

Jon Niermann, *Chairman*  
Bobby Janecka, *Commissioner*  
Catarina R. Gonzales, *Commissioner*  
Kelly Keel, *Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

April 29, 2024

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 MINE SERVICE, INC.  
FOR PROPOSED AIR QUALITY PERMIT NO. 169683  
TCEQ DOCKET NO. 2024-0129-AIR**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in cursive script that reads "Jessica M. Anderson".

Jessica M. Anderson, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2024-0129-AIR

|                        |   |                       |
|------------------------|---|-----------------------|
| APPLICATION BY MINE    | § | BEFORE THE            |
| SERVICE, INC. ROCK     | § |                       |
| CRUSHING AND SCREENING | § | TEXAS COMMISSION ON   |
| PLANT                  | § |                       |
|                        | § | ENVIRONMENTAL QUALITY |

THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE  
TO REQUESTS 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 Requests for Hearing 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 Mine Service, Inc. (Applicant) for a New Source Review Authorization under Texas Clean Air Act (TCAA) § 382.0518. The Commission received timely comments and hearing requests from Cindy Luedtke and David Luedtke. For the reasons stated herein, OPIC respectfully recommends the Commission find that Cindy Luedtke and David Luedtke are affected persons, and further recommends that the Commission grant their hearing requests.

**B. Description of Application and Facility**

Mine Service, Inc. applied for a New Source Review Authorization pursuant to TCAA § 382.0518 to authorize the construction of a new facility that may emit

air contaminants. This permit would authorize the Applicant to construct a Rock Crushing and Screening Plant, which would be located at 1953 Tom Ledbetter, Waco, McLennan County.

Contaminants authorized under this permit include carbon monoxide, nitrogen oxides, organic compounds, particulate matter including particulate matter with diameters of 10 microns or less and 2.5 microns or less, and sulfur dioxide.

### **C. Procedural Background**

Mine Service, Inc.'s application was received on July 15, 2022, and declared administratively complete on July 21, 2022. The Notice of Receipt and Intent to Obtain an Air Quality Permit was published on August 5, 2022, in the *Waco Tribune Herald*. The Notice of Application and Preliminary Decision for an Air Quality Permit was published on April 4, 2023, in the *Waco Tribune Herald*. The public comment period for this application closed on May 4, 2023, and the Executive Director (ED) filed the Response to Comments (RTC) on December 14, 2023. The deadline for filing requests for contested case hearing and requests for reconsideration of the ED's decision was January 19, 2024.

## **II. APPLICABLE LAW**

The Application was filed 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 30 Texas Administrative Code (TAC) § 55.21(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 requestor'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 requestors are affected persons

##### Cindy Luedtke

Cindy Luedtke submitted a timely comment and hearing request. Ms. Luedtke gave her address as 2422 McLennan Crossing Road, Woodway. According to the map created by ED staff, this address is 0.45 miles from the proposed facility's nearest emissions point. Ms. Luedtke raised concerns about air quality and traffic.

Cindy Luedtke's concerns about air quality, when combined with her proximity to the proposed facility, give Ms. Luedtke a personal justiciable interest in this matter which is not common to the general public. Also, her concern is an interest protected by the law under which this application is considered, and a reasonable relationship exists between that interest and the regulation of the facility. Finally, the location of Ms. Luedtke's property increases the likelihood of impacts to health, safety, and use of property. Therefore, OPIC finds that Cindy Luedtke qualifies as an affected person under 30 TAC § 55.203(a) and (c).

David Luedtke

David Luedtke submitted a timely comment and hearing request. Mr. Luedtke gave his address as 2422 McLennan Crossing Road, Woodway. According to the map created by ED staff, this address is 0.45 miles from the proposed facility's nearest emissions point. Mr. Luedtke raised concerns about air quality, human health, dust and particles, and traffic.

David Luedtke's concerns about air quality, human health, and dust and particles, when combined with his proximity to the proposed facility, give Mr. Luedtke a personal justiciable interest in this matter which is not common to the general public. Also, his concern is an interest protected by the law under which this application is considered, and a reasonable relationship exists between that interest and the regulation of the facility. Finally, the location of Mr. Luedtke's property increases the likelihood of impacts to health, safety, and use of property. Therefore, OPIC finds that David Luedtke qualifies as an affected person under 30 TAC § 55.203(a) and (c).

**B. Which issues raised in the hearing requests are disputed**

The affected requestors raised the following disputed issues:

1. Whether the permit is adequately protective of air quality.
2. Whether the permit is adequately protective of human health.
3. Whether the permit is adequately protective against dust and particles.
4. Whether the permit adequately addresses traffic concerns.

**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**

Issues 1-4 in Section III.B. were specifically raised by affected requestors during the public comment period.

**E. Whether the hearing requests are based on issues raised solely in a withdrawn public comment**

No public comments were withdrawn in this matter. Therefore, the hearing requests are 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 requests raise several 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).

*Air Quality, Human Health, and Dust Particles*

Requestors are concerned with the adverse effects to air quality and its impacts on human health. The Commission may only issue this permit if it finds



no indication that the emissions from the Facility would 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—including domestic animals. TCAA § 382.002(a); *See also* TCAA § 382.003(3)(A). Therefore, Issue Nos. 1-3 are relevant and material to the Commission's decision regarding this application and are appropriate for referral to SOAH.

### Traffic

Requestors raised concerns about increased traffic and road use. TCEQ does not have jurisdiction to consider traffic, road safety, or road repair costs when determining whether to approve or deny an air permit application. Further, the TCEQ is prohibited from regulating roads per TCAA § 382.003(6), which excludes roads from the definition of "facility." Therefore, Issue No. 4 is 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.

## V. CONCLUSION

Having found that Cindy Luedtke and David Luedtke qualify as affected persons in this matter, OPIC respectfully recommends the Commission grant their hearing requests 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

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 29, 2024, the original of the Office of Public Interest Counsel's Response to 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 Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



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Jessica M. Anderson

**MAILING LIST  
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TCEQ DOCKET NO. 2024-0129-AIR**

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