

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Erin E. Chancellor, *Interim Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 2, 2023

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: **IN THE MATTER OF THE APPLICATION BY MTX MATERIALS, LP
FOR PERMIT NO. WQ0005337000
TCEQ DOCKET NO. 2023-0555-IWD**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Sheldon P. Wayne".

Sheldon P. Wayne, Attorney
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2023-0555-IWD

IN THE MATTER OF THE	§	BEFORE THE TEXAS COMMISSION
APPLICATION BY MTX	§	
MATERIALS, LP FOR PERMIT	§	ON
NO. WQ0005337000	§	
	§	ENVIRONMENTAL QUALITY

**OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUEST**

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) files this response to the hearing request received in the above-captioned matter.

I. Introduction

A. Summary of Position

Preliminarily, OPIC notes that the TCEQ Chief Clerk's office received one timely hearing request from the group Cook's Branch Conservancy (Requestor or the Conservancy). As discussed herein, OPIC respectfully recommends granting the Conservancy's hearing request and referring this application for a 180-day hearing at the State Office of Administrative Hearings (SOAH) on Issue nos. 1-3 contained in Section III.B.

B. Description of Application and Facility

MTX Materials, LP (Applicant or MTX) has applied to TCEQ for new Texas Pollutant Discharge Elimination System (TPDES) Permit no. WQ0005337000. If approved, the permit will authorize the discharge of mine dewatering water and

stormwater on an intermittent and flow-variable basis via Outfall 001. MTX currently operates the MTX 1 Plant, which is a sand mining operation, located at 19219 Keenan Cut Off Road, south of the City of Montgomery, in Montgomery County.

According to the Application, the process of sand mining at this site does not generate any wastewater, and the draft permit does not authorize the discharge of domestic wastewater. No water treatment occurs at the site and stormwater is the only discharge. Operations at the site include extracting sand from an open pit on the property and then distributing this product to customers. Precipitation may collect in the open pit, which MTX pumps into a retention pond. Also, stormwater naturally drains from other areas of the site into the retention pond. Stormwater may then be discharged via Outfall 001 as necessary.

Effluent limitations are established in the draft permit as follows:

<i>Outfall</i>	<i>Pollutant</i>	<i>Daily Average mg/L</i>	<i>Daily Maximum mg/L</i>
001	Flow	Report MGD	Report MGD
	Chemical oxygen demand (COD)	N/A	150
	Oil and grease	N/A	15
	Nitrate + Nitrite N	N/A	Report
	Total suspended solids (TSS)	25	45
	pH	6.0 SU, minimum	9.0 SU

According to the Executive Director (ED), the effluent will be discharged via Outfall 001 to an unnamed tributary, then to an unnamed impoundment, then to an unnamed tributary, then to East Edge Lake, then to an unnamed tributary, then to Lake Creek in Segment No. 1015 of the San Jacinto River Basin. The

unclassified receiving water uses are limited aquatic life use for the unnamed tributaries, the unnamed impoundment, and East Edge Lake. The designated uses for Segment No. 1015 are primary contact recreation, public water supply, and high aquatic life use.

C. Procedural Background

TCEQ received the application on November 11, 2021. On January 27, 2022 the ED declared it administratively complete. The Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English in the *Conroe Courier* and in Spanish in *La Voz* on February 16, 2022. The ED completed technical review of the Application on April 18, 2022, and prepared the proposed Permit, which if approved, would establish the conditions under which MTX's site must operate. The Applicant then published a Combined NORI and Notice of Application and Preliminary Decision in English in the *Conroe Courier* and in Spanish in *La Voz* on May 18, 2022. The combined notice was issued to correct the description of the discharge route contained in the NORI. The public comment period ended on June 17, 2022. The Chief Clerk mailed the ED's Decision and Response to Public Comment (RTC) on October 3, 2022. The deadline for filing requests for a contested case hearing and requests for reconsideration of the Executive Director's decision was November 2, 2022.

The Commission received one request for a contested case hearing from the Cook's Branch Conservancy.

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) 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).

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. Relevant factors to be considered in determining whether a person is affected 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 and safety of the person, and on the 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 executive director; and

- (3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.

30 TAC § 55.203(d).

Under 30 TAC § 55.211(c)(2)(A)(ii), for an application filed on or after September 1, 2015, the Commission must grant a hearing request made by an affected person 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.

