

Brooke T. Paup, *Chairwoman*
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

March 28, 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 MOTIONS TO OVERTURN THE
EXECUTIVE DIRECTOR'S APPROVAL OF STANDARD PERMIT
REGISTRATION NO. 176835 TO ASPHALT INC., LLC
TCEQ DOCKET NO. 2025-0338-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,

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

Jessica M. Anderson
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2025-0338-AIR

IN THE MATTER OF THE MOTIONS § BEFORE THE TEXAS
TO OVERTURN THE EXECUTIVE §
DIRECTOR'S APPROVAL OF STANDARD § COMMISSION ON
PERMIT REGISTRATION NO. 176835 §
TO ASPHALT INC., LLC § 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 July 3, 2024, Asphalt Inc., LLC (Applicant) applied to the TCEQ for a Standard Permit under Texas Clean Air Act (TCAA) §382.05195 authorizing the construction of a new rock crushing plant in Burnet County. 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 permit application was received on July 3, 2024, and declared administratively complete on August 20, 2024. The Notice of Application for an Air Quality Standard Permit for Permanent Rock and Concrete Crushers was published in English on August 28, 2024, in the *Burnet Bulletin* and in Spanish on August 29, 2024, in *El Mundo*. The notice of public meeting was mailed on November 8, 2024. A public meeting was held on December 10, 2024, at Hill

Country Fellowship in Burnet. The public comment period ended on December 10, 2024. After considering more than 4000 comments, the Executive Director's (ED) Response to Comments (RTC) was mailed on February 14, 2025.

II. APPLICABLE LAW

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 the general counsel, by written order, extends the period of time for filing motions.⁴ Because the TCEQ mailed the approval on February 14, 2025, the period to file a motion to overturn closed on March 10, 2025. Timely MTOs were filed by the Honorable Ellen Troxclair, Larry Black, and Myra Habbit. Each Movant (collectively, Movants) timely submitted their motions and, as such, OPIC finds they have the right to seek Commission

¹ 30 TAC § 50.131(b)(1).

² 30 TAC § 50.139.

³ 30 TAC § 50.139(b).

⁴ 30 TAC § 50.139(e).

review of the ED’s approval through the motion to overturn process, in addition to any rights of judicial review.

In order for the Commission to grant a motion to overturn, a movant must present “substantial evidence in the record” upon which the Commission can rely to overturn the decision of the ED.⁵ Conclusory legal assertions are inadequate because the Commission must consider evidence that “a reasonable mind might accept as adequate to support a conclusion of fact.”⁶

III. DISCUSSION

A. Summary of the Motions

1. Emissions Information and Modeling

Movants argue that Applicant’s emissions calculations use significantly lower emission rates than those considered by TCEQ’s protectiveness review for the standard permit without adequate explanation of the emission factors and rates used.⁷ Movants further assert that because the application utilizes lower emission rates, the tons per year of particulate matter estimates given could potentially suggest artificially low emissions quantities.⁸ Additionally, Movants argue that locating a rock crushing facility in this particular location, with its proximity to state parks and a children’s summer camp, poses a greater threat to the public than was considered by the standard permit’s protectiveness

⁵ *TXI Operations LP v. Texas Comm’n on Env’t Quality*, 665 S.W.3d 203, 212 (Tex. App.—Austin 2023, pet. filed).

⁶ *Slay v. Texas Comm’n on Env’t. Quality*, 351 S.W.3d 532, 549 (Tex. App.—Austin 2011, pet. denied)

⁷ See Motion to Overturn submitted by Representative Ellen Troxclair at p. 5.

⁸ *Id.*

review.⁹ Furthermore, Movants assert that the meteorological data used in the permit review process was not reflective of the regional wind patterns.¹⁰

In addition to their general concerns about the application's emissions rates, Movants argue that the report of Dr. David Mitchell was not adequately responded to in the ED's Response to Comments.¹¹ The expert report created by Dr. David Mitchell was introduced by a commenter at the public meeting, and contains analysis and criticism of the methodology contained in the application and permit.¹² Dr. Mitchell's report articulated concerns about the accuracy of the emissions calculations presented in the application.¹³ Dr. Mitchell, a forensic meteorologist, took issue with the modeled concentrations of particulate matter calculated by the Applicant. Dr. Mitchell states, "It is certainly not scientifically realistic that a rock crushing operation of this size and magnitude would produce such low concentration. It is my professional, expert opinion that the emission calculations presented to the TCEQ for the permit application are severely underestimated for this type of facility."¹⁴

In addition to their concerns about the application's adequacy as it relates to emissions calculations, Movants argue that the Texas Parks and Wildlife Department (TPWD) has indicated that the application has failed to include air dispersion modeling that adequately considers impacts to the nearby state parks,

⁹ *Id.*

¹⁰ *Id.* at 4.

