

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

March 8, 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 TEXAS COASTAL MATERIALS, LLC'S
AIR QUALITY STANDARD PERMIT, REGISTRATION NO. 173296
TCEQ DOCKET NO. 2024-0138-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, reading "Eli Martinez".

Eli Martinez, Senior Attorney
Assistant Public Interest Counsel

cc: Service List

TCEQ DOCKET NO. 2024-0138-AIR

IN THE MATTER OF THE MOTION	§	BEFORE THE TEXAS
TO OVERTURN THE EXECUTIVE	§	
DIRECTOR'S APPROVAL OF	§	COMMISSION ON
TEXAS COASTAL MATERIALS, LLC'S	§	
AIR QUALITY STANDARD PERMIT	§	ENVIRONMENTAL QUALITY
REGISTRATION NUMBER 173296	§	

**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

A. Background

On July 7, 2023, Texas Coastal Materials, LLC (Texas Coastal or Applicant) applied to the TCEQ for Standard Permit Registration Number 173296 under the Texas Clean Air Act (TCAA) § 382.05195, authorizing the construction of a concrete crushing plant at 5875 Kelley Street in Houston. Contaminants authorized under the permit are particulate matter—including particulate matter with diameters of 10 microns or less (PM 10) and 2.5 microns or less (PM2.5)—carbon monoxide, nitrogen oxides, organic compounds, and sulfur dioxide. The Executive Director (ED) received 667 comments from the public

regarding this application and filed a Response to Comments (RTC) on January 10, 2024. On January 11, 2024, the ED approved Permit Registration Number 173296. The deadline to file a motion to overturn the ED's decision was February 5, 2024.

B. Procedural Issues

Title 30, TAC, Chapter 50, addresses authority delegated to the ED and specifies applications for which the ED may take action on behalf of the Commission. Section 50.131(c)(1) provides that air quality standard permits under Chapter 116 that require a decision by the Executive Director are subject to Chapter 50, including the motion to overturn process.¹ Where a registration under an air quality standard permit 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 January 11, 2024, the period to file a motion to overturn closed on February 5, 2024. All Movants timely submitted their motions before the deadline, and

¹ Additional authority is provided by Tex. Health & Safety Code § 382.061(b), which states that "An applicant or a person affected by a decision of the executive director may appeal to the commission any decision made by the executive director..."

² 30 TAC § 50.139.

³ 30 TAC § 50.139(b).

⁴ 30 TAC § 50.139(e).

OPIC therefore finds that all Movants have the right to seek Commission review of the ED's approval, in addition to any rights of judicial review.

In order for the Commission to grant a motion to overturn, the 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

II. Motions to Overturn

Timely motions to overturn were filed by: Senator Borris L. Miles; City of Houston Mayor John Whitmire; Sallie Alcorn, Houston City Council, At-Large Position 5; Letitia Plummer, DDS., Houston City Council, At-large Position 4; Lindsay Lanagan and Daniella Flanagan, on behalf of New Liberty Road Community Development Corporation; Tien C. Ko, MD, FACS; Calista Herbert, Shawna Callaghan, Susan McKinley, Audrey VonBorstel, Jim Elmore, Kathryn Earle, and Denise Stasio, on behalf of PAVE Community Group; Marilyn Rayon, on behalf of Southwest Crossing Community Initiative; Cecile Roeger, on behalf of the Dominican Sisters of Houston; Huey German Wilson; Katherine G. Dotsey; Keith Downey, on behalf of Kashmere Gardens Super Neighborhood Council #52; Donna Ganther and Rev. James L. Caldwell, on behalf of the Coalition of

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)

Community Organization; Rev. Katherine Noel Denison; Father Martin Eke, MSP on behalf of St. Francis of Assisi; Pearlie Wright; Frank B. Rynd, Sr. Maureen O'Connell. OP, and Albany Ashiru, on behalf of the Archdiocese of Galveston-Houston; Joseph W. Higgs; Rev. Diane McGehee, on behalf of Bering Memorial United Church of Christ; Rosa M. Estrada-Y-Martin MD, MSc, FCCP; Britney Stredic; Denae King, PhD, on behalf of Bullard Center for Environmental and Climate Justice at Texas Southern University; Amy Catherine Dinn and Caroline Crow, on behalf of Lone Star Legal Aid; Jennifer M. Hadayia, MPA, on behalf of Air Alliance Houston; the Northeast Action Collective; and Sarah Jane Utley, on behalf of Harris Health and Harris County (collectively, Movants).

