

November 30, 2010

Sunset Advisory Commission
PO Box 13066
Austin, TX 78711
(via E-Mail/Website)

RE: Sunset Review of the Texas Commission on Environmental Quality

Dear Members of the Texas Sunset Advisory Commission,

We thank you for your service to the Sunset Advisory Commission and greatly appreciate the opportunity to present concerns to you about the Texas Commission on Environmental Quality (TCEQ). For nearly three years, we have been contesting an air permit for a proposed new rock crushing facility near New Braunfels in Comal County, Texas. We were named “affected persons” (also referred to as “Protestants”) in this contested case. This is our first time to be involved in such a case and through the years we have learned a lot about the TCEQ and its processes. Some TCEQ employees were very helpful, courteous, and respectful, particularly those in the Office of Public Interest Counsel (OPIC). On the other hand, there were times that we felt like unnecessary burdens were placed on the Protestants and that we were up against the Applicant and the TCEQ itself. We respectfully request that you consider our comments, most of which have been derived from our recent and ongoing experiences with the TCEQ in this contested matter.

I. BACKGROUND INFORMATION

Re: Application of Aggregate Industries-WCR, Inc. for New Source Review Authorization for Air Quality Permit No. 83755 for a Proposed Rock Crushing Facility at 5900 FM 482 near New Braunfels in Comal County, Texas; TCEQ Docket No. 2009-1842-AIR; SOAH Docket No. 582-10-2489

It is our understanding that the Sunset Advisory Commission is not reviewing specific cases. However, to fully explain our concerns about the TCEQ, the following background information is provided.

A. Aggregate Industries – WCR, Inc. (also referred to as “Aggregate Industries” or “Applicant”) applied to the TCEQ in December 2007 for an air permit to start a new rock crushing facility near New Braunfels in Comal County, Texas.

- 1) Aggregate Industries is based in Colorado; however, when researching the multiple layers of corporate ownership, Aggregate Industries is ultimately owned by Holcim, an international conglomerate based in Switzerland. It is a huge corporation with operations worldwide.
- 2) The new rock crushing facility would lie between the existing Dean Word Asphalt and Rock Crushing Plant, the Dry Comal Creek Flood Retention Structure, and the many residents that live in the area.

- 3) The physical address of the new plant is 5900 FM 482, where New Braunfels meets the city of Schertz. Property records indicate that the land (approximately 1,000 acres) where Aggregate Industries would operate is actually owned by Holcim.

B. Plans for the Applicant's new operations allow for:

- 1) 24/7 operations
- 2) Not just "a" rock crusher, but 7 rock crushers (jaw crushers, impact crushers, cone crushers)
- 3) Extraction of limestone along the Balcones Escarpment with a process limit of 2,000 tons per hour (5,000,000 tons per year)
- 4) Trinity Aquifer water usage for operations and dust suppressant
- 5) 30 acres of stockpiles, with two piles exceeding the state height limit of 45 feet
- 6) Massive rail and truck operations, including a new rail spur near the Dry Comal Creek
- 7) Primary plant operating in the Balcones Escarpment (quarry, jaw crushers, conveyors, haul trucks)
- 8) Secondary plant operating below the Balcones Escarpment near the Dry Comal Creek close to FM 482 (crushers, distribution facilities, conveyors, rail spur, rail and truck loading)
- 9) Holcim to also ship cement from its Midlothian, Texas plant to a facility near the proposed secondary plant for redistribution in this area

C. The air permit application remains highly contested by citizens of Comal County.

- 1) The proposed facility is located within an approximate 8-mile stretch along the Balcones Escarpment that follows Wald Road, Apg Lane, FM 482, Old Nacogdoches Road, and FM 2252. The scarring of the Balcones Escarpment is clearly evident when traveling IH 35 between New Braunfels and San Antonio. This area is already concentrated with large existing operations, including CEMEX, Martin Marietta, L-Hoist (formerly Chemical Lime), Dean Word Company, Hanson Aggregates, and numerous ready-mix plants and industrial operations. Several of these aggregate operations are owned by huge, multi-national corporations. Yet, hundreds of families also reside in this 8-mile stretch, along Solms Road, Rusch Lane, Krueger Canyon, Bunker Road, Coyote Run, FM 482, FM 1863, FM 2252, and Old Nacogdoches Road. Homes, schools, parks, chapels, cemeteries, heritage farms, and historic structures are found in this area. These families and the community suffer daily from contaminants emitted from the existing operations as well as contaminants from traffic on nearby IH 35 and multiple railways.
- 2) The TCEQ, through modeling techniques, has analyzed the air quality effects of the Applicant's proposed facility. We understand that an "average Comal County background" factor (using population data not updated since 1998) was added which would be less dense than the actual surrounding area. It also appears that no provisions were made for outstanding applications for increased emissions from several neighboring facilities. Before another permit is issued, we believe an in-depth, cumulative environmental study of this entire area should be performed to consider the potential adverse effect from all sources.
- 3) As identified by the Applicant, our home is the "nearest receptor". We reside at 6028 FM 482 on approximately 72 acres that lie north of FM 482 and adjacent to the property owned by Holcim and to be operated by the Applicant. Our property, which