III. Analysis of Hearing Requests

A. Whether the requestor is an affected person

On May 17, 2022 the Commission received the timely hearing request of the Cook's Branch Conservancy, which was filed during the public comment period for this Application. Attached to the request are comments which explain that the Conservancy is a 7,184-acre conservation area consisting of forest, prairies, streams, ponds, lakes, and wetlands. The Conservancy states that the Application does not correctly describe the discharge route of the effluent because it fails to include Cook's Branch, which is a tributary of Lake Creek. It further details a number of concerns regarding the discharge's effects on water

quality and wildlife, stating that at least one federally proposed and six state listed threatened species have been observed or are likely present on the Conservancy's property, including the alligator snapping turtle. It also questions whether new Commission regulations regarding sand mining operations are adequate to protect water quality and wildlife. The Conservancy also notes that it was the 2012 recipient of the Texas Parks and Wildlife's (TPWD) Leopold Conservation Award, and that Lake Creek has been designated by TPWD as an ecologically significant stream and an ecoregion reference stream.

According to the map provided by the ED's staff, the Conservancy's property borders the Applicant's site, is bisected by the discharge route, and includes the entirety of East Edge Lake.

To be granted a contested case hearing, the Conservancy must show that it is an "affected person" who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application, and must distinguish that interest from an interest common to the general public. *See* 30 TAC § 55.203(a). Here, the Conservancy has stated interests, for example, water quality and animal life, that are protected by the law under which this application will be considered. *See* 30 TAC § 55.203(c)(1). Also, as the Conservancy's property is adjacent to the Applicant's site and the discharge route runs through it, a reasonable relationship exists between their claimed interests and MTX's regulated activity. *See* 30 TAC § 55.203(c)(3). Finally, the Conservancy's location increases any likelihood that MTX's operations will impact its use of property as a wildlife refuge. *See* 30 TAC § 55.203(c)(4). Therefore, OPIC finds that the

Conservancy has successfully demonstrated that it qualifies as an affected person.

B. Which Issues Raised in the Hearing Request Are Disputed

The Conservancy raised the following disputed issues:

1. Whether the discharge route has been correctly characterized and described in the Application?
2. Whether the draft permit is adequately protective of water quality?
3. Whether the draft permit is adequately protective of wildlife?
4. Whether 30 TAC Chapter 311, Subchapter J rules applicable to the Applicant's sand mining operation are adequate to protect water quality and wildlife?

C. 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). The issues listed above are issues of fact.

D. Whether the Issues Were Raised During the Public Comment Period

Issue nos. 1-4 in Section III.B were raised by the Conservancy during the public comment period.

E. Whether the Hearing Request is Based on Issues Raised Solely in a Withdrawn Public Comment

The hearing request was submitted during the public comment period, and no public comments were withdrawn. Therefore, the hearing request is based on timely comment that has not been withdrawn.

F. Whether the Issues are Relevant and Material to the Decision on the Application

The Conservancy raises 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), as well as irrelevant issues. 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. The Commission can only consider issues within its jurisdiction. Therefore, relevant and material issues include those governed by the substantive law of the permit at issue. *Anderson v. Liberty Mutual, Inc.*, 477 U.S. 242, 248-51 (1986).

Discharge Route

The Conservancy is concerned that the Application's description of the discharge route is not accurate and that the discharge actually flows through a tributary of the Cook's Branch stream. TCEQ rules require that if an applicant becomes aware that it failed to submit relevant facts or submitted incorrect information in a permit application, the applicant is required to promptly submit such facts and information. 30 TAC § 305.125(19). Therefore, Issue no. 1 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Water Quality and Wildlife

The Conservancy is concerned about adverse effects to water quality and wildlife, including threatened species. The Commission is responsible for the protection of water quality under TWC Chapter 26 and 30 TAC Chapters 307 and

309. The Texas Surface Water Quality Standards (Standards) in Chapter 307 require that the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life, operation of existing industries, and economic development of the state.” 30 TAC § 307.1. According to Section 307.6(b)(4) of the Standards, “[w]ater in the state must be maintained to preclude adverse toxic effects on aquatic life, terrestrial life, livestock, or domestic animals, resulting from contact, consumption of aquatic organisms, consumption of water, or any combination of the three.” Additionally, “[s]urface waters must not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life.” 30 TAC § 307.4(d). Finally, pollution in stormwater must not impair a waterbody’s existing or designated uses. 30 TAC § 307.8(e). As Chapter 307 and these Standards designate criteria for the protection of water quality and wildlife, Issue nos. 2 and 3 are relevant and material to the Commission’s decision regarding this application and are appropriate for referral to SOAH.