Movants alleged multiple defects in the ED's analysis of Permit Registration Number 173296 as support for their motion to overturn the ED's approval:

1. The Proposed Facility will be Located within 440 yards of a School and Place of Worship in Violation of the Texas Clean Air Act

Movants argue that Permit Registration Number 173296 improperly allows the proposed facility to be located within 440 yards of LBJ Hospital, which contains both a school and a place of worship. Movants argue LBJ Hospital contains a school because it is a teaching hospital with affiliation agreements to provide clinical education, includes classrooms where the University of Texas hosts students, and is a site of both the UT McGovern

Medical School and the Harris Healthy System School of Diagnostic Imaging.⁷

LBJ Hospital contains a place of worship because it includes a multi-faith chapel to provide spiritual care where mass is held three times a week.⁸ A map created by the City of Houston Planning and Development Department demonstrates the alleged proximity of the Applicant's facility to the hospital, which appears to lie within a 440-yard radius,⁹ as does the satellite imagery provided by Harris County.¹⁰

Additionally, Movants assert St. Francis of Assisi Catholic Church is likewise within 440 yards of the proposed facility.¹¹ Movants state that the church was omitted from the application and therefore not appropriately mapped; however, the distance is alleged to be approximately 402 yards¹²

In her Response to Comments, the ED states that "the plant is located greater than 1320 feet (440 yards) away from any point of the noted nearby hospital, and from the noted Saint Francis of Assisi Catholic Church."¹³ The

⁷ *Exempli gratia* Motion to Overturn submitted by Senator Borris L. Miles, "Motion to Overturn Executive Director's Decision to Grant Standard Air Quality Permit 173296 to Texas Coastal Materials LLC" at 2.

⁸ *Id.*

⁹ *Exempli gratia* Motion to Overturn submitted by Lone Star Legal Aid, "Motion to Overturn Texas Coastal Materials Air Quality Standard Permit No. 173296" at p. 5.

¹⁰ "Harris County and Harris Health Comments; Texas Coastal Materials, LLC; Regulated Entity Id No. RN111769154; Application for an Air Quality Standard Permit, Registration Number 173296, located at 5875 Kelley Street, Houston, Texas 77026" at Figures 1-3.

¹¹ See "Harris County and Harris Health Comments; Texas Coastal Materials, LLC; Regulated Entity Id No. RN111769154; Application for an Air Quality Standard Permit, Registration Number 173296, located at 5875 Kelley Street, Houston, Texas 77026" at Figure 5.

¹² See Motion to Overturn submitted by Lone Star Legal Aid, "Motion to Overturn Texas Coastal Materials Air Quality Standard Permit No. 173296" at p. 6.

¹³ Executive Director's Response to Public Comment, at Response 11.

exact points of reference used to determine the distance from the proposed facility to LBJ Hospital and Saint Francis of Assisi are not specified.

2. The Application does not Contain Accurate Distances between the Facility and Community Buildings

Movants assert that, in addition to the above school and places of worship, the application contains multiple distance discrepancies and failures to identify important community buildings, such as the nearest residence.¹⁴

Movants assert that a potential culprit for these inaccuracies lies in the fact that the maps in the Application measure from an unidentified point within the proposed location that does not accurately depict the entire “facility,” as that term is defined by TCEQ regulations and the Standard Permit.¹⁵ The Kelley Street Facility diagram, for instance, fails to identify equipment that constitutes part of the facility such as the crusher, screens, belt conveyors, generator sets, and material storage or feed bins.¹⁶ Movants assert this failure makes it impossible to determine whether the nearest point between the facility and locations of concern was accurately determined by either the Applicant or the ED.¹⁷

¹⁴ See Motion to Overturn submitted by Lone Star Legal Aid, “Motion to Overturn Texas Coastal Materials Air Quality Standard Permit No. 173296” at p. 6. See also “Summary Report by City of Houston on Air Monitoring Concerns on Proposed Facility” (Dec. 6, 2023).

¹⁵ Motion to Overturn submitted by Lone Star Legal Aid, “Motion to Overturn Texas Coastal Materials Air Quality Standard Permit No. 173296” at p. 7.

¹⁶ *Id.* at 8.

¹⁷ *Ibid.* at 9.

