

**SOAH DOCKET NO. 582-20-0884  
TCEQ DOCKET NO. 2019-0902-AIR**

<b>APPLICATION BY</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>INGRAM CONCRETE, LLC</b>	<b>§</b>	
<b>ROCK CRUSHER</b>	<b>§</b>	<b>OF</b>
<b>NEMO, SOMERVELL COUNTY</b>	<b>§</b>	
<b>AIR PERMIT NO. 152417L001</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**OCEAN CANYON PROPERTIES, INC. AND TRES RIOS, LLC D/B/A TRES RIOS RV  
RESORT’S EXCEPTIONS TO PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

The Permit Application of Ingram Concrete, LLC (“Ingram” or “Applicant”) should be denied for all of the reasons presented at hearing by the Protestants Ocean Canyon Properties, Inc. and Tres Rios, LLC d/b/a Tres Rios RV Resort (together, the “Ocean Canyon Protestants”). The Ocean Canyon Protestants file these exceptions to particularly assert that Ingram did not comply with the sign posting requirements of 30 Tex. Admin. Code § 39.604, a fatal flaw in the application. The ALJs’ Proposal for Decision is erroneous insofar as it finds that Ingram’s sole sign complied with the requirements because they were placed at the closest location to the proposed site that touched a public road. That is not what is required under 30 Tex. Admin Code § 39.604, and its specific, different requirements are mandatory, as the Proposal for Decision acknowledges. Accordingly, the Ocean Canyon Protestants ask the ALJs to revise the Proposal for Decision to include a finding that Ingram has not complied with the sign posting requirements, and to recommend that TCEQ therefore deny Ingram’s Permit Application.

**I. IT IS UNDISPUTED THAT THE SIGN PLACEMENT REQUIREMENTS ARE MANDATORY**

As the Ocean Canyon Protestants argued in their written Closing Statement, the sign placement requirements of 30 Tex. Admin. Code § 39.604 are mandatory, not directory. Each of

the placement requirements under §39.603(c) is preceded by the word “must,” which, under Texas law, is generally construed as creating a mandatory requirement. *See* Tex. Gov’t Code § 311.016 (use of “must” in statutes should be construed to create a condition precedent); *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 494 (Tex. 2001) (“[t]he word must creates or recognizes a condition precedent...[t]he Legislature has instructed us to apply this definition unless its context necessarily requires a different construction”) (citing Gov’t Code § 311.016); *TJFA, L.P. v. Texas Com’n on Env’tl. Quality*, 368 S.W.3d 727, 734 (Tex. App.—Austin 2012, pet. denied) (“In general, statutes that use words like “shall” or “must” are construed as mandatory”).<sup>1</sup>

The language surrounding § 39.604(c) also demonstrates that TCEQ intended the placement requirements to be mandatory. For example, § 39.604(a) lays out requirements for the content of signs and states that signs “must substantially meet [the] requirements.” This is in contrast to § 39.604(c), in which the unqualified use of “must” indicates an intent that applicants must strictly comply with the placement requirements. Similarly, § 39.604(d) allows an applicant to seek a variance from the placement requirements if “it is not practical to comply with the specific requirements” of § 39.604(c). This further demonstrates that strict compliance with the placement requirements is mandatory.

Critically, neither the Executive Director nor Ingram have disputed the arguments above. In fact, the Proposal for Decision appears to agree that the placement requirements are mandatory. It states that “[t]he ALJs find that the sign placement complied with the mandatory requirements for this facility.”<sup>2</sup> Thus, to prevail on Issue No. 5, Ingram must show that its signs complied with

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<sup>1</sup> This interpretative rule regarding use of “must” also applies to interpretation of administrative rules such as § 39.604. *See Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999) (“We construe administrative rules, which have the same force as statutes, in the same manner as statutes”).

<sup>2</sup> PFD at 50.

the specific requirements of § 39.604(c). It cannot, because its signs did not comply with those requirements.

**II. IT IS UNDISPUTED THAT INGRAM’S SIGNS DON’T MEET THE SPECIFIC PLACEMENT REQUIREMENTS OF 30 TEX. ADMIN. CODE § 39.604**

Under § 39.604(c), an applicant’s sign placement must satisfy three specific requirements. First, the signs must be posted along every property line “paralleling a public highway, street, or road.” Second, the signs must be posted within 10 feet of those property lines. Finally, the signs must be visible from the street paralleling a public highway, street, or road.

No one—not Ingram, not the Executive Director, and not the ALJs—contends that Ingram’s signs satisfied these criteria, because they did not. It is undisputed that the signs were not posted within 10 feet of a property line, or along a property line paralleling a public road. Instead, they were placed at the end of a dead-end road that is perpendicular to the nearest property line. It is also undisputed that the signs were not visible from a road paralleling the property. This detail is crucial. By requiring signs be posted along and visible from roads running parallel to property lines, the Commission rules ensure that signs will be seen by those driving by a property, thus maximizing the number of individuals who might see the signs. In contrast, posting signs on a perpendicular road that dead ends into a property minimizes the number of people who will see the signs. In that location, signs are only likely to be seen by those entering the property and not by people passing by the property.

