

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Toby Baker, *Executive Director*



Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 30, 2021

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: **ROADRUNNERR EXPRESS LLC**
TCEQ DOCKET NO. 2021-1482-MSW

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in black ink that reads "Vic McWherter".

Vic McWherter
Public Interest Counsel

cc: Mailing List

DOCKET NO. 2021-1482-MSW

**IN THE MATTER OF THE
MOTION TO OVERTURN THE
EXECUTIVE DIRECTOR'S
DECISION TO APPROVE
ROADRUNNER EXPRESS LLC'S
APPLICATION FOR
REGISTRATION NO. 170067**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO MOTION TO OVERTURN**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ or Commission) files this Response to the pending Motion to Overturn (Motion) the decision of the Executive Director (ED) approving the application of Roadrunner Express LLC (Applicant) for Registration No. 170067 (Registration). For the reasons discussed below, OPIC respectfully recommends that the Commission grant the Motion.

I. Background

The Registration authorizes the Applicant to process used and scrap tires at a facility (Facility) located at 14650 Dove Road, Moody, Texas 76557. The Registration authorizes storage of a maximum of 500 used or scrap tires (or the equivalent in tire pieces) on the ground or 2,000 used or scrap tires (or the equivalent in tire pieces) in enclosed containers at the Facility. The TCEQ received the application on August 11, 2021. The ED issued Registration No. 170067 on October 14, 2021. On November 8, 2021, Bell County Commissioner Bill Schumann timely filed the pending Motion on behalf of Bell County (Movant). For the reasons stated below, OPIC recommends that the Commission grant the Motion and remand the application to the ED for the purposes of: (1) providing effective notice to the Bell County Judge and the Bell County Fire

Marshal; (2) allowing 45 days from the date of mailing for these officials to respond; and (3) allowing time for the ED to review and consider input received from these local officials.

II. Applicable Law

Activities including the storage, management, and processing of used and scrap tires are regulated under 30 TAC Chapter 328, Subchapter F. Regulated entities including “scrap tire storage sites” and “scrap tire facilities” must obtain a registration under 30 TAC § 328.55. Facilities that process or recycle scrap tires (“scrap tire facilities”) are subject to specific registration application requirements under 30 TAC § 328.63. Scrap tire facilities storing a maximum of 500 tires on the ground or 2,000 tires in containers (such as the Applicant’s Facility) must comply with 30 TAC § 328.63(c) and (d) when applying for a registration.¹

An applicant for a scrap tire facility must mail notice to local officials with jurisdiction over the facility site, including the County Judge and the appropriate local fire authority. 30 TAC § 328.63(d)(1). The County Judge and the local fire authority have 45 days to provide input to the ED. 30 TAC § 328.63(d)(2) and (4). Before issuance of a registration, the ED must review and consider input received from these local authorities relevant to concerns about noncompliance with local requirements relating to public health and safety and fire protection. 30 TAC § 328.63(d)(2) and (4).

Under 30 TAC § 328.70, a person affected by a registration may file a motion to overturn pursuant to 30 TAC § 50.139. There are no predetermined limitations on who has a right to file such a motion. As provided by 30 TAC § 50.139(a), any person may file a motion to overturn the ED’s action on an application. A motion to overturn must be filed no later than 23 days after the date the agency mails notice of the decision to the applicant and persons on any required mailing

¹ Under 30 TAC § 328.63(b), facilities that intend to store more tires on site must comply with 30 TAC § 328.60 registration requirements for scrap tire storage sites.

list for the action. 30 TAC § 50.139(b). An action by the ED is not affected by a motion to overturn unless expressly ordered by the Commission. 30 TAC § 50.139(d). The Commission or General Counsel may extend the time for filing motions to overturn and for acting on motions. 30 TAC § 50.139(e).

III. Discussion

A. The Motion to Overturn

The Movant expresses concern regarding Applicant's failure to provide notice to local officials. The County contends that Applicant did not send the required notice to the Bell County Judge. The Motion points out that the Bell County District Attorney is not the Bell County Judge. The notice mailed to the District Attorney was not received by County administrators. Neither the Bell County Judge nor other members of the Bell County Commissioners Court had any knowledge of the application.

