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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 29, 2020

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

RE: **TYCON READY MIX, LLC**
TCEQ DOCKET NO. 2020-1426-AIR

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Amanda D. Pesonen", with a long horizontal flourish extending to the right.

Amanda D. Pesonen
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2020-1426-AIR

IN THE MATTER	§	BEFORE THE
OF THE APPLICATION OF	§	
TYCON READY MIX, LLC FOR	§	TEXAS COMMISSION ON
STANDARD PERMIT	§	
REGISTRATION NO. 159582	§	ENVIRONMENTAL QUALITY

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

To the 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. Summary of position

Before the Commission is the application of Tycon Ready Mix, LLC (Applicant) for a Standard Permit under the Texas Clean Air Act (TCAA), Texas Health & Safety Code (THSC) § 382.05195. OPIC recommends granting the hearing requests of Debora Burkett, Franky Burkett, Janet Johnson Burkett, Robert Burkett, Leah Michelle Carter, and Gina Davis, and referring Issues 1 through 4 specified in § III.H for a contested case hearing at the State Office of Administrative Hearings (SOAH) with a maximum duration of 180 days. OPIC further recommends referring Bryan Burkett and Shelby Burkett to SOAH for a determination on whether they are affected persons. OPIC recommends the Commission deny the remaining hearing requests.

B. Background of facility

Applicant has applied to the TCEQ for Standard Permit Registration No. 159582 under TCAA § 382.05195. This registration would authorize the construction of a new concrete batch plant. The plant would be located at the following driving directions: from the intersection of

Hunters Trail and Country Road 139 (Burkett Road) in Flint, Smith County, go north on County Road 139 for approximately 180 feet and find the site entrance on the right. Contaminants authorized under this permit include particulate matter (PM), including but not limited to aggregate, cement, road dust, and PM with aerodynamic diameters of 10 microns or less (PM₁₀) and 2.5 microns or less (PM_{2.5}).

C. Procedural background

The application was received on December 20, 2019, and declared administratively complete on January 6, 2020. The Consolidated Notice of Receipt of Application and Intent to Obtain Permit and Notice of Application and Preliminary Decision (public notice) was published in English on January 27, 2020, in the *Tyler Morning Telegraph* and in Spanish on January 27, 2020, in *La Prensa Comunidad*. A virtual public meeting was held on July 21, 2020. The notice of public meeting was mailed to interested persons on the Chief Clerk's mailing list on July 1, 2020. The public comment period ended on July 21, 2020. The Chief Clerk mailed the Executive Director's (ED) Decision and Response to Comments (RTC) on October 1, 2020. The deadline to request a contested case hearing was November 2, 2020.

The Commission received timely requests for a contested case hearing from 66 requestors. OPIC recommends the Commission find that Debora Burkett, Franky Burkett, Janet Johnson Burkett, Robert Burkett, Leah Michelle Carter, and Gina Davis qualify as affected persons in this matter and that Bryan Burkett and Shelby Burkett be referred to SOAH for a determination on whether they are affected persons. OPIC recommends the Commission find all remaining hearing requestors are not affected persons.

II. APPLICABLE LAW

This application was filed on or after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015).

Under 30 TAC § 55.201(c), a hearing request by an affected person must be in writing, must be timely filed, may not be based on an issue raised solely in a public comment which has been withdrawn, and, for applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

Section 55.201(d) states that 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;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor 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) for applications filed:
 - (B) on or after September 1, 2015, list all relevant and material disputed issues of fact that were raised by the requestor 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 requestor should, to the extent possible, specify any of the ED's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and
- (5) provide any other information specified in the public notice of application.

30 TAC § 55.201(d).

For concrete batch plant registrations under the Standard Permit, THSC § 382.058(c) limits those who may be affected persons to “only those persons actually residing in a permanent residence within 440 yards of the proposed plant.” 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. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to be considered in determining whether a person is affected. These factors 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, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person;
- (6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and
- (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

Under § 55.203(d), to determine whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the Commission may also consider the following:

- (1) the merits of the underlying application and supporting documentation in the administrative record, including whether the application meets the requirements for permit issuance;

- (2) the analysis and opinions of the ED; and
- (3) any other expert reports, affidavits, opinions, or data submitted by the ED, the applicant, or hearing requestor.

30 TAC § 55.203(d).

For applications filed on or after September 1, 2015, § 55.205(b) states that a hearing request by a group or association may not be granted unless all of the following requirements are met:

- (1) comments on the application are timely submitted by the group or association;
- (2) the request identifies, by name and physical address, one or more members of the group or association that would otherwise have standing to request a hearing in their own right;
- (3) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (4) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

30 TAC § 55.205(b).

For an application filed on or after September 1, 2015, § 55.211(c)(2)(A)(ii) provides that a hearing request made by an affected person shall be granted if the request raises disputed issues of fact that were raised by the affected person during the comment period, that were not withdrawn by filing a withdrawal letter with the Chief Clerk prior to the filing of the ED's RTC, and that are relevant and material to the Commission's decision on the application.

