

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

January 31, 2022

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: **METROPLEX GUNITE, L.P.**
TCEQ DOCKET NO. 2022-0092-AIR

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing and Requests for Reconsideration 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. 2022-0092-AIR

IN THE MATTER	§	BEFORE THE
OF THE APPLICATION OF	§	
METROPLEX GUNITE, L.P. FOR	§	TEXAS COMMISSION ON
STANDARD PERMIT	§	
REGISTRATION NO. 164838	§	ENVIRONMENTAL QUALITY

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

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 and Requests for Reconsideration in the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is the application of Metroplex Gunite, L.P. (Applicant) for a Standard Permit registration under the Texas Clean Air Act (TCAA), Texas Health & Safety Code (THSC) § 382.05195. OPIC recommends the Commission find no affected person has filed a hearing request and therefore deny all hearing requests. OPIC also recommends the Commission deny all requests for reconsideration.

B. Background of Facility

Applicant has applied to the TCEQ for Standard Permit Registration No. 164838 under Texas Clean Air Act (TCAA) § 382.05195. This registration would authorize the construction of a permanent concrete batch plant to be located at 873 Wall Street Road, Gunter, Grayson County, Texas 78058. 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 April 16, 2021, and declared administratively complete on April 19, 2021. The Amended Consolidated Notice of Receipt of Application and Intent to Obtain Permit and Notice of Application and Preliminary Decision (amended public notice) was published on June 25, 2021, in the *Herald Democrat*. A virtual public meeting was held on September 27, 2021. The public comment period ended at the close of the public meeting on September 27, 2021. The Chief Clerk mailed the Executive Director's (ED) Decision and Response to Comments (RTC) on December 14, 2021. The deadline to request reconsideration or a contested case hearing was January 13, 2022.

The Commission received timely requests for a contested case hearing from the following persons: David Boring, Corey Crawford, Deirdre Diamond, Brian Holtum, Colin Drew Hunter, Don Hunter, Linda K. Hunter, Fermin Ortiz, Christina Peyton, Michael Spano, Amber M. Weber, and Jennifer Woodwell. The Commission received requests for reconsideration from Deirdre Diamond, Brian Holtum, Colin Drew Hunter, and Linda K. Hunter. OPIC recommends the Commission find no affected person has filed a hearing request and therefore deny all hearing requests. OPIC also recommends all requests for reconsideration be denied.

II. APPLICABLE LAW

A. Requests for Reconsideration

Any person may file a request for reconsideration of the ED's decision under 30 TAC § 55.201(e). The request must be in writing and filed with the Chief Clerk no later than 30 days after the Chief Clerk mails the ED's decision and RTC. The request must expressly state that the person is requesting reconsideration of the ED's decision and give reasons why the decision should be reconsidered.

B. Requests for Hearing

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. Requests for Reconsideration

The Commission received requests for reconsideration from Deirdre Diamond, Brian Holtum, Colin Drew Hunter, and Linda K. Hunter. The requests generally raise concerns regarding air quality and health effects associated with air pollution, cumulative effects of existing concrete batch plants, nuisance conditions, siting concerns, and effects on the local economy. Although OPIC finds many of these issues are within the Commission's jurisdiction, OPIC cannot recommend reversal of the ED's decision or remand of the application to the ED on these issues without the development of an evidentiary record.¹ For this reason, OPIC must recommend denial of the requests for reconsideration received in this matter.

B. Determination of Affected Person Status

If an applicant seeks authorization of a concrete batch plant by standard permit, only those persons actually residing in a permanent residence within 440 yards of the proposed plant may

¹ OPIC notes that these issues were addressed at length in the ED's RTC.


request a hearing as a person who may be affected. *See* THSC § 382.058(c). According to the GIS maps prepared by the ED, no hearing requestor appears to reside within 440 yards of the proposed plant.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 no hearing requestor qualifies as an affected person and must respectfully recommend denial of all hearing requests.

IV. CONCLUSION

OPIC respectfully recommends the Commission find no affected person has filed a request for a contested case hearing in this matter and therefore deny all hearing requests. OPIC further recommends denial of all requests for reconsideration.

Respectfully submitted,


Vic McWherter
Public Interest Counsel

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² OPIC recognizes that Colin Drew Hunter, Don Hunter, and Linda K. Hunter reside very close to the facility. However, although OPIC acknowledges that the locations represented on the ED’s maps are approximations, it appears that the distance between these requestors’ residence and the nearest location where emissions could be authorized exceeds 440 yards. Any person who has filed a timely hearing request or request for reconsideration, including the Hunters, may provide information to refute the maps provided by the ED by filing a reply by 5:00 p.m. on February 14, 2022.

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2022, the Office of Public Interest Counsel's Response to Requests for Hearing and Requests for Reconsideration 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

**MAILING LIST
METROPLEX GUNITE, L.P.,
TCEQ DOCKET NO. 2022-0092-AIR**

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