While the ED has represented that the facility is not located within the statutorily prohibited proximity to the nearest school or place of worship, it is not clear from either the Application or the Response to Public Comment where the nearest point of the facility was determined to lie, nor what equipment was included in their analysis.

3. A Public Interest Hearing Should have been Granted for Permit Registration Number 173296

State Senator for Texas State Senate District 13, Borris L. Miles, contends on behalf of Movants that the ED's decision should be overturned because Texas Water Code §5.556(d) authorizes a contested case hearing be held where the Commission determines a hearing is in the public interest.¹⁸ Senator Miles submitted a hearing request on December 15, 2023, and asserts that this request should have been granted because the proposed facility will endanger public health and the facility will be located within 440 yards of a school and place of worship inside LBJ Hospital in violation of Texas Health and Safety Code (THSC) § 382.065(a).¹⁹ Senator Miles further articulates that a disinterested party would be better equipped to handle questions of the magnitude implicated in this permitting action, and that a contested case hearing is necessary to effectuate meaningful public involvement.²⁰

¹⁸ See Motion to Overturn submitted by Senator Borris L. Miles, "Motion to Overturn Executive Director's Decision to Grant Standard Air Quality Permit 173296 to Texas Coastal Materials LLC" at 4.

¹⁹ *Id.*

²⁰ *Ibid.*

In her Response to Comments, the ED states that THSC § 382.05195(g) excludes standard permits from consideration under the Texas Administrative Procedure Act (Texas Government Code chapter 2001), and thus a contested case hearing on a registration for authorization under the Standard Permit is not available.²¹ Further, the provision in the Standard Permit that the crusher and all associated facilities be located no less than 440-yards from any building in use as a single or multi-family residence, school, or place of worship is an operational requirement not related to whether there is an opportunity for a contested case hearing.²² The ED therefore asserts that, read in concert, these provisions do not give the ED authority to refer the matter for a contested case hearing.²³

4. Permit Registration Number 173296 Disproportionately Impacts Low-Income Communities of Color

Movants raise the concern that Permit Registration Number 173296 will disproportionately impact vulnerable communities of color who are in historically low-income households and suffer greater health effects from industries that have clustered in their area. Movants contend that data reveals zip codes surrounding the proposed facility experience elevated rates of heart disease, stroke, asthma, and chronic obstructive pulmonary disease (COPD) compared to county, state, and national averages, resulting in lower life

²¹ Executive Director's Response to Public Comment, at Response 15.

²² *Id.*

²³ *Ibid.*

expectancy levels overall.²⁴ Further, vulnerable demographics and at-risk communities were never considered as part of the Protectiveness Review.²⁵

In her Response to Comments, the ED states that air permits evaluated by TCEQ are reviewed without reference to the socioeconomic or racial status of the surrounding community. However, discrimination on the basis of race, color, national origin, sex, or disability in the administration of Commission programs or activities, is not allowed as required by federal and state laws and regulations.²⁶ The ED further contends that the Commission works to help citizens and neighborhood groups participate in the regulatory process to ensure that agency programs that may affect human health or the environment operate without discrimination and to make sure that citizens' concerns are considered thoroughly and are handled in a way that is fair to all.²⁷

5. The Proposed Facility is not Protective of Human Health

Movants express concern about the effect of the emissions from the proposed project on air quality and public health, including patients and visitors of LBJ Hospital. Movants contend emissions may be especially harmful to sensitive populations such as the elderly, children, and immunocompromised patients, as well as those with respiratory diseases,

²⁴ See Motion to Overturn submitted by Air Alliance Houston, “Urgent Motion to Overturn Air Quality Permit 173296 to Texas Coastal Materials LLC.”

²⁵ *Exempli gratia*, Motion to Overturn submitted by Lone Star Legal Aid, “Motion to Overturn Texas Coastal Materials Air Quality Standard Permit No. 173296” at p. 15.

²⁶ Executive Director’s Response to Public Comment, at Response 14.

²⁷ *Id.*

cancer, lower-respiratory infections, kidney failure, silicosis, pneumonia, influenza, autoimmune disease, bronchitis, and other cardiovascular illness.

