

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

December 13, 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: **AMERITEX PIPE & PRODUCTS, LLC**
TCEQ DOCKET NO. 2021-1508-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. 2021-1508-AIR

IN THE MATTER	§	BEFORE THE
OF THE APPLICATION OF	§	
AMERITEX PIPE & PRODUCTS,	§	TEXAS COMMISSION ON
LLC FOR STANDARD PERMIT	§	
REGISTRATION NO. 164317	§	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 AmeriTex Pipe & Products, LLC (Applicant) for a Standard Permit registration under the Texas Clean Air Act (TCAA), Texas Health & Safety Code (THSC) § 382.05195. OPIC recommends the Commission refer Don Hunter, Linda K. Hunter, and Emily Lewis to the State Office of Administrative Hearings (SOAH) for an affectedness hearing. OPIC recommends all other hearing requests be denied for lack of standing.

B. Background of facility

Applicant has applied to the TCEQ for Standard Permit Registration No. 164317 under Texas Clean Air Act (TCAA) § 382.05195. This registration would authorize the construction of four new concrete batch plants. The plants would be located approximately 2,200 feet southeast of the McDonald Road and Wall Street Road intersection, Gunter, Grayson County. Contaminants authorized under this permit include particulate matter (PM), including but not limited to

aggregate, cement, road dust, and PM with diameters of 10 microns or less (PM₁₀) and 2.5 microns or less (PM_{2.5}).

C. Procedural background

The application was received on March 8, 2021, and declared administratively complete on March 9, 2021. The Consolidated Notice of Receipt of Application and Intent to Obtain Permit and Notice of Application and Preliminary Decision (public notice) was published on March 30, 2021, in the *Herald Democrat*. A virtual public meeting was held on July 19, 2021. The public comment period ended at the close of the public meeting on July 19, 2021. The Chief Clerk mailed the Executive Director's (ED) Decision and Response to Comments (RTC) on October 5, 2021. The deadline to request reconsideration or a contested case hearing was November 4, 2021.

The Commission received timely requests for a contested case hearing from the following persons: Cheyrl Cohagan, Deirdre Diamond, Connie Jo Eubanks, Don Everingham, Adam M. Friedman on behalf of Paul Gabriel, Bryan Hemman, Don Hunter, Linda K. Hunter, Emily Lewis, Linda McAllister, Nick Owens, Timothy Mark Peery, Christina Peyton, Jessica Seay, Michael Spano, and Wendy Wright. The hearing requests of Cheyrl Cohagan and Paul Gabriel were subsequently withdrawn. OPIC recommends the Commission refer Don Hunter, Linda K. Hunter, and Emily Lewis to SOAH for an affectedness hearing and find that no other affected person has filed a hearing request.

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 Title 30, Texas Administrative Code ("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

If an applicant seeks to authorize a concrete batch plant by standard permit, only those persons actually residing in a permanent residence within 440 yards of the proposed plant may request a hearing as a person who may be affected. *See* THSC § 382.058(c). According to the GIS map prepared by the ED as well as Applicant's plot plan submitted with the application and attached hereto as Attachment A, it is probable that no requestors reside within 440 yards of the proposed plants. However, for multiple reasons discussed below, OPIC believes that certain requestors may be within the statutorily-required distance to be considered as affected persons.

The ED's map identifies the facility as a single defined point, but a concrete batch plant includes multiple emission sources, such as stockpiles, in addition to the baghouse. Any distance measurement should be taken from the emission source closest to a residence, and it is unclear whether the single starting point used by the ED represents the closest emission source to each residence. While the plot plan provided by Applicant provides more information about the location of the facility, it is nonetheless likewise unclear whether the proposed plant location indicated on the plot plan represents the closest emission source to each residence. Further, the language of the concrete batch plant standard permit provides that "the owner or operator shall not locate or operate stationary equipment, stockpiles, or vehicles used for the operation of the concrete batch plant ... within 50 feet from any property line," and the suction shroud baghouse may be located 100 feet

from any property line. These required buffer zones are the only absolute restrictions on where a permit holder can locate stationary equipment, stockpiles, and the baghouse. OPIC learned during a prior case that, in practice, emission sources can be relocated after a standard permit has been granted. If this occurs, without any opportunity for further public participation, emission sources can ultimately be located within 440 yards of requestors who were denied standing to challenge a registration before it was issued.¹

Moreover, the distances for each requestor stated on the ED's map and Appendix A contain necessary disclaimers that the location of emission sources are "*approximate*" and provided by the applicant, and that the map is provided for "*informational purposes only*" and may not be suitable for "*legal, engineering, or surveying purposes*" (emphasis added). Applicant's plot plan also notes that the location of the property line is approximate. It must be emphasized that for concrete batch plant registrations, the 440-yard statutory distance limitation on persons who are affected persons is a prescriptive and precise *legal standard*.

