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November 4, 2009

by first class mail



Stanley M. Spruiell
Air Permits Section (6PD-R)
Environmental Protection Agency
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Re: Docket ID No. EPA-R06-OAR-2006-0867

Dear Mr. Spruiell:

## Party submitting comments

These comments are submitted on behalf of the Concerned Citizens of Grayson County ("CCGC"), which is a group of citizens, including retired United States District Judge Paul Brown, living in and near Denison and Sherman, Texas. The CCGC has been concerned for quite some time with a permanent hot mix asphalt plant located just outside the western edge of Denison, near the small town of Pottsboro, which is a gateway to Lake Texoma and the extensive recreational activities there. (*This asphalt plant was generally known as the Rushing Paving plant, but, since its ownership changed after the plant opened, it will be referred to here as "Asphalt Plant No. 4".*) Its location near Pottsboro public schools and near numerous private residences has caused significant disruptions in the lives of those living nearby, especially given the noxious stench repeatedly emitted from the plant.

## Background to CCGC's concerns and comments

In March 2007, TCEQ approved Asphalt Plant No. 4's registration to operate under the standard permit for hot mix asphalt plants. TCEQ had issued the standard permit nearly four years earlier, on July 9, 2003. CCGC and numerous other individuals, including Judge Brown, filed suit in state court in Austin, Texas, challenging the authorization for Asphalt Plant No. 4. (*The case was* Concerned Citizens of Grayson County v. TCEQ, *No. D-1-*

*GN-07-001064, in the 419th Judicial District, Travis County.)** The essence of the challenge was directed at the procedural and substantive shortcomings in the underlying standard permit which TCEQ's Commissioners had approved in 2003 after only perfunctory consideration by them.

TCEQ's defense was based on basic two points. ***First***, the CCGC's lawsuit came four years late, since (according to TCEQ) the only challenge the local citizenry could have lodged was to TCEQ's issuance of the standard permit in 2003—and CCGC and its allies had not sued back then. ***Second***, the CCGC could not have sued back then anyway because the Texas Legislature, in Section 382.05195(g) of the Texas Health & Safety Code, has made the state's Administrative Procedure Act inapplicable to TCEQ's development and implementation of standard permits—with the result that there were no judicially enforceable legal standards to apply as to the standard permit anyway, so why bother with addressing the facts of the case.

TCEQ's argument was successful, and the district court entered judgment against CCGC and the other plaintiffs this past February, affirming TCEQ's authorization for Asphalt Plant No. 4 to operate under the 2003 standard permit. Lack of resources and, even more, a complete absence of confidence in the integrity of the entire process by which TCEQ handles air pollution permitting led the CCGC group to forego any appeal.

## Texas standard permit process effectively freezes out the public

The insidious nature of the process which Texas has developed for standard permits prompts the CCGC group to submit these comments. Their objective is to convince EPA that, to the extent the current issues opened by the EPA's proposed rule on Texas's SIP do not encompass the matters raised in the Asphalt Plant No. 4 process, *something* must be done to open Texas's standard permitting process to greater public scrutiny and involvement. For now, it is nothing but a cozy affair between TCEQ and the regulated industry.

The biggest problem with TCEQ's successful insulation of Asphalt Plant No. 4 from any meaningful public review and comment whatever is that it

* CCGC encloses with these comments the briefs filed by the parties in the litigation and the state district court's final judgment.

exemplifies the closed nature of the standard permitting process. TCEQ and the Texas Legislature have purposefully structured it this way. The affected industry works with TCEQ to sculpt the standard permit to its standards. Then, in a year or two or three, when a plant comes onto the local scene waving the standard permit, the local citizenry is concretely affected for the first time, but told that it should have been involved years ago, when the permit was being developed.

In the instance of the standard permit for hot mix asphalt plants, the record is indisputably plain that the public was entirely frozen out of the process. The public simply was not involved in the 2002-2003 rulemaking process. The administrative record for the hot mix asphalt plant rulemaking reflects that there was only a single comment from outside the realm of industry (this coming from a Harris County agency). The sign-in sheets for TCEQ's ostensibly "public hearings" show that only industry and trade groups with financial interests in the asphalt plant business attended. The written comments effectively came only from this same self-interested group. It is true, of course, that the public was not told by TCEQ that it could not comment and attend the public sessions. But, the process was legislatively and administratively crafted in such a way that the reality would be that only trade and industry would attend, comment, and have influence. The reason is obvious. Take the CCGC situation and Asphalt Plant No. 4 as a prime example. In 2002-2003, the local residents in Grayson County had no way to know that they *should* be concerned about the hot mix asphalt standard permit then under development because they were not faced with a single asphalt plant proposal to operate in the area. Asphalt Plant No. 4 wasn't even on the radar screen at the time. No one was proposing a plant in the area, and local people had plenty to do beyond reading the Texas Register every day to discovery merely theoretical threats to the well-being of their community.

The *only* part of the public that could possibly be affected enough to devote time and resources to monitoring and trying to influence the standard permit while it was actually being developed—which is the *only* time the state allows public involvement—was the affected trade and industry group. In other words, the reality of the standard permit process in Texas is that the public is excluded from the process—and this is by design, not happenstance.

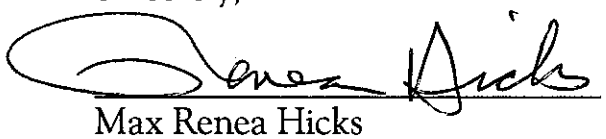
Local citizens aren't affected when the permit is being developed, and they are deemed to have complained too late when they actually are affected by a years-later authorization for someone to operate under the permit developed only in a room occupied by TCEQ and the interested industry.

To make the Catch-22 situation even worse, the Texas Legislature has roped off the standard permit process itself from meaningful judicial review, even in the unlikely event that someone other than the affected industry had been far-sighted and resource-rich enough to have become involved and concerned during the permit's development. So, not only is the practical reality that the public is excluded from the standard permitting process; the statutory rule is that such involvement would be rendered legally meaningless anyway, because TCEQ has legally untrammeled freedom to simply disregard whatever facts the public might bring to bear on the matter.

**Texas's standard permit process should be disapproved, and EPA should require revision of Texas's SIP to remedy the current exclusion of the public from involvement in development of standard permits**

It is not entirely clear to the CCGC that the current process embraces the issue it raises here about Texas's standard permitting process. If it does, please take these comments into account, disapprove Texas's SIP insofar as its standard permit rules are concerned, and require Texas to allow realistic, meaningful and judicially reviewable citizen input into the standard permits the state adopts. If it does not, please extend your inquiry to this topic, too. The current situation constitutes a rigged shell game insofar as the public and standard permits are concerned. What happened to CCGC, and what TCEQ did, in the Asphalt Plant No. 4 situation amply demonstrate this reality.

Sincerely,



Max Renea Hicks

encl.

cc: Hon. Paul Brown, w/o encl.) (*by* first class mail)
Jack Chiles, w/o encl.) (*by* e-mail)

# ENCLOSURES

*to*

CCGC Comments of Nov. 4, 2009

*on*

Docket ID No. EPA-R06-OAR-2006-0867

No. D-1-GN-07-001064

**IN THE DISTRICT COURT FOR TRAVIS COUNTY**
**419TH JUDICIAL DISTRICT**

CONCERNED CITIZENS OF GRAYSON COUNTY, *et al.*,
*Plaintiffs,*

vs.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
*Defendant.*

# BRIEF OF PLAINTIFFS CONCERNED CITIZENS OF GRAYSON COUNTY AND OTHERS

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September 25, 2008

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## LIST OF PARTIES

**Plaintiffs:**
Concerned Citizens of Grayson County
City of Pottsboro
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Bill Jack Chiles, Jr.
Martha Medellin Chiles
Jon C. Gaulding, Sr.
Jack Ellsworth Ridgeway
Jeffrey Ross Sargent
Kimberly Michelle Sargent
Roger H. Vicars
Dominion Farms LLC
Amerivest Equities, Inc.
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**Defendant:**
Texas Commission on Environmental Quality

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## STATEMENT OF THE NATURE OF THE CASE

The plaintiffs in this case challenge the action of the Texas Commission on Environmental Quality ("TCEQ") in authorizing operation of a permanent hot mix asphalt plant located between Denison and Pottsboro in Grayson County under TCEQ's air quality standard permit for hot mix asphalt plants. It is brought by a local organization of concerned citizens, an adjacent affected city, and numerous individuals, including a retired United States District Judge, and other entities holding property adjacent to or near the asphalt plant.

The case does not come into Court from a contested case proceeding under the Texas Administrative Procedure Act, TEX. GOV'T CODE ch. 2001 ("APA"). Instead, the Court has jurisdiction under TEX. WATER CODE § 5.351(a) (authorizing affected persons to petition for review of TCEQ actions) and TEX. HEALTH & SAFETY CODE § 382.032(a) (authorizing affected persons to appeal TCEQ actions into a Travis County district court).

The parties have agreed to go to trial based on stipulations. These stipulations consist of eight numbered stipulations, two stipulated exhibits, and a two-volume stipulated administrative record.



## STATEMENT OF FACTS

### A. Asphalt Plant No. 4 seeks authorization to operate, raising environmental concerns of those nearby.

In mid-January of 2007, a North Texas-based paving company submitted an application to TCEQ to operate a new, permanent hot mix asphalt plant near Denison, Texas. AR 1:Tab 1. This new plant (sometimes referred to here as "Asphalt Plant No. 4") would run day and night, year-round and produce up to 300 tons an hour, and 250,000 tons per year, of asphalt. *Id.*

If authorized, the asphalt plant's operation would entail significant emissions of pollutants into the air. More than 9 tons a year of particulate matter (more than half of which would be the smaller, more dangerous particles of 10 microns across or less) would be released into the air. AR 1:Tab 11. Also emitted would be more than five tons a year of volatile organic compounds, more than 8 tons a year of nitrous oxide, nearly 10 tons a year of sulfur dioxide, and more than 18 tons a year of carbon monoxide. *Id.* Included in the emissions would be such metal and organic pollutants as arsenic, chromium, lead, mercury, formaldehyde, and benzene. AR 1:Tab 1.

These facts, combined with Asphalt Plant No. 4's location, raised widespread concern in the surrounding communities, particularly in the

nearby town of Pottsboro.[1] The City of Pottsboro, the Pottsboro Independent School District, and the Pottsboro Area Chamber of Commerce each passed formal resolutions in opposition to Plant No. 4's operation in its self-designated location. AR 1:Tabs 5, 6, & 15.

There also was an outpouring of public opposition from hundreds of those living and operating businesses adjacent to or very near the Asphalt Plant No. 4 site. AR 1:Tabs 4 & 28. More than 350 concerned citizens met in a forum on the plant's proposed operation. AR 1:Tab 4. Parents of children living nearby and attending one of the three public schools within a mile of the plant site expressed their concern and hope that the plant not be allowed to operate. *Id.* The owner of a farm raising natural foods directly across the highway from the putative site expressed worry about what the plant's emissions would do to the business, as well as to the health of her children. *Id.* The impact of the plant on a residential subdivision was highlighted. *Id.* Also weighing in with his concerns was a local doctor who lives in Pottsboro. He identified potential health effects from the expected pollutant emissions, including impairments for elderly patients with heart disease from carbon monoxide, nitrous oxide damage to lung tissue, and other risks to such vulnerable populations as young children. *Id.*

[1] Pottsboro's population in the 2000 census was 1,579. http://censtats.census.gov/data/TX/1604859132.pdf. Denison's was 22,773. http://censtats.census.gov/data/TX/1604819900.pdf.



**B. TCEQ denies the opportunity for a formal public hearing or contested case on the requested authorization for Asphalt Plant No. 4 to operate.**

This public outcry came to naught, both substantively and procedurally. There was never a hearing at which the concerns could be formally presented, subject to being either established or refuted as fact.

Instead, an official from TCEQ's Air Permits Division responded that "[t]here is no public notice requirement for this [Plant No. 4] authorization and consequently no formal public comment process." AR 1:Tab 4 (M. Gould e-mail of Jan. 31, 2007). This position was later echoed by a TCEQ Deputy Director. AR 1:Tab 14. Finally, TCEQ's Executive Director informed the area's state senator[2] that there would be neither a public hearing nor a contested case proceeding in connection with Plant No. 4. AR 1:Tab 8.

The Executive Director did authorize a "public *meeting*," expressly distinguished from the procedurally significant "public hearing" or "contested case hearing" processes, for the public to vent its views in a meeting that was nothing more than "informational." *Id.* (emphasis added). Four days after the meeting, TCEQ, through its Air Permits Division, issued its formal authorization for Asphalt Plant No. 4 to operate between Denison and Pottsboro. AR 1:Tab 11 [at Brief Appendix Tab A].[3]

[2] The senator had requested that TCEQ conduct a public hearing. AR 1:Tab 7.