In her Response to Comments, the ED states that, during the development of the Standard Permit, the ED conducted a protectiveness review to ensure the safety of human health and the environment by comparing emissions allowed by the Standard Permit to appropriate state and federal standards and guidelines.²⁸ These standards include the Environmental Protection Agency's (EPA) National Ambient Air Quality Standards (NAAQS), which address both primary and secondary standards for pollutants considered harmful to public health and the environment. Primary standards 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. Based on this review and modeling analysis, the ED concluded that a company operating in compliance with the Standard Permit should not effectuate deterioration of air quality that would cause health effects to the surrounding community, including the patients and staff at LBJ Hospital.²⁹ The ED therefore determined that the emissions authorized by the

²⁸ Executive Director's Response to Public Comment, at Response 1.

²⁹ *Id.*

Standard Permit are protective of both human health and welfare and the environment.³⁰

6. Permit Registration Number 173296 does not Apply the Correct NAAQS Limits of PM, does not Consider Background Concentrations, and does not Consider Emissions from Engines

Movants argue that the Standard Permit does not comply with the PM_{2.5} and PM₁₀ NAAQS. They point out that the Standard Permit was most recently issued in 2008, its protectiveness review was performed in 2006, and it has not been updated in response to changes in the PM_{2.5} standards, including revisions—proposed at the time of application and approval but recently adopted—lowering the PM_{2.5} annual standard to 9 ug/m³.³¹

Movants emphasize that the NAAQS are meant to provide an adequate margin of safety necessary to protect public health and that since 2006, the annual PM_{2.5} standard has been lowered from 15 ug/m³ to 12 ug/m³, and now will be 9 ug/m³. The PM_{2.5} 24-hour standard has also been lowered from 65 ug/m³ to 35 ug/m³. They point out that the Protectiveness Review did not account for engines and other sources of PM_{2.5}. Movants state that the 2006 PM_{2.5} and PM₁₀ reviews are outdated and do not reflect current background

³⁰ *Ibid.*

³¹ *Exempli gratia* Motion to Overturn submitted by Lone Star Legal Aid, “Motion to Overturn Texas Coastal Materials Air Quality Standard Permit No. 173296” at p. 10. *See also* Motion to Overturn submitted by Senator Borris L. Miles, “Motion to Overturn Executive Director’s Decision to Grant Standard Air Quality Permit 173296 to Texas Coastal Materials LLC” at 5. *See also* Harris County, and Harris County Hospital District at pp. 9-16.

concentrations of PM in Harris County near the Facility. Additionally, they assert that the PM10 review utilized an inaccurate background concentration of 60 ug/m³, which was based on an outdated guidance document.

As evidence, the Movants highlight that the North Wayside air quality monitor, located approximately two miles from the Facility, shows that the annual mean concentration of PM2.5 in 2023 was 13.1 ug/m³ and that in 2024 the 24-hr PM2.5 standard of 35 ug/m³ was exceeded on January 1, 2024. They also note that in the 2023 amendment to the Standard Permit for Concrete Batch Plants, TCEQ used PM2.5 background concentrations of 26 ug/m³ (24-hour) and 11 ug/m³ (annual) for Harris County. Combining these background concentrations with the rock crusher's modeled emissions from its 2006 Protectiveness Review results in exceedance of the 2012 PM2.5 annual NAAQS of 12 ug/m³.

As previously stated, the ED contends that during the development of the Standard Permit, the ED conducted a protectiveness review to ensure the safety of human health and the environment by comparing emissions allowed by the Standard Permit to appropriate state and federal standards and guidelines, including the EPA's NAAQS.³² Further, in her Response to Comments, the ED confirms that the application was evaluated using the NAAQS that were applicable at the time of the application.³³

³² Executive Director's Response to Public Comment, at Response 1.

³³ *Id.* at Response 2.

7. Permit Registration Number 173296 does Not Consider Cumulative Impacts

Movants expressed concern about the cumulative effects of this project with pending or existing facilities in the area and contend that cumulative impacts should have been taken into consideration.³⁴

In her Response to Comments, the ED states the maximum modeled emission concentrations typically occur at a relatively short distance from the source, so that peak modeled concentrations represent the source's impact at a few receptors within the modeled area—rendering review of other off-site sources unnecessary.³⁵ Further, Commission rules establish a separation distance of 550 feet between any crushing facility authorized under the standard permit and either an additional operating crushing facility, concrete batch plant, or hot mix asphalt plant to help ensure that cumulative emissions do not result in adverse off-property impacts. If this distance cannot be met, the crushing facility authorized under the Standard Permit cannot operate at the same time as the additional crushing facility, concrete batch plant, or hot

