

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*

August 30, 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 THOMAS HOWARD  
WATSON, II FOR RENEWAL OF AIR QUALITY REGISTRATION  
NO. 106325  
TCEQ DOCKET NO. 2024-0678-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 blue ink that reads "Jessica M. Anderson".

Jessica M. Anderson, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

**DOCKET NO. 2024-0678-AIR**

**APPLICATION BY THOMAS  
HOWARD WATSON, II FOR  
RENEWAL OF AIR QUALITY  
REGISTRATION NO. 106325**

**§  
§  
§  
§  
§  
§**

**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**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 Request 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 Thomas Howard Watson, II (Applicant) for renewal of Air Quality Registration Number 106325, which would authorize the continued operation of an existing facility that may emit air contaminants. The commission received timely comments and a hearing request from Thelma Lucas Rogers on behalf of her mother. For the reasons stated herein, OPIC respectfully recommends the Commission grant the hearing request submitted by Thelma Lucas Rogers on behalf of her mother

## **B. Description of Application and Facility**

Thomas Howard Watson, II applied to renew a Standard Permit under Texas Clean Air Act (TCAA) § 382.05195, which would authorize the continued operation of an existing facility that may emit air contaminants.

The registration renewal would authorize the Applicant to continue operation of a Concrete Batch Plant. The plant is located at 31 Rainbow Road, Cuero, in Dewitt County. Contaminants authorized under the Standard Permit include particulate matter comprised of aggregate, cement, road dust, and particulate matter with diameters of 10 microns or less and 2.5 microns or less.

## **C. Procedural Background**

Thomas Howard Watson, II's application was received on June 2, 2023, and declared administratively complete on June 23, 2023. The Notice of Receipt and Intent to Obtain an Air Quality Standard Permit Registration Renewal for this permit application was published on July 19, 2024, in the *Cuero Record*. The public comment period ended on August 3, 2023, and the Executive Director's (ED) Response to Comments (RTC) was mailed on August 16, 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.<sup>1</sup>

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

---

<sup>1</sup> 30 TAC § 55.201(d).

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.<sup>2</sup>

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.<sup>3</sup>

---

<sup>2</sup> 30 TAC § 55.203(c).

<sup>3</sup> 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 REQUEST**

#### **A. Whether a right to hearing exists**

The Commission must first decide whether the right to a hearing exists for this renewal application. Under the TCAA, the Commission may not hold a hearing on a renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.<sup>4</sup> The available record indicates that Applicant would not be authorized to increase the quantity of allowable air emissions, and would not be authorized to emit any air contaminant not previously emitted.

---

<sup>4</sup> TEX. HEALTH & SAFETY CODE § 382.056(g).

However, the Act further provides that the Commission may hold a hearing on a renewal if the Commission determines that the application involves a facility for which the applicant's compliance history is classified as "unsatisfactory" under Texas Water Code (TWC) §§ 5.753 and 5.754 and rules adopted and procedures developed under those sections.<sup>5</sup> The rules adopted under TWC §§ 5.753 and 5.754 state that the Commission may hold a hearing if the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.<sup>6</sup> At the time of the ED's RTC, this site had an "unsatisfactory" classification, and the company also had an "unsatisfactory" classification.<sup>7</sup> Given that the Rainbow Plant's rating is "unsatisfactory," OPIC finds that Applicant's compliance history *does* trigger the compliance history exception and thereby creates the opportunity for a hearing in this matter.

Based on OPIC's review of the available record, we first find that Applicant's renewal would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. Second, we find that Applicant's compliance history does trigger an exception to

---

<sup>5</sup> TEX. HEALTH & SAFETY CODE § 382.056(o).

<sup>6</sup> See 30 TAC §§ 55.201(i)(3)(D), 55.211(d)(2).

<sup>7</sup> See Executive Director's Response to Public Comment, Response 2, p. 3.

the hearing prohibition. Therefore, OPIC must conclude, under TCAA § 382.056(g) and (o), a right to a hearing exists in this matter.

**B. Whether the requestor is an affected person**

Thelma Lucas Rogers submitted timely comments and a timely hearing request for her mother. Ms. Rogers listed the relevant address as 273 Rainbow Road in Cuero, which, according to the map prepared by ED staff, falls within 440 yards of the facility. In her request, Ms. Rogers raised concerns about dust, compliance history, and water quality.