The Movant also contends that the Applicant failed to send notice to the Bell County Fire Marshal, the official who coordinates all fire emergency situations in the County. Movant argues that even though local volunteer fire departments have been notified, the County Fire Marshal should have been notified pursuant to 30 TAC § 328.63(d)(1).

In addition to notice defects, the Movant raises issues regarding the sufficiency of TCEQ enforcement activities to ensure all scrap tire facilities in Bell County are operated in compliance with applicable regulatory requirements and are protective of public health and the environment. Movant is also concerned that authorizing the storage of more scrap tires in the County contradicts policy initiatives of the Bell County Public Health District to control the Zika virus. Movant contends that storing more scrap tires outdoors will propagate mosquitoes and thereby increase the risk of contracting the Zika virus.

B. Analysis

OPIC agrees with the Movant that notice was defective. The certified mail receipt for the notice packet delivered to the Bell County Justice Center² on August 27, 2021 was addressed to Bell County District Attorney, Mr. Henry Garza. The County District Attorney prosecutes criminal felony cases, works with law enforcement in investigations, and presents cases to grand juries for the consideration of indictments. As noted in the Motion, the District Attorney is not the County Judge and is not an administrator for the general management and functioning of County government. The Applicant did not provide notice to the County Judge – the local official expressly designated as the required contact for the County under 30 TAC § 328.63(d)(1). This notice defect was consequential. Nobody responsible for the administration of County government was aware of the application. As a result of the lack of notice, the County Judge and Commissioners Court were deprived of the 45-day period to notify the ED of their concerns about compliance with local requirements relating to public health and safety. 30 TAC § 328.63(d)(2).

OPIC further agrees with Movant that the Bell County Fire Marshal is the appropriate local fire authority to receive notice under 30 TAC § 328.63(d)(1). The County Fire Marshal is best equipped to notify the ED of concerns about compliance with local requirements relating to fire protection under 30 TAC § 328.63(d)(4). The Moffatt Volunteer Fire Department has received notice and expressed an understanding that it would be dispatched in the event of an emergency at the Facility; however, the County Fire Marshal has the statutory authority to “coordinate the work of the various fire-fighting and fire prevention units in the county.” *See* Texas Local Government Code § 352.019(b). If a fire occurred at a facility where there could be 500 tires on the ground or

² The addresses for the County Judge and the District Attorney are different. While the Bell County website shows that the Bell County Justice Center on Huey Road is the address for the District Attorney, the Bell County Courthouse located at 101 E. Central Avenue is the contact address for the Bell County Judge.

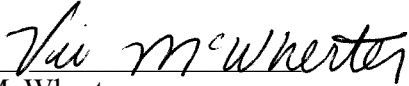
2,000 tires in containers, OPIC envisions the possibility that more than one fire-fighting response unit could be needed. The County Fire Marshal is likely in the best position to assess the availability and adequacy of local fire-fighting resources that could respond to a worst-case fire emergency at the Facility. Accordingly, OPIC finds that the notices to both the Moody Volunteer Fire Department and the Moffatt Volunteer Fire Department were insufficient for purposes of 30 TAC § 328.63(d)(1).³

IV. Conclusion

For the reasons discussed above, OPIC recommends granting the Motion and remanding the application to the ED. OPIC further recommends the Applicant be instructed upon remand to mail notice to the Bell County Judge and the Bell County Fire Marshal. After the prescribed 45-day period following proper mailed notice, the ED may consider the remaining concerns raised in the Motion and any additional information submitted on behalf of these local officials.

Respectfully submitted,

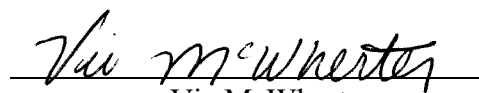
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³ Furthermore, OPIC questions whether the correct notice template was used when notice was provided to the local volunteer fire departments. The notice references 30 TAC § 328.63(d)(2) and the opportunity to provide input about compliance with local requirements regarding protecting public health and the environment, rather than the opportunity under 30 TAC § 328.63(d)(4) to provide input regarding compliance with local requirements relating to fire protection.

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2021, the foregoing document was served to all persons listed on the attached service list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Vic McWherter

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