

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

October 18, 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 MOTION TO OVERTURN THE EXECUTIVE DIRECTOR'S APPROVAL OF STANDARD PERMIT REGISTRATION NO. 175198 FOR NORTH TEXAS NATURAL SELECT MATERIALS, LLC
TCEQ DOCKET NO. 2024-1583-AIR**

Dear Ms. Gharis:

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

Sincerely,


Eli Martinez, Senior Attorney
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2024-1583-AIR

IN THE MATTER OF THE MOTION	§	BEFORE THE TEXAS
TO OVERTURN THE EXECUTIVE	§	
DIRECTOR'S APPROVAL OF STANDARD	§	COMMISSION ON
PERMIT REGISTRATION NO. 175198	§	
FOR NORTH TEXAS NATURAL SELECT	§	ENVIRONMENTAL QUALITY
MATERIALS, LLC	§	

**OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
MOTIONS TO OVERTURN**

**TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:**

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the Commission) responds to the above-captioned Motions to Overturn as follows:

I. INTRODUCTION

On January 29, 2024, North Texas Natural Select Materials, LLC (Applicant) applied to the TCEQ for a Standard Permit under Texas Clean Air Act (TCAA) §382.05195 authorizing the construction of a new Permanent Rock and Concrete Crusher in Grayson County (the Permit). Contaminants authorized under the permit include particulate matter with diameters of 10 microns or less (PM10) and 2.5 microns or less (PM2.5). The application was determined to be administratively complete on April 5, 2024, and the final public comment period closed on August 1, 2024 at the conclusion of the public meeting held in Sherman. After considering approximately 700 comments, the Executive Director (ED) approved the application on September 4, 2024.

II. PROCEDURAL ISSUES

Title 30, TAC, Chapter 50 Subchapter G, addresses authority delegated to the ED and specifies applications for which the ED may take action on behalf of the Commission. Specifically included in these provisions are air quality permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification).¹ Where an application has not been formally contested, or is ineligible for formal challenge, Subchapter G contains a provision allowing the applicant, public interest counsel or other person the opportunity to file a motion to overturn (MTO) the ED's action on an application.²

An MTO must be filed within 23 days after notice of approval of the application has been mailed³ unless general counsel, by written order, extends the period of time for filing motions.⁴ Because the TCEQ mailed the order on September 4, 2024, the period to file a motion to overturn closed on September 27, 2024. Timely MTOs were filed by filed by Adam Friedman and Thales Smith on behalf of John Huckle, Russel Petre, and Anna Wylie on September 25, 2024 and September 27, 2024. On October 7, 2024, Edna, Gary, and Andy Spillers filed additional MTOs and a Motion for Leave requesting that the Commission consider the motions after the filing deadline. On October 8, 2024, pursuant to

¹ 30 TAC § 50.131(b)(1).

² 30 TAC § 50.139.

³ 30 TAC § 50.139(b).

⁴ 30 TAC § 50.139(e).

Texas Administrative Code § 50.139(e), General Counsel granted the Spillers' request. Each Movant (collectively, Movants) therefore timely submitted their motions and, as such, OPIC finds they have the right to seek Commission review of the ED's approval through the motion to overturn process.

III. DISCUSSION

A. Residences Within 440 Yards of Facility

Firstly, Movants argue that the ED erred in issuing the Permit because residences exist within 440 yards of the proposed crusher in contravention of Texas Health & Safety Code (THSC) § 382.065(a), which prohibits "the operation of a concrete crushing facility within 440 yards of a building in use as a single family or multifamily residence...at the time the application for a permit to operate the facility...is filed with the commission."

Additionally, General Requirement (1)(B) of the Standard Permit states that a crusher "shall be operated at least 440 yards from any building which was in use as a single or multi-family residence...at the time an application was filed."

The ED addresses this concern at Response 5 of the Response to Comments (RTC). On July 30, 2024, the Dallas/Fort Worth Regional office conducted a site review of the area where the proposed facility was to be located. At that time, a residence was identified within the 440-yard radius of the proposed facility. The ED informed Applicant that the proposed location of the facility did not comply with the setback distances required by the Standard Permit. Thereafter, Applicant updated the proposed location of the crusher to

comply with the 440-yard distance buffer required by the Standard Permit and THSC § 382.065(a). On August 7, 2024, the DFW Regional office conducted a second site review and determined that the previously identified residence is now outside of the 440-yard buffer zone. The Regional Office therefore recommended that the ED proceed with the permit application review.