[3] Rushing Paving Company, Ltd., received the original authorization for Asphalt Plant No. 4. AR 1:Tab11. It since has been transferred to the current operator,

### C. TCEQ's industry-centered process for developing a standard permit for asphalt plants supplants individualized permit hearings.

The reason that the affected public's concerns fell on deaf ears at TCEQ is that the agency previously had issued what is known as a "standard permit" for hot mix asphalt plants. AR 2:Tab 58 (Air Quality Standard Permit for Hot Mix Asphalt Plants). Under the standard permit mechanism, those who wish to construct and operate hot mix asphalt plants in the state have only to submit an application (officially termed a "registration"),[4] affirming that they meet the standard permit's parameters. Afterwards, as a matter of course, TCEQ issues the applicant an authorization to operate under the permit—without any mechanism or need for public notice or input. *See, e.g.*, AR 1:Tab 17 (Deputy Director correspondence referencing "rule").[5]

The origins of the standard permit for hot mix asphalt plants in Texas are in 2002 and 2003. TCEQ staff began to evaluate switching the process for permitting hot mix asphalt plants from the then-current process that used both permits-by-rule and regular air quality permits to the standard permit format. AR 2:Tab 37. In 2002, TCEQ's Air Permits Division conducted so-called "stakeholder" meetings with the asphalt

RK Hall Construction, Ltd. Stip. 6. Both companies have been provided notice of this litigation. Stip. 8.

[4] 30 TEX. ADMIN. CODE § 116.604. The registration is valid for ten years. *Id.* § 116.604(1).

[5] Of the 389 hot mix asphalt plants in the state, 86 operate under the standard permit for such plants. Stip. 7.



plant industry and subsequently received input from the industry, particularly the Texas Asphalt Pavement Association, and, to a much lesser extent, the Texas Department of Transportation. AR 2:Tab 38-41 & 43-44.[6] Agency staff also began air modeling, based on the express assumption that such plants "would be located in *areas considered rural* for modeling purposes" and using "rural coefficients." AR 2:Tab 42 (emphasis added).[7]

In early 2003, TCEQ gave notice of its issuance concerning a draft standard permit for hot mix asphalt plants, the opportunity for public comment on it, and a public meeting in Austin to receive testimony on it. AR 2:Tab 50. This public comment and hearing process was essentially an industry-only affair. See AR 2:Tabs 51-53.[8]

TCEQ completed its work on the standard permit in early 2003, but chose to wait until the legislative session ended to present it to TCEQ Commissioners for consideration and adoption. AR 2:55 (p. 4). The proposed standard permit was placed on the TCEQ Commissioners'

[6] TCEQ staff later made clear that the stakeholder meeting was designed to be only for asphalt operators. AR 2:Tab 53 (p. 6). Ironically, one of the industry representatives at the first of these meetings was from the same company, Westward Environmental Services, Inc., which five years later prepared and submitted the registration for Asphalt Plant No. 4. *Compare* AR 1:Tab 1 *with* AR 2:Tab 43 (1st page, last line).

[7] Despite the statewide application of the program, the modelers limited their use of surface meteorological data to Austin and the upper air data to Victoria, all from a five-year period ending in 1988. AR 2:Tab 42.

[8] The record reveals *only a single comment from someone outside industry.* See AR 2:Tab 51 (last letter in stack) (comment of Public Health & Environmental Services Pollution Control Division of Harris County).

hearing agenda for July 9, 2003. AR 2:57 (Addendum to Agenda, Item 60).

**D. TCEQ adopts the standard permit without discussion and with bare-bones findings.**

At the hearing, an Air Permits Division staff member made a truncated presentation—less than five minutes—of the proposed standard permit. AR 2:C-2 (agenda tape). The Commissioners asked no questions and made no substantive comments. Stip. Exh. 2 (2-page transcript) [at Brief Appendix Tab B].[9] The standard permit was unanimously adopted. *Id.*

The Commissioners made findings, which state, *in their entirety*:

> In accordance with 30 TAC § 116.602, the commission finds that the standard permit requires best available control technology, that the standard permit is enforceable, and that the commission can adequately monitor compliance with the terms of the standard permit.

AR 2:Tab 58 (dated July 9, 2003) [at Brief Appendix Tab C].

**E. The plaintiffs were first affected by TCEQ's adoption of the standard permit when Asphalt Plant No. 4 came to town.**

The City of Pottsboro and individuals living and owning property and businesses near what several years later became Asphalt Plant No. 4 were not confronted with any real or potential asphalt plants when the standard permit was being developed and adopted by TCEQ. Stips. 3 & 4; *see also* AR 2:Tab 48 (1st two pages, listing extant plants).[10] When, however, TCEQ first deployed the standard permit procedure in a way directly affecting them, they challenged the TCEQ action, initially by raising the previously-summarized concerns about the prospective authorization for Asphalt Plant No. 4 and, then, when those efforts led to nothing, by filing this lawsuit.[11]

It is agreed that the plaintiffs are "affected by operation of" Asphalt Plant No. 4. Stip. 4. The 150-member Concerned Citizens of Grayson County includes those with special concerns about health matters in connection with the plant, including concerns about their children who will be attending public school near it. *Id.* The City of Pottsboro is concerned not only about the effect of the plant on future growth and

[9] TCEQ's Chairman did comment on there having been "a lot of involvement." Stip. Exh. 2 (2nd page). The record reflects that there was effectively *no involvement* beyond the asphalt plant operators and, to a minor extent, the Texas Department of Transportation.

[10] In fact, the standard permit process as used by TCEQ is such that no ordinary citizen or association of citizens could level a judicial challenge to whether the standard permit was legally adopted. Actual or eminent injury is required to assert a justiciable interest sufficient to confer jurisdiction on a court. *See, e.g., Texas Disposal Systems Landfill, Inc. v. TCEQ*, 259 S.W.3d 361, 363 (Tex.App.—Amarillo 2008, no pet. h.). "[P]otentialities or events that 'may' happen are insufficient to confer a justiciable interest in agency action." *Id.* at 363-64 ("like the chance of a pig growing wings, the purported injury . . . is mere speculation" and the "public's interest" cannot be invoke to fill the jurisdictional void). In all likelihood, TCEQ's standard permit process is best seen as a guaranteed method for denying all but affected industries the ability to raise a judicial challenge to far-reaching environmental actions by the state's lead environmental agency.

[11] The plaintiffs filed a "Motion for Reconsideration or Rehearing and to Overturn or, Alternatively a Variance" ["Reconsideration Motion"] twenty-one days after the Asphalt Plant No. 4 authorization issued. AR 1:Tab 29. The Commission declined to act on the motion. AR 1:Tab 30. The plaintiffs filed their original petition in this Court twenty-nine days after the issuance of the authorization. This suffices to give the Court jurisdiction over the case. *See generally West v. TCEQ*, __ S.W.3d __, 2008 WL 2938850 (Tex.App.—Austin July 31, 2008, pet. rev. pending).

development activities in this area, which serves as a major gateway to nearby resort and recreational facilities, but also about its effects on the City's air quality and the health effects on vulnerable populations such as the elderly and children. *Id.* Retired United States District Judge Brown owns more than a hundred acres of property directly across from the plant site, while other plaintiffs own and live on nearby property and fear for their health and the devaluation of their property's value. *Id.*

All the plaintiffs come into this Court to raise the legal issue whether TCEQ used legally sanctioned methods to authorize Asphalt Plant No. 4's operation.



## POINTS OF ERROR AND ARGUMENT

**POINT OF ERROR NO. I:**

**THE STANDARD PERMIT FOR HOT MIX ASPHALT PLANTS, AS APPLIED IN TCEQ'S AUTHORIZATION FOR ASPHALT PLANT NO. 4, AND THE ASPHALT PLANT NO. 4 AUTHORIZATION ARE INVALID BECAUSE THE STANDARD PERMIT IS NOT SUPPORTED BY LEGALLY SUFFICIENT FINDINGS. [See Reconsideration Motion, Part V, at 6-8.][12]**

Texas administrative agencies have no inherent powers, and their authority is not presumed. "Rather, they may exercise only those powers the law, in clear and express statutory language, confers upon them." *Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002).

The Texas Clean Air Act, TEX. HEALTH & SAFETY CODE ch. 382, is the source of TCEQ's authority to issue standard permits. The basic authorization is in Section 382.051(b)3) of the Clean Air Act, which simply provides that TCEQ may issue "a standard permit for similar facilities." A standard permit is, essentially, a type of "off-the-shelf" permitting system for regulating emission of air pollutants in the state. To establish and operate an air pollutant-emitting facility covered by a

[12] The requirement in Travis County District Court Rule 10.5.1(d) that a point of error reference pertinent portions of the motion for rehearing at the agency is inapplicable in this case. TCEQ does not recognize a formal motion for rehearing process for authorizations under standard permits. *See, e.g.*, AR 1:Tab 12 (2nd letter, March 12, 2007, from Air Permits Division Director to Renea Hicks, advising that judicial appeal deadline was 30 days from authorization); *see also* 30 TEX. ADMIN. CODE § 116.605(g) (TCEQ announcing that its issuance of a registration to use a standard permit is not subject to the APA's requirements). Nonetheless, the plaintiffs protectively filed a reconsideration motion with TCEQ, and any points raised in that motion that are raised here are cross-referenced.

TCEQ standard permit, the putative operator has only to submit a completed application—technically, a "registration"—and pay a modest fee. In the Asphalt Plant No. 4 instance, Rushing Paving Company, Ltd., submitted a registration to TCEQ, paid a $900 registration fee, and received authorization to operate. AR 1:Tab 1. The whole process took less than two months.

The legislature, however, imposed explicit requirements which constrain TCEQ's authority to use standard permits as a one-size-fits-all method for authorizing the emission of pollutants. Specifically, Section 382.05195(a) of the Clean Air Act authorizes TCEQ, in the event the agency chooses[13] to take the standard permit route, to develop and issue a standard permit for "new or existing similar facilities" in the state only if TCEQ "finds" that:

> (1) the standard permit is enforceable;
>
> (2) the commission can adequately monitor compliance with the terms of the standard permit; and
>
> (3) ...[f]or permit applications filed after August 31, 2001, all facilities permitted under this section will use control technology at least as effective as that described in Section 382.0518(b).

TEX. HEALTH & SAFETY CODE § 382.05195(a).[14] The general rules TCEQ adopted under this standard permitting authority merely repeat verbatim the first two of these legislative required findings and summarizes the third requirement in even more cursory terms. *See* 30 TEX. ADMIN. CODE § 116.602(a), (c) [at Brief Appendix Tab E].

TCEQ added nothing to this list of required findings when it adopted the air quality standard permit for hot mix asphalt plants. The Commission's only findings under the Section 382.05195(a) mandate are:

> In accordance with 30 TAC § 116.602, the commission finds that the standard permit requires best available control technology, that the standard permit is enforceable, and that the commission can adequately monitor compliance with the terms of the standard permit.

AR 2:Tab 58 (Order Issuing An Air Quality Standard Permit, July 9, 2003, 1st para., 2nd sent.).

The agency's mere parroting of the legislative directive in the findings supporting issuance of the permit is legally insufficient under governing principles of administrative law. When an agency is statutorily directed to make findings in connection with agency action, the agency may not support the action with bare-bones recitation of the statutory language, but, instead, must support the action with supporting statements of underlying facts. That did not happen here. Therefore, the standard permit for hot mix asphalt plants is invalid and the authorization under it for Asphalt Plant No. 5 also is invalid.

As explained earlier in this brief,[15] Section 382.032 of the Clean Air Act provides the jurisdictional basis for this challenge to TCEQ's action.[16]

[13] The legislature did not mandate the use of standard permits for air-polluting facilities. It simply gave TCEQ the administrative option of going that route.

[14] TEX. HEALTH & SAFETY CODE § 382.05195 is at Brief Appendix Tab D.

[15] *See* Statement of Nature of the Case, *supra*, at p. 2.

[16] TEX. HEALTH & SAFETY CODE § 382.032 is at Brief Appendix Tab F.

The question in such an appeal is whether the agency action is "invalid, arbitrary, or unreasonable." TEX. HEALTH & SAFETY CODE § 382.032(e).

The Austin Court of Appeals considered this agency review provision and gave it a crucial gloss in *Smith v. Houston Chemical Svcs., Inc.*, 872 S.W.2d 252 (Tex.App.—Austin 1994, writ withdrawn) [at Brief Appendix Tab G]. This statutory gloss, necessitated by constitutional concerns, trumps the Clean Air Act provision that standard permits and authorizations under them are not subject to the APA. *See* TEX. HEALTH & SAFETY CODE § 382.05195(g).

