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Kelly Keel, *Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

June 9, 2025

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 AUSTIN READY-MIX,  
LLC FOR CONCRETE BATCH PLANT REGISTRATION NO. 178130  
TCEQ DOCKET NO. 2025-0554-AIR**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in cursive script that reads "Jessica M. Anderson".

Jessica M. Anderson, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

**DOCKET NO. 2025-0554-AIR**

**APPLICATION BY AUSTIN  
READY-MIX, LLC CONCRETE  
BATCH PLANT COMFORT,  
KENDALL 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 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 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 Austin Ready-Mix, 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 comments and hearing requests from Kendall A. Bergmann and Bradley J. Adair. For the reasons stated herein, OPIC respectfully recommends the Commission refer requestor Kendall A. Bergmann for an affectedness determination at the State Office of Administrative Hearings (SOAH).

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

Austin Ready-Mix applied to the TCEQ for a Standard Permit under TCAA § 382.05195, which would authorize the construction of a permanent Concrete Batch Plant. The proposed plant would be located in Kendall County, near Comfort, at the following driving directions: from the intersection of Farm to Market Road 289 and Old Comfort Road travel 0.45 miles south on Farm to Market Road 289 to the site on the west side. Contaminants authorized under this permit include aggregate, cement, road dust, and 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 178130.

The permit application was received on November 4, 2024, and declared administratively complete on November 7, 2024. The Consolidated Notice of Receipt of Application and Intent to Obtain Permit and Notice of Application and Preliminary Decision for this registration application was published on December 1, 2024, in the *Boerne Star*. The public comment period ended on December 31, 2024. The Executive Director's (ED) Response to Comments (RTC) was mailed on February 27, 2025. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was March 31, 2025.

## 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 requestor is an affected person**

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. According to the map prepared by ED staff, Bradley Adair resides 625.12 yards from the closest emission point, and Kendall Bergmann resides 465.5 yards from the closest

emission point. However, for multiple reasons discussed below, OPIC believes that Kendall Bergmann may be within the statutory required distance to be considered an affected person.

The ED's map measures from a single defined point, demarcated on the map as EPN (Emission Point Number) Nearest to Residence. However, a concrete batch plant includes multiple emission sources, and the map does not include a plot plan to indicate multiple emission points. Any distance measurement should be taken from the emission source closest to a residence, and it is unclear whether the single starting point used by the ED represents the closest emission source for each residence.

When examining the map used for distance determinations, OPIC notes that the ED's map states that the site location information was obtained from the Applicant. The map further states the following disclaimer:

This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries.

By contrast, 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. A requestor's standing depends entirely on whether they are within or without 440 yards. The precision of the distance measurement is critical.

OPIC acknowledges that the maps provided by ED staff are very useful in most hearing request matters where a general idea of a requestor's location

relative to a regulated activity is a factor to consider in determining affected person status. These maps are also very helpful in concrete batch plant matters where requestors are located at distances that are obviously far beyond the statutory distance limitation. However, for a batch plant where a requestor is indisputably very close, such as the present case, that requestor should not be excluded without absolute certainty that they reside beyond 440 yards from where emission sources may be located.

*Kendall A. Bergmann*

Kendall A. Bergmann filed timely comments and a hearing request. Mr. Bergmann resides at 48 Old Comfort Road in Comfort. According to the map prepared by ED staff, Mr. Bergmann resides 465.5 yards from the proposed facility, but in his request, Mr. Bergmann states that his property is located approximately 750 feet from the proposed facility.<sup>1</sup> Given this discrepancy and the unknown accuracy of the competing distance measurements, he could be within 440 yards of the plant's emission sources. In the request, Mr. Bergmann raised concerns about air quality, human health, cumulative emissions, water usage and availability, noise pollution, and traffic. His proximity to the plant, when combined with some of his concerns, gives Mr. Bergmann a personal justiciable interest in this matter. His proximity also indicates that he could be impacted in a manner not common to the general public and distinguishes his personal justiciable interest from an interest common to the general public.

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<sup>1</sup> If Mr. Bergmann is able to provide any more specific information regarding his location relative to the plant, OPIC notes that he may do so by filing a reply on or before June 23, 2025.



Further, the 30 TAC § 55.203 affected person determination factors indicate that he qualifies as an affected person. First, some of his concerns are interests protected by the law under which this application is being considered. Second, a reasonable relationship exists between those interests and the regulation of air contaminants. Finally, his proximity to the facility increases the likelihood of impacts to his health, safety, and use of property.