is part of a 100-Year Heritage Farm, lies directly adjacent to the Applicant's secondary plant and corners with the primary plant. Our farm land touches the property line with Aggregate Industries/Holcim. Our home is about 435 feet away from the property line and 1,000 feet from the Applicant's secondary plant. Our house is about 2,650 feet (½ mile) from the Applicant's proposed primary plant. Additionally, our home is approximately 700 feet from Dean Word's property line, so we may actually be their "nearest receptor" as well. Due to our location, we have raised many questions about the effects of the proposed facility and the air modeling assumptions.

- 4) Most citizens became aware of the air permit application in February 2008 and began to participate in the public commenting process. A public hearing was held in New Braunfels in March 2009. The TCEQ received about 400 comment letters expressing concerns and asking that the air permit be denied. The citizens are saying "Enough is Enough".
 - 5) Due to issues of disputed facts that were raised during the public comment period, in January 2010, the TCEQ Commissioners referred 14 material and relevant issues to the SOAH. Those citizens that were named affected parties (or "Protestants") in the proceeding were limited to those living within a one-mile radius of the proposed facility, with a few exceptions. The Protestants are comprised of 26 individuals.
- D. The Hearing on the Merits was held in October 2010 and lasted three days.
- 1) As is customary in SOAH Hearings of this type, the Protestants needed legal representation. The Protestants retained Blackburn Carter PC. The Protestants are having to pay for legal and expert air modeling fees, expected to total in excess of \$100,000. The Protestants may also have to pay for some of the court costs. Discovery and depositions occurred through May and September of 2010.
 - 2) Sound challenges, particularly as it relates to air modeling, were made by the Protestants at the Hearing.
 - 3) Aggregate Industries is represented by Jackson Walker of Austin. Experts for the Applicant include an air modeler and a toxicologist. Westward Environmental serves as environmental consultants for Aggregate Industries and had three professionals testify as experts.
 - 4) TCEQ ED was represented. Several TCEQ employees in the Air Permits Division testified.
 - 5) TCEQ OPIC was represented.
 - 6) The case is under review by an SOAH Administrative Law Judge. A Proposal for Decision is expected to be issued in January 2011. Then it will go back to the TCEQ Commissioners for a final decision, expected in early spring 2011.

II. WHAT COULD THE TCEQ DO BETTER

Reflecting back through the TCEQ air permitting process and ~~thinking~~ thinking what could happen in the very near future upon the Judge's Proposal and the TCEQ Commissioners' final decision, we offer the following thoughts and recommendations:

- A. Newspaper Notices are not adequate. The requirements should be specific to the community being impacted. In our case, one notice was published for one day in one

local newspaper (New Braunfels Herald-Zeitung) and one Spanish newspaper. However, the proposed facility lies between two cities (New Braunfels and Schertz). The Notice should have also appeared in the Schertz newspaper (Northeast Herald) as well as the San Antonio Express News (a major newspaper in the area). Due to the size of the proposed operation, perhaps Notices should run for more than one day and contain more specific information about the proposed operation. If the Notice as published resulted in 400 comment letters, can you imagine how many more would have commented had they known about it? Also, perhaps individuals in the immediate vicinity should receive special, personalized notification from the TCEQ at the onset, instead of reading about it in the newspaper.

