

Bryan W. Shaw, Ph.D., P.E., *Chairman*  
Toby Baker, *Commissioner*  
Zak Covar, *Commissioner*  
Richard A. Hyde, P.E., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

January 12, 2015

Bridget Bohac, Chief Clerk  
Texas Commission on Environmental Quality  
P.O. Box 13087, MC 105  
Austin, Texas 78711-3087

Re: Executive Director's Response to Hearing Requests Brief for APAC-Texas, Inc., Concrete  
Batch Plant Standard Permit Registration No. 119281  
TCEQ Docket No. 2014-1568-AIR

Dear Ms. Bohac:

Enclosed please find a copy of the Executive Director's Response to Hearing Requests brief for the above referenced item. If you have any questions, please do not hesitate to call me at extension 1320.

Sincerely,

A handwritten signature in blue ink that reads "Nicolas Parke".

Nicolas Parke  
Staff Attorney  
Environmental Law Division

Enclosure

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**TCEQ AIR QUALITY STANDARD PERMIT REGISTRATION NO. 119281**  
**TCEQ DOCKET NUMBER 2014-1568-AIR**

APPLICATION BY	§	BEFORE THE
APACK-TEXAS, INC	§	
CONCRETE BATCH PLANT	§	TEXAS COMMISSION ON
MANOR, TRAVIS COUNTY	§	
	§	ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR’S RESPONSE TO HEARING REQUESTS**

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this response (Response) to the request for a contested case hearing submitted by the person listed herein. The Texas Clean Air Act (TCAA) § 382.056(n) requires the Commission to consider hearing requests in accordance with the procedures provided in Tex. Water Code (TWC) § 5.556.<sup>1</sup> This statute is implemented through the rules in 30 Texas Administrative Code (TAC) Chapter 55, Subchapter F.

A map showing the location of the site for the proposed facility is included with this Response and has been provided to all persons on the attached mailing list. In addition, a current compliance history report, technical review summary, and a copy of the standard permit for concrete batch plants prepared by the ED’s staff have been filed with the TCEQ’s Office of Chief Clerk for the Commission’s consideration. Finally, the ED’s Response to Public Comments (RTC), which was mailed by the chief clerk to all persons on the mailing list, is on file with the chief clerk for the Commission’s consideration.

**I. Application Request and Background Information**

APAC-Texas, Inc. applied to the TCEQ for a Standard Permit under TCAA § 382.05195. This permit will authorize the Applicant to construct and operate a permanent concrete batch plant. The plant is located at 14201 Littig Road, Manor, Travis County. Contaminants authorized under this permit include dust, aggregate, cement, and particulate matter (PM), including particulate matter with aerodynamic diameters of 10 micrometers or less (PM10) and 2.5 micrometers or less (PM2.5). The Applicant is not delinquent on any administrative penalty payments to the TCEQ. The TCEQ Enforcement Database was searched and no enforcement activities were found that are inconsistent with the compliance history.

Before work is begun on the construction of a facility that may emit air contaminants, the person planning the construction must obtain authorization from the Commission. This permit application is for a new issuance of Registration 119281 for a standard permit for a concrete batch plant. The permit application was received on April 8, 2014, and declared administratively complete on April 23, 2014. The Notice of Receipt and Intent to Obtain an Air Quality Permit (public notice) for this permit application was published in English

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<sup>1</sup> Statutes cited in this response may be viewed online at [www.capitol.state.tx.us/statutes/statutes.html](http://www.capitol.state.tx.us/statutes/statutes.html). Relevant statutes are found primarily in the Texas Health and Safety Code and the Texas Water Code. The rules in the Texas Administrative Code may be viewed online at [www.sos.state.tx.us/tac/index.shtml](http://www.sos.state.tx.us/tac/index.shtml), or follow the “Rules, Policy & Legislation” link on the TCEQ website at [www.tceq.state.tx.us](http://www.tceq.state.tx.us).

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on May 26, 2014, in the Austin American Statesman and in Spanish on May 8, 2014, in El Mundo. The Notice of Application and Preliminary Decision for an Air Quality Permit was published on June 30, 2014, in English in the Austin American Statesman and in Spanish on July 3, 2014, in El Mundo. The public comment period ended on August 4, 2014. The executive director's Response to Comment was filed on September 12, 2014. The Chief Clerk's Office mailed the ED's RTC on September 16, 2014, to all interested persons, including those who submitted a comment or requested a contested case hearing. The cover letter attached to the RTC included information about making requests for a contested case hearing or for reconsideration of the ED's decision.<sup>2</sup> The letter also explained that hearing requesters should specify any of the ED's responses to comments they dispute and the factual basis of the dispute, in addition to listing any disputed issues of law or policy.