To protect the statute from potential separation-of-powers constitutional defects,[17] the court of appeals determined that the same judicial rules apply to Section 382.032 appeals as apply to more typical administrative appeals under the APA. *Houston Chemical* at 257 n.2. The court in *Houston Chemical*, therefore, held that the "entire scope" of APA review applies in appeals such as this one. More recently, the Austin Court of Appeals has reiterated *Houston Chemical*'s holding on this point, observing the "unusual standard" in Section 382.032 and, in reliance on *Houston Chemical*, concluding that it imports the APA rules of review into these kinds of cases. *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 801 (Tex.App.—Austin 2000, pet. rev. dism'd).[18]

[17] *See* Point of Error No. 2, *infra* at pp. 18-21.

[18] Using the APA as a template for judicial review of agency actions not otherwise governed by the APA is not unique to the Austin Court of Appeals and its line of authority concerning Section 382.032. The Supreme Court of Texas has taken a similar approach. *See Board of Law Examiners v. Stevens*, 868 S.W.2d 773, 777 (Tex. 1994) (explaining that, although the APA does not govern Board procedures, "the APA sections addressing the scope of judicial review under the substantial evidence rule are instructive").



Guided by this reference to APA procedures, the legal shortcomings in TCEQ's parroted findings for the asphalt plant standard permit are glaringly obvious. The APA requires that agency findings, "if set forth in statutory language, must be accompanied by a concise and explicit statement of the *underlying facts* supporting the findings." TEX. GOV'T CODE § 2001.141(d) (emphasis added). Failure to set out the requisite underlying facts invalidates the agency action. *See, e.g., Centerpoint Energy Entex v. RRC*, 213 S.W.3d 364, 370-71 (Tex.App.—Austin 2006, pet. rev. dism'd) (finding agency violation of APA Section 2001.141(d)).

Judicial disapprobation of agency action supported by nothing more than agency recitation of findings which merely repeat statutory directives concerning such findings has been a mainstay of Texas administrative law for quite some time. In *Lewis v. Gonzales County Savings and Loan Ass'n*, 474 S.W.2d 453 (Tex. 1972), the Supreme Court invalidated agency action granting an application to operate a business because the only supporting agency findings were set forth only in statutory language. 474 S.W.2d at 457 [at Brief Appendix Tab H]. The Court held that such findings were insufficient standing alone, but had to be "accompanied by a concise and explicit statement of the underlying facts supporting the findings." *Id.* The policy underpinning this requirement was explained to be the need for the reviewing courts to

have some guide to measure how the agency decision-makers went about exercising the discretion and judgment placed in their laps, at least in the first instance, by the legislature. *Id.*

A little over a decade later, the Supreme Court re-emphasized the requirement for agencies to buttress findings made in purely statutory language with underlying findings to flesh out the factors going into the statutory findings. Citing *Lewis*, the Court in *Texas Health Facilities Comm'n v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446 (Tex. 1984), held that the predecessor version of APA Section 2001.141(d) "requires an accompanying statement of underlying facts . . . when the ultimate fact finding embodies a mandatory fact finding set forth in the relevant enabling act." 665 S.W.2d at 451 [at Brief Appendix Tab I]. The Court found this requirement of underlying facts to be "more than a technical prerequisite." *Id.* at 451-52. It explains:

> One purpose no doubt is to restrain any disposition on the part of the [agency] to grant a certificate without a full consideration of the evidence and a serious appraisal of the facts. Another is to inform protestants of the facts found so that they may intelligently prepare and present an appeal to the courts. Still another is to assist the courts in properly exercising their function of reviewing the order.

665 S.W.2d at 452, quoting *Miller v. RRC*, 363 S.W.2d 244, 245-46 (Tex. 1962); *see also United Resource Recovery, Inc. v. Texas Water Comm'n*, 815 S.W.2d 797, 800 (Tex.App.—Austin 1994, writ denied) (stating same underlying principles).



TCEQ's bare-bones repetition of the findings required by Section 382.05195(a) violates both the technical requirements applicable to the agency and the more basic principles guiding the technical requirement. It is particularly troubling to have such an agency shortcoming in an action as far-reaching as a standard permit. This is not a one-time action, directed at a single facility and site. Instead, a standard permit reaches far into the future and across the entire state, making the need for supportive, underlying findings particularly acute. Asphalt Plant No. 4, for example, involves the applicability of a permit based on modeling for rural areas and keyed to air movements in locales (Austin and Victoria) hundreds of miles to the south. Asphalt Plant No. 4 is in a rapidly transitioning area, with residential subdivisions and public schools nearby, a far cry from the "rural" area basis for the model for the permit. There is nothing in the findings of the Commissioners making the 2003 permit decision remotely suggesting that they gave attention to, or were even aware of, the ramifications of their actions for future plants in different locations.

The absence of *any* underlying agency findings, beyond rote repetition of the statutory directive about findings, renders the permitting decision creating the standard permit for hot mix asphalt plants invalid and, consequently, the issuance of the authorization for Plant No. 4 to operate under that permit also invalid. Therefore, the challenged agency action should be reversed.

**POINT OF ERROR NO. II:**

**IF THE TCEQ FINDINGS IN SUPPORT OF THE STANDARD PERMIT FOR HOT MIX ASPHALT PLANTS ARE LEGALLY SUFFICIENT, THEN SECTION 382.1595(a) OF THE CLEAN AIR ACT IS UNCONSITUTIONAL BECAUSE IT VIOLATES THE SEPARATION OF POWERS REQUIREMENT IN ARTICLE II, § 1, OF THE TEXAS CONSTITUTION. [See Reconsideration Motion, at 7 n.8.]**

It is elementary that the power to pass laws rests with the legislature and cannot be delegated to some other tribunal. *Brown v. Humble Oil & Refining Co.*, 83 S.W.2d 935, 941 (Tex. 1935). Still, the modern administrative state is well-established, and agencies are given enormous powers. There are checks, though.

Under Texas's separation of powers requirement, the legislature, in exercising its authority to delegate government police powers to administrative agencies in the executive branch of government, is required to establish "reasonable standards" to guide the agencies in their exercise of such powers. *See, e.g., RRC v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex. 1992); *see also Edgewood ISD v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995) (same). If Section 382.1595(a) is construed to require no more of TCEQ than a mere recitation of statutory language in making findings in support of a standard permit, then the legislative delegation is unconstitutional for failure to set any "reasonable standards" for TCEQ's actions.

If they require TCEQ to do no more than chant the legislative mantra, the preamble and Subsections (1) and (2) of Section 382.05195(a) provide no guidance or control over the actions of TCEQ. The legislature directs



that standard permits may only be issued for "similar facilities." TCEQ may no finding at all in the asphalt plant standard permit concerning this requirement. Its order issuing the permit says nothing about what makes every asphalt plant in the state "similar" to every other one beyond the fact that they are all asphalt plants. Yet, atmospheric conditions across the state vary tremendously, as do population densities and land use. Standing alone, the legislative directive about "similar facilities" provides no meaningful or reasonable guidance to TCEQ—and the TCEQ commissioners made no express determination that fleshes out the meaning and reach of the phrase in concrete ways.

The legislative directive that TCEQ may not issue a standard permit for "similar facilities" without a contemporaneous finding that the permit being issued is "enforceable" is meaningless without agency elucidation. The agency's general rules for standard permits provide no such elucidation. They merely repeat that the permit be "enforceable." 30 TEX. ADMIN. CODE § 116.602(a)(1). The Commissioners' order issuing the standard permit for asphalt plants adds nothing either, repeating only that it is "enforceable." AR 2:Tab 58.[19]

[19] The public meeting TCEQ deigned to give local concerned citizens on the eve of issuance of the Plant No. 4 authorization gives the only sense of what TCEQ staff thought "enforceable" means in this context. There, the staff told the audience that, because of inadequate staffing, the public itself had to be TCEQ's "eyes and ears." AR 2:C-1 (Tape of March 8, 2007, informational meeting). [*Before trial and argument in this matter, counsel for the plaintiffs will endeavor to confirm whether this TCEQ statement made its way onto the tape that is in the record, which captured only 48 minutes of audible statements at the meeting.*]

The statutory mandate that any permit be "enforceable" is empty without a requirement of underlying findings or rules explaining what it means in the context of these off-the-shelf authorizations to issue a given level of air pollutants in a community. As the Supreme Court explained in striking down an insufficient legislative delegation to a state agency, "the legislature may not delegate its powers without providing *some criteria and safeguards.*" *Texas Antiquities Comm. v. Dallas County Community College Dist.*, 554 S.W.2d 924, 927 (Tex. 1977) (emphasis added). Administrative safeguards in the form of agency rules can be a substitute method, beyond clearer legislative directives, for protecting the need for some measurable standards for agencies and the citizens affected by their actions. *Id.* at 928 (citing Davis, ADMINISTRATIVE LAW TREATISE § 2.16 (1st ed. 1970). But, the rules in this instance add nothing protective or explanatory.

The same problem presents itself in the second of the required findings under Section 382.1595(a), mandating a finding that TCEQ can "adequately monitor compliance" with the permit's terms. Again, the agency rules simply repeat the statutory language, as does the order issuing the standard permit. 30 TEX. ADMIN. CODE § 116.602 (a)(2); AR 2:Tab 58. Absent agency gap-filling through rules or findings of underlying fact, this also reduces itself to a standardless legislative requirement.



For these reasons, if the Court rejects Point of Error No. 1, it should determine that Section 382.05195(a) violates TEX. CONST. Art. I, § 2 and that, therefore, the standard permit for asphalt plants issued under the statute is invalid, as is the authorization for Asphalt Plant No. 4 to operate under the standard permit.

**POINT OF ERROR NO. III:**

**TCEQ'S OPTIONAL CHOICE TO DEVELOP AND IMPLEMENT A STANDARD PERMIT FOR HOT MIX ASPHALT PLANTS VIOLATES THE OPEN COURTS REQUIREMENT IN ARTICLE I, § 13, OF THE TEXAS CONSTITUTION.**

The legislature did not mandate that TCEQ develop and issue a standard permit for hot mix asphalt plants. The choice was TCEQ's, which could have opted to use an individualized permitting system. The manner in which TCEQ chose to exercise this option effectively froze out affected third parties such as the plaintiffs in this case from the permitting process, while allowing the industry side of the equation to give full vent to its concerns and interests during the process of issuing the permit and, should it have come to it, in seeking judicial review afterwards (in the highly unlikely event that the industry side would have been disapproving of the very permit it was given such a role in forming).

TCEQ made things even more one-sided in terms of the opportunity for judicial review when it promulgated its general rules for the standard permitting process. The agency tried to keep the APA out of the process insofar as citizen input and rights were concerned, but it expressly imported the APA into the process insofar as industry rights are

concerned. In Section 116.601(b) of TCEQ's rules for standard permits, the agency dictated that standard permits "remain in effect . . . *until* . . . *repealed under the APA*." 30 TEX. ADMIN. CODE § 116.601(b) (1st sent.) (emphasis added).

In other words, TCEQ has chosen to adopt two different standards for the opportunity of those affected by its standard permitting decision for hot mix asphalt plants to seek judicial review of TCEQ actions. The industry, which always will have a present and justiciable interest in the standard permits affecting it, will be able to challenge TCEQ actions in court. Citizens in the shoes of the plaintiffs in this case, however, will not. As previously discussed, the rules for finding a justiciable interest sufficient to seek judicial relief in Texas courts will preclude a contemporaneous citizen challenge to the standard permit decision of the agency. *See* p. 9, fn. 10, *supra* (citing *Texas Disposal Systems Landfill, Inc. v. TCEQ*).

This is, effectively, an indefinite postponement of the opportunity for citizen challenges in court to TCEQ's issuance of standard permits. Similar indefinite deferments of the opportunity that is otherwise available for judicial review have been found to violate the open courts provision of the Texas Constitution. *See Gebhardt v. Gallardo*, 891 S.W.2d 327, 332 (Tex.App.—San Antonio 1995) (orig. proceeding) (abating a case indefinitely has been found to violate open courts requirements).



Equal access to the judicial system has been a long-established component of the constitutional rule requiring open courts. In *Dillingham v. Putnam*, 109 Tex. 1, 14 S.W. 303 (1890) [at Brief Appendix Tab J], the Court struck down as violative of open courts a statute which established a differential bond requirement for access to the courts. The Court explained that Article I, § 13, of the Texas Constitution "applies to a defendant as well as a plaintiff" and pointedly concluded:

> A law which practically takes away from either party to litigation the right to a fair and impartial trial in the courts provided by the constitution for the determination of a given controversy, denies a remedy by due course of law.

*Dillingham*, 14 S.W. at 304, cited in *R Communications, Inc. v. Sharp*, 875 S.W.2d 314, 315 (Tex. 1994).

These open courts principles are violated by TCEQ's differential approach to its decision-making for standard permits.[20] State agencies are not authorized to establish and operate a system of administration which effectively forecloses the affected citizenry's opportunity to seek judicial review of agency actions while leaving affected industry's right to seek judicial review of those same actions unimpeded.