- B. TCEQ Signs posted by the property should be properly maintained. In our case, the signs were subjected to floodwaters and weeds, detracting from visibility. Also, the entrance to the proposed facility is used by Dean Word Company (their sign is by the entrance). People passing by thought this was part of the existing Dean Word operations, not a new source. Perhaps an applicant should have their name on the signs.
- C. Undue burden is placed on the public to view available documents. Unless a person is available during normal business hours (takes off work), it is very difficult to view documents. It was even more difficult to obtain copies. Protestant Sharlene Fey made a trip to the TCEQ Region 13 office (13 miles from our home) only to find a 2 to 3-inch bound report that could be copied, for a charge, at a specific retail printer which was located another 17 miles away. Sharlene then went to the Comal County Courthouse, thinking it was closer, only to find that the charge per page was \$1.00 (\$5.00 for large maps), equating to about \$300 for a copy of the entire bound report. Eventually, Sharlene made a trip to Austin and was directed to three different departments and buildings (Office of Chief Clerk, Central Records, and finally the Air Permits Division) before the application or any supporting documents were made available. Please know that the TCEQ staff at all locations offered help and support, were courteous, and provided what information they could. It was, however, difficult to obtain copies of relevant public documents. This could be a deterring factor in submitting meaningful and relevant comments to the TCEQ. Again, perhaps individuals in the immediate vicinity should be offered copies of documents, free of charge, from the Applicant or TCEQ at the onset of the process.
- D. Careless administrative errors by the TCEQ raise doubts as to the reliability of other TCEQ data. Without even trying, at least three errors on the part of the TCEQ were noted -- transposition in the TCEQ Austin zip code; a font discrepancy in a letter from the TCEQ Deputy Director which was corrected and resent to us; and incorrect location marking of our home on a TCEQ-prepared map. Granted, these may be simple, inconsequential errors, but if these errors are representative of the TCEQ's performance, how can we trust the TCEQ with complicated air modeling and rely on the TCEQ's ability to protect our environment?
- E. Air modeling by the TCEQ does not provide assurance of protecting human health or the environment. An independent audit and evaluation should be required. TCEQ should seek to obtain real, scientific data as opposed to using standardized modeling assumptions. TCEQ should properly follow EPA guidance documents. TCEQ appears to narrowly interpret rules of convenience, but does not seek to find scientific, reliable data. As noted in the Protestants' Closing Arguments and Replies, many challenges were made

to the air modeling assumptions, including, among others: (i) emission factors for granite in North Carolina were used when, in fact, actual limestone emissions could have been obtained from nearby facilities; (ii) since no air monitor exists in Comal County, a background concentration factor was used based on population data not updated since 1998, instead of obtaining current data; (iii) and no consideration was given to the urbanizing effect in this immediate vicinity. There is a new housing development (Magnolia Springs) that has over 60 new families living there and the builder plans for 500 homes in total. This development is within the arbitrary one-mile circle. The TCEQ should keep abreast of changes in the area of the proposed facility and change its recommendations accordingly. We believe the Applicant incorrectly modeled the projected emissions of the proposed facility. The critical errors went under the radar of the engineers at the TCEQ. The errors undermine the entire permit application and the accuracy of the projected concentrations. The record evidence strongly suggests that the true health effects are far greater than have been represented by the Applicant. If this permit is issued based on the application, the consequences will fall on the innocent Protestants that are merely seeking to protect their health and welfare. Even with the evidence, the ED continues to stand firm on its original decision to issue the air permit without addressing the Protestants' concerns.

- F. TCEQ should be required to consider cumulative effects of proposed new or expanded air permits. Presently, TCEQ ignores the cumulative effects of combined air emissions from clusters of facilities, such as the quarries and rock crushing facilities in south Comal County. TCEQ should evaluate proposed new pollution in light of existing pollution.
- G. Post-reviews should be conducted by the TCEQ to see if permit conditions are effective, and if not, then require necessary changes. If best practices and suppressants are required in a permit to control dust, then why are the yellow stripes on the roads near the existing rock crushing facilities so hard to see? Why is the vegetation covered with dust?
- H. The culture of the TCEQ needs to change. The ED's responses to public comments seem canned and conveniently try to respond to groupings of similar (yet different) issues. Several of our concerns were not addressed, particularly as to cumulative effects. It was not until Senator Kay Baily Hutchison's office wrote the TCEQ on our behalf did we receive a personal letter from the Deputy Director addressing our specific questions.
- I. Definitions need to be changed so as to better match reality. For instance, "emissions" is defined to not include particulate matter emitted from quarrying operations. Hence, a quarry may operate in Texas without an air permit. However, a rock crushing facility does need an air permit.
- J. TCEQ places undue emphasis on distinguishing between "minor source" and "major source" in the air permitting process. In our situation, we are concerned about the particulate matter in the air; we do not care if it came from a minor or a major source. The significant point is that emissions are sent into the air and, either individually or combined with other facilities, these emissions contribute to the pollution in the air and may cause exceedances above the state limit. When it comes to public health and issuing air permits, the difference between major source and minor source emissions should not matter. The particulate matter is polluting the air, no matter the source.
- K. TCEQ seems disdainful of contested cases regarding particulate matter from rock crushing and aggregate operations. All industries should come under equal scrutiny and not be allowed to emit particulate matter above state levels. It is easy to challenge

