

TCEQ DOCKET NO. 2021-0942-AIR

**PORT ARTHUR LNG, LLC § BEFORE THE
AIR PERMITS 148420, § COMMISSION ON
PSDTX1572, GHGPSDTX198 § ENVIRONMENTAL QUALITY
§**

**PORT ARTHUR COMMUNITY ACTION NETWORK'S REPLY
IN SUPPORT OF ITS CONTESTED CASE HEARING REQUEST**

To the Honorable Commissioners of the Texas Commission on Environmental Quality:

Lone Star Legal Aid on behalf of, Requestor, Port Arthur Community Action Network (“PA-CAN”) files this Reply in Support of its Contested Case Hearing Request on the application by Port Arthur LNG (“PALNG” or “Applicant”) for a new Prevention of Significant Deterioration (“PSD”) air permit, and, in support thereof, respectfully shows the following.

I. SUMMARY OF ARGUMENT

On September 15, 2021, PA-CAN timely filed a request for a contested case hearing meeting the requirements of 30 TAC § 55.201(d).¹ The Office of Public Interest Council (“OPIC”) agrees that PA-CAN meets the four requirements for organizational standing to request a contested case hearing.² The Executive Director (“ED”) concurs on three out of four requirements.³ The only point of disagreement by the ED is whether PA-CAN has a group member who has standing to request the hearing in his own right.⁴

In support of its contested case hearing request, PA-CAN presented John Beard, Jr., PA-CAN’s President and Chairman, as a group member who constitutes an “affected person”

¹ PA-CAN’s Public Comments and Request for Contested Case Hearing on Draft Permit for Proposed Air Quality Permit Numbers: 158420, PSDTX1572, and GHGPSDTX198 for the Emission of Air Pollutants for the Proposed Port Arthur LNG, LLC Export Terminal near Port Arthur, Jefferson County, Texas (“PA-CAN Comments”).

² Office of Public Interest Council, Response to Hearing Request (“OPIC Response”) at 5.

³ Executive Director, Response to Hearing Request and Requests for Reconsideration (“ED Response”) at 6.

⁴ 30 TEX. ADMIN. CODE § 55.203(b)(2); TEX. WATER CODE § 5.115(a-1)(2).

under 30 TAC § 55.203(a) in his individual capacity. Mr. Beard’s personal justiciable interest in the permit relates to the following four protected interests affected by this application:

- (a) **a property interest:** the Beard home’s proximity (3.5 miles) to the facility boundary;
- (b) **his interests in air quality and health impacts from the increased pollution:** Mr. Beard raised concerns about health effects from (1) proposed increases in NO_x and VOC emissions; (2) the contribution of these precursor pollutants to increases in ozone; and (3) nuisance odors from the facility while he is utilizing Pleasure Island;
- (c) **a recreational interest:** Mr. Beard’s involvement with recreational activities on Pleasure Island, which is less than 900 feet from the facility in some areas; and
- (d) **an economic interest:** Mr. Beard’s eight years of involvement with the Pleasure Island Advisory Board in supporting the development of this recreational area for the residents of Port Arthur and visitors to the region.

The record before the Commission leads to the conclusion, as OPIC has rightfully reached, that Mr. Beard’s interests, which are not common to the general public, should confer standing in his own right. Thus, PA-CAN’s hearing request should be granted.

II. PA-CAN’S CONTESTED CASE HEARING REQUEST SHOULD BE GRANTED BECAUSE JOHN BEARD, JR. HAS STANDING IN HIS OWN RIGHT

Under 30 TAC § 55.203(a), an “affected person” is one who has a personal justiciable interest related to a legal right, duty, privilege, or power, or economic interest affected by the application.⁵ The Commission must consider each of Mr. Beard’s four asserted protected interests in this application to decide whether PA-CAN has organizational standing to proceed with a contested case hearing.⁶ Given the factors provided in Sections 55.203(c) and (d) to guide this determination,⁷ the presence of one interest or even a combination of these interests may prove sufficient.⁸

⁵ See also TEX. WATER CODE § 5.115(a).

⁶ 30 TEX. ADMIN. CODE § 55.203(c), (d).

⁷ ED Response at 4, 5; OPIC Response at 3-5.

⁸ 30 TEX. ADMIN. CODE § 55.203(c), (d); see also ED Response at 4, 5; OPIC Response at 3-5.