¹¹ *See* Motion to Overturn submitted by Larry Black at p. 4.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

Inks Lake State Park and Longhorn Cavern State Park.¹⁵ Movants further argue that the ED's Response to Comments did not provide a sufficient technical analysis of TPWD's modeling request.¹⁶

In their Response to Comments, the ED states that the Applicant is bound by the representations it makes in its application, including those related to emission rates.¹⁷ While the ED has represented that the Applicant would be bound by the emission rates contained in its application, it is not clear from either the application or Response to Comments whether the ED has considered the Movants' expert report nor its implications on the facility's potential for compliance. Further, OPIC notes that a standard permit cannot be adjusted on an individual case-by-case basis. An applicant must meet the standard permit as is, and if it cannot, that applicant does not qualify for authorization under the standard permit.

In their Response to Comments, the ED states the following regarding modeling completed in relation to the Standard Permit:

TCEQ conducted a protectiveness review during the development of the standard permit to ensure that the requirements of the standard permit were protective of human health and the environment. 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.¹⁸

¹⁵ See Motion to Overturn submitted by Representative Ellen Troxclair at p. 4. See also Motion to Overturn submitted by Larry Black at p. 2.

¹⁶ *Id.*

¹⁷ Executive Director's Response to Public Comment at Response 7.

¹⁸ *Id.* at Response 1.

While the ED's Response to Comments describes some modeling, it does not address the concerns raised by Movants and commenters about air dispersion modeling.

2. Permit Registration Number 16835 is not protective of human health or general air quality

Movants raised concerns that the issuance of this permit will cause an increase in unnecessary and harmful air pollution.¹⁹ Movants argue that the issuance of this permit will cause a violation of 30 TAC §§ 101.4 and 116.615(1) relating to the protection of public health and welfare and the normal use and enjoyment of animal life, vegetation, and property.²⁰ Movants further argue that the permit is not adequately protective of vulnerable populations, particularly the elderly and the young.²¹ Additionally, Movants expressed concerns that, given the proposed facility's proximity to two state parks and the children's summer camp, Camp Longhorn, the facility poses a greater threat to the health and property of the public than was considered by the standard permit's protectiveness review.²² Further, Movants argue that the particulate matter emitted by rock crushing operations can significantly impact human health by causing respiratory problems to which children are particularly susceptible to.²³

In their Response to Comments, the ED explains that the Standard Permit is designed to be in compliance with the National Ambient Air Quality Standards

¹⁹ See Motion to Overturn submitted by Myra Habbit.

²⁰ See Motion to Overturn submitted by Representative Ellen Troxclair at p. 2-3.

²¹ See Motion to Overturn submitted by Myra Habbit.

²² See Motion to Overturn submitted by Representative Ellen Troxclair at p. 3.

²³ *Id.*

(NAAQS), which protect public health and the environment.²⁴ The NAAQS are protective of public health, including the health of sensitive members of the population such as children, the elderly, and individuals with preexisting health conditions.²⁵

The ED also states that while one of the most commonly expressed concerns about crushing operations is exposure to silica, “adverse impacts to human health or welfare as a result of silica emissions from the proposed plant are not expected.”²⁶ They further state that most particles created by the crushing process are too large to be inhaled, rather they settle close to the source and have limited off-property impacts.²⁷ Additionally, the Standard Permit review process evaluates the impact on air quality presuming the crushed material had up to twenty-percent silica, which is described as a very conservative estimate.²⁸ Using this model, the concentrations of silica would be half of TCEQ’s health-based screening values.²⁹

3. There is insufficient air monitoring available for the area surrounding the proposed facility.

Movants argue that there is inadequate air monitoring in the area surrounding the proposed facility.³⁰ According to TCEQ air monitoring station maps, there is not an air quality monitoring station closer than approximately 55

²⁴ Executive Director’s Response to Public Comment at Response 1.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *See* Motion to Overturn submitted by Representative Ellen Troxclair at p. 6.

miles from the proposed facility.³¹ Movants further argue that the lack of air monitoring in the region will make compliance efforts difficult as there will be little baseline data available.³²

In their Response to Comments, the ED 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....TCEQ evaluates the placement of air quality monitors within the air monitoring network using trends in population, reported emissions inventory data, and existing air monitoring data for a given area.”³³

4. Permit Registration Number 176835 is not protective of the environment and endangered species

Movants argue that the proposed facility will have disproportionate impacts on the environment, particularly given the proposed facility’s proximity to two state parks and a children’s summer camp.³⁴ Movants further argue that TPWD has raised concerns about the proposed facility’s adverse impact on the environment and endangered species.³⁵

In their Response to Comments, the ED states that, “the secondary NAAQS are those the EPA Administrator determines are necessary to protect public welfare and the environment...from any known or anticipated adverse effects

³¹ *Id.*

³² *See* Motion to Overturn submitted by Larry Black at p. 3.

