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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 9, 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: **TEXCRETE, INC.**
CONCRETE BATCH PLANT
TCEQ DOCKET NO. 2022-0327-AIR
STANDARD PERMIT NO. 166281

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing and Response to Request for Reconsideration in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Jamison".

Jennifer Jamison, Attorney
Assistant Public Interest Counsel

TCEQ DOCKET NO. 2022-0327-AIR

IN THE MATTER	§	BEFORE THE
OF	§	
TEXCRETE, INC.	§	TEXAS COMMISSION ON
CONCRETE BATCH PLANT	§	
STANDARD PERMIT	§	ENVIRONMENTAL QUALITY
REGISTRATION NO. 166281	§	

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

TO THE HONORABLE 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

For the reasons stated below, OPIC recommends granting the hearing requests of Tom and Joyce Hanson and referring Issue Nos. 1-5 listed in Section III. I. for a contested case hearing with a duration of 180 days. OPIC recommends denial of the remaining requests for hearing. OPIC further recommends denial of the request for reconsideration.

B. Background

Texcrete, Inc. (Applicant) has applied to the TCEQ for a Standard Permit under the Texas Clean Air Act (TCAA), Texas Health and Safety Code (THSC) § 382.05195. This registration would authorize the construction of a new facility that may emit air contaminants. The plant is proposed to be located at 6140 Farm-to-Market Road 3405, Georgetown, Williamson County.

Contaminants authorized under this registration would include particulate matter, including particulate matter with diameters of 10 microns or less and 2.5 microns or less.

The application was received on August 25, 2021 and declared administratively complete on August 25, 2021. The Consolidated Notice of Receipt of Application and Intent to Obtain Permit and Notice of Application and Preliminary Decision (public notice) for this permit application was published in English on September 22, 2021, in the *Williamson County Sun* and in Spanish on September 28, 2021, in *La Prensa Comunidad*. The public comment period ended on October 28, 2021. The Chief Clerk mailed the Executive Director's (ED) Decision and Response to Comments (RTC) on January 25, 2022, and the deadline to request a contested case hearing was February 24, 2022. The Commission received timely requests for a contested case hearing and a request for reconsideration from attorney Eric Allmon on behalf of Tom and Joyce Hanson and Stone Oak Ranch, and a request for a contested case hearing from Patti Young.

II. APPLICABLE LAW

A. Hearing Requests

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) 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.

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.

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.

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.

B. 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.

III. DISCUSSION

A. Requests for Reconsideration

Tom and Joyce Hanson and Stone Oak Ranch RV Resort jointly submitted a timely request for reconsideration asserting in part that Applicant has failed to demonstrate use of Best Available Control Technology (BACT), failed to demonstrate that the facility is protective of public health and physical property, and failed to demonstrate that the proposed emissions are protective against impacts of crystalline silica. As more fully discussed below, many of these issues are relevant and material to the decision on this application. However, an evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the proposed permit should be denied on these grounds. While OPIC is recommending a hearing be held, OPIC cannot recommend Commission action on the application without the benefit of such a hearing.

B. Affected Person Analysis for Hearing Requests

THSC Section 382.058(c) limits affected person status to “only those persons actually residing in a permanent residence within 440 yards of the proposed plant” authorized by a Standard Permit registration under THSC § 382.05195. Accordingly, OPIC’s analysis is restricted by the distance limitations imposed by statute.

1. Tom and Joyce Hanson

Tom and Joyce Hanson live within 440 yards of the proposed facility and filed timely hearing requests on October 20, 2021, October 27, 2021, February 24, 2022. The requests list the Hansons’ permanent residence as Space 38 of the Stone Oak Ranch RV Resort, located at 25101 Ronald Reagan Boulevard, Georgetown, Texas. The map prepared by the ED confirms that the Hansons satisfy the distance restriction prescribed by THSC § 382.058(c). The Hansons’ requests raised concerns regarding the use and enjoyment of their property, adverse health effects caused

by particulate emissions, effects on general welfare, including animal life, vegetation, and the environment, concerns regarding Applicant's compliance with National Ambient Air Quality Standards (NAAQS), and whether the proposed emissions will contribute to air pollution. Each of these concerns represent interests that are protected by the law under which this permit will be considered, and in combination with the Hansons' proximity to the proposed facility, demonstrate that they have a personal justiciable interest in this matter not common to the general public. OPIC therefore finds that Tom and Joyce Hanson qualify as affected persons in this matter and recommends that the Commission grant their hearing requests.

2. Stone Oak Ranch RV Resort

Stone Oak Ranch RV Resort (Stone Oak) submitted timely comments and hearing requests on October 20, 2021, October 27, 2021, February 24, 2022. The requests describe Stone Oak as an RV resort containing 226 separate RV sites, 37 of which can accommodate permanent "tiny home" residences. Stone Oak's location is listed as 25101 Ronald Reagan Boulevard, Georgetown, Texas. The map prepared by the ED shows this address as being located 0.3 miles from the facility, and just outside the 440-yard radius. However, the request contends that the tiny home sites are all located near Stone Oak's southwestern property boundary, and the majority lie within 500 feet of the proposed plant. The request further describes communal amenities such as a recreational center, swimming pool, playground area and two pickle ball courts for residents of the resort located approximately 500 feet from the truck loadout area on the proposed site.