TCEQ’s “affected person” standard for associations like PA-CAN is analogous to state and federal court standards for determining whether an association has standing.⁹ The Texas Supreme Court has expressly adopted the test for associational standing laid out by the U.S. Supreme Court in *Hunt v. Washington State Apple Adver. Com’n*, 432 U.S. 333, 343 (1977).¹⁰ The *Hunt* test requires an organization to demonstrate that: (1) its members would otherwise have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.¹¹ As explained further below, Mr. Beard has more than one constitutionally protected interest in PALNG’s application for the proposed LNG facility that provides the grounds for his contested case hearing request. The ED, OPIC and PALNG all agree that PA-CAN meets the remaining two elements for organizational standing codified in 30 TAC § 55.205(b).¹²

A. PSD SITES LIKE PORT ARTHUR LNG REQUIRE THE COMMISSION TO CONSIDER A LARGER IMPACT AREA THAN MERELY A MILE.

The likely impact of the regulated activity “on the use of property of the person” is a factor TCEQ is required to consider in determining whether a person is an affected person.¹³ Mr. Beard is a resident of West Port Arthur, residing less than 4 miles from the proposed site.¹⁴ There are no

⁹ *Heat Energy Advanced Tech., Inc., v. W. Dallas Coalition for Env’l Justice*, 962 S.W.2d 288, 295 (Tex. App—Austin 1998, pet. denied) (“The Commission clearly derived its rule on associational standing from the standard Texas courts apply in analogous circumstances.”); citing *Texas Ass’n of Bus v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993); see also *id.* at 444 (“[W]e look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield.”). To satisfy federal Article III standing, “a plaintiff must show (1) it has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Env’l. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (internal citations omitted).

¹⁰ See *Texas Ass’n of Bus.*, 852 S.W.2d at 447.

¹¹ *Hunt*, 432 U.S. at 343.

¹² ED Response at 6; OPIC Response at 8; PALNG Response at 11.

¹³ 30 TEX. ADMIN. CODE § 55.203(c)(4).

¹⁴ PA-CAN Comments at 4-5; OPIC Response at 6; ED Response at 6.

distance restrictions imposed by law on who may be considered an affected person for this type of air permit.¹⁵ The area of impact for air emissions depends on multiple factors including: the type and level of emissions, the height of the emission source, and the area topography and meteorology—and, thus, these impacts must be evaluated on a case-by-case basis.

As acknowledged by OPIC, PA-CAN’s request on behalf of Mr. Beard presents a compelling case here to discourage the Commission’s default to a “one-mile radius”.¹⁶ First, this permit is a considered a major facility for air pollution and would emit over 6,000 tons per year of air pollutants.¹⁷ Contaminants authorized under this permit include ammonia, nitrogen oxides (NO_x), volatile organic compounds (VOC), particulate matter (both PM_{2.5} and PM₁₀), sulfur dioxide, sulfuric acid mist, and greenhouse gases.¹⁸ As OPIC acknowledges, “[t]he emission of air contaminants at PSD levels warrants the consideration of potential affected person status at further distances from the site.”¹⁹ Indeed, the Commission has granted hearing requests on other permitting matters for large air emission facilities like PALNG where the hearing requestor lived 4 or more miles from the site, farther away than Mr. Beard in this instance. Examples of such proceedings include:

- **Application of Air Quality Permit No. 102892 for the Construction of a New Ethylene Production Unit at ExxonMobil’s Baytown Olefins Plant.** An individual qualified as an affected person in a challenge to ExxonMobil’s Baytown Ethylene plant permit based in part on her ownership of a motorcycle repair shop which was located 4-5 miles from the ExxonMobil plant. Her home was about three blocks from the shop (SOAH Docket No. 582-13-4611; TCEQ Docket No. 2013-0657-AIR). ExxonMobil’s proposed emission increases were significantly smaller for NO_x that the emissions proposed by PALNG.²⁰

¹⁵ 30 TEX. ADMIN. CODE § 55.203(c)(2).

¹⁶ See Map attached to ED Response.

¹⁷ Application at 61.

¹⁸ ED Response at 1.

¹⁹ OPIC Response at 6.

²⁰ ExxonMobil’s proposed ton per year increases were as follows NO_x (235.59), CO (931.16), VOC (224.14), PM, PM₁₀, PM_{2.5} (90.54, 78.58, 73.45) and SO₂ (22.47). See TCEQ Construction Permit Source Analysis Technical Review Permit No. 102982.

