

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Kelly Keel, *Interim Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 18, 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: **On-Site Concrete Solutions, LLC (Applicant)**
TCEQ Docket No. 2023-0849-AIR

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in cursive script that reads "Josiah Mercer".

Josiah T. Mercer, Attorney
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2023-0849-AIR

| | | |
|----------------------------------|----------|------------------------------|
| APPLICATION BY ON-SITE | § | BEFORE THE |
| CONCRETE SOLUTIONS, LLC | § | TEXAS COMMISSION ON |
| CONCRETE BATCH PLANT | § | ENVIRONMENTAL QUALITY |
| FREEPORT, BRAZORIA COUNTY | § | |
| REGISTRATION NO. 171356 | § | |

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

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 in the above-captioned matter.

I. Introduction

A. Summary of Position

Before the Commission is the application of On-Site Concrete Solutions, LLC (Applicant) for Standard Permit registration under the Texas Clean Air Act, Texas Health & Safety Code (THSC) § 382.05195. OPIC recommends that the Commission find no affected person has filed a hearing request and therefore deny the one and only hearing request.

B. Description of Application and Facility

Applicant seeks Registration No. 171356 to authorize construction of a new facility that may emit air contaminants. The proposed facility would be located on County Road 217 approximately 0.2 mile east of the intersection of County Road 217 and US Highway 36 in Brazoria County. Contaminants

authorized under this permit include aggregate, cement, road dust, and particulate matter with diameters of 10 microns or less and 2.5 microns or less.

C. Procedural Background

TCEQ received the application on December 27, 2022, and declared it administratively complete on December 28, 2022. The Consolidated Notice of Receipt of Application and Intent to Obtain Permit and Notice of Application and Preliminary Decision for this permit application was published in English on February 2, 2023, in *The Facts* and in Spanish on February 2, 2023, in *El Perico*. The public comment period ended on March 6, 2023. The Executive Director's (ED) Response to Comment (RTC) was mailed on April 27, 2023, and the deadline to submit a hearing request or request for reconsideration of the ED's decision on this application was June 2, 2023.

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.

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.

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.

III. Analysis of Hearing Request

Texas Health and Safety Code 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 directed by this restrictive distance limitation imposed by statute.

According to the map prepared by ED staff, the residence of the only requestor in this case—Valerie Jansky—is located further than 440 yards from the nearest emission point at the proposed facility. OPIC has reviewed Ms. Jansky’s comments related to the existing, temporary facility and notes that the proposed facility is more than twice the distance from Ms. Jansky’s residence as compared to the current facility. Because Ms. Jansky falls outside of the 440-yard limitation on affected persons for purposes of requesting a hearing on a Concrete Batch Plant Standard Permit, OPIC is statutorily compelled to find that Ms. Jansky does not qualify as an affected person. Consequently, OPIC must respectfully recommend denial of the one and only hearing request.

That said, OPIC would like to draw attention to the ongoing review of a recently proposed amendment to Section 116.615 of 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. The review may result in changes that would require an owner or operator of a

concrete batch plant authorized under TCEQ's Air Quality Standard Permit for Concrete Batch Plants to comply with certain public notice and hearing requirements should they opt to move the registered concrete batch plant to a new location on the existing site. It is possible that moving an existing concrete batch plant within a property boundary would trigger compliance with new public notice requirements, including the opportunity to request a contested case hearing for residents within 440 yards of the new location. The review project is ongoing, and the precise changes to Section 116.615 are to be determined, but OPIC will continue to participate in this project and advocate for the public interest with respect to any proposed changes.

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 the one and only hearing request.

Respectfully submitted,
Garrett T. Arthur
Public Interest Counsel

By: *Josiah Mercer*
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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2023 the original and true and correct copies of the Office of Public Interest Counsel's Response to Request 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.



Josiah T. Mercer

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TCEQ DOCKET NO. 2023-0849-AIR

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REQUESTER(S):

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