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

As shown on the ED’s map, Ms. Rogers’ mother resides within 440 yards of the plant. She is concerned about air quality and compliance history. Her proximity distinguishes those interests from interests common to the general public. Further, her concerns regarding air quality and compliance history are interests protected by the law under which this application is considered, and a reasonable relationship exists between those interests and the regulation of a concrete batch plant. Finally, her proximity increases the likelihood that the regulated activity may impact her health, safety, and use of property. OPIC finds



that Ms. Rogers' mother has a personal justiciable interest in this matter and qualifies as an affected person.

**C. Which issues raised in the hearing request are disputed**

The requestor raised the following disputed issues:

1. Whether the permit will be adequately protective against dust.
2. Whether the Applicant's history of noncompliance may lead to future violations.
3. Whether the permit will be adequately protective of water quality.

**D. 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.

**E. Whether the issues were raised during the public comment period**

Issue Nos. 1-3 in Section III.B. were specifically raised by the requestor during the public comment period.

**F. 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.

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

The hearing request raises some 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.<sup>8</sup>

*Dust Control*

The requestor is concerned with dust control as it relates to this facility. The Commission may only issue this registration 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.<sup>9</sup> 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.<sup>10</sup> Applicant must also comply with 30 TAC § 101.4, which prohibits discharge of air contaminants in such concentration or duration as may 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

---

<sup>8</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

<sup>9</sup> TCAA § 382.0518(b)(2).

<sup>10</sup> TCAA § 382.002(a); *See also* TCAA § 382.003(3)(A).

animal life, vegetation, or property. Therefore, Issue No. 1 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

### Compliance History

The requestor has stated concerns regarding Applicant's previous history of noncompliance with environmental regulations. When making a decision on the issuance of a permit, the Commission is required to consider an entity's past compliance with applicable environmental rules and statutes through an evaluation of that entity's compliance history.<sup>11</sup> Additionally, to address concerns with compliance history, the TCEQ may impose certain permit conditions or provisions.<sup>12</sup> Because compliance history must be considered in the decision to issue a permit and whether special conditions should be included in the permit, Issue No. 2 is relevant and material to the Commission's decision regarding this application.

### Water Quality

Water quality issues fall outside the scope of review of this application for an air standard permit. Issue No. 3 is therefore not relevant and material.

## **H. 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

---

<sup>11</sup> 30 TAC § 60.1(a)(1)(A); 30 TAC § 60.3(a)(1)(A).

<sup>12</sup> 30 TAC § 60.3(a)(2).

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.<sup>13</sup> 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

Under the Texas Clean Air Act, the Commission may not hold a hearing on a renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.<sup>14</sup> However, Applicant's unsatisfactory compliance history triggers an exception to this statute, meaning that the right to a hearing exists in this case.

This hearing request was submitted by Thelma Lucas Rogers on behalf of her mother. Having found that the requestor's mother qualifies as an affected person in this matter, OPIC respectfully recommends the Commission grant the

---

<sup>13</sup> 30 TAC § 50.115(d)(2).

<sup>14</sup> TEX. HEALTH & SAFETY CODE § 382.056(g).

hearing request and refer Issue Nos. 1-2 specified in Section III.B for a contested case hearing at SOAH with a maximum duration of 180 days.

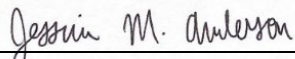
Respectfully submitted,

Garrett T. Arthur  
Public Interest Counsel

By: Jessica M. Anderson  
Jessica M. Anderson  
Assistant Public Interest Counsel  
State Bar No. 24131226  
P.O. Box 13087, MC 103  
Austin, Texas 78711-3087  
(512) 239-6823

**CERTIFICATE OF SERVICE**

I hereby certify that on August 30, 2024, 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.

  
\_\_\_\_\_  
Jessica M. Anderson

**MAILING LIST**  
**THOMAS HOWARD WATSON, II**  
**TCEQ DOCKET NO. 2024-0678-AIR**

FOR THE APPLICANT

via electronic mail:

Thomas Watson II  
Thomas Watson Company LLC  
P.O. Box 786  
Cuero, Texas 77954  
[thwatson1969@gmail.com](mailto:thwatson1969@gmail.com)  
[office@thwatson.com](mailto:office@thwatson.com)

FOR THE EXECUTIVE DIRECTOR

via electronic mail:

Kate Keithley, 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  
[kate.keithley@tceq.texas.gov](mailto:kate.keithley@tceq.texas.gov)

Miguel Gallegos, Technical Staff  
Texas Commission on Environmental  
Quality  
Air Permits Division MC-163  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-1185 Fax: 512/239-1400  
[miguel.gallegos@tceq.texas.gov](mailto:miguel.gallegos@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](mailto: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](mailto: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):

Thelma Lucas Rogers  
273 Rainbow Road  
Cuero, Texas 77954