OPIC acknowledges that the maps provided by the ED's staff and the applicant's proposed plot plan are very helpful in concrete batch plant matters where requestors are located at distances that are obviously well beyond the statutory distance limitation, as are many of the requestors in the present proceeding. However, for concrete batch plant registrations where requestors are indisputably located very close to a plant, as are some of the requestors in the present matter, those requestors should not be excluded without absolute certainty that they reside beyond 440 yards from where emission sources may be located. Given the uncertainties regarding the exact location

¹ Issues regarding the enforceable distance limitations for a concrete batch plant registration, the potential for emission source relocations, and uncertainties regarding the point of origin for measuring the 440-yard statutory distance standard were discussed extensively in briefing filed for *TCEQ Docket No. 2021-0056-AIR; the Motion for Rehearing of the Application of AmeriTex Pipe & Products, LLC for Standard Permit Registration No. 159336*. By letter dated May 4, 2021, this motion was set for oral argument and Commission consideration for the May 19, 2021, Agenda. However, by letter dated May 12, 2021, the Movant withdrew their motion and their underlying hearing requests before the Commission had the opportunity to opine and act on these issues.

of emission sources, the proximity of multiple requestors, and the potential relocation of plant emission sources to areas as close as 50 feet from the property boundary, OPIC recommends that the 440-yard distance should be measured from 50 feet within Applicant's property line.

B. Whether the requestors are affected persons

Don Hunter

Don Hunter timely submitted comments and a hearing request. He is concerned about the cumulative effects of the numerous concrete batch plants located near his residence, stating six concrete batch plants have already been permitted within ½ mile of his home. According to the GIS map prepared by the ED, Mr. Hunter resides 0.61 miles from the "facility," which is an undefined term. Mr. Hunter's residence is the southernmost circled property on Applicant's plot plan attached hereto as Attachment A. If the statutory distance is measured from the facility's buffer zone boundary, OPIC cannot conclude with confidence that Mr. Hunter's residence would not be located within 440 yards of the plants.

His proximity to the proposed plants, when combined with his concerns regarding the cumulative effects of the concrete batch plants near his residence, likely give Mr. Hunter a personal justiciable interest in this matter. His proximity also indicates that he could be impacted in a manner not common to the general public and distinguishes his personal justiciable interest from an interest common to the general public. Further, the 30 TAC § 55.203 affected person determination factors indicate that he qualifies as an affected person. First, his concerns about cumulative effects are interests protected by the law under which this application is being considered. Second, a reasonable relationship exists between those interests and the regulation of air contaminants. Finally, his proximity to the facility increases the likelihood of impacts to his health, safety, and use of property. OPIC finds that if he resides within 440 yards of the facility's

buffer zone, Don Hunter would qualify as an affected person in this matter. OPIC thus recommends Mr. Hunter be referred to SOAH for an affectedness hearing in order to determine the precise location of his residence relative to the facility's buffer zone.

Linda K. Hunter

Linda K. Hunter timely submitted comments and a hearing request. She is concerned about the proposed plants' effect on her use and enjoyment of property. According to the GIS map prepared by the ED, Ms. Hunter resides 0.61 miles from the "facility," which is an undefined term. Ms. Hunter's residence is the southernmost circled property on Applicant's plot plan attached hereto as Attachment A. If the statutory distance is measured from the facility's buffer zone boundary, OPIC cannot conclude with confidence that Ms. Hunter's residence would not be located within 440 yards of the plants.

Her proximity to the plants, when combined with her concerns regarding the use and enjoyment of her property, likely give Ms. Hunter a personal justiciable interest in this matter. Her proximity also indicates that she could be impacted in a manner not common to the general public and distinguishes her personal justiciable interest from an interest common to the general public. Further, the 30 TAC § 55.203 affected person determination factors indicate that she qualifies as an affected person. First, her concerns about use and enjoyment of property are interests protected by the law under which this application is being considered. Second, a reasonable relationship exists between those interests and the regulation of air contaminants. Finally, her proximity to the facility increases the likelihood of impacts to her health, safety, and use of property. OPIC finds that if she resides within 440 yards of the facility's buffer zone, Linda K. Hunter would qualify as an affected person in this matter. OPIC thus recommends Ms. Hunter be referred to SOAH for an

affectedness hearing in order to determine the precise location of her residence relative to the facility's buffer zone.

