

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



Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 12, 2015

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

RE: APAC-TEXAS, INC.
TCEQ DOCKET NO. 2014-1568-AIR

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Request for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Isabel Segarra".

Isabel G. Segarra Treviño, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2014-1568-AIR

**IN THE MATTER
OF THE APPLICATION OF
APAC-TEXAS, INC., FOR PERMIT
NO. 119281**

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§

**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUEST FOR HEARING**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Request for Hearing in the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

A. Background of Facility

APAC-Texas, Inc. (Applicant or APAC) has applied to the TCEQ for a Standard Permit under Texas Clean Air Act (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. The standard permit registration would authorize the facility to emit the following air contaminants: 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 (PM_{2.5}).

B. Procedural Background

TCEQ received this application on April 8, 2014. On April 23, 2014, the Executive Director of TCEQ (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain an Air Quality Permit (NORI) was published in English on May 6,

2014 in the *Austin-American Statesman* newspaper and in Spanish on May 8, 2014 in the *El Mundo* newspaper. To correct a formatting error, the NORI was re-published in English on May 26, 2014 in the *Austin-American Statesman* newspaper. The ED completed the technical review of the application, and prepared a draft permit. The Notice of Application and Preliminary Decision for an Air Quality Permit (NAPD) was published on June 30, 2014 in the *Austin-American Statesman* newspaper and in Spanish in the *El Mundo* newspaper. The public comment period ended on August 4, 2014. On September 12, 2014, the ED filed his Response to Comments (RTC). The ED issued his decision on September 16, 2014 resulting in no amendments to the permit application. The deadline to request a contested case hearing was October 16, 2014.

TCEQ received a timely comment and request for a contested case hearing from Bobby Massirer. As more fully discussed below, OPIC recommends denying Mr. Massirer's hearing request.

II. APPLICABLE LAW

This application was declared administratively complete on May 3, 2013. Because this application was declared administratively complete after September 1, 1999, it is subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues

of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of the application. 30 TEX. ADMIN. CODE (TAC) § 55.201(d).

Under 30 TAC § 55.203(a), 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.” This justiciable interest does not include an interest common to the general public.

Relevant factors considered in determining whether a person is affected include:

- (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.

The TCAA limits who may request a contested case hearing on a concrete plant registered under a standard permit to “only those persons actually residing in a permanent residence within 440 yards [$\frac{1}{4}$ mile] of the proposed plant may request a hearing under [TEX. HEALTH & SAFETY CODE] § 382.056 as a person who may be affected.” TEX. HEALTH & SAFETY CODE (THSC) § 382.058(c).

The Commission shall grant an affected person’s timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission’s decision on the application. 30 TAC § 55.211(c).

Accordingly, responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or of law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

30 TAC § 55.209(e).

III. DISCUSSION

A. Determination of Affected Person Status

Mr. Massirer filed a timely request for a contested case hearing. Mr. Massirer states that he lives at 13808 Old Highway 20, Manor, Texas 78653, directly across from the Applicant's property. Mr. Massirer is concerned that emissions from the proposed facility will adversely affect his health, his property, and his quality of life. Based on the map prepared by the ED for this application, Mr. Massirer is not within 440 yards of the proposed facility as required by THSC § 382.058(c).¹

OPIC recommends that the Commission deny Mr. Massirer's hearing request because Mr. Massirer's hearing request does not establish that he is an affected person.

B. Issues Raised in the Hearing Request

The hearing request raises the following issues:

1. Whether the proposed facility will adversely affect Mr. Massirer's health.
2. Whether the proposed facility will adversely affect Mr. Massirer's property.
3. Whether the proposed facility will adversely affect Mr. Massirer's quality of life.

¹ Attached as Exhibit A.

C. Issues Raised in the Comment Period

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) & (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

There is no agreement between the hearing requestor and the ED on the issues raised in the hearing requests, thus, the issues remain disputed.

E. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. 30 TAC § 55.211(c)(2)(A). All of the issues presented are issues of fact.

F. Relevant and Material Issues

The hearing requests raises issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). To refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–51 (1986).

TCEQ is responsible for the protection of air quality under the TCAA and accompanying administrative rules. The purpose of the TCAA is "to safeguard the state's air resources from pollution by controlling or abating air pollution and emission of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility." THSC § 382.002. In addition, "[n]o person shall discharge from any source whatsoever one or more air

contaminants or combinations thereof, in such concentration and of such duration as are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property, or as to interfere with the normal use and enjoyment of animal life, vegetation, or property.” 30 TAC § 101.4.

Issue No. 1 and No. 3 are relevant and material issues because they relate to the effects of air quality on human health and the use and enjoyment of property. Accordingly, Issue No. 1 and No. 3 are appropriate for referral to SOAH. Issue No. 2 is not relevant and material because it raises property concerns alone which do not relate to air quality. This issue is outside the Commission’s jurisdiction to review air quality permit applications.

G. Issues Recommended for Referral

As stated in § III.A, OPIC recommends denial of the hearing request because Mr. Massirer is not an affected person under the distance requirements of THSC § 382.058(c). However, if the Commission disagrees and decides to grant Mr. Massirer’s hearing request, OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

1. Whether the proposed facility will adversely affect Mr. Massirer’s health.
2. Whether the proposed facility will adversely affect Mr. Massirer’s quality of life.