[20] To the extent the Court does not find in the open courts provision of the Texas Constitution an equal judicial access component, as urged in the text, the plaintiffs would argue that the same disparate treatment violates the equal protection constitutional requirement in TEX. CONST. Art. I, § 3, the due course of law constitutional requirement in TEX. CONST. Art. I, § 19, and the right to seek redress in the courts in TEX. CONST. Art. I, § 27.

## PRAYER FOR RELIEF

The Court should reverse TCEQ's authorization of March 12, 2007, for Asphalt Plant No. 4 to operate because: (a) TCEQ's standard permit for hot mix asphalt plants was illegally issued; or, alternatively, (b) TEX. HEALTH AND SAFETY CODE §§ 382.051(b)(3) and 382.05195(a) violate the separation of powers requirement of Article II, § 1, of the Texas Constitution. Consequently, the Court should remand this matter to TCEQ for further proceedings consistent with the Court's ruling.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF PLAINTIFFS CONCERNED CITIZENS OF GRAYSON COUNTY AND OTHERS** has been served by hand-delivery on the following counsel of record on September 25, 2008, and that the text of the brief was served electronically on the same counsel on the same day.

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|---|---|---|
| CONCERNED CITIZENS OF GRAYSON COUNTY, et al., Plaintiffs, | § | IN THE DISTRICT COURT OF |
| | § | TRAVIS COUNTY, TEXAS |
| v. | § | |
| TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Defendant. | § | 419th JUDICIAL DISTRICT |

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November 4, 2008

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**Texas Statutes and Rules**





**Texas Administrative Code Provisions**

The defendant, the Texas Commission on Environmental Quality (TCEQ), files this brief on the merits, responding to the Brief of Plaintiffs Concerned Citizens of Grayson County and Others that was filed September 25, 2008.

## STATEMENT OF THE NATURE OF THE CASE

This is a suit for judicial review of the March 2007 authorization for Rushing Paving Company, Ltd. (Rushing) to use a standard permit, one issued by the TCEQ in 2003 under a statute authorizing standard permit issuance. The standard permit is for hot mix asphalt plants (HMAPs). Plaintiffs attempt to challenge the 2007 authorization by attacking the 2003 standard permit.

## STATEMENT OF FACTS[1]

In 1999, the Texas Legislature authorized the TCEQ to identify categories of air-contaminant emitting facilities that are similar to each other, and to issue a standard permit for an entire identified category of facilities.[2] Once a standard permit is issued, a person intending to build and operate a qualifying facility applies under TCEQ rules for "the issuance of . . . an authorization to *use* [the] standard permit."[3]

1. The plaintiffs' statement of facts is argumentative.

2. *See* Act of May 30, 1999, 76th Leg., R.S., ch. 406, § 5, 1999 Tex. Gen. Laws 2626, 2630-31, codified in TEX. HEALTH & SAFETY CODE § 382.05195. Subsection (a) of § 382.05195 says, "The commission may issue a standard permit for . . . similar facilities . . .". Subsection (g) speaks of the "adoption" of a standard permit.

A Compendium of Individually Cited Statutory and Rules Sections is at the end of this brief.

All citing and text references to "Code" in this brief will be to chapter 382 of the Texas Health & Safety Code (the Texas Clean Air Act) unless otherwise specified.

3. *See* CODE § 382.05195(e) (emphasis added).

In 2003, pursuant to the legislation, the TCEQ developed and issued a standard permit for typical HMAPs.[4] While this regulatory exercise was rule-*like*, it was not a rulemaking, because Code § 382.05195(g) explicitly removes the issuance (or amendment) of standard permits from the coverage of the Texas Administrative Procedure Act (APA)[5] and therefore from the broad coverage of the APA provision defining "rule."[6] (The standard permit issuance process also was not an APA contested case process.) Nevertheless, subsections (b), (c), and (d) of Code § 382.05195 require that the agency allow public participation in issuance decisions. Notice of a proposed standard permit must be published in the Texas Register and in newspapers, and written comments by the public must be invited; a public meeting must be held to receive oral comment; and comments must be responded to. These steps were followed in connection with the agency's 2003 issuance action.[7]

4. *See* Order Issuing An Air Quality Standard Permit dated July 9, 2003 (hereafter referred to as July 9, 2003, Order). This is the material preceding Tab 58 in Volume 2 of the stipulated administrative record. A copy of this material (except for two transmittal letter pages) is in the Appendix to this brief, behind Tab 1.

The July 9, 2003, Order consists of a first page, showing the signature of a TCEQ official; two unnumbered pages (a title page and a table of contents); pages 1-9 of 24, giving a narrative explanation (introductory language); pages 9-11 of 24, analysis of comments; and pages 12-24 of 24, the actual permit text.

Hereafter citations to the administrative record will be in the form "xxx A.R. Item *yyy*," in which "xxx will be the volume number and "*yyy*" will be the number of the tabbed divider that follows the referred-to material.

5. TEX. GOV'T CODE §§ 2001.001-.902. Hereafter, citations to Chapter 2001 provisions will be in the form "APA § 2001.*xxx*."

6. *Id.* § 2001.003(6).

7. *See, e.g.*, 2 A.R. Items 38 (sign in sheets from stakeholders meeting), 40 (comment letters), 43 (sign in sheets from stakeholders meeting), 44 (comment letters), 45 (TCEQ letter to state senator), 46 (comment letter by Texas Department of Transportation); 50 (newspaper and Texas Register notices), 51

The standard permit approach to regulation[8] simplifies and accelerates the TCEQ process under which fuel-burning productive facilities may become entitled to emit air contaminants under tightly controlled conditions. An individual air emission permit application, tailored to a particular site, would undergo case-by-case technical review and therefore would take more time to be considered and acted upon than an application to use a standard permit. The legislative policy was to allow qualifying applicants — ones who would agree to abide by fixed conditions — more promptly to get productive but relatively low-emission facilities on-line when and where they are needed.

The HMAP standard permit applies to HMAPs with asphalt production rates of not more than 400 tons per hour.[9] The one-size-fits-all document was crafted in 2003 to ensure that the air emissions control criteria set forth in it include a mandate to install best available air pollution control technology, and to ensure that all HMAPs operating under it protect the public health and welfare.[10]

In reviewing a particular application for an authorization to use the HMAP standard permit, the TCEQ inquires whether the facility will meet the standard permit's well thought-out conditions. The conditions include plant size limitations, limitations on how much raw

(comment letters), 52 (sign in sheets for public meeting), 53 (transcript of public meeting), 58 (order adopting standard permit, including response to comments), C-2 (audio tape of Commissioners' agenda).

8. The process of applying to use a standard permit is sometimes called registration. *See, e.g.*, 30 TEX. ADMIN. CODE § 116.611(a).

9. *See* July 9, 2003, Order, in TCEQ's Appendix, Tab 1, page 1 of 24.

10. *See id.*, page 1 of 24.



material may be put through the manufacturing process in a given amount of time, the requirement to install best available control technology, and prohibitions on certain plant components being too close to neighboring property. Only facilities that meet the operations, processes, and emissions conditions in the standard permit are authorized to operate under it. No site-specific variances from the terms of the standard permit are allowed.

Rushing applied to the TCEQ in January 2007 for an authorization to use the HMAP standard permit to build and operate a permanent plant in Grayson County.[11] Although not required to do so, the TCEQ held an informational public meeting at Grayson County College on March 8, 2007.

Because Rushing's application showed its planned facility met the prescribed conditions for using the HMAP standard permit, the TCEQ on March 12, 2007, authorized the company to construct and operate pursuant to the permit.[12] Plaintiffs, who had lined up against the use-authorization, filed this suit within 30 days after the March order, invoking, for jurisdiction, Water Code and Texas Clean Air Act judicial review provisions.

## SUMMARY OF THE ARGUMENT

Plaintiffs' suit presents itself as a timely 2007 challenge to a 2007 TCEQ order. But in fact, all of the briefed arguments attack a *2003* Order, while invoking judicial-review-authorizing statutes containing 30-day statutes of limitations. The statutes have long since

11. 1 A.R. Item 1 (application).

12. 1 A.R. Item 12 (notification letters).

run out, depriving the Court of jurisdiction.

Even if there were court jurisdiction, nothing obliged the TCEQ to state underlying findings, given the inapplicability of the APA to the standard permit issuance process. Plaintiffs' cases that supposedly require findings arose in an APA context and therefore are infirm authority (and in any event, the Order was accompanied by a lengthy narrative and response to comments that served the same function as underlying findings).

Compared with other Texas statutes that have been upheld despite using general language in granting authority to state agencies, the Code § 382.05195 delegation easily passes muster under the over-delegation doctrine. When a delegation is broad and general, which in the modern administrative state it often is, cases give weight to whether agency action has narrowed the grant — something that certainly occurred in the present case when the TCEQ issued the rule-like standard permit in an Order that incorporated the permit itself and accompanying narrative bearing on similarity, enforceability, compliance monitoring, and best available control technology.

Although people have no right to a constitution-driven degree of procedural opportunities in the legislative activities of Texas state agencies, the TCEQ in fact obeyed Code § 382.05195 in giving ample and non-discriminatory procedural opportunities. As to judicial review opportunities flowing from general statutes, the law provides them without cognizable discrimination. "Industry" *and* "citizens" faced standing hurdles. Assuming arguendo (although plaintiffs have not proven) that some company somewhere in Texas



could have met the standing prerequisites, so could some neighbor or group of neighbors. The fact that people with environmental concerns, and environmental groups, at times may be outdone in point of focusedness and organization by companies in particular industries does not rise to the level of a constitutional concern.

## ARGUMENT

### I. The TCEQ was not required to state underlying findings when it issued the HMAP standard permit.

(Responding to Plaintiffs' Point of Error No. I)

Plaintiffs' argument that an order issuing a standard permit must contain underlying findings[13] rests on a poor foundation: that in issuing the 2003 HMAP Order, the agency was mandatorily "guided by"[14] the requirements of the APA. This skates past the fact that Code § 382.05195(g) says the APA does not apply to the issuance of standard permits.[15] Since the APA is a procedural statute, the Legislature's explicit instruction that it not apply means the lawmakers did not want the TCEQ to be bound to APA procedural requirements, including the one in § 2001.141(d) that "[f]indings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the

13. This argument and the rest of plaintiffs' arguments comprise a 2007 procedural challenge to a 2003 TCEQ Order. The challenge is under judicial-review-authorizing statutes — *see* Brief of Plaintiffs Concerned Citizens of Grayson County and Others at 2, lines 12-14 (hereafter cited as "Plaintiffs' Brief") — that contain 30 day statutes of limitations. Because the statutes have run, the Court lacks jurisdiction.

14. Plaintiffs' Brief at 15, line 1.

15. Plaintiffs' APA-incorporation argument is countered by their own admission that the "case does not come into Court from a contested case proceeding under the Texas Administrative Procedure Act . . . ." Plaintiffs' Brief at 2, lines 10-11.

findings."

Section 2001.141(d) is in Subchapter F of the APA, entitled "Contested Cases: Final Decisions and Orders; Motions for Rehearing." Even if the Legislature had not explicitly excluded the issuance of standard permits from APA coverage, this subchapter would not apply, since issuance is not a contested case matter.

Plaintiffs string together inapposite case law to manufacture an argument for applicability of a finding-of-fact requirement. They cite to a footnote in a 1994 Austin Court of Appeals opinion, *Smith v. Houston Chemical Services, Inc.*[16] That case concerned the appeal of a TCEQ order issuing a permit after a *contested case* proceeding at the agency. Addressing possible discrepancies in the appeal provision of the applicable organic statute[17] and APA appeal provisions,[18] the Court's footnote said that § 361.321(e) "was intended to incorporate the entire scope of review allowed by APA §§ 2001.171-.174."

Plaintiffs indicate that the *Houston Chemical Services* case was an "appeal[] such as this one,"[19] ignoring the fact that the APA directly applied to that case. They stretch the *Houston Chemical Services* holding — which declares nothing more than that APA appeal provisions apply to appeals of agency decisions made *pursuant* to the APA — beyond any reasonable interpretation and argue that it must mean that all provisions of the APA apply

16. 872 S.W.2d 252, 257 n. 2 (Tex. App.–Austin 1994, pet. denied).

17. TEX. HEALTH & SAFETY CODE § 361.321.

18. APA §§ 2001.171-.174.

19. Plaintiffs' Brief, p. 14, line 15.



to any agency decision, even when the Legislature explicitly has negated applicability.