While these tiny home sites and community amenities are likely within the prescribed 440-yard parameter, requestor Stone Oak Ranch and RV Resort itself is not "a person actually residing in a permanent residence within 440 yards of the proposed plan" as required by THSC § 382.058(c). Unfortunately, because of the express and restrictive statutory limitation on affected

persons for purposes of requesting a hearing on a registration under the concrete batch plant standard permit, OPIC is compelled to find that Stone Oak is not an affected person. Accordingly, OPIC must respectfully recommend denial of its hearing requests.

3. Patricia Young

Patricia Young submitted timely comments and a timely hearing request on February 24, 2022. As previously discussed, a hearing request must first be analyzed to determine if the requestor resides in a permanent residence located within 440-yards of the proposed Facility as required by THSC § 382.058(c). Ms. Young's request lists her address as 351 CR 256 Liberty Hill, TX 78642. The map prepared by the ED shows that Ms. Young's residence is located 2.9 miles from the proposed facility. While the concerns raised by Ms. Young regarding impacts to human health and the environment are certainly relevant to the Commission's decision on this application, OPIC cannot recommend finding affected person status because of the statutory distance limitation imposed by THSC § 382.058(c). Because Ms. Young's permanent residence is located outside the strict 440-yard radius imposed by statute, OPIC must respectfully recommend denial of the hearing request submitted by Patricia Young.

C. Issues Raised by the Affected Persons

Tom and Joyce Hanson raised the following issues:

1. Whether operation of the proposed facility will adversely affect air quality and the affected persons' use and enjoyment of property;
2. Whether operation of the proposed facility will adversely affect the affected persons' health and the health of their plants and animals;
3. Whether dust from the facility will cause nuisance conditions violating 30 TAC § 101.4;
4. Whether the proposed facility will comply with National Ambient Air Quality Standards (NAAQS);

5. Whether the proposed facility will utilize BACT (Best Available Control Technology; and
6. Whether the cumulative effects of existing operations and sources in the local and immediate area were properly determined and factored into the air modeling and health effects review?

D. Which issues raised in the hearing request are disputed

There is no agreement between the affected persons and the Executive Director on the issues raised in the hearing requests, thus, the issues 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. Issues raised by the affected persons during the public comment period

All of the issues discussed above were raised by the affected persons during the public comment period.

G. Issues in public comment have not been withdrawn

The hearing requests of the affected persons are not based on issues raised solely in a public comment which has been withdrawn.

H. Relevant and Material Issues

The Hansons raise issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4)(B) and 55.211(c)(2)(A)(ii). 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 Mutual, Inc.*, 477 U.S. 242, 248-51 (1986).

The affected persons are concerned about the health effects on humans, plants, and animals associated with particulate matter emissions, as well as nuisance conditions caused by dust. 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. THSC § 382.0518(b)(2). Therefore, Issues No. 1 – 5 regarding air quality, effects on health, nuisance conditions, compliance with National Ambient Air Quality Standards, and use of Best Available Control Technology are relevant and material to the Commission’s decision on this application and are appropriate for referral to SOAH.

With respect to Issue No. 6 regarding modeling, THSC § 382.058(d) provides that if TCEQ considered modeling when adopting a Concrete Batch Plant Standard Permit, the agency may not require a person to submit modeling in their application for registration under

that standard permit. Modeling was considered during the adoption of the standard permit. Unfortunately, for protesting parties challenging the presumption that operations at a proposed facility would be adequately protective, if modeling of a pollutant was considered when the standard permit was adopted, THSC § 382.058(d) also prevents anyone from submitting air dispersion modeling for that pollutant in any contested case hearing on an application for a registration under the standard permit. Because of this statutory prohibition, OPIC cannot recommend referral of Issue No. 6. OPIC asserts, however, to the extent TCEQ has not considered modeling with respect to a particular pollutant, evidence that includes modeling could be introduced at hearing with respect to Issue No. 2.

I. Issues Recommended for Referral

OPIC recommends that the following relevant and material disputed issues of fact be referred to SOAH for a contested case hearing:

1. Whether operation of the proposed facility will adversely affect air quality and the affected persons' use and enjoyment of property;
2. Whether operation of the proposed facility will adversely affect the affected persons' health and the health of their plants and animals;
3. Whether dust from the facility will cause nuisance conditions violating 30 TAC § 101.4;
4. Whether the proposed facility will comply with National Ambient Air Quality Standards (NAAQS); and
5. Whether the proposed facility will utilize Best Available Control Technology (BACT).

J. Maximum Expected Duration of Hearing

Commission Rule 30 TAC § 80.6(b)(5) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing. To assist the Commission in stating 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 the application would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC recommends granting the hearing requests of Tom and Joyce Hanson and referring Issues 1-5 as specified in in § III. I. OPIC further recommends denying the remaining requests for hearing and requests for reconsideration. Finally, OPIC recommends that the referred issues listed be referred to SOAH for a contested case hearing for a duration of 180 days.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2022 the the original and true and correct copies of the Office of Public Interest Counsel's Response to Requests for Reconsideration and 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.


Jennifer Jamison

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