Emily Lewis

Emily Lewis timely submitted comments and a hearing request. She is concerned about the cumulative air quality impact of the numerous concrete batch plants located near her property as well as effects of air contaminants on her health and her family's health. Ms. Lewis's property located at 3243 Wall Street Road is the northernmost circled property on Applicant's plot plan attached hereto as Attachment A. If the statutory distance is measured from the facility's buffer zone boundary, OPIC cannot conclude with confidence that Ms. Lewis's property would not be located within 440 yards of the plants. OPIC notes Ms. Lewis's hearing request states that she ceased residing at this property in December 2020 due the growing presence of nearby concrete batch plants and the adverse effects of emissions from those plants on her health. OPIC acknowledges that THSC § 382.058(c) requires a hearing requestor to be "actually residing in a permanent residence within 440 yards of the proposed plant." Ms. Lewis's hearing request indicates that she would be actually residing at the property but for the number of concrete batch plants in the area and her ongoing health concerns related to the influx of air contaminants. In OPIC's opinion, fairness dictates that Ms. Lewis be considered a resident of her property located at 3243 Wall Street Road for purposes of establishing standing in this proceeding.²

² See TEX. WATER CODE § 5.556 ("This section does not preclude the commission from holding a hearing if it determines that the public interest warrants doing so.") If Ms. Lewis's Wall Street Road property is located within 440 yards of the buffer zone at Applicant's facility, OPIC contends the public interest warrants granting Ms. Lewis a hearing although she does not currently reside at the property. Ms. Lewis's hearing request documents in detail her history of health concerns that she believes have been exacerbated by the concrete batch plants TCEQ has permitted to operate near her Wall Street Road residence. She should not be denied the opportunity to participate in a contested case hearing because the subject of such hearing—the operation of concrete batch plants—has caused her to feel unsafe residing near Applicant's property.

Ms. Lewis's proximity to the plants, when combined with her concerns regarding health effects and cumulative effects on air quality, likely give Ms. Lewis a personal justiciable interest in this matter. Her proximity also indicates that she could be impacted in a manner not common to the general public and distinguishes her personal justiciable interest from an interest common to the general public. Further, the 30 TAC § 55.203 affected person determination factors indicate that she qualifies as an affected person. First, her concerns about health effects and cumulative air quality impacts are interests protected by the law under which this application is being considered. Second, a reasonable relationship exists between those interests and the regulation of air contaminants. Finally, her proximity to the facility increases the likelihood of impacts to her health, safety, and use of property. OPIC finds that if her property is located within 440 yards of the facility's buffer zone, Emily Lewis would qualify as an affected person in this matter. OPIC thus recommends Ms. Lewis be referred to SOAH for an affectedness hearing in order to determine the precise location of her residence relative to the facility's buffer zone.

Persons outside of 440 yards

According to the map prepared by the ED as well as independent mapping by OPIC based on the plot plan submitted with the application, the following requestors are located farther than 440 yards from the proposed facility: Deirdre Diamond, Connie Jo Eubanks, Don Everingham, Bryan Hemman, Linda McAllister, Nick Owens, Timothy Mark Peery, Christina Peyton, Jessica Seay, Michael Spano, and Wendy Wright. 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.

C. Issues raised in the hearing requests

The potentially affected persons raised the following issues:

1. Whether emissions from the proposed plants will adversely affect human health and safety, including sensitive receptors. (Raised by Emily Lewis)
2. Whether emissions from the proposed plants will adversely affect air quality. (Raised by Emily Lewis)
3. Whether emissions from the proposed plants will cause nuisance conditions affecting the use and enjoyment of property, in violation of 30 TAC § 101.4. (Raised by Linda K. Hunter)
4. Whether the proposed plants will cause or contribute to cumulative emissions impacts. (Raised by Don Hunter and Emily Lewis)

D. 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.

E. 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.

F. 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.

G. 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.

H. 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 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. *See* THSC § 382.0518(b)(2). Therefore, Issues No. 1, 2, and 3 regarding effects on human health, air quality, and nuisance conditions are relevant and material to the Commission’s decision on this application.

Cumulative Effects

By statute, the TCEQ must develop and implement policies, by specific environmental media, to protect the public from cumulative risks in areas of concentrated operations, and must give priority to monitoring and enforcement in areas in which regulated facilities are concentrated. Tex. Water Code § 5.130. Issue No. 4 regarding cumulative emissions impacts of multiple concrete batch plants is therefore relevant and material to the Commission's decision on this application.

J. 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.

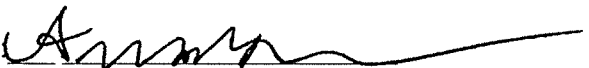
IV. CONCLUSION

OPIC respectfully recommends that Don Hunter, Linda K. Hunter, and Emily Lewis be referred to SOAH for an affectedness hearing to determine whether they reside within 440 yards of the buffer zone at Applicant's facility. If any referred persons are found to be affected persons, OPIC further recommends they be granted a 180-day hearing at SOAH on the issues they raised as outlined in § III.C. OPIC also recommends the Commission find no other affected person has

filed a request for a contested case hearing in this matter and therefore deny all remaining hearing requests.

