

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



April 20, 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 Munilla
Construction Management, LLC, Concrete Batch Plant Standard Permit
Registration No. 95295L002
TCEQ Docket No. 2015-0504-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 1088.

Sincerely,

A handwritten signature in cursive script that reads "PN Petty".

Becky Nash Petty
Staff Attorney
Environmental Law Division

Enclosure

TCEQ AIR QUALITY STANDARD PERMIT REGISTRATION NO. 95295L002
TCEQ DOCKET NUMBER 2015-0504-AIR

APPLICATION BY	§	BEFORE THE
MUNILLA CONSTRUCTION	§	
MANAGEMENT, LLC	§	TEXAS COMMISSION ON
CONCRETE BATCH PLANT	§	
LITTLE ELM, DENTON 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 requests for a contested case hearing submitted by persons 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) § 5.556.¹ 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

Munilla Construction Management, LLC (Munilla) has applied to the TCEQ for a Standard Permit under TCAA § 382.05195. This permit will authorize the Applicant to construct and operate a temporary concrete batch plant. The facility will be located at 26790 East U.S. Highway 380, Little Elm, Denton County. Contaminants authorized under this permit include road dust, aggregate, cement, and particulate matter (PM), including PM with aerodynamic diameters of 10 micrometers or less (PM₁₀) and 2.5 micrometers or less (PM_{2.5}). 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.

This permit application is for issuance of Registration No. 95295L002 for a temporary concrete batch plant. The permit application was received on October 28, 2014, and declared administratively complete on November 4, 2014. The Notice of Receipt and Intent to Obtain an Air Quality Permit (first public notice) for this permit application was published on November 7, 2014 in English in the *Denton Record-Chronicle* and on November 14, 2014 in Spanish in *La Prensa Comunidad*. The Notice of Application and Preliminary Decision for an Air Quality Permit (second public notice) was published on December 12, 2014, in English in the *Denton Record-Chronicle* and in Spanish on December 15, 2014 in *La Prensa Comunidad*. The public

¹ Statutes cited in this response may be viewed online at 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, or follow the "Rules, Policy & Legislation" link on the TCEQ website at www.tceq.state.tx.us.

comment period ended on January 14, 2015. The ED's RTC was mailed on February 27, 2015 to all interested persons, including those who asked to be placed on the mailing list for this application and those who submitted comments or requests for 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.² The letter also explained 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 March 30, 2015. The TCEQ received two identical timely hearing requests that were not withdrawn from Mr. George R. Gibson on behalf CR Emergency Room, LLC, operator of the Baylor Emergency Hospital.

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 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 and 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

² 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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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.

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.”

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.³

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

³ 30 TAC § 55.205(a)

authorization from the commission prior to the construction and operation of the facility or facilities.⁴ 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.⁵ 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.⁶ 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.⁷ The materials accompanying this response list and reference permit conditions and operational requirements and limitations applicable to this proposed facility.

III. ANALYSIS OF HEARING REQUESTS

A. Were the requests for a contested case hearing in this matter timely and in proper form?

Mr. George R. Gibson on behalf CR Emergency Room, LLC, operator of the Baylor Emergency Hospital (CR or CR Emergency Room), as its attorney, submitted timely hearing requests that were not withdrawn on November 19 and 21, 2014. The requests were made in two identical comments submitted to the commission during the relevant comment period. Although the hearing requests provided the phone number and office address of CR's attorney, George R. Gibson, they did not identify a person with a justiciable interest affected by the application to represent CR Emergency Room.

The requests also stated that CR Emergency Room is located directly across the street from and within 440 yards of the proposed plant. Based on the address provided CR and on the attached map, the ED's staff was able to confirm that CR is within 440 yards of the plant. Although CR is located within 440 yards of the proposed facility, the requests do not claim that any person resides at the hospital, nor do they provide a residential address for any such individual. The analysis for the CR's request as a group or association follows in subsection C below.

The requests indicated that CR will be adversely affected by the proposed plant in the following ways:

- The plant's proposed location would be in close proximity to CR Emergency Room.
- The cement dust from the proposed plant could be harmful to the health of CR's staff and patients, especially those with respiratory and pulmonary health conditions.
- CR's owners and operators would lose income because of the plant.
- CR's facility and equipment would be harmed by dust from the proposed plant.
- The dust from the plants would create a nuisance.