H. Maximum Expected Duration of Hearing

Commission Rule 30 TAC § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is

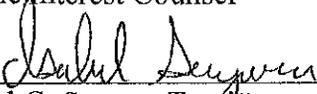
expected to issue a proposal for decision, and as required by 30 TAC § 55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC recommends denying Bobby Massirer's hearing request because he is not an affected person. However, if the Commission grants Mr. Massirer's hearing request, OPIC recommends referring Issue No. 1 and No. 2 referenced above in § III.G for a contested case hearing.

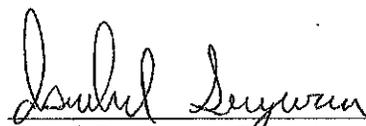
Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: 
Isabel G. Segarra Treviño
Assistant Public Interest Counsel
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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2015 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.


Isabel G. Segarra Treviño

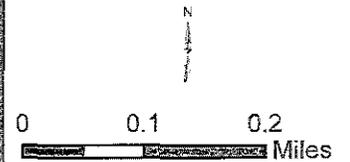
Agenda Meeting for Permit # 119281 ROUND ROCK READY MIX BATCH PLANT 1

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

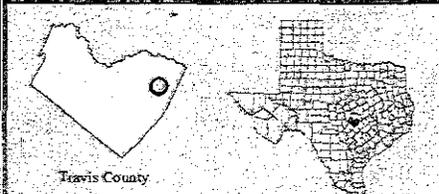
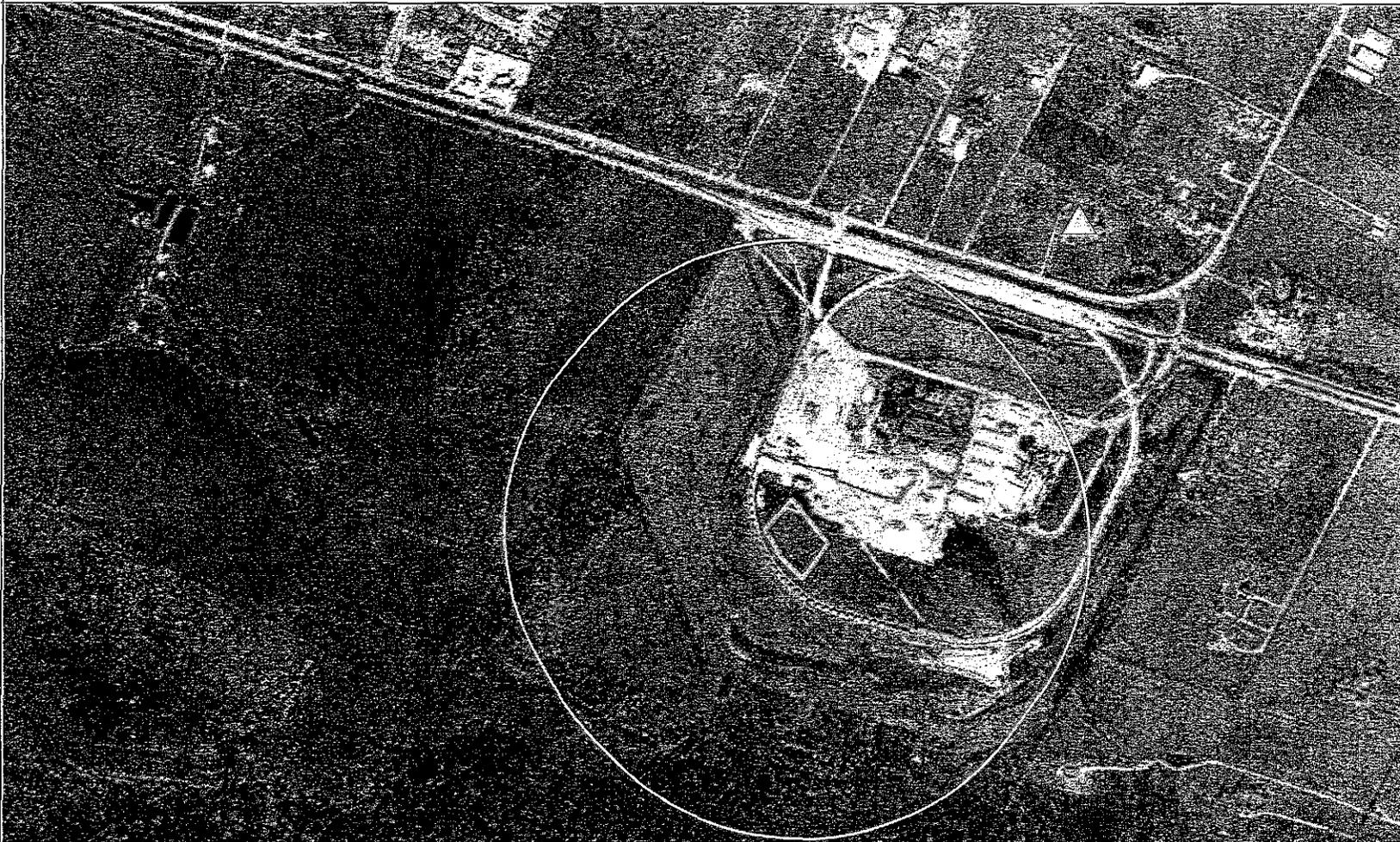
Date: 10/30/2014



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

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.



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.

**MAILING LIST
APAC-TEXAS, INC.
TCEQ DOCKET NO. 2014-1568-AIR**

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FOR ALTERNATIVE DISPUTE

RESOLUTION:

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