

John Huckle’s Reply in Support of the Motions to Overturn

In approving North Texas Natural Select Materials’ (“NTNSM”) application, the Executive Director (“ED”) ignored air-quality standards in place when the application was filed and also relied on NTNSM’s “updated representations” made outside the public record regarding the proposed location of the crusher. The ED’s Response¹ to the Motions to Overturn clings to outdated and inapplicable air-quality standards and provides little detail and no evidence of NTNSM’s “updated representations” regarding the crusher’s proposed location. The Commissioners should therefore overturn ED’s approval of NTNSM’s application, or, in the alternative, remand the application to the ED to reopen the record for comment on NTNSM’s “updated representations” regarding crusher location.

Argument

I. The ED’s reliance on NTNSM’s “updated representations” regarding the proposed location of the crusher violated procedural due process.

The ED concedes that as of July 30, 2024—as raised in the public comments—the proposed location for NTNSM’s crusher was within 440 yards of the residence at 4778 Fannin Road.² The ED then claims that “subsequently” NTNSM “submitted updated representations of the proposed location of the facility.”³ The ED points to no evidence in the record to substantiate these facts. The ED does not provide the date on which the “updated representations” occurred or indicate in what form the “updated representations” were made.

¹ The Office of Public Interest Counsel (“OPIC”) also filed a Response to the Motions to Overturn. OPIC’s Response, however, largely mirrors the ED’s Response. This Reply will refer to the ED’s Response but responds to both.

² ED Resp. at 3; Resp. to Cmts. at 12–13.

³ ED Resp. at 3; *see also* Resp. to Cmts. at 13.

It appears that the public was not made aware of NTNSM’s “updated representations” until October 11, 2024, in the ED’s Response to Comments—over two months after the public comment period closed on August 1, 2024.⁴

The ED’s approval of NTNSM’s application based on “updated representations” not included in the application and made outside the record after the public comment period had closed is a violation of procedural due process, which requires “that a party be apprised of the evidence contrary to his position so that he may refute, test, and explain that evidence.”⁵

The remedy for this due-process violation is to remand the application to the ED to provide the public with NTNSM’s “updated representations” and reopen the public comment period for comment on those representations. However, this remedy would be unnecessary if the Commissioners overturn the ED’s approval of NTNSM’s application for the failure to meet applicable air-quality standards, as discussed below.

II. The applicable air-quality standards have improved since 2008.

The ED defends only the Standard Permit’s and NTNSM’s crusher’s compliance with the air-quality standards in place in 2008.⁶ However, the air-quality standards applicable to the Standard Permit and NTNSM’s crusher have improved since then.

In 2008, the National Ambient Air Quality Standard (“NAAQS”) for PM_{2.5} was 15 micrograms per cubic meter (µg/m³), and PM_{2.5} could be estimated using measurement of PM₁₀.⁷ When NTNSM’s application was filed, however, the annual NAAQS for PM_{2.5} had been reduced to 12 µg/m³, and direct measurement of PM_{2.5} was required.⁸

Similarly, the TCEQ Long-Term Effects Screening Level for quartz silica was

⁴ Resp. to Cmts. at 12–13.

⁵ *R.R. Comm’n of Tex. v. Lone Star Gas Co.*, 611 S.W.2d 908, 910 (Tex. App.—Austin 1981, writ ref’d n.r.e.) (citing *Richardson v. City of Pasadena*, 513 S.W.2d 1, 3 (Tex. 1974)).

⁶ ED Resp. at 4–6.

⁷ See 76 Fed. Reg. 28646, May 18, 2011; 78 Fed. Reg. 3086, Jan. 15, 2013.

⁸ 76 Fed. Reg. 28646, May 18, 2011; 78 Fed. Reg. 3086, Jan. 15, 2013.

1.0 $\mu\text{g}/\text{m}^3$ in 2008 but was 0.27 $\mu\text{g}/\text{m}^3$ when NTNSM's application was filed.⁹ The Standard Permit continues to project maximum concentration of quartz silica to be 0.3 $\mu\text{g}/\text{m}^3$, which exceeds TCEQ's Long-Term Effects Screening Level in effect when NTNSM's application was filed by 10%.¹⁰

Air quality standards have improved since 2008, and the Standard Permit and NTNSM's proposed crusher do not meet those standards. Thus, the ED's approval of NTNSM's application under the Standard Permit is unreasonable, arbitrary, and capricious.

III. The ED has no answer regarding the excessive emissions of PM₁₀ from NTNSM's stockpiles.

In his Motion to Overturn, Mr. Huckle argued that there is no evidence that NTNSM's proposed crusher would comply with the NAAQS for PM₁₀ because NTNSM has projected that its crusher facility will emit "more than 250% more fugitive emissions of PM₁₀ than the generic concrete crusher evaluated by TCEQ" in its 2008 protectiveness review. The ED has no response to this argument. With no justification for approving these excessive emissions, the ED's decision was unreasonable, arbitrary, and capricious.

Prayer

Mr. Huckle respectfully requests that the ED's decision to approve NTNSM's Application be overturned or, in the alternative, remanded to the ED to provide the public with NTNSM's "updated representations" and to reopen the public comment period for comment on the "updated representations."

⁹ Summary Document for Air Quality Standard Permit for Permanent Rock and Concrete Crushers at 8; see Texas Air Monitoring Information System (TAMIS) database (online at <https://www.tceq.texas.gov/downloads/toxicology/publications/community-health-impacts-as-202.pdf>).

¹⁰ Summary Document for Air Quality Standard Permit for Permanent Rock and Concrete Crushers at 8.

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I certify that on October 29, 2024, a true and correct copy of the foregoing was served upon all persons listed below via the methods listed.

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