- **In Re Application for Air Quality Permit No. 85013, PSD-TX-1138, and HAP 48 for the Las Brisas Energy, Center LLC.** In the 2009 challenge to construction of the Las Brisas power plant individuals were admitted as affected persons who lived more than 10 miles from the plant site, and more than a dozen individuals were admitted as affected persons who lived more than 5 miles from the site. For example, Mr. Whakefield was an active participant in that hearing and his home was approximately 9 miles from the Las Brisas site. (SOAH Docket No. 582-09-2005; TCEQ Docket No. 2009-0033-AIR).
- **In Re Application for Air Quality Permit Nos. 79188 PSD-TX-1072 and HAP 14 for NRG Texas Power LLC** affected party status was granted to Douglas Ray who lived approximately 4 miles from the site. (SOAH Docket Nos-0861 and 582-08-4013; TCEQ Docket Nos. 2007-1820-AIR and 2008-1210-AIR). Mr. Beard lives even closer to the proposed PALNG site, approximately 3.5 miles.²¹

Two of the largest contaminants proposed by this permit are VOCs and NO_x,²² precursors to the formation of ozone. The Applicant projects that the total NO_x potential-to-emit for all sources at PALNG sums to 1,914 tons per year (tpy) NO_x and 207 tpy VOCs.²³ Given the amount of industrial activity that exists in the region generally—and West Port Arthur more specifically—Jefferson County’s history of ozone nonattainment should be a primary focus for the agency. Each new PSD site potentially jeopardizes that status.

TCEQ must also consider health and safety impacts from the proposed facility.²⁴ Members who work, live, or travel near a proposed facility may be conferred standing due to these impacts. PA-CAN expressed detailed concerns not only from PA-CAN Members²⁵ but also by Mr. Beard individually regarding the air quality near his home:²⁶

PA-CAN members who live and recreate nearby are concerned the proposed increased emissions of NO_x and other air pollutants will affect their breathing, affect their lung function, and irritate their eyes, among other adverse health effects. PA-CAN members are also concerned increased NO_x emissions will contribute to further degradation of nearby ecosystems on Pleasure Island, the wildlife areas, and elsewhere, by contributing to acid rain and causing adverse

²¹ OPIC Response at 6.

²² PA-CAN Comments at 12; ED Response at 1.

²³ Application at 8; *see also* PA-CAN Comments at 12 (identifying specific emission sources for NO_x and VOCs at proposed facility).

²⁴ 30 TEX. ADMIN. CODE § 55.203(c)(4).

²⁵ PA-CAN Comments at 3.

²⁶ PA-CAN Comments at 7-8.

health effects in local wildlife. Specifically, PA-CAN members are concerned fishing, birding, and other hunting and other wildlife viewing would be harmed by additional air pollution. Odors and air pollution emitted by the facility will adversely affect the viability and enjoyment of recreational activities.

Considering the other industry—Motiva, Valero, and Oxbow Calcining, among others—already operating immediately adjacent to the West Port Arthur Community where Mr. Beard lives, these additional pollution sources raised by the proposed permit create concern for the already-crowded air shed. The Fifth Circuit has stated that the analysis of cumulative impacts and other environmental justice concerns of West Port Arthur residents like Mr. Beard should be addressed in the PSD permitting process.²⁷

Applicant argues that PALNG’s air emissions could not possibly have any adverse health impacts on Mr. Beard given the location of his property in West Port Arthur.²⁸ However, PALNG’s modeling offered in support of these contentions demonstrates the Significant Impact Levels (“SIL”) for NO₂ (1-hour averaging period) and PM_{2.5} (24-hour averaging period) *will be exceeded* at Mr. Beard’s home, as well as at Pleasure Island.²⁹ A SIL is a threshold amount below which there is not an expectation a source will cause or contribute to a violation of PSD increments or National Ambient Air Quality Standards (“NAAQS”).³⁰ Emissions which exceed a SIL should be given additional scrutiny. PALNG contends its contribution to the air shed’s NO₂ and PM_{2.5} NAAQS levels are too low to support Mr. Beard’s request³¹ and claims its proposed facility will not contribute or risk the area’s struggle with ozone nonattainment.³² Yet the application reveals

²⁷ *CleanCOAlitiion v. TXU Power*, 536 F.3d 469, 473 (5th Cir. 2008); PA-CAN Comments at 8-10.