⁴ TEXAS HEALTH & SAFETY CODE § 382.0518

⁵ TEXAS HEALTH & SAFETY CODE § 382.0513

⁶ TEXAS HEALTH & SAFETY CODE § 382.085

⁷ TEXAS HEALTH & SAFETY CODE § 382.0513

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Of the issues raised in the requests, the ED finds that some would be considered personal justiciable interests that are also relevant and material disputed issues of fact were they raised on behalf of a named person who otherwise met the requirements to be an “affected person.” Analysis of whether CR can be considered an affected person is discussed in detail in subsection B below.

The ED addressed all public comments in this matter by providing responses in the RTC. The cover letter from the Office of the Chief Clerk attached to the RTC states that requesters should, to the extent possible, specify any of the ED’s responses in the RTC that the requesters dispute and the factual basis of the dispute, and list any disputed issues of law or policy.⁸ CR did not submit a response to the ED’s RTC.

CR’s hearing requests failed identify any individual patients, staff, owners, or operators. Also, the requests did not claim that anyone resides at CR or in a permanent residence within 440 yards of the proposed location of the batch plant. Based on the foregoing, the ED finds that CR failed to comply with all of the requirements to request a contested case hearing under 30 TAC 55.201(d). Although the requester provided some of information required by 30 TAC 55.201(d), it failed to name a person who resides in a permanent residence within 440 yards of the proposed location of the plant. Therefore, the ED is unable to determine whether it is likely that the requester will be impacted differently than members of the general public or if there is a likely impact of the regulated activity on any such person’s interests. The ED finds that the issues raised by CR in its requests do not qualify as personal justiciable interests. Based on the foregoing, the ED finds that the requests submitted by CR do not substantially comply with all of the requirements to request a contested case hearing required by 30 TAC § 55.201(d) because they failed to identify a personal justiciable interest since it does not identify a specific individual whose interests could be evaluated.

B. Are those who requested a contested case hearing affected persons?

The law applicable to this permit application is outlined above in Section II. Although CR is located within 440 yards of the proposed facility, it is not a residence and, therefore, fails to satisfy the requirement of TCAA § 382.058(c).

The requests do identify what would be a personal justiciable interest different from that of the general public. The requests state that the proposed plant would adversely affect the hospital’s patients because dust from the plant would harm the health of patients with respiratory and pulmonary conditions due to its proximity to the plant. The requester also states that the plant would adversely affect CR’s owners, operators, staff, patients, facility, equipment, and business physically, emotionally, economically, or otherwise. However, since the request failed to identify anyone residing within 440 yards of the proposed facility, the requester is not an “affected person” entitled to a contested case hearing, under the requirements of TCAA § 382.058(c).

⁸ See 30 TAC § 55.201(d)(4).

C. Does CR Emergency Room meet group or associational standing requirements?

The commission must consider whether CR meets the requirements for associational standing found in 30 TAC § 55.205(a), discussed above in Section II. George Gibson filed the hearing request on behalf of CR Emergency Room. No one who could be considered a “member” of CR Emergency Room is identified. While the purpose of CR Emergency Room is not explicitly stated in the requests, it is presumably to treat medical patients. In addition, since no individual has been named as a member of CR Emergency Room, the ED is unable to determine whether the claim asserted or the relief requested requires the participation of the individual members in the case. Therefore, since it did not identify one or more members that would have standing to request a hearing in their own right, CR Emergency Room did not meet the requirements for associational standing found in 30 TAC § 55.205(a).

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

Because the hearing requests do not satisfy TCAA § 382.056, the ED does not recommend referral of any issues.

VI. MAXIMUM EXPECTED DURATION OF THE CONTESTED CASE HEARING

The ED recommends the contested case hearing, if held, should last no longer than six months from the preliminary hearing to the proposal for decision.

VII. EXECUTIVE DIRECTOR'S RECOMMENDATION

The Executive Director respectfully recommends the commission:

A. Find all requests for reconsideration and hearing requests in this matter were timely filed.

B. Deny the requests of the CR because it fails to satisfy the requirements for form under 30 TAC§ 55.201(d) and is not an affected person under 30 TAC § 55.203:

D. If the commission determines any requester is an affected person, refer the following issues to SOAH:

- Whether the facility will have any adverse effects on air quality;
- Whether adverse health impacts are expected, including sensitive subgroups such as individuals with pre-existing health conditions;
- Whether the concrete batch plant will cause or contribute to a dust nuisance condition.