*United Copper Industries, Inc. v. Grissom*[20] concerned the TCEQ's denial of a request for a contested case hearing on an air permit application. The Court of Appeals holding emphasized by plaintiffs discussed the proper standard of review. Citing to *Houston Chemical Services, Inc.*, the Court stated that "[b]ecause the statutory grounds for reversal in the APA are legal questions subject to *de novo* review by a court of appeals, we will treat as a question of law the issue here of whether the Commission's order was invalid, arbitrary, or unreasonable."[21] This holding regarding the standard for review does not say or suggest that APA requirements for contested cases should apply to an explicitly non-APA agency decision.

*CenterPoint Energy Entex v. Railroad Commission*[22] (an appeal of a Railroad Commission rate order), *Texas Health Facilities Commission v. Charter Medical-Dallas, Inc.*[23] (an appeal of decision regarding certificates of need for several hospitals), and *United Resource Recovery, Inc. v. Texas Water Commission*[24] (an appeal of a decision to grant a hazardous waste disposal permit) all are appeals of agency decisions made after *contested case* proceedings to which the APA, including § 2001.141(d), applied. The courts' holdings

20. 17 S.W.3d 797 (Tex. App.–Austin 2000, pet. dism'd).

21. *Id.* at 801.

22. 213 S.W.3d 364 (Tex. App.–Austin 2006, no pet.).

23. 665 S.W.2d 446 (Tex. 1984).

24. 815 S.W.2d 797 (Tex. App.–Austin 1991, writ denied).

regarding the need of the agency to make underlying findings of fact were based on § 2001.141(d), a provision that applies only to contested case proceedings and did not apply here.

*Lewis v. Gonzales County Savings and Loan Association*[25] was the appeal of a decision, after a contested case proceeding, by the Savings and Loan Commissioner on an application to establish a savings and loan branch office. The Court's discussion of the agency's failure to include underlying findings of fact is inapplicable here. The high court's decision rested on a specific provision in the organic statute applicable to adjudicatory proceedings before the Commissioner.[26] The provision said that "[f]indings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."[27]

Although, as shown above, the TCEQ was not obliged to state underlying facts, the next section of this brief shows that in fact, the 2003 agency Order incorporated a lengthy narrative and a comments-and-responses section that more than amply served the function of formal findings.[28]

25. 474 S.W.2d 453 (Tex. 1971). This case predates the APA.

26. TEX. REV. CIV. STAT. ANN. art. 852a, § 11.11(4) (now codified in § 61.006 of the Finance Code).

27. *Lewis*, 474 S.W.2d at 457.

28. *Cf. Goeke v. Houston Lighting & Power Co.*, 797 S.W.2d 12 (Tex. 1990) (saying there is no precise form for underlying facts, and that the factual parts of agency orders are not subject to hypertechnical review); *Buddy Gregg Motor Homes, Inc. v. Motor Vehicle Bd.*, 179 S.W.3d 589, 605 (Tex. App.–Austin 2005, pet. denied) (there is no specified manner in which an agency must frame findings and conclusions; an order's narrative portion is an appropriate place).



## II. The challenged statute is a constitutional delegation and does not violate separation of powers principles.[29]

(Responding to Plaintiffs' Point of Error No. II)

"[E]ven in a simple society, a legislative body would be hard put to contend with every detail involved in carrying out its laws; in a complex society it is absolutely impossible to do so."[30] Very broad legislative grants of regulatory power to executive agencies are regularly upheld against allegations of insufficiently guided delegation.[31] The Supreme Court in the *Edgewood Independent School District* case[32] cited by plaintiffs wrote that delegations (including the one challenged in *Edgewood*) are lawful as long as they include "reasonable standards" to guide the agency.[33] The Legislature is not required to "include every detail or anticipate every circumstance . . . ."[34] Broad standards may be sufficient,[35] particularly when

29. Legislative enactments are not invalidated unless it is "absolutely necessary to so hold." *Texas State Bd. of Barber Examiners v. Beaumont Barber College, Inc.*, 454 S.W.2d 729, 732 (Tex. 1970).

30. *Texas Boll Weevil Eradication Found'n v. Lewellen*, 952 S.W.2d 454, 466 (Tex. 1997).

31. Article II, § 1, of the Texas Constitution, invoked by plaintiffs in their over-delegation point, provides for three departments of state government and says no department shall exercise the powers "attached to either of the others. . . ."

32. *Edgewood I.S.D. v. Meno*, 917 S.W.2d 717 (Tex. 1995).

33. *Id.* at 740; *see also Jordan v. State Bd. of Ins.*, 160 Tex. 506, 334 S.W. 2d 278, 280 (1960) (statute giving insurance commissioner power to determine whether insurance company officer is "not worthy of public confidence" set sufficiently clear standard to withstand unlawful delegation challenge).

34. *Texas Bldg. Owners and Managers Ass'n, Inc. v. Public Util. Comm'n*, 110 S.W. 3d 524, 535-36 (Tex .App.–Austin 2003, pet. denied) (upholding legislative delegation to PUC to determine "reasonable" and "nondiscriminatory" compensation payable by telecommunications providers to building owners; the terms were deemed sufficiently descriptive "against the backdrop of the history of that complex industry and the evolving public policy goals of the State").

35. In another case relied on by plaintiffs, the high court wrote that, "The Texas courts have upheld standards which are quite broad." *Railroad Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex. 1992) (upholding statute).

the executive agency has experience with the procedures and realities of the regulated industry.[36] "Requiring the legislature to include every detail and anticipate unforeseen circumstances in the statutes . . . would defeat the purpose of delegating legislative authority."[37]

The only case cited by plaintiffs in which a delegation was said to be unlawful is *Texas Antiquities Committee v. Dallas County Community College District*.[38] The Committee, invoking statutory power over "buildings . . . and locations of historical . . . interest," attempted to block demolition of three buildings. A Supreme Court plurality wrote,

> The word "buildings" comprehends all structures; "historical" includes all of the past; "interest" ranges broadly from public to private concerns and embraces fads and ephemeral fascinations. All unrestorable structures ordinarily hold some nostalgic tug upon someone and may all qualify as "buildings . . . of historical . . . interest."[39]

Neither the district court's judgment nor the Texas Supreme Court plurality's opinion was based on the constitutional provision the present plaintiffs invoke: Texas' separation of powers constitutional provision.[40] And as the four justices wrote, "There has been called to

36. *See id.* The TCEQ has vast experience and expertise in the procedures and realities of the industry it regulates, and knowledge about enforceable permits and other authorizations. *Cf. Phillips Petroleum Co. v. Tex. Comm'n on Envt'l Quality*, 121 S.W.3d 502, 507 (Tex. App.–Austin 2008, no pet.) (characterizing TCEQ's predecessor agency as one created to centralize complex environmental regulatory expertise).

37. *Lone Star Gas Co.*, 844 S.W.2d at 689.

38. 554 S.W.2d 924 (Tex. 1977).

39. *Id.* at 927.

40. The district court, and, on direct appeal, the Supreme Court plurality on the over-delegation point, relied on the due course and due process provisions of the Texas and United States Constitutions.



our attention no case in Texas or elsewhere in which the powers of a state board are more vaguely expressed or less predictable than those permitted by the phrase in question."[41]

The plurality in *Texas Antiquities Committee* observed that the responsible agency itself did "not contend that [the statutory section at issue] gives any predictable standard or safeguard."[42] More importantly, it observed that the responsible agency had not bothered to adopt any regulations fleshing out key terms in the statute: "The Antiquities Committee, although it has the power . . ., has adopted no rules or standards which state criteria for 'buildings . . . and locations of historical . . . interest.'"[43] This signaled that the college district's challenge might well have been rejected if agency rules had narrowed the broad and vague statutory terms. In contrast with the *Texas Antiquities Committee* situation, the TCEQ in the present case adopted detailed, objective criteria by which similarity — a key concept in the statute — among HMAPs may be evaluated. An applicant is ineligible for an authorization to use the standard permit unless it *makes itself* similar to the facilities described in the permit.[44] For example, a company cannot produce more than 400 tons per year of asphalt mix, the plant must be set back at least 100 feet from the property line, the

*Texas Antiquities Committee*, 554 S.W.2d at 927-28, 931.

41. *Id.* at 927.

42. *Id.*

43. *See id.* at 927.

44. In the Order's narrative, the TCEQ noted that the HMAP standard permit was "not intended to provide an authorization mechanism for all possible unit configurations or for unusual operating scenarios. Those facilities which cannot meet the standard permit conditions may apply for an [individual] air quality permit . . . ." July 9, 2003, Order, in TCEQ's Appendix, Tab 1, narrative overview at 1-2 of 24.

drum discharge point temperature cannot exceed 325°F, and in many other ways the emitter must force itself into a tightly constricted mold. The Legislature rightly left it to the expert agency prescriptively to fill in the details of similarity. Given how many kinds of contaminant-emitting facilities exist in our industrial society, it would have taken a very long statute indeed to enumerate even a fair sampling of the possible points of similarity among facilities in the various industrial categories. This was a proper job for the TCEQ, it did the job well, and its success easily preserved constitutionality.

The plaintiffs accuse the agency of having shirked a supposed duty to make underlying findings about enforceability, compliance monitoring, and control technology. The charge rests upon their apparent belief that the TCEQ's Order issuing the standard permit was just one page long and did not elaborate beyond stating that the permit must use best available control technology, be enforceable, and monitorable by the TCEQ.[45] This belief, which seems central to their argument, is incorrect. The Order actually consists of a first page, showing the signature of a TCEQ official; two un-numbered pages (a title page and a table of contents); pages 1-9 of 24, giving a narrative explanation (introductory language); pages 9-11 of 24, analysis of comments; and pages 12-24 of 24, the actual permit text.[46] All these important pages were incorporated by reference in the Order, yet plaintiffs omitted them from their Appendix C and omitted discussion of them. The pages amply filled

45. *See* Plaintiffs' Brief at 8, and their Appendix C.

46. *See* July 9, 2003, Order, in TCEQ's Appendix, Tab 1.



any gap of the sort disapproved by the four *Texas Antiquities Committee* justices. Plaintiffs themselves seem to acknowledge that agency action may fill gaps, writing that "[a]bsent agency gap-filling through rules or findings of underlying fact," the statute supposedly was standardless.[47]

TCEQ used its experience and knowledge to write an enforceable standard permit, one drafted with specificity that will allow the TCEQ to detect (and, if necessary, prove up in a contested case hearing or a court enforcement case) if a permittee operates outside the standard permit's limitations. To ensure its enforceability, the standard permit includes record keeping and reporting requirements. There are two pages of sampling requirements in paragraph (2) of the standard permit[48] and nearly a page of record keeping requirements in paragraph (1)(W).[49] The TCEQ explained on page 10 of 24, in the Order's response to comments section, that it had added to the proposed standard permit a record keeping requirement for start and stop times of the truck load-out, mix production and silo filling "to insure compliance" with those terms.

An example of the permit's specificity is in paragraph 1, subparagraph N, which describes in seven detailed points the fuel (and its characteristics) that may be used.[50] This sort of specificity is found throughout the permit.

47. Plaintiffs's Brief at 20, lines 20-22.

48. *See* July 9, 2003, Order, in TCEQ Appendix, Tab 1, pages 18-20 of 24.

49. *Id.*, pages 17-18 of 24.

50. *Id.*, pages 14-15 of 24.

The TCEQ addressed best available control technology (BACT) in its Order and the standard permit. For example, on pages 3 and 4 of 24, in the Order's narrative section, the TCEQ wrote several paragraphs about emissions limits and BACT for emissions from drum dryers, saying fabric filters are BACT. In section 1.(I)[51] of the standard permit, the TCEQ incorporated that BACT, saying that a drum dryer must be controlled by a fabric filter.

A decade ago, the Texas Supreme upheld even a private delegation, writing, "The nondelegation doctrine should be used sparingly, when there is, in Justice Cardozo's memorable phrase, 'delegation running riot.'"[52] Here the delegation was nowhere close to running riot. It was circumscribed in the statute itself, and the rule-like standard permit, including the order adopting it, added considerable detail.

## III. Open courts principles were not violated.
(Responding to Plaintiffs' Point of Error No. III)

The issuance of a standard permit is a TCEQ exercise of legislative power, yet it is not APA rulemaking.[53] In APA rulemaking, of course, agencies are statutorily obliged to

51. *Id.*, page 3 of 24.

52. *Texas Boll Weevil Eradication Found'n*, 952 S.W.2d at 475. In *Boll Weevil*, the high court upheld a delegation to the foundation, which the court said was a private entity for purposes of the delegation. The heightened scrutiny applicable to private delegations does not apply to the TCEQ, which is a public entity. *State v. Rhine*, 255 S.W.3d 745 (Tex. App.–Fort Worth 2008, pet. granted) (noting that delegations to private entities raise more troubling questions; holding TCEQ is a public entity; upholding legislative delegation to it).

