

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *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

May 2, 2016

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: ARGOS READY MIX (SOUTH CENTRAL) CORP.
TCEQ DOCKET NO. 2016-0435-AIR**

Dear Ms. Bohac:

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

Sincerely,


Isabel G. Segarra Treviño, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2016-0435-AIR

**IN THE MATTER
OF THE APPLICATION OF
ARGOS READY MIX (SOUTH
CENTRAL) CORP. FOR A
RENEWAL OF STANDARD
PERMIT REGISTRATION
NO. 77728**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUESTS 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 Requests for Hearing in the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

A. Background of Facility

Argos Ready Mix (South Central) Corp. (Argos or Applicant) has applied to the TCEQ for a renewal of a Standard Permit registration under Texas Clean Air Act (TCAA) § 382.05195. This permit registration renewal would authorize the continued operation of a permanent concrete batch plant (Facility). The Facility is located at 110 Holmes Road, Houston, Harris County. Contaminants authorized to be emitted 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}).

B. Procedural Background

The TCEQ received this application on January 20, 2016. On January 26, 2016, 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 February 4, 2016 in the *Houston Chronicle* newspaper in Harris County. The NORI was published in Spanish on January 31, 2016 in the *El Perico* newspaper in Harris County. Alternate language publication was required for this application. The public comment period ended on February 19, 2016. The Chief Clerk mailed the ED's Amended Response to Comments (RTC) on April 20, 2016. The Commission received one timely hearing request from State Representative Dr. Alma Allen. As more fully discussed below, OPIC recommends denying the hearing request submitted by Dr. Allen.

II. APPLICABLE LAW

As an initial matter, the Commission must determine whether a right to a hearing exists under the provisions of the Texas Health and Safety Code (THSC) § 382.056(g). The Commission “may not seek further public comment or hold a public hearing...in response to a request for a public hearing on an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.” THSC § 382.056(g). According to the information reviewed by OPIC, the Applicant is not seeking to increase emissions allowed under the existing permit, nor is the Applicant seeking to emit new contaminants. Pursuant to THSC § 382.056(o), the Commission may hold a hearing on this permit registration renewal if the Applicant's compliance history is unsatisfactory. The Executive Director compiled the Applicant's compliance history and classified the Applicant as a satisfactory performer. For these reasons, OPIC concludes that there is no right to a contested case hearing on Argos' application. However, if the Commission disagrees and concludes that there is a right to a hearing, OPIC provides further analysis below.

This application was declared administratively complete on January 26, 2016. 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 requester's personal justiciable interest affected by the application showing why the requester 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.

30 TAC § 55.203(c).

For a concrete batch plant registered under a Standard Permit, the TCAA provides that “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.” 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 requester 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

As an initial matter, and as more fully discussed in § II above, OPIC finds that THSC § 382.056(g) prohibits the Commission from holding a hearing on the renewal of this authorization which would not result in any increase in emissions or the emission of a contaminant not previously emitted. In the event the Commission disagrees, OPIC discusses the affected person status of the Requester below.

A. Determination of Affected Person Status

Representative Dr. Alma Allen timely filed a hearing request that substantially complies with 30 TAC § 55.201(d). In her hearing request, Dr. Allen states that other batch plants exist in District 131, Dr. Allen's district. Dr. Allen asks the Commission to consider Argos' permit registration renewal in light of the cumulative health and safety effects posed by all the concrete batch plants in District 131. Dr. Allen is concerned that the hours of operation of these facilities may interfere with community activities. Dr. Allen is also concerned about the aesthetics of communities within District 131 and property values. Finally, Dr. Allen is concerned about the capacity of existing roads to handle truck traffic from these facilities.