OPIC cannot determine that the ED erred in granting the Permit on this basis. At the time the application for a permit to operate the facility was filed with the Commission, there existed a building in use as a single family or multifamily residence within 440-yards of the proposed facility. Therefore, under that initial configuration the Commission could not have issued a permit to operate pursuant to THSC § 382.065(a). However, prior to permit approval, Applicant moved the location of the facility to comply with statutory and permit requirements. This was verified by the Dallas/Fort Worth Regional office during a second site review. Given these events, the ED did not clearly err in determining that Permit Registration No. 175198 appropriately complied with applicable setback requirements prior to authorizing operations.

B. Public Health

Movants express concerns about the effects of the emissions from the proposed project on air quality and public health, including those to sensitive populations such as the elderly, children, and immunocompromised residents. Further, Movants are concerned that emissions may result in respiratory

diseases, cancer, silicosis, fibrosis, bronchitis, and other cardiovascular illness to nearby residents.

In her Response to Comments at Response 1, the ED states that, during the development of the Standard Permit, an extensive protectiveness review was conducted to ensure protectiveness of human health and the environment. The protectiveness review determined potential impacts to human health and welfare or the environment by comparing emissions allowed by the standard permit to appropriate state and federal standards and guidelines. These standards and guidelines include the National Ambient Air Quality Standards (NAAQS) and TCEQ rules. The ED determined that the emissions authorized by the standard permit are protective of both human health and welfare and the environment.

The EPA's NAAQS include both primary and secondary standards for pollutants considered harmful to public health and the environment. Primary NAAQS protect public health—including sensitive members of the population such as children, the elderly, and those individuals with preexisting health conditions. Secondary NAAQS protect public welfare and the environment, including animals, crops, vegetation, visibility, and buildings, from any known or anticipated adverse effects from air contaminants. The EPA has set NAAQS for criteria pollutants, which include carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO₂), ozone (O₃), sulfur dioxide (SO₂), particulate matter less than or equal to 10 microns in aerodynamic diameter (PM₁₀), and particulate matter

less than or equal to 2.5 microns in aerodynamic diameter (PM2.5). The Standard Permit is designed to comply with the NAAQS in place at the time the permit application was submitted.

The primary contaminants that have the potential to be emitted from the facility are dust particles having particle sizes of less than or equal to an aerodynamic diameter of PM10 and PM2.5. The ED contends that all of the potential dust concentrations, as well as emissions from combustion sources, were evaluated using reasonable worst-case operating parameters and compared to the federal criteria mentioned above. Therefore, when a facility is operated in compliance with the Standard Permit, its emissions should not cause or contribute to a violation of the NAAQS and are protective of human health and the environment.

OPIC cannot find that this contention by Movants is an appropriate basis for a motion to overturn because protection of health, analysis of cumulative impacts for concrete crushing operations of the type and throughput authorized under this type of registration, analysis of background concentrations, and BACT requirements were analyzed and approved by the Commission in the development and approval of the Standard Permit applicable to this registration. The ED is charged with applying those requirements to applicants and cannot be said to have erred by doing so in the absence of a change to the Standard Permit itself.

Because the EPA has made updates to the NAAQS since the protectiveness review was conducted, OPIC is of the opinion that the Standard Permit may benefit from Commission reevaluation and reexamination to ensure that it is protective and in compliance with the recently updated NAAQS. However, OPIC agrees that the ED evaluated the application using the PM NAAQS applicable at the time the application was submitted. Therefore, OPIC does not find that the ED erred in her evaluation of these issues and cannot recommend that the registration be overturned on these grounds.

C. Compliance with NAAQS

Movants identify multiple basis upon which the Permit does not demonstrate compliance with applicable NAAQS. These contentions are primarily based upon the 2008 protectiveness review conducted by the ED that does not reflect updated limits promulgated by the EPA with respect to PM_{2.5} or quartz silica. Further, Movants contend that the proposed crusher will emit more PM₁₀ than TCEQ has evaluated for safety.

Movants contend that, in the 2008 protectiveness review, the ED relied on interim guidance from the EPA stating that a satisfactory demonstration of PM₁₀ impacts serves as a surrogate for demonstrating the acceptability of PM_{2.5}, a policy which was ended in 2011. Subsequently, the NAAQS for the annual average PM_{2.5} concentration was lowered in 2013 from 15 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) down to 12 $\mu\text{g}/\text{m}^3$. Subsequently, the annual PM_{2.5} NAAQS was lowered again from 12 $\mu\text{g}/\text{m}^3$ to 9 $\mu\text{g}/\text{m}^3$. However, TCEQ has

never updated its protectiveness review to reflect the new NAAQS. Therefore, Movants contend, TCEQ cannot ensure that PM_{2.5} emissions from rock and concrete crushers do not pose a dangerous threat to public health.