Under § 55.211(c)(2)(B)-(D), the hearing request, to be granted, must also be timely filed with the Chief Clerk, pursuant to a right to hearing authorized by law, and comply with the requirements of § 55.201.

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 ED's RTC;
- (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

Section 382.058(c) of the THSC limits affected person status to “only those persons actually residing in a permanent residence within 440 yards of the proposed plant” applying for a Standard Permit under THSC § 382.05195.

Persons within 440 yards

The following requestors timely filed hearing requests, and, according to the map prepared by the ED's staff, maintain permanent residences located within 440 yards from the proposed facility: Debora Burkett, Franky Burkett, Janet Johnson Burkett, Robert Burkett, Leah Michelle Carter, and Gina Davis. Each of these requestors residing within 440 yards of the proposed facility based their requests on their own timely comments and, as detailed below, demonstrated they have a personal justiciable interest in this matter. Therefore, OPIC finds these requestors are affected persons.

Persons near 440 yards

Richard Ashby, Bryan Burkett, and Shelby Burkett live very close to within 440 yards of the proposed facility and filed timely hearing requests. The map prepared by the ED shows that

these requestors live so close to the boundary of the distance restriction specified in THSC § 382.058(c) that OPIC cannot determine with confidence whether they meet the statutory distance requirement for affected person status. Notwithstanding this uncertainty, because OPIC has found no record of timely-filed comments from Richard Ashby, OPIC cannot find he qualifies as an affected person. With respect to Bryan Burkett and Shelby Burkett, OPIC recommends that they be referred to SOAH for a determination on whether they are affected persons.

Grace Fellowship Church

Two timely hearing requests and timely comments were submitted by Robert Burkett on behalf of Grace Fellowship Church (the Church). In these requests, Mr. Burkett, whom OPIC finds is an affected person in this matter, identifies himself as the pastor of the Church, which is located fewer than 300 yards from the proposed facility. However, because § 382.058(c) of the THSC limits affected person status to “only those persons actually residing in a permanent residence within 440 yards of the proposed plant,” OPIC respectfully recommends the Commission find the Church is not an affected person.¹

Persons outside of 440 yards

According to the map prepared by the ED, the following requestors are located further than 440 yards from the proposed facility: John Brindley, Charlie Brown, Mindyn Brown, David Lee Brune, Wendy Brune, Bradley Burkett, Alfredo Castillo, Brittney Checketts, Scott Chelette, Andrew Chesnut, Robert Carroll Denmon, Mike Drain, Tamra Dunlap, Tyler Dunlap, Codi Foster, Karin Grantham, Ralph Gregory Grantham, Monique Hammond, Ashley Fair Harrison, John

¹ OPIC notes that it has previously recommended legislative changes to expand the right to a hearing under THSC § 382.058(c) to include schools, places of worship, licensed day-care facilities, and hospitals and other medical facilities, all of which may be utilized by sensitive receptors of particulate matter. *See, e.g.*, The Office of Public Interest Counsel’s Annual Report to the Texas Commission on Environmental Quality for Fiscal Year 2018, pp. 17-19. OPIC maintains that the efficiencies served by the limiting language of the THSC should be balanced against the TCEQ’s mandate to protect public health and general welfare.

Hendrix, Alesia Henry, Jerry King, Stephen Lange, Carolyn Lewis, Tyler Dean Lewis, Curt Lightle, Rob Love, Jackie Lowe, Sheila Mann, Ronald Masters, John McKinney, John Mitchell, Melissa Mitchell, Sheron Morrison, Debbie Powers, Steven Propper, Aaron Rediker, Susan Rediker, Jamie Slagle, Jennifer Lorraine Smith, David Starks, Jason Lee Stewart, Rebecca Stewart, Richard Stewart, Sallie Stewart, Hilde Marie Taylor, Matt Tefteller, Melinda Tefteller, Scott Toon, Jesse Walker, and Michael Wesp. OPIC notes that requestors Jonna Fitzgerald Boersma, Laura Corley, Renee Lovelace, Robert Richey, and Sylvia Wamble provided an address to a P.O. box, but failed to provide a residential address.² Because THSC § 382.058(c) limits affected person status to “only those persons actually residing in a permanent residence within 440 yards of the proposed plant,” OPIC finds that these requestors do not qualify as affected persons and must respectfully recommend denial of their hearing requests.