The Proposal for Decision ignores Ingram’s failure to satisfy even one of the three mandatory placement requirements under § 39.604(c), and it instead finds that it was sufficient for Ingram to place its signs at “the closest place to the proposed site that touched a public

road.”<sup>3</sup> But that is not what is required under § 39.604(c). By requiring Ingram only to put its signs “close to the property” and “touching a public road,” the Proposal for Decision disregards the plain language of § 39.604(c), and it guts the specific requirements the Commission requires of applicants under its own rules.

The Ocean Canyon Protestants recognize that, given the layout of the property and the location of the nearby roads, it likely was not practical for Ingram to comply with the specific placement requirements. That impracticality does not, however, excuse Ingram’s non-compliance. On the contrary, § 39.604(d) provides a specific remedy for impracticality, which Ingram failed to follow: obtain a variance from the Executive Director. The availability of this remedy under § 39.604(d), along with the mandatory nature of the placement requirements under § 39.604(c), means that applicants may not simply select a non-compliant sign location that they believe is close enough, or that they have unilaterally have determined is reasonable. Rather, if Ingram was unable to comply with the specific, mandatory requirements of § 39.604(c), it was required to seek a variance. Its failure to do so was a failure to comply with § 39.604.

### **III. AS A RESULT OF ITS INABILITY TO SATISFY THE SPECIFIC SIGN POSTING REQUIREMENTS AND ITS FAILURE TO OBTAIN A VARIANCE, INGRAM HAS NOT MET TCEQ’S PUBLIC NOTICE REQUIREMENTS**

That Ingram failed to comply with the sign placements requirements, and that the Proposal for Decision is therefore erroneous, is demonstrated by three points, each of which is undisputed. First, it is undisputed that the specific sign placements requirements of § 39.604(c) are mandatory, not directory. Strict compliance with the specific requirements is thus necessary for Ingram to prevail on this issue. Second, it is undisputed that Ingram’s sign placement did not

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<sup>3</sup> PFD at 49.

meet the specific requirements of § 39.604(c): 10 feet from a property line paralleling a public road, and visible from that parallel road. Third, it is undisputed that Ingram did not obtain a variance from those requirements. Ingram's placement of its signs at the end of a dead-end road near the property does not satisfy § 39.604. Accordingly, Ingram has not complied with the signage requirements, and the Proposal for Decision was in error to the extent it found that Ingram's sign placement was proper.

#### **IV. PRAYER**

For the foregoing reasons, the Ocean Canyon Protestants respectfully pray that should be denied for all of the reasons presented at hearing by the Protestants Ocean Canyon Properties, Inc. and Tres Rios, LLC d/b/a Tres Rios RV Resort (together, the "Ocean Canyon Protestants").

the ALJs:

- (1) Revise the Proposal for Decision to find that Ingram has not complied with the mandatory sign placement requirements of 30 Tex. Admin. Code § 39.604(c). Particularly:

Finding of Fact No. 11 should be revised to state the following:

*"Ingram failed to post signs in English and Spanish as required for the duration of the initial public comment period."*

Finding of Fact No. 54 should be revised to state the following:

*Based on Findings of Fact Nos. 7 through 18, Ingram did not comply with the Commission's public notice requirements related to sign-posting and newspaper notice for air permit applications to maintain jurisdiction to decide the Application.*

Conclusion of Law No. 5 should be revised to state the following:

*Notice was not provided in accordance with Texas Water Code § 5.5553; Texas Health and Safety Code §§ 382.0516, 0517 and .056; Texas Government Code §§ 2001.051 and .052; and 30 Texas Administrative Code chapter 39.*

Conclusion of Law No. 14 should be revised to state the following:

*Ingram has not made all demonstrations required under applicable statutes and regulations, including 30 Texas Administrative Code § 116.111 regarding air*

*permit applications, to be issued an air quality permit with conditions as set out in the Draft Permit.*

Conclusion of Law No. 15 should be revised to state the following:

*In accordance with Texas Health and Safety Code § 382.0518(b), the Application for Air Quality Permit No. 152417L001 should be denied.*

Proposed Ordering Provision No. 1 should be revised to state the following:

*The Application by Ingram for Air Quality Permit No. 152417L001 is denied.*

- (2) Based on the above revision and for all of the other reasons presented at hearing by the Ocean Canyon Protestants, recommend that TCEQ deny the Permit Application.

The Ocean Canyon Protestants further pray that the ALJs grant them all other relief to which they may show themselves entitled.

Respectfully submitted,

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By: \_\_\_\_\_



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## CERTIFICATE OF SERVICE

I certify by my signature above that a true and correct copy of the foregoing document was served on the persons indicated below by electronic service on this 2nd day of July 2020.

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