § 116.615(2).
8. If a person makes a change from a standard permit application representation, but the facility remains eligible for the standard permit, the owner or operator must notify the TCEQ ED of any change that will result in a change in the method of control of

emissions, a change in the character of emissions, or an increase in emissions as compared to the original application for registration under the standard permit. Such notice must be received by the TCEQ ED no later than 30 days after the change. 30 TAC § 116.615(2).

9. TCEQ established the CBP Standard Permit pursuant to 30 TAC § 116.602.
10. In accordance with 30 TAC § 116.602(c), the TCEQ determined, when establishing the CBP Standard Permit, that a concrete batch plant that is constructed and operated in compliance with the requirements of the standard permit will employ best available control technology.
11. In accordance with 30 TAC § 116.615(1), the TCEQ determined, when establishing the CBP Standard Permit, that a concrete batch plant that is constructed and operated in compliance with the requirements of the standard permit will comply with the intent of the Texas Clean Air Act, including the protection of health and property of the public.
12. SCC demonstrated that the Plant will be constructed and operated in accordance with the requirements of the CBP Standard Permit.
13. Based on the above Findings of Fact, the Application meets all of the requirements applicable to the Air Quality Standard Permit for Concrete Batch Plants. 30 TAC §§ 116.610-.611, .615.
14. The Plant will comply with all TCEQ rules and with the intent of the TCAA, including the requirement to use best available control technology for protection of public health and physical property.
15. The emissions from the Plant will comply with all TCEQ rules and with the intent of the TCAA, including the protection of public health and physical property.
16. Under the TCAA and TCEQ rules, a project that meets the requirements for a standard air permit issued by the TCEQ qualifies for the standard air permit. 30 TAC § 116.610(a) and Tex. Health & Safety Code § 382.051.
17. The application for Air Quality Standard Permit Registration No. 119443L001 provides sufficient information, satisfies TCEQ requirements, and should be approved.
18. The TCEQ's rules provide a list of factors to be considered when determining a proper allocation of transcript costs. 30 TAC § 80.23(d).
19. Based on the above Findings of Fact and the factors established in 30 TAC § 80.23(d), SCC should pay all of the transcription costs for the hearing on the merits.

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:**

1. The application of Southern Crushed Concrete LLC for registration to use the CBP Standard Permit is granted and the attached permit is issued.
2. Southern Crushed Concrete LLC shall pay all of the transcript costs.
3. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
4. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Texas Government Code § 2001.144.
5. The Commission's Chief Clerk shall forward a copy of this Order to all Parties.
6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

SIGNED:

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Bryan W. Shaw, Ph.D., Chairman**  
**For the Commission**