Given the uncertainty regarding the exact location of emission sources, the unknown precision of the applicable distance measurement, the proximity of Mr. Bergmann's permanent residence, and the justiciability of several of the articulated concerns, OPIC recommends that this matter be referred to SOAH for an affectedness determination. If Kendall Bergmann is within 440 yards, OPIC finds that he would otherwise qualify as an affected person.

*Bradley J. Adair*

Bradley J. Adair filed timely comments and a hearing request. Mr. Adair resides at 23 Old Comfort Road in Comfort, which, according to the map prepared by ED staff falls 625.12 yards from the proposed facility. As a threshold issue, a hearing request must first be analyzed to determine if the requestor resides in a permanent residence that is located within 440 yards of the proposed facility as required by the distance restriction for affected persons contained in THSC § 382.058(c). According to the map created by ED staff, Mr. Adair's residence is not located within 440 yards of the proposed facility. The ED measured the distance to Mr. Adair's residence at 625.12 yards, and unlike

Kendall Bergmann, OPIC finds that Mr. Adair's distance is not a close call. Therefore, under the 440-yard distance restriction, Bradley J. Adair does not qualify as an affected person.

**B. Which issues raised in the hearing requests are disputed**

The affected requestor raised the following disputed issues:

1. Whether the proposed facility would be protective of air quality.
2. Whether the proposed facility would have adverse effects on human health.
3. Whether the proposed facility will cause or contribute to cumulative emissions impacts.
4. Whether the proposed facility would have adverse effects on water usage and availability.
5. Whether the proposed facility would create noise pollution.
6. Whether the proposed facility would have adverse effects on traffic.

**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 here are issues of fact.

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

Issues No. 1-6 in Section III.B. were specifically raised by the affected requestor during the public comment period.

**E. Whether the hearing requests are based on issues raised solely in a withdrawn public comment**

No public comments were withdrawn in this matter. Therefore, the hearing requests are 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 requests raise 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).

*Air Quality and Human Health*

Kendall Bergmann raised concerns about the proposed facility's potential to affect air quality and human health. 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. *See* THSC § 382.0518(b)(2). Further, the purpose of the Texas Clean Air Act is partly 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[.]" *See* THSC § 382.002(a). Therefore, Issues No. 1 and 2 are relevant and material to the Commission's decision on the Application.

### Cumulative Effects

By statute, the TCEQ must develop and implement policies, by specific environmental media, to protect the public from cumulative risks in areas of concentrated operations; and give priority to monitoring and enforcement in areas in which regulated facilities are concentrated. *See* Tex. Water Code § 5.130. Issue No. 3 is therefore relevant and material to the Commission's decision.

### Water Usage and Availability

Water usage and availability falls outside of the scope of review of this application for an air permit. Therefore, Issue No. 4 is not relevant and material to the decision on this application.

### Noise Pollution

The requestor expressed concern regarding noise pollution from the proposed facility. TCEQ does not have jurisdiction to consider noise pollution when evaluating an air quality permit application and determining whether to approve or deny an application. Accordingly, TCEQ does not have authority under the TCAA to require or enforce any noise abatement measures and Issue No. 5 is not relevant and material to the Commission's decision on this application.

### Traffic

The requestor raised concerns about increased traffic and road use. TCEQ does not have jurisdiction to consider traffic, road safety, or road repair costs

when determining whether to approve or deny an air permit application. Further, the TCEQ is prohibited from regulating roads per TCAA § 382.003(6), which excludes roads from the definition of “facility.” Therefore, Issue No. 6 is not relevant and material to the Commission’s decision regarding this application.

**G. Maximum expected duration for the contested case hearing**

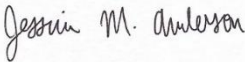
Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 1, 2015, the administrative law judge must conclude the hearing and provide a proposal for decision by the 180th day after the first day of the preliminary hearing, or a date specified by the Commission, whichever is earlier. 30 TAC § 50.115(d)(2). To assist the Commission in setting a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this Application would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

**IV. CONCLUSION**

OPIC respectfully recommends the Commission refer Kendall Bergmann to SOAH for an affectedness determination. Should Mr. Bergmann be found to be an affected person, OPIC further recommends the Commission refer Issues No. 1-3 specified in section III.B to SOAH for a 180-day contested case hearing.

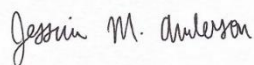
Respectfully submitted,

Garrett T. Arthur  
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**CERTIFICATE OF SERVICE**

I hereby certify that on June 9, 2025, the original 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 Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

  
\_\_\_\_\_  
Jessica M. Anderson

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TCEQ DOCKET NO. 2025-0554-AIR**

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