³⁴ *Exempli gratia*, “Characteristics of the Neighborhood Surrounding LBJ Hospital and Texas Coastal Material’s Proposed Concrete Crushing Facility,” (December 10, 2023), Attachment to Motion to Overturn by Tien C. Ko, MD, FACS, “Motion to Overturn Executive Director’s Decision to Grant Standard Air Quality Permit 173296 to Coastal Materials.” *See also* “Harris Health and Harris County’s Motion to Overturn” at 17. *See also* Motion to Overturn by Bullard Center for Environmental & Climate Justice, “Motion to Overturn Executive Director’s Decision to Grant Standard Air Quality Permit # AIRNSR-173296/Docket #2024-0138-AIR to Texas Coastal Materials LLC CN606158293.

³⁵ Executive Director’s Response to Public Comment, at Response 1.

mix asphalt plant when determining approval of any particular Standard Permit application.³⁶

8. Permit Registration Number 173296 does Not Utilize Best Available Control Technology

Movants contend that BACT should have been utilized in the evaluation of Permit Registration Number 173296 because § 116.602 of the Commission rules require that “all standard permits issued by the commission under this chapter shall require best available control technology.”³⁷

In her Response to Comments, the ED states that a Standard Permit registration does not require individual BACT review because the protectiveness review and impacts analysis were performed with a worst-case operating scenario when it was developed.³⁸ The impacts analysis found that when plants operate within the parameters listed within this Standard Permit, they should not cause or contribute to a violation of the NAAQS and are protective of human health and the environment.³⁹

III. DISCUSSION

1. Distance Requirements from Schools and Places of Worship, Accurate Distance Representations to Other Buildings

³⁶ Id.

³⁷ *Exempli gratia*, Motion to Overturn submitted by Lone Star Legal Aid, “Motion to Overturn Texas Coastal Materials Air Quality Standard Permit No. 173296” at p. 14. *See also* “Harris Health and Harris County’s Motion to Overturn” at Exhibit A.

³⁸ Executive Director’s Response to Public Comment, at Response 3.

³⁹ Id.

Concrete crushing facilities are statutorily prohibited from being sited within 440 yards of a school or place of worship. Specifically, THSC § 382.065(a) states:

The commission by rule shall prohibit the operation of a concrete crushing facility within 440 yards of a building in use as a single or multifamily residence, school, or place of worship at the time the application for a permit to operate the facility at a site near the residence, school, or place of worship is filed with the commission. The measurement of distance for purposes of this subsection shall be taken from the point on the concrete crushing facility that is nearest to the residence, school, or place of worship toward the point on the residence, school, or place of worship that is nearest the concrete crushing facility.

OPIC is persuaded from the record provided by Movants that LBJ Hospital contains both a school and place of worship. As neither of these terms are defined in THSC Chapter 382 (Texas Clean Air Act), it is reasonable to interpret them in ordinary parlance as a place for education or connecting with God, respectively. If the legislature had desired to narrow the siting prohibition of THSC § 382.065(a) to refer to only stand-alone churches or educational facilities used to educate students of a particular age, they could have easily drafted their legislation to so indicate. Because LBJ Hospital provides clinical education, includes classrooms where the University of Texas hosts students, and is a site of both the UT McGovern Medical School and the Harris Healthy System School of Diagnostic Imaging, OPIC finds that it contains a school. Because LBJ Hospital contains a place of worship where spiritual care is provided and active

religious services are routinely held several times per week, OPIC finds that it contains a place of worship.

While the ED generally represents that “the plant is located greater than 1320 feet (440 yards) away from any point of the noted nearby hospital,”⁴⁰ it is not clear from the record which exact points of reference were used to determine the distance from the proposed facility to LBJ Hospital. Further, Movants have raised credible evidence that the ED’s measurements failed to identify equipment that should have been considered points of the facility, such as the crusher, screens, belt conveyors, generator sets, and material storage or feed bins. Maps provided by Movants, including those found in Attachment A of Harris County’s motion and Figure 1 of Lone Star Legal Aid’s motion (generated by the City of Houston Planning and Development Department), reach the conclusion that the proposed facility may indeed lie within 440 yards of LBJ Hospital. The same may be said of Saint Francis of Assisi Catholic Church, depending on how the facility is configured. As Movants have indicated, complying with statutorily-required spacing requirements is especially crucial where particulate matter concentrations are already high and some students and worshippers may be in vulnerable subpopulations.