²⁸ Port Arthur LNG, LLC’s Response to Request for Contested Case Hearing (“PALNG Response”) at 3-6.

²⁹ PALNG Response at 4.

³⁰ U.S. ENVTL. PROT. AGENCY, Fact Sheet—Prevention of Significant Deterioration for Fine Particle Pollution—Increments, Significant Impact Levels and Significant Monitoring Concentration, <https://www.epa.gov/sites/default/files/2015-12/documents/20070912fs.pdf>.

³¹ PALNG Response at 5.

³² *Id.*

PALNG will be a major source of ozone precursors,³³ and Jefferson County continually threatens to re-enter nonattainment.³⁴ As noted above, PA-CAN amplifies resident concerns that the air shed at Mr. Beard's home, at Pleasure Island, and across Port Arthur's Westside already includes high levels of air pollution.³⁵ Thus, the proposed increases from PALNG will further cause and contribute to respiratory illnesses and eye, nose, and throat irritation, among other health impacts.³⁶ Finally, PA-CAN presents questions of fact which challenge PALNG's assertions: (1) whether PALNG is adopting the best available control technology ("BACT") required by law to minimize the risk of NAAQS exceedances; (2) whether there is a potential for adverse health effects from NOx, VOC, and ozone from the new PSD site without appropriate BACT; and (3) whether PALNG's methodologies are correct.³⁷

B. MR. BEARD RECREATES AND RELAXES ON PLEASURE ISLAND, APPROXIMATELY 900 FEET FROM THE FACILITY.

Recreational, aesthetic, and economic interests have been recognized as injuries that can confer standing in environmental cases.³⁸ In recommending the granting of PA-CAN's hearing request, OPIC appropriately recognized that Mr. Beard's recreational interest in his enjoyment of Pleasure Island is a constitutionally protected interest that adequately supports PA-CAN's hearing request.³⁹ Given the proximity of the PALNG facility to the primary recreational asset in Port Arthur, Pleasure Island, the residents of the area, like Mr. Beard, are concerned about the potential

³³ Application at 8.

³⁴ U.S. ENVTL PROT. AGENCY, Texas Nonattainment/Maintenance Status for Each County by Year for All Criteria Pollutants, available at https://www3.epa.gov/airquality/greenbook/anayo_tx.html.

³⁵ PA-CAN Comments at 7-8, 9-10.

³⁶ PA-CAN Comments at 7-8.

³⁷ PA-CAN Comments at 11-19.

³⁸ See *Friends of the Earth*, 528 U.S. at 183-84 (finding an injury-in-fact where "reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests"); *Sierra Club, Lone Star Chapter v. Cedar Point Oil. Co.*, 73 F.3d 546, 557 (5th Cir. 1996) ("harm to aesthetic, environmental, or recreational interests is sufficient to confer standing") (internal quotation omitted); *Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 154 (1970) (explaining the legal interest conferring standing may, at times, reflect "aesthetic, conservational, and recreational" as well as economic values).

³⁹ OPIC Response at 7.

impacts that this new facility—only 900 feet away in some areas—will have on his and others recreational activities in the area. The PALNG facility, less than a ¼ mile in proximity to this community asset at its farthest eastern point, poses a direct threat to the quality of recreational activities regularly occurring on the island: city-wide picnics and celebration events,⁴⁰ fishing, duck hunting, disc golf, picnicking, cycling, and camping.⁴¹ Moreover, beyond Pleasure Island, several wildlife management areas and other recreational areas, like Keith Lake and other state parks are also found within a two-to-four-mile radius of the proposed facility.⁴²

Further, beginning in 2012, Mr. Beard spent eight years on the Pleasure Island Advisory Board, serving as its chairman from 2018 to 2021. Pleasure Island was also part of Mr. Beard's district while he served on the Port Arthur City Council from 2003 to 2012. Mr. Beard's reason for his involvement on the board primarily was his interest in economic development for the region: to expand and grow the recreational opportunities for residents and tourism on Pleasure Island.⁴³ Economic interests are a type of personal justiciable interest explicitly included in the definition of an affected person.⁴⁴ PA-CAN described John's frequent visits to Pleasure Island for the purpose of managing these interests in his capacity as the Chairman of the Pleasure Island Advisory Board.⁴⁵ Although he no longer serves as Chairman of the Board, Mr. Beard's interest in promoting the island has not waned. He continues to work on initiatives through PA-CAN that will improve the island, recently speaking to several groups involved with Pleasure Island about these proposed projects.