The time for requests for reconsideration and hearing requests ended on October 16, 2014. The TCEQ did not receive any requests for reconsideration. The TCEQ received a timely hearing request during the public comment period from Bobby Massirer.

## **II. Applicable Law for Hearing Requests**

The commission must assess the timeliness and form of the hearing requests, as discussed in Section I above. The form requirements are set forth in 30 TAC § 55.201(d):

(d) A hearing request must substantially comply with the following:

- 1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
- 2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requester's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requester believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- 3) request a contested case hearing;
- 4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requester should, to the extent possible, specify any of the executive director's

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<sup>2</sup> See TCEQ rules at Chapter 55, Subchapter F of Title 30 of the Texas Administrative Code. Procedural rules for public input to the permit process are found primarily in Chapters 39, 50, 55 and 80 of Title 30 of the Code.

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- responses to comments that the requester disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- 5) provide any other information specified in the public notice of application.

The next necessary determination is whether the requests were filed by “affected persons” as defined by TWC § 5.115, implemented in commission rule 30 TAC § 55.203. Under 30 TAC § 55.203, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Local governments with authority under state law over issues raised by the application receive affected person status under 30 TAC § 55.203(b).

In determining whether a person is affected, 30 TAC § 55.203(c) requires all factors be considered, including, but not limited to, the following:

- 1) whether the interest claimed is one protected by the law under which the application will be considered;
- 2) distance restrictions or other limitations imposed by law on the affected interest;
- 3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- 4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- 5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- 6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

In addition to the requirements noted above regarding affected person status, in accordance with 30 TAC § 55.205(a), a group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- 1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- 2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- 3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.<sup>3</sup>

Additionally, this application is for registration for the Standard Permit for Concrete Batch Plants. Hearing requests on a concrete batch plant standard permit are subject to the requirements in TCAA § 382.058(c), which states that “only those persons actually residing in a permanent residence within 440 yards of the proposed plant may request a hearing ... as a person who may be affected.”

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<sup>3</sup> 30 TAC § 55.205(a)

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If the Commission determines a hearing request is timely and fulfills the requirements for proper form and the hearing requester is an affected person, the commission must apply a three-part test to the issues raised in the request to determine if any of the issues should be referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing. The three-part test in 30 TAC § 50.115(c) is as follows:

- 1) The issue must involve a disputed question of fact;
- 2) The issue must have been raised during the public comment period; and
- 3) The issue must be relevant and material to the decision on the application.

The law applicable to the proposed facility may generally be summarized as follows. A person who owns or operates a facility or facilities that will emit air contaminants is required to obtain authorization from the commission prior to the construction and operation of the facility or facilities.<sup>4</sup> Thus, the location and operation of the proposed facility requires authorization under the TCAA. Permit conditions of general applicability must be in rules adopted by the Commission.<sup>5</sup> Those rules are found in 30 TAC Chapter 116. In addition, a person is prohibited from emitting air contaminants or performing any activity that violates the TCAA or any Commission rule or order, or that causes or contributes to air pollution.<sup>6</sup> The relevant rules regarding air emissions are found in 30 TAC Chapters 101 and 111-118. In addition, the Commission has the authority to establish and enforce permit conditions consistent with this chapter.<sup>7</sup> The materials accompanying this response list and reference permit conditions and operational requirements and limitations applicable to this proposed facility.

### **III. Analysis of Hearing Request**

A. Was Bobby Massirer's request for a contested case hearing in this matter timely and in proper form?

Bobby Massirer is the only person who submitted a timely hearing request. He submitted his request for a contested case hearing on May 7, 2014. While Mr. Massirer's request was received prior to publication of the NORI, his request states that a sign (*see*, 30 TAC § 39.604) was posted at the location of the proposed facility. For this reason, the ED considered Mr. Massirer's request timely. In his comment he provided his name, phone number, and residential address. In addition, he stated his concern that the proposed plant would adversely affect his health, property, and welfare. As indicated by the enclosed map, however, Mr. Massirer does not reside within 440 yards of the proposed plant.