53. This is because Code § 382.05195(g) says that "[t]he adoption or amendment of a standard permit or the issuance, renewal, or revocation of an authorization to use a standard permit is not subject to Chapter 2001, Government Code."



provide a certain suite of procedural opportunities to the public.[54] The Legislature chose not to place all of those particular obligations on the TCEQ with respect to its standard-permit-issuance function. This violated no one's rights because there exists no right to a constitution-driven degree of process with respect to governmental exercise (including Texas state agency exercise) of legislative power.[55] This leaves the Legislature as the highest — indeed, the only — arbiter regarding what opportunities must be provided.

Although the APA's rulemaking-procedure sections are inapplicable, the Legislature in Code § 382.05195 itself required the TCEQ to publish notice of a proposed standard permit in the Texas Register and in newspapers;[56] to invite written comments by the public;[57] to hold a public meeting to receive oral comments;[58] and to respond in writing to comments.[59]

Against the backdrop of the information in the two preceding paragraphs, the invalidity of the complaint in the first paragraph of the plaintiffs' argument under their Point

54. *See, e.g.*, APA §§ 2001.023 (notice), -.024 (content of notice), -.029 (comment opportunity), -.030 (statement of reasons upon request), -.033 (statement of reasoned justification).

55. *Lawton v. City of Austin*, 404 S.W.2d 648, 651 (Tex. Civ. App.– Austin 1966, writ ref'd n.r.e.) (due process does not require notice of proceedings for enactment of legislative zoning ordinance); *Kinkaid School, Inc. v. McCarthy*, 833 S.W.2d 226, 230 (Tex. App.–Houston [1st Dist.] 1992, no writ); *Bank One Texas, N.A. v. Ameritrust Texas, N.A.*, 858 S.W.2d 516, 521 (Tex. App.–Dallas 1993, writ denied); *see also, e.g., Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (decision by state tax officers to increase valuation of taxable property for city is not required by Constitution to be accompanied by procedural protections); *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 241 (1973).

56. CODE § 382.05195(b).

57. *Id.*

58. *Id.*, subsection (c).

59. *Id.*, subsection (d).

of Error No. III — including about how the TCEQ supposedly chose to disadvantage them — is plain. First, the only relevant choice the agency made was to develop and issue a standard permit authorizing construction and operation of qualifying similar low-emitting HMAPs. Contrary to plaintiffs' suggestion, all else followed from what the statute commanded, not what the TCEQ supposedly nefariously chose to do. Second, the statutory set-up and the TCEQ's effectuation of it does not freeze anyone out. To argue someone is frozen out of a process is to assume the person has a right to be *in* a process, but no one has a constitution-driven right to participate in the TCEQ's standard permit development and issuance process or any other legislative process. Third, the Legislature did require that many procedural opportunities be given and they were faithfully given. The TCEQ showed genuine attention to comments,[60] meaning that these opportunities were valuable. Moreover, they were provided without discrimination. Anyone and everyone — Rushing, the Sierra Club, any asphalt manufacturers' association, the American Lung Association, these plaintiffs, federal, state, and local elected officials, units of government at every level, and Texas entities and individuals of every persuasion — received exactly the same Texas Register and newspaper notice. They all received exactly the same time in which to submit written comments. They all received exactly the same opportunity to attend a public meeting and give oral

60. For example, the Harris County Public Health and Human Services Pollution Control Division commented that local pollution control agencies should receive notification of an HMAP relocating to a public works site. The TCEQ agreed and added a clause accordingly. *See* July 9, 2003, Order, in TCEQ's Appendix, Tab 1, page 9 of 24 (under ANALYSIS OF COMMENTS), and 21 of 24 (Permit § (3)(B)). For other examples, the agency recited comments from industry — suggesting that standard permit language should be changeable by mere memorandum, page 10 of 24, and asking for a transition period for the use of fabric filter technology, *id.* — and rejected them.



comments.[61]

Finally, contrary to the main thesis of plaintiffs' Point of Error No. III, the relevant law does not cognizably discriminate in how it provides judicial review opportunities. Although the 2003 Order issuing the HMAP standard permit was a legislative action, time-honored broad statutes[62] authorized review of it in court at the behest of affected persons. An affected person, however, would have had to file not later than 30 days after the Order's effective date, or be barred. The deadline passed long ago, of course (and no one sued). The limitations in the judicial review statutes (only affected persons may sue, and only for 30 days) applied to every possible litigant, without discrimination. Not a single word in either of the statutes affords a textual basis for plaintiffs' claim that the review provisions gave "the industry side of the equation" access to the courts while depriving "citizens" of access.

The showing of the present plaintiffs that in 2003 *they* would not have been affected[63]

61. Perhaps implicitly acknowledging these truths, the plaintiffs strain to manufacture rights by sharply dividing the public into supposedly oppositional groups, industry and citizens. In their zeal to intensify their dichotomization, they go entirely off the track in paragraph two of their argument under Point of Error No. III (beginning on page 21), where they contend that in contrast to persons who might oppose issuance of a standard permit, companies receive the full APA panoply of procedural opportunities in connection with repeal of such a permit. But 30 Texas Administrative Code § 116.601(a) distinguishes between standard permits that were adopted under the APA and ones (like the HMAP standard permit) issued under § 116.603 (and Code § 382.05195). The ones adopted under the APA are listed in § 116.601(a)(1): standard permits for Pollution Control Projects, Installation and/or Modification of Oil and Gas Facilities, and Municipal Solid Waste Landfills. Subsection (b) of § 116.601 refers exclusively to this narrow class of APA-adopted standard permits, and, symmetrically, commits the agency to using APA procedures in connection with any repeal of them. This commitment does not apply to the § 116.601(a)(2) class of permits "issued . . . in accordance with § 116.603."

62. CODE § 382.032; TEX. WATER CODE § 5.351.

63. Yet when one reads about their concerns, recited in Stipulation 4, about health threats they believe are posed by asphalt plants, and takes into account that such a plant — another Rushing plant, in Sherman, which had an individualized permit, not a standard permit — existed in 2003 and was operating

and therefore would have lacked standing to sue within the 30 day window does not prove pro-industry bias and thus (as plaintiffs spin the law[64]) an open courts constitutional violation. This is because there is no showing that members of industry (adopting plaintiffs' dichotomous characterization for the sake of discussion) would have had standing either. The standing of any particular company would have been dependent on plans to build an HMAP and use the standard permit.[65]

Plaintiffs might respond that surely somewhere in Texas a company had a plan to build a plant and use the permit, and that, therefore, surely, the company or its association could have sued within the crucial 30 days. But *the same would be true of "citizens"* and of citizens' environmental representatives like the Sierra Club. Somewhere in Texas (indulging

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only three and a half miles from the plant at issue in this case, *see* Stipulation 3, one could fairly fault them for not at least having gotten involved in the permit development process at the agency level. There should be no reward for environmental complacency.

64. Texas' open courts constitutional provision, article I, § 13,

> includes three separate constitutional rights: (1) courts must actually be available and operational; (2) the Legislature cannot impede access to the courts through unreasonable financial barriers; and (3) meaningful remedies must be afforded, so that the legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress.

*Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996) (internal quotations and citations omitted). Plaintiffs on pages 22 and 23 of their Brief cite an indefinite abatement case and two unreasonable financial barrier cases. To make them seem to cover this case, plaintiffs present them as having been *focused* on differential court access, whereas in fact their language about differences in the treatment of parties — *see, e.g., Dillingham v. Putnam*, 109 Tex. 1, 14 S.W. 303, 304 (1890) (open courts provision "applies to a defendant as well as a plaintiff") — was incidental to their main, fairly standard open-courts holdings.

65. The Texas Supreme Court in *Texas Association of Business v. Texas Air Control Board*, 852 S.W.2d 440, 447 (Tex. 1993), noted that "individual TAB members have been assessed administrative penalties" as part of an analysis of whether they or, derivatively, their association met the test for affectedness and could stay in court on a suit to challenge a statute authorizing non-judicial penalties.



the plaintiffs' own hypothesis) some neighborhood in 2003 faced the prospect of a standard-permit-qualifying hot mix asphalt plant's being built nearby.[66] This parallelism unmasks the plaintiffs' real complaint: that companies in a given industry tend to be more regulatorily attentive than people with environmental concerns (and than environmental institutions and other entities, like local governments, that often advocate neighborhood concerns). This may be a fact of life but it does not support a claim of constitutional violation.

## CONCLUSION AND PRAYER

For the reasons set out above, the TCEQ asks the Court to dismiss plaintiffs' suit for want of jurisdiction, because the applicable 30 day statutes of limitations ran out — with respect to the 2003 Order actually attacked — long before filing. The TCEQ asks in the alternative for affirmance of its actions; for a judgment that the plaintiffs take nothing; and for taxation of all costs against the plaintiffs.

Respectfully submitted,

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66. The *Texas Association of Business* majority wrote that a substantial risk of penalty would have been sufficient to sustain the standing of companies to challenge an administrative penalty statute. This made the courthouse door wide enough, perhaps, to have admitted even the present plaintiffs in 2003.

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**CERTIFICATE OF SERVICE**

I transmitted a true and correct copy of the foregoing Defendant Texas Commission on Environmental Quality's Brief on the Merits to the person listed below, by the method shown, on November 4, 2008.

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No. D-1-GN-07-001064

**IN THE DISTRICT COURT FOR TRAVIS COUNTY**
**419TH JUDICIAL DISTRICT**

CONCERNED CITIZENS OF GRAYSON COUNTY, *et al.*,
*Plaintiffs*,

vs.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
*Defendant.*

# REPLY BRIEF OF PLAINTIFFS CONCERNED CITIZENS OF GRAYSON COUNTY AND OTHERS

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## REPLY BRIEF

The plaintiffs—sometimes termed here the Grayson neighbors for economy of reference[1]—reply to TCEQ's merits brief.

### I. INTRODUCTION

"The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, beg in the streets or steal bread." A. France, *The Red Lily*, ch. 7 (1894). Such is TCEQ's core defense of the "standard permit" process for Texas hot mix asphalt plants and its obscure, but carefully crafted, exclusion of affected neighbors from any substantively meaningful participation in either the so-called "legislative" process at the agency or the ensuing judicial process for situating 24-hour-a-day-, 365-days-a-year pollution-emitting asphalt plants in their midst.[2]

Contrary to TCEQ's arguments, neither Texas administrative law nor the Texas Constitution compels judicial acceptance of such a one-sided system of environmental regulation. TCEQ is wrong to tell the Court that the Legislature is "the only . . . arbiter regarding what opportunities must be provided[]" those affected by government action, insofar as legal redress is concerned. TCEQ Br. 16. It is well-established the courts have an important role, too.

### II. THE COURT HAS JURISDICTION TO HEAR THE GRAYSON NEIGHBORS' CHALLENGE.

Without citation to case authority and with no quotes from any statute, TCEQ argues that the Grayson neighbors had only thirty days after TCEQ's July 2003 order adopting a standard permit for hot mix asphalt plants to challenge the permit's legal validity. TCEQ Br. 18. According to TCEQ, the neighbors waited too long to sue by waiting until TCEQ actions in implementing the 2003 permit first actually affected them in a judicially cognizable way. TCEQ Br. 4-5 (stating that 30-day limitations period had "long since run out").

Fundamentally, TCEQ rests this jurisdictional argument on a simple, but misleading, twist in the characterization of the Grayson neighbors'

[1] These neighbors of Asphalt Plant No. 4 include families living nearby or with children attending nearby public schools, adjoining landowners such as retired federal Judge Brown, the City of Pottsboro, and individual members of the Concerned Citizens of Grayson County.

[2] TCEQ itself provides a curious litany of the ironic equalities in the standard permit process.

- *The exclusionary and insular nature of the standard permit process—which was a near-exclusive industry affair, CCGC Br. 7—was not the result of legislative choice, not nefarious TCEQ scheming. TCEQ Br. 17.* Yes, the Grayson neighbors largely agree. This situation results more from legislative design than anything, but TCEQ was not forced to use the standard permit process. The legislature only made it a TCEQ option.

- *No one was frozen out, because no one had a right to be there in the first place. TCEQ Br. 17.* This suggests that industry found the way into the process through state efforts and assistance.

- *TCEQ was solicitous of comments, without discrimination. TCEQ Br. 17.* It just so happens that, but for the single comment highlighted in footnote 60, all the comments were from industry-side interests. Since the industry had been the dominant, if not exclusive, presence in the stakeholder meeting leading to the proposed standard permit, it is no surprise that *some* later comments from industry were not adopted.

