TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 10, 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 MOTIONS TO OVERTURN THE EXECUTIVE DIRECTOR'S ISSUANCE OF STANDARD PERMIT REGISTRATION NO. 174419 TO JULPIT INC.**
TCEQ DOCKET NO. 2024-1751-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. 2024-1751-AIR

IN THE MATTER OF THE MOTIONS TO OVERTURN THE EXECUTIVE DIRECTOR'S APPROVAL OF STANDARD PERMIT REGISTRATION NO. 174419 TO JULPIT INC.	**§ § § § §**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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 October 25, 2023, Julpit, Inc. (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 Fort Bend County (the Permit). Contaminants authorized under the permit include carbon monoxide, nitrogen oxides, organic compounds, particulate matter including particulate matter with diameters of 10 microns or less (PM10) and 2.5 microns or less (PM2.5), and sulfur dioxide.

The Permit application was received on October 25, 2023, and declared administratively complete on October 26, 2023. The consolidated Notice of Receipt and Intend to Obtain an Air Quality Permit and Notice of Application

and Preliminary Decision for an Air Quality Permit was originally published in English on January 10, 2024 in *The Fort Bend Star*. The Applicant requested to publish an amended Public Notice to correct a clerical error in the application. The amended consolidated Notice of Receipt and Intent to Obtain an Air Quality Permit and Notice of Application and Preliminary Decision for an Air Quality Permit for this application was then published in English on March 27, 2024, in *The Fort Bend Star*. The consolidated Notice was also published in Spanish on March 28, 2024, in *The Greensheet.* A public meeting was held at the Restoration City Life Center on August 20, 2024, in Rosharon. The public comment period was extended to September 26, 2024, to accommodate additional sign postings and allow for further public participation.

After considering approximately 500 comments, the Executive Director (ED) approved the application on October 25, 2024, and mailed her Response to Comments (RTC) on December 9, 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

[1] 30 TAC § 50.131(b)(1).

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 mailed[3] unless the general counsel, by written order, extends the period of time for filing motions.[4] Because the TCEQ mailed the approval on October 25, 2024, the period to file a motion to overturn closed on November 18, 2024. Timely MTOs were filed by Angelica B. Baines, Leslie Boards, Afolake Cannon, Clayton Collier, Erika Johnson, Latoya and Marquis Lane, Courtney Lewis, Mathew Metharatta, Charnella Mims, George Moussa, Hernan Ortiz, Mariela Parra, Orlando Parra, Teresa Roher, Pauline and James Spatafore, Janzen Viator, Ashly Waltman, Michael Watts, and Fort Bend County. Each Movant (collectively, Movants) 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

[2] 30 TAC § 50.139.
[3] 30 TAC § 50.139(b).
[4] 30 TAC § 50.139(e).

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."

Movants argue that the application does not contain "coordinates…metes and bounds, (or anything) more than a digitally imposed outline of the boundaries of its facility."[5] Further, insufficient information was disclosed relating to the "size of the Facility or its specific location within the property to permit TCEQ to confirm that the Facility would be located more than 440 yards from a residence."[6] Additionally, according to the Investigation Report for the Application, a three-investigator site visit took place on June 26, 2024 and discussions between investigators and project managers were held to confirm the distances to the nearest property line and nearest off-property receptors. Movants note that during this visit "the use of a range finder was not possible due to the presence of dense foliage on site," and "plotting…walking the site with stakes, tape, measuring tools or a camera were…not options either."[7] The investigative report therefore contains "no recorded distances, no measurements, no photographs, no documentation or any type of verification

[5] *Fort Bend County's Motion to Overturn* at Page 3.
[6] *Id.*at 10.
[7] *Ibid.* at 11.

of the planned location for the Facility equipment or the "nearest receptors.'"[8] For these reasons, Movants argue that it is "not possible to know whether the Facility will or can meet the statutory setback requirements of the Rock Crusher Standard Permit," despite the fact that it is "Julpit's responsibility to demonstrate compliance with all conditions of this permit."[9]

The ED addresses this concern at Response 6 of the Response to Comments (RTC), stating,

> In addition to the representations provided in the initial application, the Applicant updated its maps and representations on May 10, 2024. These representations further clarified that the proposed facility would be more than 440 yards away from the nearest residence, school, or place of worship.

