TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Protecting Texas by Reducing and Preventing Pollution

November 2, 2001 RQ-0460-GC

By Certified Mail, Return Receipt Requested

FILE # ML-42271-D1
I.D. # 42271

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

Re: Construction of TEX. HEALTH & SAFETY CODE § 382.056(r) and 382.065

Dear General Cornyn:

On behalf of the Texas Natural Resource Conservation Commission (Commission), I am requesting your opinion as to the application and interpretation of new requirements for portable facilities and concrete crushers imposed by the Texas Clean Air Act (TCAA) TEX. HEALTH & SAFETY CODE § 382.056(r) and §382.065. Both sections were amended by House Bill 2912 and became effective September 1, 2001.

Section 382.056(r)(1), Health and Safety Code, states that relocation or change of location of a portable facility can be done without notice if: a) the portable facility is moving to a site that contains a permitted facility and b) there has not been a portable facility at that same site within the past two years. With regard to that section, we request your opinion on the following four issues:

(1) May the statute be interpreted to allow a portable facility to move to a site without notice if: a) the portable facility is moving to a site that contains a permitted facility, and b) there has been a portable facility at that same site within the past two years?

(2) Does the statute apply to pending applications, or does it only apply to those applications filed on or after the effective date of the statute?

(3) Does "permitted facility" refer only to facilities permitted under the Texas Clean Air Act or can it also include facilities permitted under other authority of the Commission (i.e. the Texas Solid Waste Disposal Act, etc.)?

(4) Does "permitted facility" refer only to permits that are subject to public notice prior to issuance or does it also include all available permitting authorizations (such as general permits, standard permits, and permits by rule)?

For background purposes, the Commission notes that portable facilities include facilities such as concrete batch plants, trench burners and concrete and rock crushers. The TCAA defines "facility" as "a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source" Tex. Health & Safety Code Ann. 382.003(6) (Vernon 1992). For a "facility" to be subject to the TCAA's requirements, the emissions from the facility must be from a "stationary source." Although the TCAA does not define "stationary source" the general provisions of the Federal Clean Air Act (FCAA) define "stationary source" as "generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 7550 of this title." 42 U.S.C. 7602(z). Thus, the emissions from portable facilities, while they are operating, are considered to be emissions from a stationary source. The fact that these facilities can easily move about does not exempt them from regulation under the permitting requirements of the TCAA, nor from the requirements of federal permitting programs (e.g., Prevention of Significant Deterioriation and Nonattainment Permits).

The commission has been presented with a number of arguments regarding the appropriate interpretation of subsection (r)(1) of the statute. In addition, the Commission has received letters from Reps. Fred Bosse and Burt Solomons indicating that the shared intention with which their amendments were offered was to allow a portable facility, within a two-year period, to move onto and off of a site with a previously permitted facility without having to give notice of relocation or change of location.

The second set of questions are in reference to Section 382.065, Health and Safety Code, as amended, which states that:

(a) The commission by rule shall prohibit the location of or operation of a concrete crushing facility within 440 yards of a building used as a single or multifamily residence, school or place of worship.

(b) This section does not apply to an existing concrete crushing facility.

Against that backdrop, under which of the following circumstances is a facility "existing"?

(a) The concrete crushing facility was authorized as of September 1, 2001 and it is actually located or operating at the site as of September 1, 2001;

(b) The concrete crushing facility was authorized as of September 1, 2001 but it is not located or operating at the site as of September 1, 2001; or

(c) The concrete crushing facility was not authorized as of September 1, 2001 but it is located or operating illegally at the site as of September 1, 2001.

The commission's practice for permitting these facilities has been to issue a "portable facility permit" which may specify a specific address that a concrete crushing facility is authorized to move to or it may have general provisions that would apply to any location. The commission has been presented with a number of arguments concerning the interpretation of the term "existing" in subsection (b). The interpretation of the term "existing" is key since the prohibition on siting in subsection (a) appears to hinge on whether an existing concrete crushing facility was located or operating at the site as of September 1, 2001. Said differently, the ability to locate or operate a concrete crushing facility at a site could be limited by the interpretation of "existing."

The TNRCC appreciates your attention to this matter and gladly offers its assistance. If you have any questions, please contact Lydia Gonzalez Gromatzky, Senior Director of the TNRCC's Office of Legal Services at (512) 239-0660.

Sincerely,

Duncan C. Norton
General Counsel

cc: Robert J. Huston, Chairman
R. B. "Ralph" Marquez, Commissioner
Kathleen Hartnett White, Commissioner
Jeffrey A. Saitas, Executive Director