- *"[A]ll received exactly the same" time and opportunity to comment in writing or orally. TCEQ Br. 17-18.* Again, this is true, but just a tad myopic. Industry's palpable financial incentives compared with the public's uncertain and indeterminate interest could have, and did have, only one result: industry totally dominated "public" involvement in development of the standard permit. The very design of the legislation and the standard permit process realistically yield no other outcome—which is a core problem with the process's design (which is to say, a core problem with the legislation creating the process and giving TCEQ the option to pursue it).

legal challenge. TCEQ's characterization is that this is "a 2007 procedural challenge to its 2003 TCEQ Order." TCEQ Br. 6 n.13. The neighbors' pleadings show the precise opposite: this is a challenge to TCEQ's 2007 local implementation of a 2003 procedural permitting order. As stated at the outset of the plaintiffs' live pleading, "[t]he TCEQ action challenged here is *the application* of TCEQ's [hot mix asphalt plant standard permit]" to an individual request for authorization to operate under the permit near Pottsboro. Plaintiffs' Third Am. Orig. Pet. ¶ 1 (2nd para.) (emphasis added). The first item of requested relief is a declaratory judgment that the 2007 authorization to operate Plant No. 4 under the 2003 permit is invalid. *Id.* ¶ 20.a. Consistent with these assertions, the neighbors' brief opens with the explanation that the challenge is to TCEQ's action in authorizing operation of Plant No. 4 under the standard permit. CCGC Br. 2.

The plain words of the relevant jurisdictional statutes directly rebut TCEQ's argument. Under these statutes, not just anyone is authorized to challenge TCEQ actions. Instead, it must be "[a] person *affected by* a ruling, order, or decision" of TCEQ. TEX. WATER CODE § 5.351(a) (emphasis added). The other jurisdictional statute is to exactly the same effect, authorizing only "[a] person *affected by* a ruling, order, decision, or other act" to appeal to district court. TEX. HEALTH & SAFETY CODE § 382.032(a) (emphasis added).



The 2003 standard permit did not "affect" the Grayson neighbors within a thirty day period after its July 9th adoption by the TCEQ commissioners. At that time, there was no hot mix asphalt plant on the drawing boards for Grayson County, and the only hot mix asphalt plant in existence already had an individualized permit, operative before, and independent of, the 2003 standard permit for such plants. Stip. 3. The Grayson neighbors, therefore, had no concrete reason or basis for complaining about the standard permit when TCEQ issued it.

TCEQ indirectly makes the neighbors' jurisdictional point for them. Toward the end of its brief, TCEQ lobs an impertinent accusation of "environmental complacency" at the Grayson neighbors for their non-involvement in the 2003 administrative development of the standard permit. TCEQ Br. 18-19 n.63. The launching pad for this accusation is that the Sherman asphalt plant already existed a few miles away. But, as TCEQ has stipulated, the Sherman asphalt is not subject to the standard permit process. It had its own individualized, site-specific permit. Stip. 3 (4th sent.).[3] Invalidation of the standard permit process for Plant No. 4, then, would put Plant No. 4 on the same footing, permitting-wise, as Plant No. 3: it would need to obtain a site-specific permit[4]—which, in turn, would allow the Grayson neighbors to make their case that the

[3] Only about 22% of the state's hot mix asphalt plants operate under the standard permit. Stip. 7.

[4] Even with the standard permit in place, those seeking to operate hot mix asphalt plants remain free to go the site-specific, individualized application route. "Any hot mix asphalt producing facility may continue to apply for an air quality permit under 30 TAC § 116.111." AR 2:58, at p. 2 of published comments.

specific site for Plant No. 4 is the wrong place for such an operation. They were never given such an opportunity under the "standard permit—registration & authorization" regime TCEQ defends.

The 2003 standard permit first "stung" the Grayson neighbors in 2007 when TCEQ authorized Plant No. 4 to operate under it. Until then, it was at best an inchoate, theoretical concern to them, and they would have been asking the courts to act beyond their subject matter jurisdiction if they had sought judicial relief affecting the 2003 permit any earlier.[5] The as-applied nature of this challenge is akin to administrative permit proceedings in which a promulgated rule is challenged in the context of its application in the circumstances of the permit action. The basic rule in such circumstances has long been that a time limit on challenges to rules does not foreclose subsequent examination of a rule when properly brought before court for review of later agency action applying it. *See Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

There is no jurisdictional bar to the Grayson neighbors challenging the 2007 TCEQ authorization and, as part of the challenge, asserting that the authorization was illegal because it rests on an invalid permit.

[5] TCEQ makes a hedged suggestion that maybe the neighbors would have had standing in 2003 to challenge the standard permit, even though there is zero evidence it affected them either then or in the next four years. TCEQ Br. 20 n.66. This borders on the preposterous and comfortably inside the "dead wrong" category. *See, e.g., Texas Disposal Systems, Landfill, Inc. v. TCEQ*, 259 S.W.3d 361, 363 (Tex.App.—Amarillo 2008, no pet.) (speculation and "public interest" are insufficient for jurisdiction).



TCEQ identifies no cases holding otherwise, and the two statutes it cites directly support the Grayson neighbors, not TCEQ.

## III. APA PROCEDURES APPLY TO THE STANDARD PERMIT PROCESS OUT OF CONSTITUTIONAL NECESSITY, BRINGING WITH THEM THE REQUIREMENT OF UNDERLYING FINDINGS, AND THE TCEQ COMMISSIONERS DID NOT MAKE THE REQUISITE UNDERLYING FINDINGS IN THE ORDER ADOPTING THE STANDARD PERMIT FOR HOT MIX ASPHALT PLANTS.

TCEQ argues that the APA's "underlying facts" requirement does not apply, TCEQ Br. 6-9, and that, even if it does, TCEQ found sufficient underlying facts, TCEQ Br. 13-15. Case law refutes the first point, and the record refutes the second one.

### A. The APA's "underlying facts" requirement applies under governing case law.

TCEQ assails the Grayson neighbors' argument about an absence of underlying facts by asserting the syllogism that: (a) the "underlying facts" requirement derives from the APA, TEX. GOV'T CODE § 2001.141(d); and (b) the legislature expressly made the APA inapplicable to the standard permitting process. TCEQ Br. 6-7. The second point is undoubtedly correct, as the plaintiffs themselves have acknowledged. CCGC Br. 14 (citing TEX. HEALTH & SAFETY CODE § 382.05195(g)).

TCEQ's first point, though, is where its argument founders. The jurisdictional vehicle for this case is TEX. HEALTH & SAFETY CODE § 382.032. Subsection (e) of this statute sets the standard of review to be whether TCEQ's action (issuance of the authorization for Plant No. 4 to operate under the standard permit) is "invalid, arbitrary, or unreasonable." The Austin Court of Appeals has held that, *in order to*

*avoid constitutional defects*, this provision—which is indisputably the jurisdictional source for this case—must be construed to import the APA procedures in their entirety into cases brought into court through Section 382.032. *Smith v. Houston Chemical Svcs., Inc.*, 872 S.W.2d 252, at 252 n.2 (Tex.App.—Austin 1994, writ withdrawn); *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 801 (Tex.App.—Austin 2000, pet. rev. dism'd) (citing *Houston Chemical* as importing APA procedures and requirements into Section 382.032 appeals).

Stated another way, under Austin Court of Appeals case law, the "underlying facts" requirement of the APA, along with other APA procedures, is imported into this case out of constitutional necessity in order to save Section 382.032.[6] The legislature did not make *Section 382.032* inapplicable to standard permit processes. Thus, because constitutional requirements trump statutory rules where they are in conflict, whatever the legislature did with the APA in subsection (g) of Section 382.05195 is overridden by the necessary constitutional gloss placed on Section 382.032. And, that reading of the statute requires that the APA procedures, which include the requirement for underlying facts, be applied to TCEQ's adoption of the standard permit for hot mix asphalt plants.

TCEQ tries to distinguish the key case, *Houston Chemical*, on the ground that it arose from a contested case proceeding, while this case

[6] If possible, courts are to interpret statutory language in a manner that makes it constitutional. *City of Houston v. Clark*, 197 S.W.3d 314, 320 (Tex. 2006).



did not. TCEQ Br. 7-8. But, the *Houston Chemical* decision's ruling on the constitutionally-driven importation of APA procedures into Section 382.032(e)-based administrative appeals has nothing to do with whether the case in front of the court arose from a contested case at the administrative level. This part of the ruling focuses only on subsection (e) and what it must be read to require in terms of administrative action as the case comes into the judicial system. If accepted, TCEQ's explanation of the decision's rationale—that it declared "nothing more than that APA appeal provisions apply to appeals of agency decisions made *pursuant* to the APA", TCEQ Br. 7 (emphasis in original)—would turn this part of the *Houston Chemical* decision into nothing but an empty gesture. That is, TCEQ's proffered reading of *Houston Chemical*'s footnote 2 pronouncement is that it announces nothing more than that the APA applies if the APA applies. This interpretation would turn *Houston Chemical*'s decision on this point into a meaningless statement and is wrong on a straightforward reading of what the Court actually says in the decision.

TCEQ dismisses the applicability of *United Copper* in a similarly misguided way. TCEQ Br. 8 (arguing *United Copper*'s inapplicability because it dealt with a standard of review in the appeal of a contested case proceeding). But, whatever the accuracy of this characterization, *United Copper* plainly states that, under *Houston Chemical*, the APA scope of review—which carries with it the "underlying facts"

requirement—applies to Section 382.032 appeals. 17 S.W.3d at 801. The decision says nothing about limiting this principle only to appeals from APA contested cases (which would have been a meaningless tautology in any event).

*Houston Chemical* admittedly is key to the Grayson neighbors' "underlying facts" argument. Its rule is clear and carries substantive meaning. The APA procedures are imported into this case through Section 382.032, as interpreted by *Houston Chemical*. Hence, the "underlying facts" rule applies.

### B. The TCEQ Commissioners did not make the requisite findings of underlying facts when adopting the hot mix asphalt plant standard permit.

TCEQ argues that, even if underlying facts are required to flesh out the bare-bones statutory findings[7] in the Commissioners' July 9, 2003, order, TCEQ nonetheless made them by incorporating "a lengthy narrative and a comments-and-responses section that more than amply served the function of formal findings." TCEQ Br. 9. TCEQ later surveys the introductory narrative, the response to comments, and the text of the permit itself and pronounces them sufficient for underlying findings. TCEQ Br. 13-15.

TCEQ confuses specific *recitations* of requirements and rules with *fact findings* about why or how those recitations support the requisite

[7] Recall that the underlying facts must buttress three categories of required statutory findings: (i) enforceability; (ii) monitoring for compliance; and (iii) use of best available control technology.



statutory findings. Reciting a requirement or rule is not the same as providing a finding about why or how the requirement or rule factually supports one of the statutory requirements. The underlying fact finding is what is required to link the administrative requirement with the statutory requirement. It lies between these two requirements and is necessary in the administrative law context to validate the administrative action.

#### *1. Essential requirements of underlying findings*

It may be that the law imposes no rigid and precise form for *how* or *where* an agency must state or locate its requisite underlying findings. TCEQ Br. 9 & n.28 (citing two cases). *See, e.g., United Resource Recovery, Inc. v. Texas Water Comm'n*, 815 S.W.2d 797, 800(Tex.App.—Austin 1991, writ denied) ("no precise form in which an agency must articulate its underlying findings"). But, the problem for TCEQ in this case is not *how* or *where* it made such findings; instead, it is *whether* it made them.

To understand why the "Proposed Air Quality Standard Permit for Hot Mix Asphalt Plants" does not contain the necessary findings,[8] it is important to have in mind the policy underpinnings for requiring such findings in the first place. The courts require them as part of their judicial review function in the administrative law context "to ensure a

[8] If underlying findings are to be discovered, this document is the only possible place to find them. The Commissioners' Order itself did nothing but recite the statutory findings. TCEQ points to nothing else in the record that would contain underlying findings.

serious appraisal of the facts by an agency." *United Resource*, 815 S.W.2d at 800.[9] Evidence of such an agency appraisal is necessary because of the uncomfortable, uncertain, but by now functionally unavoidable, fit of administrative agencies into the three branches of government and the exceptional deference the judiciary must give to agency fact findings. Without the agency accountability that comes with the underlying findings, fundamental separation of powers principles would be threatened.

The leading Texas case on underlying fact findings in administrative proceedings, *Texas Health Facilities Comm'n v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446 (Tex. 1984), details the requirements for valid underlying facts: (a) they may not be presumed from findings of a "conclusional nature;" (b) they must be capable of being judicially read as fairly and reasonably supporting the required criteria; (c) they should be "clear, specific, [and] non-conclusory;" (d) they are not to be mere recitals to testimony or summations of the evidence; and (e) they should "relate to material basic facts . . . and to the ultimate statutory finding that they accompany." 665 S.W.2d at 451-52. They also must show "the basis for

[9] The Austin Court of Appeals recently repeated a fuller exposition of the rationale for courts to require administrative agencies to provide underlying fact findings:

> The purposes in requiring underlying facts are to require a full consideration of the evidence and serious appraisal of the facts on the part of the administrative agency; to inform the [appellants] of the facts found so that they may intelligently prepare and present an appeal to the courts; and to assist the courts in properly exercising their functions of reviewing the order.