These updated representations took place after the combined notice for this application was published on March 28, 2024. Meaningful public participation requires that the public have notice of changes to the application and its representations, access to that information, and a reasonable period of time to review the information so a concerned citizen may avail themselves of agency procedures and challenge—where necessary—whether the application properly adheres to the rules and regulations applicable to the permit sought.

[8] *Ibid* at 12.
[9] *Ibid.*

From the record, OPIC cannot determine how the ED determined that the setback requirements of THSC § 382.065(a) and General Requirement (1)(B) of the Standard Permit would be met by the Applicant. The application materials are unclear as to the components and configuration of the proposed facility, do not contain clear information orienting the reader precisely where the nearest receptor is located in relation to facility equipment, and there does not appear to be any supporting information as to how measurements were taken after the updated information was provided by the Applicant. As the Movants highlight, the June 26, 2024 investigation report similarly does not contain sufficient detail to inform the public of this analysis. Without this information, the public was denied access to meaningful public participation because there was insufficient notice of the clarifying information submitted by the Applicant to conduct their own measurements or otherwise contest the accuracy of the setback analysis requisite to the ED's approval of the permit. In addition, there is insufficient detail outlining the precise components of the facility and the method of measuring those components to the nearest permanent residence to ensure meaningful public participation.

OPIC notes that the Commission's recent decision in the Motions to Overturn North Texas Natural Select Materials LLC's Air Quality Standard Permit No. 175198[10] is instructive with respect to an applicant submitting

[10] Motions to Overturn the Executive Director's Issuance of Air Quality Standard Permit No. 175198 to North Texas Natural Select Materials LLC; 2024-1583-AIR.

updated representations of facility layout and measurements to surrounding residences after an original application has been noticed. In this matter, the submission of updated representations as to facility layout and their proximity to local residences after the comment period had closed was found to have created a notice issue sufficient to overturn the ED's decision because "the revised location of the rock crusher was not appropriately made available to the public."[11] While in the instant case the September 26, 2024 comment period had not yet elapsed before the updated representations were provided to the ED on May 10, 2024, OPIC finds that a duplicate notice issue has taken place in this matter, as the application had already been noticed on March 28, 2024. Further, the June 26, 2024 Investigation Report did not sufficiently describe what information had been updated and the precise basis for its finding that the applicable setback requirements would be met. For these reasons OPIC finds that the ED erred in granting the Permit, and recommends that the Commission grant the motions to overturn.

B. Permit was Granted to Wrong Applicant

Movants contend that the ED erred in granting the permit to the wrong applicant. Specifically, the TCEQ Core Data Form represents that "Julpit, LLC" rather than "Julpit Inc." is the independently owned "small business source" with less than 20 employees that TCEQ considered for the permit. Movants note

[11] *An Order concerning Motions to Overturn the Executive Director's Issuance of Air Quality Standard Permit No. 175198 to North Texas Natural Select Materials LLC*; 2024-1583-AIR. December 3, 2024.

that the Standard Permit New Registration checklist "contains no federal, state or local tax identification for Julpit, LLC (and Movants have) been unable to locate information about Julpit, LLC, or Julpit Inc. with the Texas Secretary of State and the registration documents do not list a Secretary of State filing number."[12]

OPIC agrees that this error, whether it prove to be merely clerical in nature or a more substantive oversight, must be rectified to ensure that the authorized entity has been registered with the Secretary of State, properly vetted, and accounted for in the Commission's databases used for basic public searches and tracking of compliance records. OPIC therefore agrees that the ED's decision should be overturned on this issue.

C. The RTC Was Filed after the MTO Deadline

Movants contend that the ED's failure to submit an RTC before the deadline for a motion to overturn constitutes error. In support of this argument, Movants note that the TAC requires the ED to prepare a response to "all timely, relevant and material, or significant public comment…. before an application is approved,"[13] while the THSC Standard Permit provides that a written response to comments will be issued "at the same time the commission issues or denies the permit."[14]

[12] *Fort Bend County's Motion to Overturn* at Page 9.
[13] 30 TAC § 50.156(b)(1).
[14] TEX. HEALTH & SAFETY CODE § 382.05195(d).

