

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 FNH CONSTRUCTION,  
LLC FOR CONCRETE BATCH PLANT REGISTRATION NO. 173515  
TCEQ DOCKET NO. 2024-0679-AIR**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Jamison".

Jennifer Jamison, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

**DOCKET NO. 2024-0679-AIR**

<b>APPLICATION BY FNH CONSTRUCTION, LLC CONCRETE BATCH PLANT SEAGOVILLE, DALLAS COUNTY</b>	<b>§ § § § §</b>	<b>BEFORE THE  TEXAS COMMISSION ON  ENVIRONMENTAL QUALITY</b>
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**THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE  
TO REQUESTS 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 Requests 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 FNH Construction, 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 timely hearing requests from Detra and Yolonda Newhouse, and a request for reconsideration from Detra Newhouse through her counsel at Legal Aid of Northwest Texas. For the reasons stated herein, OPIC respectfully recommends the Commission find that no requestors qualify as affected persons, and that the Commission deny all pending hearing requests. OPIC must further recommend denial of the request for reconsideration.

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

FNH Construction applied to the TCEQ for a Standard Permit under TCAA § 382.05195 which would authorize construction of a permanent Concrete Batch Plant. The proposed plant would be located approximately 0.48 miles south of the intersection of Cloverhill and West Simmonds Road in Seagoville, Dallas County. Contaminants authorized under this permit would include aggregate, cement, road dust and particulate matter including particulate matter with diameters of 10 microns or less and 2.5 microns or less.

## **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 Registration Number 173515.

Here, the permit application was received on July 31, 2023, and declared administratively complete on September 9, 2023. 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 September 19, 2023, in *Daily Commercial*, and in Spanish on September 19, 2023, in *La Prensa Comunidad*. The public comment period ended on October 19, 2023. The Executive Director's (ED) Response to Comments (RTC) was mailed on January 29, 2024. The deadline for filing requests for a contested cases hearing and requests for reconsideration of the ED's decision was March 6, 2024.

## 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, Texas Health and Safety Code (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. Request 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 REQUESTS**

#### **A. Whether the requestor is an affected person**

##### *Detra & Yolonda Newhouse*

The Commission received timely comments and a hearing request from Ms. Detra Newhouse, and an additional request submitted on her behalf by Legal Aid of Northwest Texas. The map prepared by staff for the ED lists three property addresses provided for Ms. Detra Newhouse, with distances from the proposed facility point ranging from 1.98 miles to 2.28 miles. In her requests, Ms. Newhouse raised concerns about notice deficiencies, human health, and air quality. She also noted that she regularly recreates and attends church near the proposed facility. The Commission also received a timely request from Ms. Yolonda Newhouse, who provided her property address as 6626 Tealglen Dr. Using the scale on the ED's map, it appears that Yolonda Newhouse resides over 10 miles from the proposed plant.

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.

Because of the restrictive statutory limitation on affected persons for purposes of requesting a hearing on a registration under the Concrete Batch Plant Standard Permit, OPIC is compelled to find that Detra and Yolonda Newhouse do not qualify as affected persons for the purposes of this application. Consequently, OPIC must respectfully recommend denial of both hearing requests.

#### **IV. REQUEST FOR RECONSIDERATION**

Ms. Detra Newhouse through her Counsel, Legal Aid of Northwest Texas, submitted a request for reconsideration that articulated concerns about improper public notice, accuracy and completeness of the application, and concerns pertaining to environmental equity.

While OPIC notes that the concerns expressed are relevant and material to the Commission’s decision on this application, a record establishing the evidentiary basis for reconsidering the ED’s decision based on these issues would be needed 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

OPIC respectfully recommends the Commission find no affected person has filed a request for a contested case hearing in this matter and therefore deny all hearing requests. Finally, OPIC respectfully recommends the Commission deny the request for reconsideration.

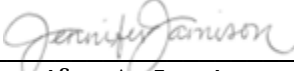
Respectfully submitted,

Garrett T. Arthur  
Public Interest Counsel

By:   
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**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.

  
\_\_\_\_\_  
Jennifer A. Jamison

**MAILING LIST**  
**FNH CONSTRUCTION, LLC**  
**TCEQ DOCKET NO. 2024-0679-AIR**

FOR THE APPLICANT

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FOR ALTERNATIVE DISPUTE

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