⁴⁰ PA-CAN Comments at 5.

⁴¹ PA-CAN Comments at 3.

⁴² PA-CAN Comments at 6.

⁴³ PA-CAN Comments at 5.

⁴⁴ TEX. WATER CODE § 5.115(a); 30 TEX. ADMIN. CODE § 55.203(a).

⁴⁵ PA-CAN Comments at 5.

III. CONCLUSION

As OPIC points out in its response,⁴⁶ there are no distance restrictions imposed by law related to this permit. In fact, there are difficulties with finding any homes within a 1-mile radius of this facility. That reality should not lead to the Commissioners to the erroneous conclusion, however, that the air emissions from this new PSD site won't impact the air shed in West Port Arthur or that its operations cannot impact individuals in West Port Arthur, like John Beard, Jr. of PA-CAN, in ways that the general public are not. As described in PA-CAN's comments, this new facility, sited near Pleasure Island and other key recreational and economic interests in the area for the residents in Port Arthur, like Mr. Beard, will impact these constitutionally protected interests and increase air pollution in the area. For the foregoing reasons, PA-CAN respectfully requests that the Commission:

- (a) affirm OPIC's recommendation to grant PA-CAN's hearing request based on John Beard, Jr.'s affected person status;⁴⁷
- (b) refer the matter to alternative dispute resolution;⁴⁸
- (c) refer the matter to State Office of Administrative Hearings ("SOAH") for a 180-day hearing;⁴⁹ and
- (d) affirm the referral of the following issues raised by PA-CAN to SOAH as recommended by the ED and OPIC shown in the chart below:

Issues Raised by PA-CAN ⁵⁰	ED: Referral Recommended ⁵¹	OPIC: Referral Recommended ⁵²
Whether the proposed emissions will threaten the health and safety of nearby residents.	X (ED Issue 1)	X
Whether the proposed emissions will cause or contribute to exceedances of NAAQS.	X (ED Issue 2)	X

⁴⁶ OPIC Response at 5.

⁴⁷ OPIC Response at 5-6.

⁴⁸ ED Response at 10.

⁴⁹ OPIC Response at 10-11; ED Response at 10.

⁵⁰ PA-CAN Comments at 20-21.

⁵¹ ED Response at 6-7.

⁵² OPIC Response at 8-9.

Issues Raised by PA-CAN⁵⁰	ED: Referral Recommended⁵¹	OPIC: Referral Recommended⁵²
Whether the proposed emissions will exceed allowable Prevention of Significant Deterioration Increments.	X (ED Issue 14)	X
Whether the proposed emissions will cause nuisance conditions violating 30 Tex. Admin. Code § 101.4.	X (ED Issue 3)	X
Whether the TCEQ considered cumulative risks of concentrated heavy industrial sources of air pollution.	X (ED Issue 19)	X
Whether draft permit conditions are adequate to protect the public from cumulative risks in accordance with Tex. Water Code § 5.130.	X (ED Issue 18)	X
Whether the applicant's air quality analysis is flawed.	X (ED Issue 4)	X
Whether the proposed sources will utilize Best Available Control Technology.	X (ED Issues 11-12)	X
Whether the emissions calculation methodologies outlined in the application are flawed or outdated.	X (ED Issue 13)	X
Whether proposed air monitoring and reporting requirements are adequate to ensure compliance with the Clean Air Act and protect residents.	X (ED Issue 17)	X

Dated: August 16, 2021

Respectfully submitted,

LONE STAR LEGAL AID
EQUITABLE DEVELOPMENT INITIATIVE
ENVIRONMENTAL JUSTICE TEAM

Amy Catherine Dinn
Managing Attorney
Texas Bar No. 24026801
P.O. Box 398
Houston, TX 77001
Telephone: 713-652-0077 ext 1118
adinn@lonestarlegal.org

Chase Porter
Attorney
Equal Justice Works Fellow
cporter@lonestarlegal.org
Telephone: 713-652-0077 ext 1031

**ATTORNEYS FOR PORT ARTHUR
COMMUNITY ACTION NETWORK**

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2021, Port Arthur Community Action Network's Reply in Support Its Contested Case Hearing Request was filed with the Chief Clerk of the TCEQ, and a copy was served on all persons listed on the attached mailing list via electronic mail and the U.S. Mail.

/s/ Amy Catherine Dinn
Amy Catherine Dinn