RAILROAD COMMISSION OF TEXAS

TONY GARZA
CHAIRMAN

RQ-0072-GC

May 31, 1999

The Honorable John Cornyn
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Dear General Cornyn:

Pursuant to Section 402.042 of the Texas Government Code, and on behalf of the Railroad Commission of Texas, I am requesting your opinion on two questions regarding the Texas Aggregate Quarry and Pit Safety Act (the "Act"). These questions, set out below, concern the applicability of the vehicle barrier requirements of the Act, codified at Chapter 133 of the Texas Natural Resources Code and administered under Title 16, Chapter 11 of the Texas Administrative Code (the "Code").

> 1) Is the regulatory definition of "unacceptable unsafe location" at 16 Texas Administrative Code §11.1004, to the extent it encompasses all pits within 200 feet of a public road without regard to distance to a roadway intersection, overly broad and thus outside the Commission's authority to adopt under the Act?
>
> 2) Is the Act limited in scope to pits associated with commercial extraction of aggregates for use as building materials or on-site processing, or does it include pits used on a one-time or short duration basis?

To assist you in your examination of these issues, I provide the following background information.

Question 1: Definition of "unacceptable unsafe location"

The Act seeks to protect the public by requiring safety devices, such as barriers, between certain pits and an adjacent roadway to prevent a motor vehicle leaving the road from entering the pit. *See* TEX. NAT. RES. CODE ANN. §§ 133.002 and 133.041 (Vernon 1993, Vernon Supp. 1999). The Act requires a person responsible for an active pit to construct a barrier or other device between a public road and the pit if the pit is "in hazardous proximity" to the road. *See* TEX. NAT. RES. CODE ANN. § 133.041(a) (Vernon 1993).

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A different requirement is applied to abandoned or inactive pits. Section 133.041(b) requires a person responsible for an abandoned or inactive pit to construct a barrier between the pit and a public road if the pit is "in hazardous proximity to a public road *and* in an unacceptable unsafe location." TEX. NAT. RES. CODE ANN. § 133.041(b) (Vernon Supp. 1999) (emphasis added).

The Act defines the terms "in hazardous proximity to a public road" and "unacceptable unsafe location" as follows:

> "In hazardous proximity to a public road" means that distance beginning 200 feet from the nearest roadway edge of a public road or highway to the pit perimeter.
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> "Unacceptable unsafe location" means a condition where the edge of a pit is located within 200 feet of a public roadway intersection in a manner which, in the judgment of the commission:
>
> (A) presents a significant risk of harm to public motorists by reason of the proximity of the pit to the roadway intersection; and,
> (B) has no naturally occurring or artificially constructed barrier or berm between the road and pit that would likely prevent a motor vehicle from accidentally entering the pit as the result of a motor vehicle collision at or near the intersection; or which,
> (C) in the opinion of the commission, is also at any other location constituting a substantial dangerous risk to the driving public, which condition can be rectified by the placement of berms, barriers, guardrails, or other devices as prescribed by this code.

TEX. NAT. RES. CODE ANN. § 133.003 (Vernon 1993, Vernon Supp. 1999).

Given the use of the conjunction "and" between subparts (A) and (B) as well as the term "or which" between subparts (B) and (C), the language of the statute itself thus appears to describe two separate circumstances in which an "unacceptable unsafe location" may be found:

> 1. a condition where the edge of a pit is located within 200 feet of a public roadway intersection in a manner which, in the judgment of the commission presents a significant risk of harm to public motorists by reason of the proximity of the pit to the roadway intersection and has no naturally occurring or artificially constructed barrier or berm between the road and pit that would likely prevent a motor vehicle from accidentally entering the pit as the result of a motor vehicle collision at or near the intersection; or
>
> 2. a condition where the edge of a pit is located within 200 feet of a public roadway intersection in a manner which, in the judgment of the commission, is also at any other location constituting a substantial dangerous risk to the driving

public, which condition can be rectified by the placement of berms, barriers, guardrails, or other devices as prescribed by the code.

Under either circumstance, the statutory definition of "unacceptable unsafe location" appears to be limited to those pits within 200 feet of a public roadway intersection.

In contrast, Commission rules define an "unacceptable unsafe location" as follows:

> 'Unacceptable unsafe location'-- A condition where the edge of a pit is located within 200 feet of a public roadway intersection in a manner which, in the judgment of the commission:
> (A) presents a significant risk of harm to public motorists by reason of the proximity of the pit to the roadway intersection; and,
> (B) has no naturally occurring or artificially constructed barrier or berm between the road and pit that would likely prevent a motor vehicle from accidentally entering the pit as the result of a motor vehicle collision at or near the intersection; or which,
> (C) in the opinion of the commission, is also at any other location constituting a substantial dangerous risk to the driving public, which condition can be rectified by the placement of berms, barriers, guardrails, or other devices as prescribed by these regulations. *It is the commission's opinion that any abandoned pit which has an edge within 200 feet of a roadway edge of a public road constitutes a substantial dangerous risk to the driving public.* Other locations will be decided on a case-by-case basis.

Tex. R.R. Comm'n., 16 TEX. ADMIN. CODE § 11.1004 (West Jan. 1, 1998) (Quarry and Pit Safety).

The opening clause of this definition refers only to pits within 200 feet of a roadway intersection; yet the emphasized language appears broader in scope in that it specifies that pits within 200 feet of a public road constitute an unacceptable unsafe location. To the extent the regulatory definition encompasses all pits within 200 feet of a public road without regard to their proximity to an intersection, the Commission's rule on its face appears broader in scope than that provided for by statute.