Movants further contend that the ED erred in ensuring that the proposed crusher will not emit dangerous levels of silica. TCEQ's 2008 protectiveness review modeled a maximum annual ground level concentration for quartz silica of 0.3 µg/m³. TCEQ deemed silica impacts at that level to be protective because the modeled concentration was below the TCEQ Long-Term Effects Screening Level (ESL), which at the time was 1.0 µg/m³. However, the current TCEQ Long-Term ESL is 0.27 µg/m³. Movants therefore reason that TCEQ's 2008 Protectiveness Review, which projects maximum concentrations of quartz silica at 0.3 µg/m³, now exceeds TCEQ's Long-Term ESL by 10%.

Additionally, Movants argue that the proposed crusher will emit more PM₁₀ than TCEQ has evaluated for safety. The proposed facility will maintain large concrete and aggregate stockpiles covering six acres of land emitting 2.17 tons of PM₁₀ per year plus an additional 0.42 tons of PM₁₀ per year from other fugitive emission sources. Movants contend TCEQ has never modeled this amount of stockpiles or total amount of projected PM₁₀ emissions, and the ED therefore erred in failing to determine the proposed crusher will not emit levels of PM₁₀ beyond the NAAQS.

As stated in the previous section, OPIC is of the opinion that the Standard Permit may benefit from Commission reevaluation and reexamination to ensure

that it is protective and in compliance with the recently updated PM2.5 and PM10 NAAQS. However, OPIC agrees that the ED evaluated the application using the NAAQS applicable at the time of the application. As to the concern related to quartz silica, the Standard Permit review also evaluated the impact on air quality if the crushed material had up to twenty-percent silica, which the ED represents is “a very conservative assumption.”⁵ The model predicted that the maximum one-hour and maximum annual concentrations of silica would be half of TCEQ’s health-based screening values.⁶ Therefore, OPIC does not find that the ED erred in her evaluation of these issues and cannot recommend that her decision be overturned on these grounds.

D. Roads and Zoning

Movants contend that the ED erred in not considering impacts to local roads caused by large and heavy traffic to and from the proposed plant, as well as not considering that the area consists of a zone of residential rather than industrial use.

The TCEQ’s jurisdiction is established by the Legislature and is limited to the issues set forth in statute. As asserted by the ED in her Response to Comment 5, the TCEQ does not have jurisdiction to consider plant location choices made by an applicant when determining whether to approve or deny a permit application, unless a statute or rule imposes specific distance

⁵ Executive Director’s Response to Public Comment, at Response 1.

⁶ *Id.*

limitations that are enforceable by the TCEQ. Zoning and land use are beyond the authority of the TCEQ for consideration when reviewing air quality permit applications. The same restriction on jurisdiction applies with respect to traffic, road safety, and road repair costs, which are issues that may fall within the ambit of local, county, or other state agencies, such as the Texas Department of Transportation (TxDot) and the Texas Department of Public Safety (DPS). OPIC therefore cannot recommend overturning the ED's decision based on these issues.

E. Continuous Operation

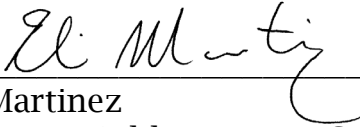
Movants contend that the ED erred in allowing the proposed facility to run continuously. However, OPIC notes that under 3(H) of the operational requirements of the Standard Permit, a rock crusher and associated facilities cannot operate outside of daylight hours, between one hour after official sunset and one hour before official sunrise. OPIC therefore cannot recommend overturning the ED's decision based on this issue.

IV. CONCLUSION

The record does not identify sufficient bases to overturn the ED's approval of Standard Permit Registration No. 175198. OPIC therefore respectfully recommends that the Commission deny the motion.

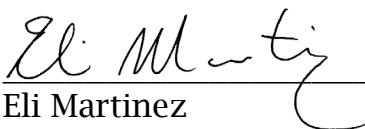
Respectfully submitted,

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By 
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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2024, the Office of Public Interest Counsel's Response to Motions to Overturn was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, electronic mail, Inter-Agency Mail or by deposit in the U.S. Mail.


Eli Martinez

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TCEQ Docket No. 2024-1583-AIR

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