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 entirety of the facility will not be located further than 440 yards from a school

⁴⁰ Executive Director’s Response to Public Comment, at Response 11.

or place of worship as required by THSC § 382.065(a). Accurate distances to other relevant structures, such as the nearest residence, should have also been properly established.

2. Contested Case Hearing

OPIC recognizes the active advocacy represented by Senator Miles in his request for the Commission to grant a contested case hearing based on the public interest, per Texas Water Code §5.556(d). However, OPIC concurs with the ED in her contention that THSC § 382.05195(g) excludes standard permits from consideration under the Texas Administrative Procedure Act (Texas Government Code chapter 2001), and thus a contested case hearing on a registration for authorization under the Standard Permit is not available. Further, the ED does not have the authority to grant a public interest hearing, and therefore did not err on this basis in the processing of the registration application and approval.

3. Disproportionate Impacts on Low-Income Communities of Color

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.⁴¹ For instance, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin.⁴² Executive Order 12898 addresses the environmental

⁴¹ See 40 CFR §7.35(b). <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-A/part-7>

⁴² <https://www.justice.gov/crt/fcs/TitleVI>

and human health conditions of minority communities and low-income communities and calls on agencies to identify and address any disproportionately high and adverse human health or environmental effects of their programs.⁴³ 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.⁴⁴

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.⁴⁵ 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

⁴³ <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>

⁴⁴ <https://www.govinfo.gov/content/pkg/FR-2000-08-16/pdf/00-20938.pdf>

⁴⁵ More information on TCEQ's Title VI Compliance efforts can be found at: <https://www.tceq.texas.gov/agency/decisions/participation/title-vi-compliance>

rules. Without specific requirements relating to these concerns, these issues do not provide a basis for overturning the ED's decision on this registration.

4. Protection of Public Health, NAAQS Limits, Cumulative Impacts, Background Concentrations, BACT

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 173296. OPIC cannot find that such objections are appropriate as a 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 Texas Coastal'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.

A potential exception lies in the application of the proper NAAQS standards for PM_{2.5} and PM₁₀, if they had been improperly applied. However, OPIC finds that Movants have not demonstrated that issuance of this registration under the Standard Permit for Rock and Concrete Crushers will violate the PM_{2.5} or PM₁₀ NAAQS. Although the North Wayside air monitor does show that the annual mean of PM_{2.5} was greater than the 12 ug/m³ annual

standard, this alone does not show noncompliance with the NAAQS, because the PM_{2.5} annual standard is averaged over three years.⁴⁶ Similarly, the January 2024 exceedance does not necessarily equate to noncompliance because the 24-hour standard is also averaged over three years.⁴⁷

OPIC recognizes that the modeling recently performed for the Standard Permit for Concrete Batch Plants used annual PM_{2.5} background concentrations of 11 ug/m³ for Harris County and, while the annual PM_{2.5} standard is currently 12 ug/m³, the EPA has just taken final action on a rule which takes effect on May 6, 2024 lowering the standard to 9 ug/m³.⁴⁸ Taking this into consideration, 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 that was applicable at the time of the application.⁴⁹ Therefore, OPIC does not find that the ED erred in her evaluation of these issues and cannot recommend overturn on these grounds.

IV. CONCLUSION

Movants have raised credible evidence that the proposed facility will lie within 440 yards of a school or church in violation of THSC § 382.065(a), and

⁴⁶ 89 FR 16203. Accessible at: <https://www.federalregister.gov/documents/2024/03/06/2024-02637/reconsideration-of-the-national-ambient-air-quality-standards-for-particulate-matter> (last visited March 7, 2024).

⁴⁷ *Id.*

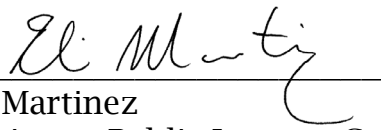
⁴⁸ 89 FR 16202.

⁴⁹ *Id.* at Response 2.

OPIC therefore recommends that the Commission grant the motions to overturn.

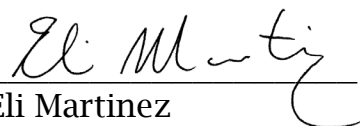
Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 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. 2024-0138-AIR

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