B. Issues raised in the hearing requests

The affected persons raised the following issues:

1. Whether operation of the proposed facility will adversely affect air quality. (Raised by Debora Burkett, Franky Burkett, Robert Burkett, and Leah Michelle Carter)
2. Whether emissions from the proposed facility will adversely affect human health and safety, including sensitive receptors. (Raised by Debora Burkett, Franky Burkett, Janet Johnson Burkett, Robert Burkett, Leah Michelle Carter, and Gina Davis)
3. Whether emissions from the proposed facility will adversely affect area wildlife. (Raised by Franky Burkett and Janet Johnson Burkett)
4. Whether emissions from the proposed facility will cause nuisance conditions affecting the use and enjoyment of requestors’ property, in violation of 30 TAC § 101.4. (Raised by Franky Burkett, Janet Johnson Burkett, and Robert Burkett)
5. Whether the proposed facility is unsuitable for the area, considering its proximity to residential neighborhoods. (Raised by Debora Burkett and Robert Burkett)

² Though Ms. Corley and Ms. Lovelace only provided P.O. box addresses with their hearing requests, they provided physical addresses with their requests to be added to the mailing list. OPIC’s independent mapping indicates that their addresses are located beyond the 440-yard statutory distance limitation.

6. Whether the proposed facility will cause excessive noise and light pollution. (Raised by Janet Johnson Burkett and Robert Burkett)
7. Whether the proposed facility will cause an increase in traffic. (Raised by Robert Burkett)

C. Which issues raised in the hearing requests are disputed

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

D. Whether the dispute involves questions of fact or of law

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 disputed issues involve questions of fact.

E. Whether the issues were raised by the affected persons during the public comment period

All of the issues were raised by the requestors during the public comment period.

F. Whether the hearing requests are based on issues raised solely in a public comment which has been withdrawn

The hearing requests are not based on issues raised solely in a public comment which has been withdrawn.

G. Relevant and material issues

The hearing requests raise 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).

Air Quality, Health Effects, and Nuisance Conditions

The affected persons raised the issue of air quality and its related effects to human and animal health. The affected persons also questioned whether the proposed facility will cause nuisance conditions. The 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. The Commission may issue this registration only if it finds no indication that the emissions from the proposed facility will contravene the intent of the TCAA, including protection of the public’s health and physical property. *See* THSC § 382.0518(b)(2). Therefore, Issue Nos. 1 through 4 regarding air quality, impacts to human and animal health, and nuisance conditions are relevant and material to the Commission’s decision on this application.

Issues That Are Not Relevant and Material

The affected persons raised concerns regarding suitability of the proposed facility’s location near residential neighborhoods, noise, light pollution, and increased traffic. The proposed registration in this matter would regulate the control and abatement of air emissions only. The TCEQ does not have jurisdiction to consider the proposed facility’s impact on traffic, noise, or

light pollution in proceedings on this registration. Additionally, general issues regarding the suitability of the location of the proposed facility are not within TCEQ's jurisdiction. Only specific buffer zone and setback requirements imposed by statute or rule may be considered, and those are not at issue here. Otherwise, TCEQ does not have jurisdiction to consider the location of a proposed facility when determining whether to approve this Standard Permit Registration.

Accordingly, Issue Nos. 5 through 7 regarding location, noise, light, and traffic are not relevant and material to the Commission's decision on this application.

H. Issues recommended for referral

OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

1. Whether operation of the proposed facility will adversely affect air quality.
2. Whether emissions from the proposed facility will adversely affect human health and safety, including sensitive receptors.
3. Whether emissions from the proposed facility will adversely affect area wildlife.
4. Whether emissions from the proposed facility will cause nuisance conditions affecting the use and enjoyment of requestors' property, in violation of 30 TAC § 101.4.

I. Maximum expected duration of hearing

Commission Rule § 50.115(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, for applications filed on or after September 1, 2015, the administrative law judge must conclude the hearing and provide a proposal for decision by the 180th day after the first day of the preliminary hearing, or a date specified by the Commission, whichever is earlier. 30 TAC § 50.115(d)(2). To assist the Commission in setting a date by which the judge is expected to issue a proposal for decision, and

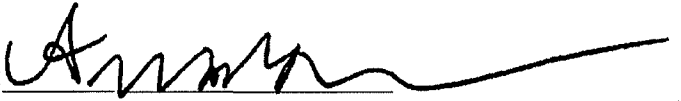
as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC respectfully recommends the Commission find Debora Burkett, Franky Burkett, Janet Johnson Burkett, Robert Burkett, Leah Michelle Carter, and Gina Davis qualify as affected persons in this matter. OPIC further recommends Bryan Burkett and Shelby Burkett be referred to SOAH for a determination on whether they are affected persons. Finally, OPIC recommends the Commission refer this application for a 180-day hearing at SOAH on Issue Nos. 1 through 4 contained in § III.H and deny all remaining hearing requests.

Respectfully submitted,

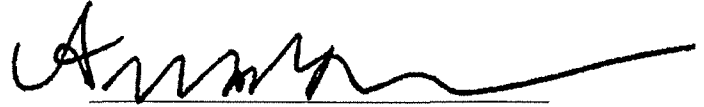
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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2020, the original 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.

A handwritten signature in black ink, appearing to read 'Amanda D. Pesonen', written over a horizontal line.

Amanda D. Pesonen

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TCEQ DOCKET NO. 2020-1426-AIR

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