

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

December 8, 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 R&L CONCRETE LLC
FOR AIR QUALITY STANDARD PERMIT FOR CONCRETE BATCH
PLANTS REGISTRATION NO. 171631
TCEQ DOCKET NO. 2023-1561-AIR**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in dark ink that reads "Jessica M. Anderson".

Jessica M. Anderson, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-1561-AIR

**APPLICATION BY R&L
CONCRETE LLC CONCRETE
BATCH PLANT KAUFMAN,
KAUFMAN COUNTY**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

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

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 Request for Hearing and Request for Reconsideration on the application in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is an application by R&L Concrete LLC (Applicant) for a Standard Permit under Texas Clean Air Act (TCAA) § 382.05195, which would authorize the construction of a new facility that may emit air contaminants. The Commission received a hearing request from Carol Bourquin, and a request for reconsideration from Cesley Ray Gordon. For the reasons stated herein, OPIC respectfully recommends the Commission find that Carol Bourquin is an affected person, and further recommends that the Commission grant her hearing request. OPIC recommends the denial of the request for reconsideration.

B. Description of Application and Facility

R&L Concrete applied for a Standard Permit under TCAA § 382.05195, which would authorize the construction of a Concrete Batch Plant. The plant is proposed to be located in Kaufman County at the following driving directions: from the intersection of Jiba Road 147 and U.S. Highway 175, drive 0.4 miles south on U.S. Highway 175, and the site entrance is on the left side.

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

C. Procedural Background

Before work is begun on the construction of a new facility that may emit air contaminants, the person planning the construction must obtain an authorization from the Commission. This permit application is for an initial issuance of Air Quality Permit Number 171631.

Here, the permit application was received on January 30, 2023, and declared administratively complete on February 6, 2023. The Consolidated Notice of Receipt and Intent to Obtain an Air Quality Permit and Notice of Application and Preliminary Decision for this permit application was published on March 30, 2023, in English in *The Kaufman Herald*, and on March 28, 2023, in Spanish in *La Prensa Comunidad*. The public comment period ended on May 1, 2023. The Executive Director's (ED) Response to Comments (RTC) was mailed on August 21, 2023. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was September 20, 2023.

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.

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.

B. Requests for Reconsideration

Any person may file a request for reconsideration of the ED's decision under Title 30, Texas Administrative Code (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. ANALYSIS OF HEARING REQUEST

A. Whether the requestor is an affected person

Carol Bourquin filed timely combined comments and a hearing request. Ms. Bourquin resides at 8550 County Road 148 in Kaufman, which, according to the map prepared by ED staff, falls within 440 yards of the proposed facility.

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.

In her request, Ms. Bourquin raised concerns about human health and animal life, air quality and dust, notice, water quality, and property values.

Given Ms. Bourquin’s location within 440 yards of the proposed facility, the fact that her concerns are specific and protected by the law under which this

application is considered, and a reasonable relationship exists between her concerns and the regulation of the facility, OPIC finds that Carol Bourquin has a personal justiciable interest in this matter and qualifies as an affected person.

B. Which issues raised in the hearing request are disputed

The affected requestor raised the following disputed issues:

1. Whether the proposed facility may have adverse effects on human and animal health.
2. Whether the proposed facility may have adverse effects on air quality.
3. Whether there was adequate notice.
4. Whether the proposed facility may have adverse effects on water quality.
5. Whether the proposed facility may have adverse effects on property values.

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. The issues raised here are issues of fact.

D. Whether the issues were raised during the public comment period

Issue Nos. 1-5 in Section III.B. were specifically raised by the affected requestor during the public comment period.

E. Whether the hearing request is based on issues raised solely in a withdrawn public comment

No public comments were withdrawn in this matter. Therefore, the hearing request is not based on issues raised in withdrawn public comments.

F. Whether the issues are relevant and material to the decision on the application

The hearing request raises 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 the State Office of Administrative Hearings (SOAH), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny the permit. Relevant and material issues are those governed by the substantive law under which the permit is to be issued. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

Human and Animal Health and Air Quality

Under the Texas Clean Air Act, the Commission may issue this permit only if it finds no indication that the emissions from the Facility will contravene the intent of the TCAA, including protection of the public's health and physical property. TCAA § 382.0518(b)(2).

Further, the purpose of the TCAA is to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property. TCAA § 382.002(a). Therefore, Issue Nos. 1 and 2 are relevant and material to the Commission's decision regarding this Application.

Notice

The TCAA § 382.056 requires the Applicant for this Standard Permit to publish adequate newspaper notice detailing the description of the facility, information on how an affected person may request a public hearing, and pollutants the facility will emit. Therefore, Issue No. 3 is relevant and material.

Water Quality

Water quality issues fall outside the scope of review of this application for an air permit. Issue No. 4 is therefore not relevant and material.

Property Value

The concern raised regarding adverse effects on property values falls outside of TCEQ's jurisdiction when determining whether to grant an air permit application. Issue No. 5 is therefore not relevant and material to the Commission's decision regarding this application.

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. REQUEST FOR RECONSIDERATION

Cesley Ray Gordon submitted a request for reconsideration that articulated concerns about human health and safety.

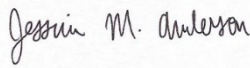
While OPIC is recommending a hearing and referral of issues encompassing the requestor's concerns expressed in the request for reconsideration, a record establishing the evidentiary basis for reconsidering the ED's decision based on these issues would need to exist in order to recommend that the request for reconsideration be granted. As no such record exists, OPIC cannot recommend the request be granted at this time.

V. CONCLUSION

Having found that Carol Bourquin qualifies as an affected person in this matter, OPIC respectfully recommends the Commission grant her 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. OPIC further recommends the Commission deny the pending request for reconsideration.

Respectfully submitted,

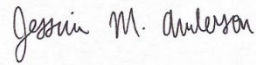
Garrett T. Arthur
Public Interest Counsel

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 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 to all persons listed on the attached mailing list via Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

A handwritten signature in cursive script that reads "Jessica M. Anderson". The signature is written in black ink on a light-colored background.

Jessica M. Anderson

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TCEQ DOCKET NO. 2023-1561-AIR**

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