Respectfully submitted,

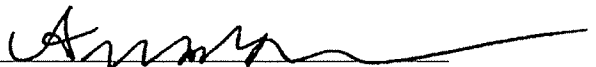
Vic McWherter
Public Interest Counsel

By 

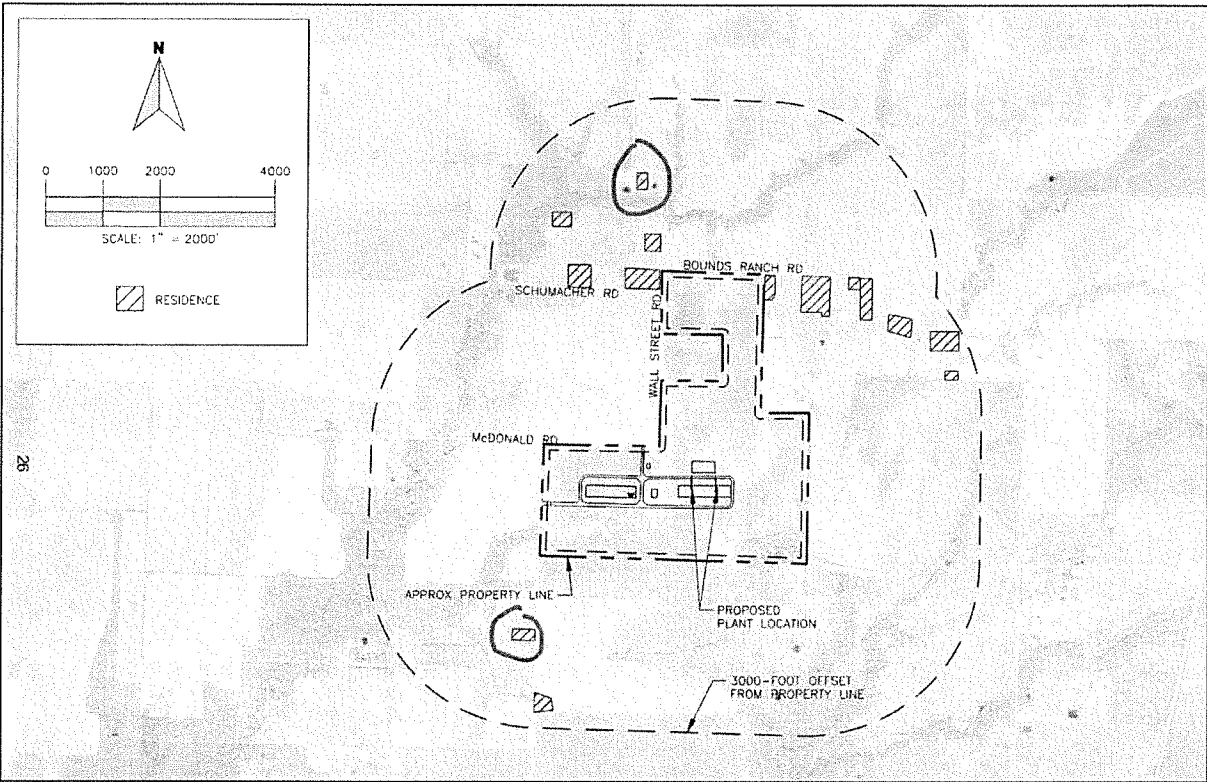
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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2021, 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.


Amanda D. Pesonen

ATTACHMENT A



SHEET NO.: 1 OF 1	IMAGE:	GOOGLE EARTH 11/26/2018
	ISSUE DATE:	03/08/2021
	DRAWN BY:	ES
	CHECKED BY:	MF
	SCALE:	1" = 1000'
JOB NO.:	10847-014	

AREA MAP		
STANDARD PERMIT CONCRETE BATCH PLANT AMCRITEX PIPE AND PRODUCTS, LLC GUNTER, GRAYSON COUNTY, TEXAS		
REV.	DESCRIPTION	BY DATE

WESTWARD
Environmental, Engineering, Natural Resources.
P.O. Box 2205 Boerne, Texas 78006
(830) 249-8284 Fax: (830) 249-0221
TBPE REG. NO.: F-4524
TBPG REG. NO.: 50112

MAILING LIST
AMERITEX PIPE & PRODUCTS, LLC
TCEQ DOCKET NO. 2021-1508-AIR

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FOR ALTERNATIVE DISPUTE

RESOLUTION:

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