Movants assert that issuing the ED's RTC after the granting of the application "undermines the intent of the Administrative Code and the TCEQ's commitment to public participation in the permit process."[15] Further, Movants contend that requiring the public to file motions to overturn "without the benefit of the ED's response to comments puts the public and the parties at a distinct and unfair disadvantage…and effectively deprives Movants "of any opportunity to review and consider the ED's responses to the issues…raised in written comments."[16] Lastly, Movants claim the timing of the RTC limits their ability to seek judicial review—as well as the scope of that judicial review—because the court may only consider issues raised in their motions and there is no way for them to know how the ED would respond.

Although OPIC agrees that providing the RTC to the public prior to approving the permit is preferable to providing it after the motion to overturn deadline has elapsed, we cannot find that it constitutes reversible error. The Air Quality Standard Permit for Permanent Rock and Concrete Crushers states that "the executive director shall issue a written response to any public comments received related to the issuance of an authorization to use the Standard Permit at the same time as *or as soon as practicable* after the executive director grants or denies the application." (emphasis added)[17] The concluding clause here seems to render some leeway after the granting of a permit to submit the RTC

[15] *Fort Bend County's Motion to Overturn* at Page 7.
[16] *Id.*
[17] TEX. HEALTH & SAFETY CODE § 382.05199 (emphasis added).

rather than a hard and fast deadline that constitutes reversible error. Further, while THSC 382.05199(i) does direct the ED to issue a written response to any public comments received related to the issuance of an authorization to use the standard permit at the same time as or as soon as practicable after the ED grants or denies the application, it follows this directive with the stipulation that "issuance of the response after the granting or denial of the application does not affect the validity of the executive director's decision to grant or deny the application." OPIC cannot therefore find that the unideal timing of the RTC is a sufficient basis for granting the motions to overturn.

D. 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. Movants are concerned these emissions contain excessive levels of PM10, PM 2.5, silica, carbon monoxide, volatile organic compounds, sulfur dioxide and nitrogen oxides because the basis for the ED's approval of the permit was predicated on a 2006 Protectiveness Review that reflects outdated science and National Ambient Air Quality Standards (NAAQS).

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 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), PM10, and 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 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. As to the concern related to 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."[18] The model predicted that the maximum one-hour and maximum annual concentrations of silica would be half of TCEQ's health-based screening values.[19]

OPIC cannot find that these contentions by Movants are 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

[18] Executive Director's Response to Public Comment, at Response 1.
[19] *Id.*

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 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.

E. Cumulative Impacts

Movants also argue that the ED erred in not properly considering the issue of the cumulative effects of this project with pending or existing facilities in the area that may exacerbate the concentration of emissions.

In her Response to Comments at Response 4, the ED states that the protectiveness review used to develop the Standard Permit demonstrated that the maximum modeled concentration typically occurs at a short distance from the source, so that the peak modeled concentrations represent the source's impact at a few receptors within the modeled area. Therefore, review of other off-site sources is not necessary when determining approval of any standard permit application. The ED contends the Standard Permit also imposes operational or location requirements for concrete batch plants, crushing plants, and hot mix asphalt plants. Under the Standard Permit, the crushing plant should be located at least 550 feet away from any other rock crusher, concrete crusher, concrete batch plant, or hot mix asphalt plant. If this distance cannot be met, then the owner or operator must not operate the crushing plant at the

same time as the other rock crusher, concrete crusher, concrete batch plant, or hot mix asphalt plant.

OPIC remains of the opinion that the Standard Permit may benefit from Commission reevaluation and reexamination to ensure that its cumulative impacts criteria are protective. However, OPIC agrees that the ED evaluated the application using the applicable criteria and therefore cannot find that the ED erred in her evaluation of these issues and cannot recommend overturn on these grounds.

F. Air quality monitoring

Movants also argue that the ED erred by requiring insufficient monitoring and control measures to protect the surrounding public.