Section 382.058(c) of the THSC limits affected person status to only those individuals actually residing in a permanent residence within 440 yards of the facility. Dr. Allen lists her District Office address as 10101 Fondren, Suite 500, Houston, Texas 77096. Dr. Allen's District Office is several miles from the Facility; OPIC has no information that this address serves as a permanent residence. Because the address provided by Dr. Allen is not one of a permanent residence within 440 yards of the Facility, OPIC concludes that the Commission is statutorily prohibited from finding Dr. Allen to be an affected person. Therefore, OPIC must recommend denial of this hearing request.

B. Cumulative Effects Issue Raised in the Hearing Request

While OPIC recommends denial of Dr. Allen's request, the cumulative effects issue she raises merits further discussion. Pursuant to Texas Water Code (TWC) § 5.130(1), the Commission has authority to "develop and implement policies, by specific environmental media, to protect the public from cumulative risks in areas of concentrated operations." The TCEQ

maintains a webpage that details how the TCEQ addresses cumulative impacts.¹ The webpage, as well as the Executive Director's Response to Comments on this matter, describe how the TCEQ uses data in its permitting process to develop allowable emission rates that are protective of human health and the environment. The Executive Director further explained that if operations comply with the permitted emission rates, there should be no adverse impact to air quality as a result of cumulative operations. Based on data received, the TCEQ also has authority to "give priority monitoring and enforcement in areas in which regulated facilities are concentrated." TWC § 5.130(2). To this end, the TCEQ maintains an Air Pollutant Watch List which can be found at the website cited above. Members of the public can make recommendations for addition or removal from the Air Pollutant Watch List. Instructions can be found at: <https://www.tceq.texas.gov/toxicology/apwl/>.

IV. CONCLUSION

OPIC finds that a hearing on the renewal of this authorization is prohibited by THSC § 382.056(g). Furthermore, OPIC finds that THSC § 382.058(c) prohibits the Commission from finding the Requester is an affected person. For these reasons, OPIC must recommend denial of the pending hearing request.

¹ *Cumulative Risk from Airborne Chemicals*, https://www.tceq.texas.gov/toxicology/q-a/cumulative_risk (last visited April 28, 2016).

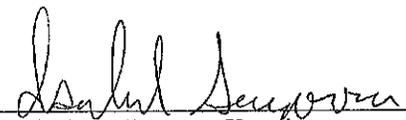
Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: 
Isabel G. Segarra Treviño
Assistant Public Interest Counsel
State Bar No. 24075857
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
Office: (512) 239-4014
Fax: (512) 239-6377

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2016 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

MAILING LIST
ARGOS READY MIX (SOUTH CENTRAL) CORP.
TCEQ DOCKET NO. 2016-0435-AIR

FOR THE APPLICANT:

Jennifer F. Warner
Argos Ready Mix (South Central) Corp.
8500 Freeport Parkway, Suite 200
Irving, Texas 75063-1932
Tel: 972/621-0999 Fax: 972/621-3350

Debbi Matthews
Westward Environmental, Inc.
P.O. Box 2205
Boerne, Texas 78006-3602
Tel: 830/249-8284 Fax: 830/249-0221

Kathryn Sipe
Westward Environmental, Inc.
P.O. Box 2205
Boerne, Texas 78006-3602
Tel: 830/249-8284 Fax: 830/249-0221

FOR THE EXECUTIVE DIRECTOR:

Sierra Redding, Staff Attorney
TCEQ Environmental Law Division
MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606

Bonnie Evridge, Technical Staff
TCEQ Air Permits Division,
MC- 163
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-5222 Fax: 512/239-7815

Brian Christian, Director
TCEQ Environmental Assistance
Division, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678

FOR ALTERNATIVE DISPUTE
RESOLUTION

Kyle Lucas
TCEQ Alternative Dispute Resolution,
MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4010 Fax: 512/239-4015

FOR THE CHIEF CLERK:

Bridget Bohac
TCEQ Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311

REQUESTER:

The Honorable Alma A. Allen
Texas House of Representatives
District 131
P.O. Box 2910
Austin, Texas 78768-2910