

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

December 2, 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 CAPROCK PRECAST,
LLC FOR CONCRETE BATCH PLANT REGISTRATION NO. 175658
TCEQ DOCKET NO. 2024-1820-AIR**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing 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

TCEQ DOCKET NO. 2024-1820-AIR

**APPLICATION BY
CAPROCK PRECAST, LLC.
CONCRETE BATCH PLANT
WHITEWRIGHT, GRAYSON
COUNTY**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUESTS FOR HEARING**

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

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing and in the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is the application of Caprock Precast, LLC. (Applicant or Caprock) for a Standard Permit registration under the Texas Clean Air Act (TCAA), Texas Health & Safety Code (THSC) § 382.05195. OPIC recommends the Commission refer requestors Kurt and Amber Warford (hereinafter “the Warfords”) to the State Office of Administrative Hearings (SOAH) to determine whether these requestors qualify as affected persons in this matter. Should the requestors be determined affected, OPIC recommends that SOAH conduct a hearing on the issues listed in section III.B below. Finally, OPIC respectfully recommends denial of the request for a contested case hearing submitted by the City of Whitewright.

B. Background

Applicant seeks Registration No. 175658 to authorize construction of a new facility that may emit air contaminants. The proposed facility would be located at 1 State Highway 160, Whitewright in Grayson County. Contaminants authorized under this permit include particulate matter with diameters of 10 microns or less and 2.5 microns or less, road dust, aggregate, and cement.

C. Procedural History

TCEQ received the application on March 13, 2024, and declared it administratively complete on March 14, 2024. 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 on April 25, 2024, in *The Whitewright Sun*. The public comment period ended on May 28, 2024. The Executive Director's (ED) Response to Comment (RTC) was mailed on September 19, 2024, and the deadline to submit a hearing request or request for reconsideration of the ED's decision on this application was October 21, 2024.

II. APPLICABLE LAW

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, 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.

III. ANALYSIS OF HEARING REQUESTS

A. Whether the requestors are affected persons

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 restricted by the distance limitation imposed by statute.

Kurt & Amber Warford

The Commission received timely combined comments and hearing requests from Kurt and Amber Warford submitted by their counsel, Adam Friedman. In their request, the Warfords emphasize the extremely close proximity of two residences on their property to the proposed plant; one where their family and two children reside, and the other where Mr. Warford's mother lives. The request states that the Warford residences are both less than 440 yards from Applicant's property, which means the permanent residences may be

extremely close to the Proposed plant's emission points and thus exposed to particulate matter and crystalline silica emissions. Further, the Warfords express several relevant and material concerns regarding potential impacts to their family's health, the health of their cattle and surrounding wildlife, as well as the Proposed plant's interference with the normal use and enjoyment of their property.

OPIC has reviewed the record and cannot precisely determine the location of the requestors relative to the emission points of the proposed plant for two primary reasons. Firstly, the map prepared by ED staff contemplates only the distance between the Applicant's property boundary and one of the two permanent residences described by requestors. Requestors' maps (Exhibits A & B to Request) show the Warford residences both located less than 440 yards from Caprock's property line, meaning that the permanent residences could be within the proscribed 440 yards of the proposed plant's emission points depending on the final layout of the facility.

Secondly, OPIC notes that the ED's map includes necessary disclaimers that the facility location is "approximate" and provided by the Applicant, and the map is provided for "*informational purposes only*" and may not be suitable for "*legal, engineering, or surveying purposes.*" (emphasis added). For concrete batch plant registrations, it must be emphasized that the 440-yard statutory distance limitation on persons who may be affected is a prescriptive and precise legal standard.

Therefore, given the uncertainty regarding the exact location of emission sources, the proximity of both permanent residences, and the potential relocation of plant emission sources to areas as close as 50 feet from the property line, OPIC recommends this matter be referred to SOAH for an affectedness determination to determine party status on behalf of the Warfords.

City of Whitewright

Sarah Beth Owen, Mayor of the City of Whitewright, submitted a timely combined comment and hearing request on behalf of the City on May 24, 2024. In its request, the City of Whitewright expresses concern that Applicant has a history of documented violations and performing poorly in other projects. The City also asserts that there is a regular wind pattern that blows from the south to north which will carry any air pollution and/or dust produced by the batch plant into Whitewright, thus posing significant health risks for nearby residents.

Again, 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 the City of Whitewright does not qualify as an affected person for the purposes of this application. Consequently, OPIC must respectfully recommend denial of its request for hearing.

B. Which issues raised in the hearing request are disputed

Requestors raised the following disputed issues:

1. Whether the proposed permit is adequately protective of human health and safety, animal life, and requestors' property compliant with the TCAA;
2. Whether the Proposed plant will interfere with the normal use and enjoyment of animal life and vegetation on requestors' property; and
3. Whether Applicant provided proper notice of the Application.

C. 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 in the request are issues of fact.

D. Whether the issues were raised during the public comment period

Issues 1-3 in Section III.B. were specifically raised by requestors during the public comment period.

E. 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.

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

The hearing request raises 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. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

Animal, Human, and Environmental Health and Safety and Use/Enjoyment

Under the Texas Clean Air Act, the Commission may issue this permit only if it finds no indication that the emissions from the facility will contravene the intent of the Texas Clean Air Act, including protection of the public's health and physical property.¹ Because concerns about noncompliance could contravene the intent of the TCAA, Issue No. 1 is relevant and material. Further, the purpose of the Texas Clean Air Act 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.² Further, relevant regulations such as 30 TAC § 101.4 prohibit the discharge of contaminants which may be injurious to, or adversely affect, animal life. Accordingly, Issue Nos. 1 & 2 regarding human health and safety, animal health, environmental concerns, and use of property are relevant and material to the Commission's decision on this application.

Notice

Section 30 TAC § 39.604 requires that signs be placed at the site of an existing or proposed facility. The sign(s) must state that an application for a standard permit has been filed and the manner in which the Commission may be

¹ TEX. HEALTH & SAFETY CODE § 382.0518(b)(2).

² TEX. HEALTH & SAFETY CODE § 382.002(a).

contacted for further information. Each sign placed at the site must be located within ten feet of every property line paralleling a public highway, street, or road. Signs must also be visible from the street and spaced at not more than 1,500-foot intervals. A minimum of one sign, but no more than three signs are required along any property line paralleling a public highway, street, or road. Finally, in cases which notice is required to be published in an alternative language, the applicant must also post signs in the applicable alternative language. Requestors dispute that notice requirements were sufficiently met in this matter. Accordingly, OPIC finds that this issue is relevant and material to the Commission's decision on this application.

IV. CONCLUSION

OPIC respectfully recommends the Commission refer Kurt and Amber Warford to SOAH to determine whether these requestors qualify as affected persons in this matter. Should the requestors be determined affected, OPIC recommends that SOAH conduct a hearing on the issues listed in section III.B. OPIC further recommends denial of the request submitted by the City of Whitewright for the reasons stated herein.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2024 the original and true and correct copies of the Office of Public Interest Counsel's Response to Requests 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 hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Jennifer Jamison

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TCEQ DOCKET NO. 2024-1820-AIR**

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