In her Response to Comments at Response 5, the ED notes that monitoring requirements are included in the Standard Permit and emissions will be monitored by runtime meters which must be active during crushing operations. The crusher will also equip a belt scale to determine the weight of material to ensure it does not exceed the permitted throughput. The permit holder is required to maintain records to demonstrate compliance with the emission rates and terms of the permit, including the monitoring requirements. Written records are required onsite to show daily hourly operations and hourly throughput, road and work area cleaning, and dust suppression logs.

The ED also states that, due to cost and logistical constraints, the placement of air monitors is prioritized to provide data on regional air quality

in areas frequented by the public, and that the existing air monitoring network is the result of a strategic balance of matching federal monitoring requirements with state and local needs.

OPIC cannot find that the record shows the ED has erred in its adherence to the monitoring requirements of the Standard Permit and does not recommend overturn of the ED's decision based on these grounds.

G. Disproportionate Impacts on Low-Income Communities of Color

Movants argue that there is a disproportionate concentration of commercial facilities in the community where the facility would be located, a low-income community of color that faces steadfast health challenges corresponding to the impacts of facility clustering. These facility patterns have resulted in the unjust and disproportionate exposure of pollutants to minority populations. Movants contend the ED erred in not properly considering this fact and denying the application.

Because the TCEQ receives federal funding, it must comply with a suite of federal guidance and laws ensuring its actions are not intentionally discriminatory and will not have discriminatory effects.[20] For instance, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin.[21] Executive Order 12898 addresses the environmental and human health conditions of minority communities and low-income

[20] *See* 40 CFR §7.35(b). https://www.ecfr.gov/current/title-40/chapter-I/subchapter-A/part-7
[21] https://www.justice.gov/crt/fcs/TitleVI

communities and calls on agencies to identify and address any disproportionately high and adverse human health or environmental effects of their programs.[22] Executive Order 13166 requires federal agencies—and recipients of federal financial assistance—to examine the services they provide, identify any need for services to those with limited English proficiency, and develop and implement a system to provide those services so limited English proficiency persons can have meaningful access to them.[23]

TCEQ has made a commitment to preventing discriminatory actions or effects through its Title VI compliance efforts, which are intended to ensure reasonable access to its decision-making processes. Towards this end, efforts have been made to develop and implement a Disability Nondiscrimination Plan, Public Participation Plan, and Language Access Plan.[24] Together, these efforts are intended to provide equal access to Commission programs and activities.

However, the specific concerns raised by the Movants involving the location of the proposed facility in an area with minority and low-income populations, disparate exposure to pollutants of minority and low-income populations, and disparate economic, environmental, and health effects on minority and low-income populations are not specifically addressed by legislation or permitting rules. Without specific requirements relating to these

[22] https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf
[23] https://www.govinfo.gov/content/pkg/FR-2000-08-16/pdf/00-20938.pdf
[24] More information on TCEQ's Title VI Compliance efforts can by found at: https://www.tceq.texas.gov/agency/decisions/participation/title-vi-compliance

concerns, these issues do not provide a basis for overturning the ED's decision on this registration, and OPIC cannot recommend granting the motions to overturn on this basis.

H. Noise and Light Pollution

Movants also argue that the ED erred by not properly considering noise and light pollution from the proposed project.

TCEQ does not have authority under the Texas Clean Air Act (TCAA) to require or enforce any noise abatement measures or consider light pollution when determining whether to approve or deny an air quality authorization. Noise ordinances are normally enacted by cities or counties and enforced by local law enforcement authorities. OPIC therefore cannot recommend that the registration be overturned on these grounds.

I. 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 numerous residences, parks, and churches.

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 6, 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

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.

IV. CONCLUSION

Movants have demonstrated that the ED did not provide sufficient notice of the updated information submitted by the Applicant relating to the configuration of the proposed facility and the location of its emission points relative to nearby residences, potentially implicating the setback requirements of THSC § 382.065(a) and General Requirement (1)(B) of the Standard Permit. Further, the ED erred by processing inconsistent entity name entries in its permitting documents. OPIC therefore recommends that the Commission grant the motions to overturn.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By_____
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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 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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