*City of Dallas v. RRC*, 2008 WL 4823225, at *8 n.4 (Tex.App.—Austin Nov. 6, 2008, no pet. h.) (mem. op.), quoting *State Banking Bd. v. Valley Nat'l Bank*, 604 S.W.2d 415, 419 (Tex.Civ.App.—Austin 1980, writ ref'd n.r.e.).



the agency's decision." *Goeke v. Houston Lighting & Power Co.*, 797 S.W.2d 12, 15 (Tex. 1990).[10]

### 2. *The absence of necessary underlying findings for the standard permit*

At pages 15 and 16 of its brief, TCEQ tries to glean the necessary underlying findings from the agency's statements in its proposed standard permit. However, of the three ultimate findings requiring underlying findings—enforceability, compliance monitoring, and best available control technology ("BACT")—TCEQ points to not a single underlying finding on one of them (monitoring) and to only a single item on one aspect of another (compliance).[11]

The underlying finding on monitoring required through Section 382.05195(a)(2) is simply not anywhere to be found, and TCEQ identifies none. This vacuum is not surprising since TCEQ officials conceded at the otherwise meaningless public meeting held shortly before issuance of the Plant No. 4 authorization that the standard permit effectively has no monitoring function.[12]

[10] The underlying findings do not have to reflect fact findings *rejected* by the agency in reaching its decision. *United Resource, supra*, 815 S.W.2d at 800.

[11] The BACT requirement appears to be satisfied. *See* TCEQ Br. 16 (1st para.).

[12] At the public meeting, one of the concerned members of the public asked TCEQ officials "Who is going to do the monitoring?" One TCEQ official noted that the permit has requirements that are supposed to be complied with and said that "the idea is that if he [Plant No. 4's operator] monitors his equipment . . ." He then said: "Is he self-monitored? Yes, *he's self-monitored.*" A second TCEQ official stepped in to explain: "The agency, especially the regional office, depends on you all to help be the eyes and ears." In other words, the only identified monitoring is either self-monitoring by the plant operator or the public.

As to any underlying finding on the compliance required through Section 382.05195(a)(1), TCEQ points primarily to requirements in the standard permit itself. TCEQ Br. 14. But, these are not fact findings that support what is being required. They are the requirement itself, and it finds no factual underpinning in the agency's spare explanation of how it ended up with the permit's requirement.

TCEQ does identify one—and only one—isolated TCEQ explanation that might generously be characterized as an underlying finding on compliance. TCEQ Br. 14 (1st full para., last sentence). But, that single "underlying finding" concerns only a minor element of plant operation dealing with "truck load-out." Broader concerns about compliance in the plant's principal operations are not even mentioned.

Thus, after scouring the only document that might conceivably contain supportive underlying findings for the statutory ultimate findings, TCEQ has found nothing supporting one of the ultimate findings and, at best, only one item supporting a narrow side-part of another ultimate finding. In short, the requisite underlying findings are not present, and the standard permit is invalid.

## IV. If it is reached, the unconstitutional delegation issue should be resolved in the Grayson neighbors' favor because, otherwise, the agency is authorized to act legislatively without any meaningful constraints or guidance from the Texas Legislature.

If the Court determines that the required underlying findings for the standard permit are absent, *see* Part III.B.2, above, it need not reach the issue of whether the legislature's delegation to TCEQ of the optional job



of developing and supporting a standard permit for hot mix asphalt plants is constitutional. TCEQ's defense on this constitutional ground is itself linked directly to its defense on the "underlying findings" issue. TCEQ Br. 10-15 (Part II).

In this part of its argument, TCEQ mis-states the holding of a leading case (getting it exactly backwards) and engages in a hyper-technical criticism of the neighbors' reliance on another leading case—a criticism at odds with later Supreme Court characterizations of that case. TCEQ represents that the Supreme Court "upheld a delegation" to the private entity in *Texas Boll Weevil Eradication Foundation v. Lewellen*, 952 S.W.2d 454 (Tex. 1997). TCEQ Br. 15 n.52. *Boll Weevil*, in fact, did precisely the opposite. It struck down a legislative act as an "overly broad delegation of legislative authority," concluding that the act "cannot stand." 952 S.W.2d at 475.

TCEQ also criticizes the neighbors' reliance on *Texas Antiquities Comm. v. Dallas County Community College Dist.*, 554 S.W.2d 924 (Tex. 1977), for its Article II, § 1, constitutional argument. TCEQ Br. 11. It asserts that the plurality decision was not based on the Texas Constitution's separation of powers provision. *Id.* But, later decisions of the Supreme Court and the Austin Court of Appeals on the unconstitutional delegation issue explicitly identify *Texas Antiquities* as resting on this very basis. *See Boll Weevil*, 952 S.W.2d at 468; *PUC v.*

*City of Austin*, 728 S.W.2d 907, 911 (Tex.App.—Austin 1987, writ ref'd n.r.e.).

*Boll Weevil* and the later anti-delegation decision in *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000) (striking down statute on constitutional ground of illegal delegation of legislative authority), demonstrate that the principles informing the outcome in *Texas Antiquities*, which struck down a legislative delegation to a state administrative agency, remain applicable in the current legal era, too. For the reasons explained in the Grayson neighbors' opening brief, CCGC Br. 18-20, Section 382.05195(a) is unconstitutional if it is read to authorize TCEQ to adopt a standard permit based on no more than is present in this record.

## V. Operation of the standard permit process violates the constitutional right of the Grayson neighbors to open courts.

TCEQ disparages the open courts challenge in this case by making a theoretical argument that under the text of the statute establishing the standard permit option, everyone—citizens, even Grayson County citizens, included—had an equal opportunity to participate in the process, help craft the standard permit for hot mix asphalt plants, and, if unhappy, challenge it in court. TCEQ Br. 16-20. The text of the statute itself, TCEQ argues, creates no disequilibrium in access between industry-based interests and concerned members of the public such as the Grayson neighbors. TCEQ Br. 18 (no "textual basis" for complaint).



The problem with this argument is the *reality*, not the theory, of how administrative processes work and how the process for developing a standard permit meshes with those processes. The record in this case amply supports the conclusion that this was a thoroughly skewed process, with virtually the only meaningful access afforded to industry interests. This factual observation is not meant to denigrate asphalt industry interests and its need to monitor and try to help shape the standard permit.

The problem this record reveals is that locally affected citizens, landowners, businesses, and cities are left high and dry by the standard permit process as implemented by TCEQ under the aegis of Section 382.05195(a). By the time a hot mix standard permit implicates their interests in a palpable, judicially cognizable way, it is too late. The rules of the game are fixed in place, leaving the agency with nothing more in answer to the outcries of local concern than a statement that there is nothing it can do as long as the forms are filled out correctly by the would-be plant operator. By that point, there is no public notice requirement and no public comment process. AR 1:Tabs 4, 8, & 14.[13]

[13] Not even the location can be evaluated by TCEQ. As a TCEQ official told one of the citizens asking questions at the public "meeting" shortly before the authorization issued, "we don't have the statutory authority" to have the operator look at a different location. There are essentially no options at that point for the citizens, other than hoping and pressing for TCEQ to do something to pay attention. TCEQ officials told the citizens at the public meeting that "we don't have policy authority," that "we can't tell you that remedies are instantaneous by any means," that there is no "notification per se" to the nearby people, that TCEQ has "very limited shutdown authority," and that TCEQ "can't look at land use compatibility."

The Supreme Court's seminal open courts decision in *Dillingham v. Putnam*, 109 Tex. 1, 14 S.W. 303 (1890), considered not simply the text of the legislation at issue (as TCEQ would have this Court do), but also the *practical* effect of the legislation. 14 S.W. at 304 (considering a law which "practically" takes away a right to court access).[14] Texas courts are to evaluate whether the legislative action "unreasonably impede[s] a party's access to court to assert a cause of action [the legislature] has created." *Central Appraisal Dist. v. Lall*, 924 S.W.2d 686, 689 (Tex. 1996). The issue is whether an "unreasonable barrier to access to the courts" has been created, given the state interest at stake. *Id.*

Here, TCEQ has failed to explain why the barriers of judicial access that flow in the wake of its use of the standard permit process for hot mix asphalt plants are not unreasonable. It tries to defuse one obvious shortcoming in the standard permit arrangement by attacking the neighbors' argument that TCEQ demonstrates its willingness to give APA protections to the industry side, but not the citizen side, by requiring application of the APA to undo the standard permit, but not to adopt it. *See* CCGC Br. 21-23 (discussing 30 TEX. ADMIN. CODE § 116.601(b). TCEQ charges that this argument is "entirely off track." TCEQ Br. 18 n.61. But, TCEQ never closes its argument on this point—and that has to be because the plain words of the rule at issue demonstrate that it is TCEQ's argument that has gone off track. TCEQ claims that the APA protection in subsection (b) of TCEQ's § 116.601 rule only applies to standard permits that were created under the APA (which would exclude the permit at issue here). The text of subsection (b) does not say that. It says that "*[a]ny* standard permit" TCEQ adopts remains in effect "until repealed under the APA." 30 TEX. ADMIN. CODE § 116.601(b) (emphasis added).

[14] TCEQ quibbles with the neighbors' reliance on *Dillingham* as an open courts decision concerned about unequal access, claiming that such a characterization was only to make the case "seem to cover this case" even though, according to TCEQ, *Dillingham*'s discussion of differential access was only "incidental" to the central analysis. TCEQ Br. 19 n.64 (last sent.). The Supreme Court treats *Dillingham* as an open courts decision. *See, e.g., Weiner v. Wasson*, 900 S.W.2d 316, 322 (Tex. 1995); *R Communications v. Sharp*, 875 S.W.2d 314, 315 (Tex. 1994). Since *Dillingham* concerned itself with a law which practically deprived one side of a lawsuit to constitutionally guaranteed access to the courts, it seems only fair and accurate to characterize it as concerned with unequal judicial access.



In their public opposition to TCEQ's authorization for Plant No. 4 to operate in their midst, the Grayson neighbors demonstrated a diligence, an attention to detail, a deep-seated concern about their community's well-being, and a respect for state regulatory authority. They faced an insurmountable hurdle, though, as far as TCEQ was concerned. By the time Plant No. 4 became a live concern locally, TCEQ effectively told them that nothing could be done because everything that mattered from a regulatory perspective had happened four years earlier. This is the kind of governmental sleight-of-hand the open courts provision of the Texas Constitution was meant to disallow, and this Court should so hold.

## CONCLUSION

The Court should vacate the authorization for Plant No. 4 to operate.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF PLAINTIFFS CONCERNED CITIZENS OF GRAYSON COUNTY AND OTHERS** has been served by first class mail (and electronic mail) on the following counsel of record on December 17, 2008:

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| CONCERNED CITIZENS OF GRAYSON COUNTY, et al., Plaintiffs, | § | IN THE DISTRICT COURT |
| | § | |
| | § | TRAVIS COUNTY, TEXAS |
| v. | § | |
| | § | |
| TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Defendant. | § | |
| | § | 419th JUDICIAL DISTRICT |

Filed In The District Court of Travis County, Texas
FEB 02 2009
At ___ M.
Amalia Rodriguez-Mendoza, Clerk

**Final Judgment**

On January 22, 2009, the Court conducted a hearing on the merits in this case. Concerned Citizens of Grayson County, City of Pottsboro, Paul N. Brown, Bill Jack Chiles, Jr. and Martha Medellin Chiles, Jon C. Gaulding, Sr., Jack Ellsworth Ridgeway, Jeffrey Ross Sargent and Kimberly Michelle Sargent, Roger H. Vicars, Dominion Farms, LLC, Amerivest Equities, Inc., Cenvest, Inc., Larry G. Guilloud and Delores J. Guilloud, Ronald Hart, James David Moore, James R. Hall and Teresa Hall, Lanna McClain, MD and William E. Cruthchfield, Nora Bynum, Shelley McBride and Angela McBride, and Mark Guilloud and Angela Guilloud, Plaintiffs, and the Texas Commission on Environmental Quality (TCEQ), Defendant, appeared through counsel.

After considering the pleadings, briefs, evidence, and arguments of counsel, the Court finds that the TCEQ's March 12, 2007, decision to authorize Rushing Paving Company Ltd. to operate its hot mix asphalt plant in Grayson County, Texas pursuant to the TCEQ's standard permit for hot mix asphalt plants should be AFFIRMED.





IT IS THEREFORE ORDERED that the Defendant have judgment against Plaintiffs and that Plaintiffs will take nothing by their suit.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all court costs shall be taxed against the Plaintiffs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all relief not expressly granted herein is DENIED. This judgment, along with previous orders, is intended to resolve all issues and claims of all the parties and to be final and appealable.

Signed on the 2 day of ~~January~~ Feb, 2009.

Hon. Darlene Byrne, Judge Presiding