Compliance with Chapter 311 Rules

The Conservancy is concerned that newly passed Commission rules located at 30 TAC, Chapter 311, Subchapter J are not adequate to protect area wildlife or the water quality of Cook’s Branch or Lake Creek. Subchapter J is entitled “Best Management Practices for Sand Mining Facility Operations within the San Jacinto River Basin,” and applies to sand mining facilities located in the San Jacinto River Watershed. Subchapter J is applicable to MTX’s sand mining

operation, however, the TPDES permit at issue is not authorized by Subchapter J nor is Subchapter J applicable to the TPDES permitting process that is currently before the Commission. Further, the Conservancy has not complained that MTX will not comply with Chapter 311, but instead is arguing that the rules themselves are not sufficient to protect water quality. General complaints about the sufficiency of particular rules cannot be properly addressed in a contested case hearing on a particular permit. Finally, to the extent that Subchapter J implicates water quality and wildlife, those concerns are addressed through Issue nos. 2 and 3, which OPIC is recommending for referral to SOAH as contested issues. Therefore, Issue no. 4 is not relevant and material to the Commission's decision regarding this application and is not appropriate for referral to SOAH.

G. Maximum Expected Duration for the Contested Case Hearing

Commission rule 30 TAC § 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

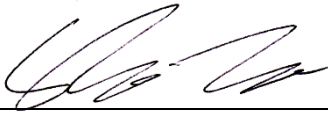
on this application would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

IV. Conclusion

For the reasons discussed above, OPIC finds that the Cook's Branch Conservancy has demonstrated that it qualifies as an affected person. Therefore, OPIC respectfully recommends that the Commission grant its hearing request and refer Issue nos. 1-3 specified in Section III.B for a contested case hearing at SOAH with a maximum duration of 180 days.

Respectfully submitted,

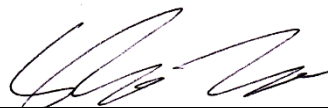
Garrett T. Arthur
Public Interest Counsel

By: 

Sheldon P. Wayne
Assistant Public Interest Counsel
State Bar No. 24098581
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-3144 Phone

CERTIFICATE OF SERVICE

I hereby certify that June 2, 2023, the original of the Office of Public Interest Counsel's Response to Request for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via electronic mail, and/or by deposit in the U.S. Mail.


Sheldon P. Wayne

**MAILING LIST
MTX MATERIALS, LP
TCEQ DOCKET NO. 2023-0555-IWD**

FOR THE APPLICANT
via electronic mail:

Marc Deer, Owner
MTX Materials, LP
7720 Westview Drive
Houston, Texas 77055

Cole Gorka, President of Sales
MTX Materials, LP
19219 Keenan Cut Off Road
Montgomery, Texas 77316
cgorka@mtxmaterials.com

Paige Baker
ESE Partners, LLC
2002 West Grand Parkway North
Suite 140
Katy, Texas 77449
paige@esepartners.com

FOR THE EXECUTIVE DIRECTOR
via electronic mail:

Celia Castro, Staff Attorney
Texas Commission on Environmental
Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606
celia.castro@tceq.texas.gov

Ruiqiang Zong, Technical Staff
Texas Commission on Environmental
Quality
Water Quality Division MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4589 Fax: 512/239-4430
ruiqiang.zong@tceq.texas.gov

Ryan Vise, Director
Texas Commission on Environmental
Quality
External Relations Division
Public Education Program MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678
pep@tceq.texas.gov

FOR ALTERNATIVE DISPUTE
RESOLUTION

via electronic mail:

Kyle Lucas, Attorney
Texas Commission on Environmental
Quality
Alternative Dispute Resolution MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0687 Fax: 512/239-4015
kyle.lucas@tceq.texas.gov

FOR THE CHIEF CLERK
via eFiling:

Docket Clerk
Texas Commission on Environmental
Quality
Office of Chief Clerk MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311
<https://www14.tceq.texas.gov/epic/eFiling/>

REQUESTER(S):

Jeffery Mundy
The Mundy Firm PLLC
4131 Spicewood Springs Road, Suite O-3
Austin, Texas 78759