Additionally, defining "unacceptable unsafe location" to include all pits within 200 feet of a roadway edge would simply collapse this definition into the definition of "in hazardous proximity to a public road" and thereby render it superfluous. Yet, the Legislature defined these two terms in different ways and for different purposes; that is, barriers for active pits (when "in hazardous proximity to a public road") should be required more frequently than those for abandoned pits (when "in hazardous proximity to a public road and in an unacceptable unsafe location").

It therefore appears that the inclusion of all pits within 200 feet of a roadway edge of a public road, without regard to distance to the nearest intersection, renders the Commission's definition of "unacceptable unsafe location" overbroad.

Question 2: Distinction between commercial operation and private use

The term "pit" as used in the Act is defined in Section 133.003 as "an open excavation not less than five feet below the adjacent and natural ground level from which aggregates have been or are being extracted." When viewed alone, this definition could be interpreted to encompass every type of excavation over five feet deep. As one court has stated, however, the definition of a pit "does not stand alone. It is only a part of a very comprehensive law . . . In construing an act of the Legislature, it is our duty to examine the entire act and construe it as a whole." Foster v. Railroad Commission, 215 S.W.2d 267, 268 (Tex. Civ. App.--Austin 1948, no writ).

Various provisions of the Act appear to limit its scope to pits created in connection with the extraction of aggregates. The Act defines the term "aggregates" as including "commonly recognized *construction material* originating from a quarry or pit by the disturbance of the surface, including dirt, soil, rock, asphalt, clay, granite, gravel, gypsum, marble, sand, shale, stone, caliche, limestone, dolomite, rock, riprap, or other nonmineral substance." TEX. NAT. RES. CODE ANN. § 133.003(2) (Vernon 1993) (emphasis added). *See also* TEX. NAT. RES. CODE ANN. § 133.002 (Vernon 1993) (stating that the purpose of the Act is to require safety devices for certain aggregate quarries and pits), TEX. NAT. RES. CODE ANN. § 133.012(a) (Vernon 1993) (requiring the Commission to inventory quarries), TEX. NAT. RES. CODE ANN. § 133.044 (Vernon 1993) (prohibiting opening of new pits for extraction of aggregates within 25 feet of a road), and TEX. NAT. RES. CODE ANN. § 133.046(b) (Vernon Supp. 1999) (requiring an application for a safety certificate to state the type of quarrying activities occurring on the site).

Other provisions embody a focus on fairly large-scale commercial aggregate extraction activities or those involving on-site processing. For example, the barrier requirements of the Act apply to a "responsible party." The term "responsible party" is defined as the "operator, lessor, or owner of lessee". TEX. NAT. RES. CODE ANN. § 133.003(22) (Vernon 1993). The terms "operator" and "owner" are further defined, respectively, as "any person, partnership, firm, or corporation engaged in and responsible for the *physical operation and control of the extraction of aggregates*" and "any person, partnership, firm, or corporation having title, in whole or in part, to the land on which an *aggregate operation exists or has existed.*" TEX. NAT. RES. CODE ANN. § 133.003(14) and (16) (Vernon 1993) (emphasis added). These definitions appear to contemplate an extraction activity of some magnitude ("physical operation and control") and duration ("land on which an aggregate operation exists or has existed").

The recordkeeping duties imposed on the Commission under the Act are also phrased in terms of operations having some lifetime: "[t]he Commission shall keep a current log of

all quarries . . . including quarries and pits for which *initial operations* begin after June 30, 1991" and "[e]ach report under this chapter must show the location, *age, operational status*, and current use of the quarry or pit to which the report applies . . . ." TEX. NAT. RES. CODE ANN. §§ 133.012(b), 133.033(a) (Vernon 1993).

The following definitions within the Act may provide further guidance as to the commercial nature of the pits subject to regulation under the Act:

> inactive quarry or pit - a site or any portion of a site that although *previously in aggregate production is not currently being quarried* by any ownership, lease, join venturer, or some other legal arrangement
>
> quarry - the site where aggregates are being or have been removed or extracted from the earth to form the pit, including the entire excavation, *stripped areas, haulage ramps,* the land immediately adjacent thereto *upon which the plant processing the raw materials is located*, exclusive of any land owned or leased by the responsible party not being currently used in the production of aggregates
>
> site - the tract of land on which is located a pit and *includes the immediate area on which the plant in the extraction of aggregates is located*

TEX. NAT. RES. CODE ANN. § 133.003 (Vernon 1993, Vernon Supp. 1999).

Similarly, Section 133.045 describes those persons required under the Act to obtain a safety certificate, as follows:

> Any person responsible who, on November 1, 1991, is utilizing a portion of a site for *quarrying operations*, including the stockpiling, *sale, or processing of aggregates* or a combination thereof, or who has a current, valid, or outstanding agreement or legal right to develop, utilize, or quarry the property, shall be responsible for obtaining a safety certificate limited to that specific pit area he is using or excavating or intends to use or excavate.

TEX. NAT. RES. CODE ANN. § 133.045 (Vernon Supp. 1999).

These provisions appear to indicate that the Act was intended to address relatively large scale, long-term activities involving sales or plant processing. Such an operation might reasonably be viewed to include a pit used to quarry materials for commercial sales or a pit used by a public or private entity to provide building materials for numerous different projects within a specific area. The Act does not appear to apply to excavations created for purposes other than aggregate extraction and that are not associated with sales or on-site plant processing, such as a stock tank, a borrow pit, or some other non-commercial use.

Thank you for your attention to this letter request. Please let me know if you require any further information.

Very truly yours,

Tony Garza
Chairman