E. Find the maximum expected duration of the contested case hearing, if held, would be six months.

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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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REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Munilla Construction Management, LLC

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

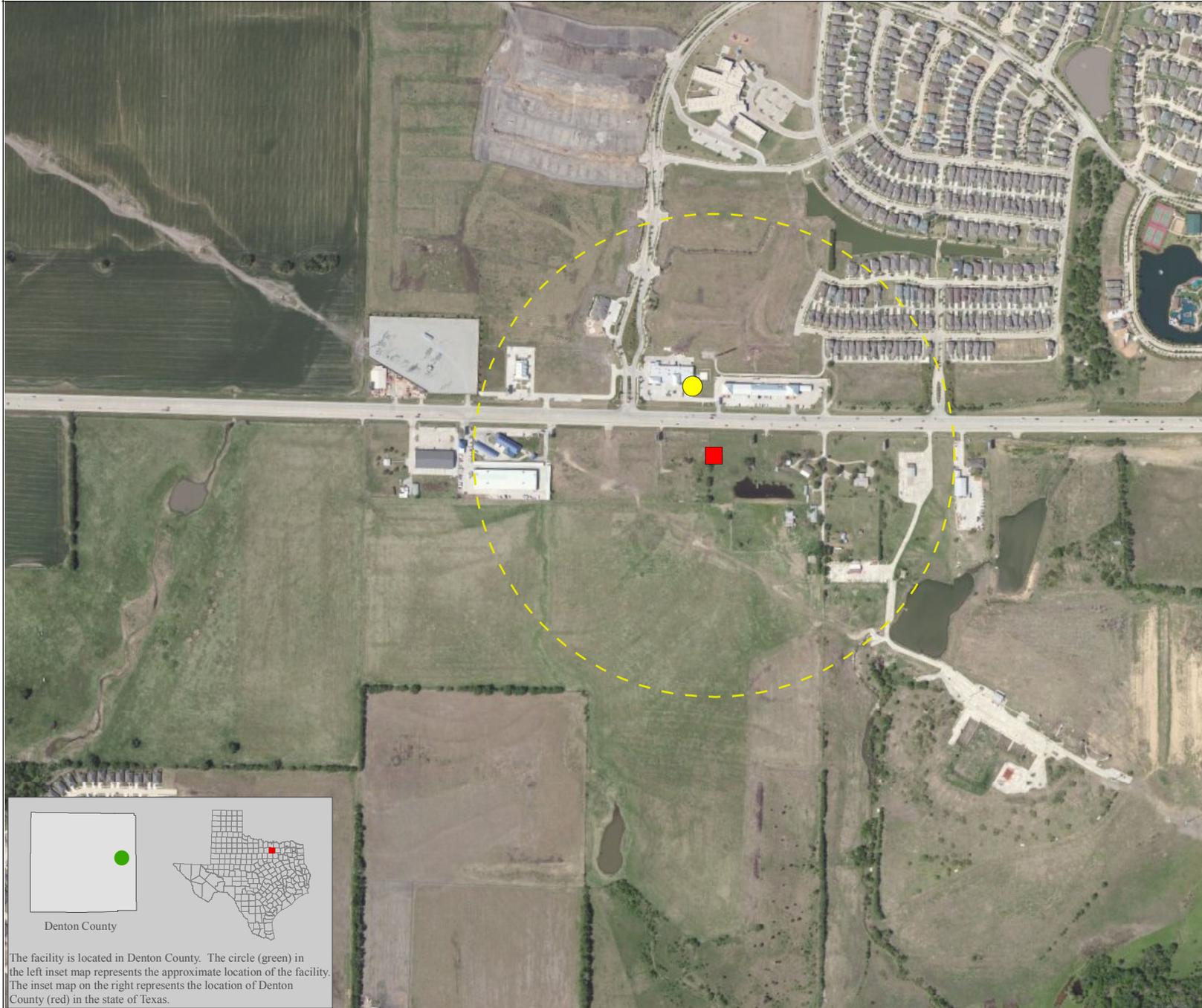


Texas Commission on Environmental Quality
GIS Team (Mail Code 197)
P.O. Box 13087
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Date: 4/10/2015



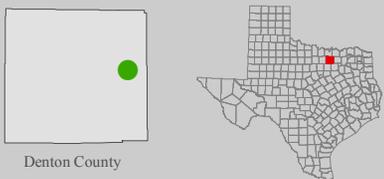
0 150 300
Yards



- Applicant
- Requester
- - - 440 yd 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 Denton 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 Denton County (red) in the state of Texas.

CERTIFICATE OF SERVICE

On the 20th day of April, 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 deliver



Becky Nash Petty

MAILING LIST
MUNILLA CONSTRUCTION MANAGEMENT, LLC
DOCKET NO. 2015-0504-AIR; PERMIT NO. 95295L002

FOR THE APPLICANT:

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