For a concrete batch plant standard permit, TCAA § 382.058(c) requires that a person reside within 440 yards of the proposed plant in order to request a hearing as an affected

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<sup>4</sup> TEXAS HEALTH & SAFETY CODE § 382.0518

<sup>5</sup> TEXAS HEALTH & SAFETY CODE § 382.0513

<sup>6</sup> TEXAS HEALTH & SAFETY CODE § 382.085

<sup>7</sup> TEXAS HEALTH & SAFETY CODE § 382.0513

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person. The ED has determined that Mr. Massirer resides more than 440 yards from the proposed plant, and therefore, by statute, Mr. Massirer is precluded from requesting a hearing as an affected person.

Additionally, this comment was generically stated and does not describe how emissions will affect his health, property, and welfare. Therefore, the ED finds that this issue does not qualify as a personal justiciable interest. The TCEQ reviewed the permit application and found it to be in compliance with all applicable federal and state regulatory requirements. Concrete production facilities under standard permits have been determined by the TCEQ not to make a significant contribution of air contaminants to the atmosphere. The Standard Permit itself was developed to ensure that, if operated properly and in accordance with the requirements of the standard permit, it would be protective at the property line of the concrete batch plant site and beyond. Emissions from these plants have already undergone a comprehensive TCEQ internal modeling of impacts and a health effects review. Based on the foregoing, the ED additionally finds that Mr. Massirer did not substantially comply with all of the requirements to request a contested case hearing required by 30 TAC § 55.201(d).

B. Is Bobby Massirer an affected person?

The law applicable to this permit application is outlined above in Section II. Mr. Massirer is the only hearing requester. Because Mr. Massirer resides more than 440 yards from the proposed facility, he is precluded from requesting a hearing as an affected person pursuant to TCAA § 382.058(c).

C. Which issues in this matter should be referred to SOAH for hearing?

If the Commission determines that Mr. Massirer's hearing request in this matter is timely and in proper form, and satisfies the requirements to be an affected person, the Commission must apply the three-part test discussed in Section II to the issue raised in this matter to determine if the issue should be referred to SOAH for a contested case hearing. The three-part test asks whether the issue involves disputed questions of fact, whether the issue was raised during the public comment period, and whether the issue is relevant and material to the decision on the permit application, in order to refer it to SOAH.

Pursuant to TCAA § 382.058(c), Mr. Massirer is precluded from requesting a hearing as an affected person because he resides more than 440 yards from the proposed facility. Thus, his hearing request should not be referred to SOAH for a contested case hearing. However, if the Commission determines that Mr. Massirer resides within 440 yards of the proposed facility and satisfies the requirements to be an affected person, then his hearing request should be referred to SOAH.

**IV. Executive Director's Recommendation**

The Executive Director respectfully recommends that the Commission deny Bobby Massirer's request for a contested case hearing in this matter.

Respectfully submitted,

Texas Commission on Environmental Quality

Richard Hyde, P.E., Executive Director

Caroline Sweeney, Deputy Director  
Office of Legal Services

Robert Martinez, Division Director  
Environmental Law Division



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Mr. Nicolas Parke, Staff Attorney  
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REPRESENTING THE  
EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

## CERTIFICATE OF SERVICE

On the 12th day of January, 2015, a true and correct copy of the foregoing instrument was served on all persons on the mailing list by the undersigned via deposit into the U.S. Mail, inter-agency mail, facsimile, electronic mail, or hand delivery.

  
\_\_\_\_\_  
Nicolas Parke

**MAILING LIST**  
**APAC-TEXAS, INC.**  
**DOCKET NO. 2014-1568-AIR; PERMIT NO. 119281**

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Bobby Massirer  
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# Agenda Meeting for Permit # 119281 ROUND ROCK READY MIX BATCH PLANT 1

Map Requested by TCEQ Office of Legal Services  
for Commissioners' Agenda



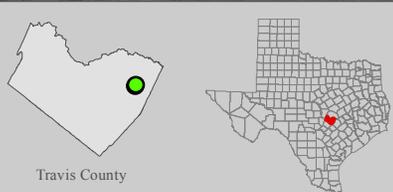
Texas Commission on Environmental Quality  
GIS Team (Mail Code 197)  
P.O. Box 13087  
Austin, Texas 78711-3087

Date: 10/30/2014



0 0.1 0.2  
Miles

-  Facility
-  Requestor (Bobby Massirer)
-  440 yd radial distance from facility



The facility is located in Travis County. The circle (green) in the left inset map represents the approximate location of the facility. The inset map on the right represents the location of Travis County (red) in the state of Texas;

Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestor information from the requestor. The background imagery of this map is from the current Environmental Systems Research Institute (ESRI) map service, as of the date of this map.

This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries. For more information concerning this map, contact the Information Resource Division at (512) 239-0800.