- petroleum refiners, natural gas producers, and coal operations, and to get caught up in highly-visible matters. However, who is protecting the citizens who are exposed to particulate matter from rock crushers and aggregates.....why discriminate?
- L. The OPIC should have an equal weight, or even more, in making recommendations and influencing the TCEQ Commissioners. The OPIC should have resources to represent Protestants, in a fair and equitable manner.
 - M. The TCEQ Commissioners should not be allowed to overrule an Administrative Law Judge or the OPIC. The number of TCEQ Commissioners should be increased and each should have up-to-date knowledge about health effects from all sources. TCEQ Commissioners should either “deny” or “approve” permit applications. In any regard, TCEQ Commissioners should not allow approval contingent on “patching up” a proposed permit application; rather it should be denied.
 - N. Instead of separate environmental departments and agencies that have responsibilities over a single environmental issue, why not have one all-encompassing environmental agency, who in the permitting process, takes into account the complete environmental impact (air, water, industrial discharge, endangered species, road safety, and other). At times, the possibilities of negatively impacting cultural and historical areas arise. In our case, the proposed facility will lie near FM 482, which is part of a US National Historical Trail, the El Camino Real de los Tejas. In recent months, the Texas Historical Commission of Comal County, the San Antonio Conservation Society, the Selma Historical Foundation, and the Schertz Preservation Society have visited this community and historical farms. Yet, there is not one governmental agency that can look at the total impact of this new proposed operation from more than one perspective. It becomes very frustrating and overwhelming for citizens to bring issues to all the separate agencies.
 - O. In our case, even after the TCEQ Commissioners referred 14 material and relevant issues to the SOAH for review, the burden still fell on the Protestants to prove the fallacies of the air modeling. The Protestants had to hire lawyers and experts and pay for them! As in our case, Protestants were subjected to depositions by the Applicant’s highly-paid corporate lawyers and had to respond to personal and sensitive questions. Is this what the citizens deserve? Protestants are intimidated and forced to deal with issues over a long period of time. Protestants suffer financial losses. It becomes extremely difficult for families to find the resources to get their questions and concerns addressed. Protestants should not have to pay.
 - P. TCEQ should be proactive and place air monitors near clusters of facilities, like in south Comal County. The monitored data should be available daily to the public with appropriate consequences if exceedances occur. Why wait until it is too late and the problem gets out of control, like in the Barnett Shale area. TCEQ should be proactive not reactive.
 - Q. Compliance history is important and should be expanded to include compliance outside of the State of Texas, particularly for New Source Reviews. Also, an applicant should be viewed in combination with its affiliated companies (i.e., compliance history of Holcim should have been considered in conjunction with its subsidiary, Aggregate Industries, and all of the Holcim affiliated companies). The companies are under one management team.
 - R. In New Source Reviews, surrounding land use should be analyzed in depth and not just point out existing industrial operations. Each and every home in the immediate vicinity should be identified and labeled in the permit evaluation. These residents should be

conferred with by the TCEQ and Applicant at the onset of the process. The TCEQ should keep abreast of current developments in the area of proposed new facilities, such as annexation, urbanization, new schools, bus routes, and new housing developments and change their recommendations appropriately.

- S. In New Source Reviews, since the facility does not yet exist, the TCEQ should mandate buffer zones on the applicant's property to minimize nuisance conditions. This could at times require applicants to redesign their proposed facilities.
- T. TCEQ should improve the public's ability to participate in agency decisions. The TCEQ's narrow approach, such as using an arbitrary one-mile radius to grant standing, is not fair, particularly with the size and impact of huge rock crushing/quarrying operations.

In conclusion, we believe the TCEQ's air permitting process for rock crushing facilities needs immediate major reform. Why let the bleeding continue? Current cases are underway. Grandfathering should not be allowed. As previously mentioned, our contested case is currently being reviewed by an Administrative Law Judge at the State Office of Administrative Hearings. A Proposal for Decision is expected soon. This Proposal will then return to the TCEQ Commissioners for a final decision. Will our case be yet another example of being overruled? Since our case seems to be representative of so many public concerns, we would be available to meet with you to discuss these concerns further and also provide documents if needed.

Again, we appreciate this opportunity to provide comments and thank you for your time and consideration. We trust that the Sunset Review will produce meaningful change for the great State of Texas.

Sincerely,


Tim Fey


Shaelene Fey

Tim and Shaelene Fey