³³ Executive Director’s Response to Public Comment at Response 6.

³⁴ *See* Motion to Overturn submitted by Representative Ellen Troxclair at p. 3.

³⁵ *Id.* at p. 4.

associated with the presence of a contaminant in the ambient air.”³⁶ The ED further states that “compliance with rules and regulations regarding endangered species is handled at the state level by the Texas Parks and Wildlife Department and at the federal level by the United States Fish and Wildlife Service. It is incumbent upon an applicant to request and acquire any additional authorizations that may be required under state or federal law.”³⁷

B. Analysis of the Motions

1. Accuracy of Emissions and Modeling Representations in the Application

According to 30 TAC § 55.156(b), if comments are received the executive director shall prepare a response to all timely, relevant and material, or significant public comment before an application is approved. OPIC is persuaded from the record provided by Movants that concerns about the emission rates used in the application were not suitably addressed in the ED’s RTC. Likewise, OPIC is persuaded by the Movants’ argument that there were insufficient responses to concerns about air dispersion modeling, which was also an issue raised in public comments.

While the ED represents that the Applicant is bound by the representations of its application, the Movants, through Dr. Mitchell’s expert report, have identified concerns that the rates represented are incongruous with the specifications of the proposed facility. OPIC reiterates that a standard permit is not adjustable, and an applicant must meet the requirements of the standard

³⁶ *Id.* at Response 2.

³⁷ Executive Director’s Response to Public Comment at Response 2.

permit as is, otherwise the applicant does not qualify for authorization under said permit. If the Applicant cannot meet the requirements of the standard permit, its application cannot be granted. Additionally, while the ED made certain representations about modeling, there was a lack of response to concerns related to air dispersion modeling.

Dr. Mitchell's report articulated concerns about the particulate emission rates calculated in the application. Dr. Mitchell opined that these calculations produce an extremely low modeled concentration of 29.69 micrograms per cubic meter near the proposed facility's fence line.³⁸ In his expert opinion, Dr. Mitchell believes that it is not scientifically realistic that a facility such as the one proposed by the application would produce such a low concentration, and therefore the calculations presented in the application are not reflective of the proposed facility.³⁹

Dr. Mitchell's expert report analyzed the emissions calculations taken from the air permit application, which are estimated emission rates, not measured.⁴⁰ He states that, the operational conditions that would be created by the proposed facility, in combination with severe weather and high wind conditions, would cause larger amounts of debris, dust, and rock material to be suspended in the atmosphere and moved off site to impact downwind communities.⁴¹

³⁸ See Motion to Overturn submitted by Larry Black, Attachment E, p. 15.

³⁹ *Id.* at p. 15

⁴⁰ *Id.* at p. 5.

⁴¹ *Id.*

For these reasons, OPIC finds that good cause to overturn the ED's decision exists, based on substantial evidence provided by the Movants that the emission rates and modeling concerns were not fully addressed.

2. Air Quality, Human Health, Air Monitoring, Environment and Endangered Species

The remainder of the issues principally concern the protectiveness review employed in the approved and adopted Standard Permit itself—its limits, scope, and requirements, rather than the ED's application of those requirements to Registration Number 176835. OPIC cannot find that such objections are appropriate as a basis for a motion to overturn because protection of general air quality, human health, standards for air monitoring, and protection of the environment and endangered species were analyzed and approved by the Commission in the development and approval of the Standard Permit applicable to Asphalt, Inc.'s 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. Therefore, OPIC does not find that the ED erred in their evaluation of these issues and cannot recommend overturning the decision on these grounds.

IV. CONCLUSION

Movants have raised credible evidence that the emissions rates expressed in the application may have been underestimated and that air dispersion modeling was not adequately addressed. Movants further assert that the comments made to this effect were not sufficiently responded to in accordance

with 30 TAC § 55.156(b). OPIC is persuaded by Movants' argument that these issues were incompletely addressed and analyzed by the ED. OPIC therefore recommends that the Commission grant the motions to overturn.

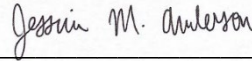
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2025, 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.



Jessica M. Anderson

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TCEQ Docket No. 2025-0338-AIR

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