



AGC of TEXAS

Highway, Heavy, Utilities & Industrial Branch

JENNIFER WOODARD, Chief Executive Officer



April 10, 2023

Ms. Gwen Ricco
MC-205
Office of Legal Services
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

RE: Rule Project Number 2022-034-116-AI

Dear Ms. Ricco:

The Associated General Contractors of Texas (AGC of Texas) Highway, Heavy, Utilities, and Industrial Branch is an organization comprised of nearly 700 member firms across Texas, and one of more than 32,000 networking firms comprising the Associated General Contractors of America. AGC of Texas' members build and maintain state, city, and county roads and bridges, as well as civil projects such as airports, bridges, dams, and municipal utilities.

AGC of Texas' members are regulated by the TCEQ across all environmental media. Their operations can include both permanent and temporary concrete batch plants, authorized primarily under the Air Quality Standard Permit for Concrete Batch Plants (CBP SP). Thank you for the opportunity to comment on the above proposed rules.

On February, 22, 2023, the commission approved for publication in the *Texas Register* proposed revisions to 30 Texas Administrative Code (TAC) Section 116.115 relating to standard permit representations. Specifically, the commission proposes adding new subsection (2)(B) which states “[f]or any request to move a concrete batch plant authorized by the Air Quality Standard Permit for Concrete Batch Plant to a new location on the site, the owner or operator shall submit a new or amended registration and fee and comply with the public notice and hearing requirements in the standard permit, unless the new location is more than 440 yards *from any property line.*” Emphasis added. The preamble articulates that the proposed rulemaking is “intended to address the possibility of situations where an applicant initially represents that a concrete batch plant will be located greater than 440 yards from a potentially affected person, but subsequently moves the plant to within 440 yards of a potentially affected person after the registration is issued.”

Standard permits are issued for new or existing similar facilities and establish requirements that must be met for a registrant to be authorized. Texas Health and Safety Code (THSC) Section 382.05195. Unlike other standard permits, the Texas Clean Air Act specifies a hearing opportunity under the CBP SP as a person affected for “only those persons actually residing in a permanent residence within 440 yards of a proposed facility.” THSC Section 382.058(c). Section 116.115 establishes general conditions that are applicable to standard permit holders, including representations made in relation to claiming a standard

permit. More specifically, “[a]ll representations with regard to construction plans, operating procedure, pollution control methods, and maximum emission rates in any registration for a standard permit become conditions upon which the facility or changes thereto, must be constructed and operated.” Section 116.115(2). The rule further provides that any changes in representations are subject to certain requirements, including written notification to the executive director no later than 30 days after a change to a registrant’s representations. *Id.*

Section 116.111 and the CBP SP Para. 3 identify the information required to register for the use of a standard permit, including a description of the project and related processes as well as information to demonstrate that the project will comply with Section 116.610 (relating to applicability). One of the key requirements of a standard permit, a minor NSR permitting mechanism, is that a project constituting a new major stationary source or major modification may not be authorized under a standard permit. Section 116.110(c) clearly establishes that “[p]ersons may not circumvent by artificial limitations the requirements of Section 116.110[.]”

The concept of no circumvention of major NSR requirements translates to the subject of the TCEQ’s proposed rulemaking, namely that a registrant would circumvent Section 382.058(c) to foreclose a person permanently residing within 440 yards of a proposed plant from requesting a hearing. However, there are instances in which a registrant may need to move a plant which are entirely unrelated to circumvention of public participation, yet a registrant would be required to start anew under proposed Section 116.115(2)(B). The intended purpose of the proposal would likewise be frustrated by a registrant moving a CBP at some point during the 10-year authorization with the possibility of a permanent resident having moved within 440 yards of the plant *after* issuance of a registration. To be clear, circumvention of the hearing process should not be tolerated. But to foreclose movement of the CBP within the site to 440 yards *from any property line* or otherwise be subject to a new registration, notice and fee is inconsistent with Section 382.058(c) and current CBP SP requirements, including additional requirements for permanent concrete plants. More specifically, under the PCP SP Paragraph (9)(D), “the owner or operator shall maintain the following minimum plant buffer distances from any property line: (i) The suction shroud baghouse exhaust shall be *at least 100 feet from any property line*; (ii) The owner or operator shall not locate or operate stationary equipment, stockpiles, or vehicles used for the operation of the concrete batch plant (except for incidental traffic and the entrance and exit to the site), *within 50 feet from any property line.*” Emphasis added.

The preamble notes that executive director staff “have historically measured the 440 yards from the outline or footprint of the proposed plant (i.e. the individual facilities that constitute the plant, such as the batch plant, stockpiles, etc.)” This is consistent with THSC 382.056(s) which provides that the measurement of distances to determine compliance with any location or distance restriction required by Chapter 382 shall be taken towards structures that are in use as of the date that the application is filed with the commission. While the intended purpose of the proposed rulemaking is to address the possibility of a registrant moving a plant post-registration within 440 yards of permanent resident, the unintended consequence is to establish a de facto 440-yard buffer from the property line.

AGC respectfully recommends that the commission address possible circumvention of public hearing requirements by enforcing against the registrant under Section 116.115(2), which provides that “[i]t is unlawful for any person to vary from such representations if the change will affect that person’s legal right to claim a standard permit.” Alternatively, proposed Section 116.115(2)(B) should be revised such that if a CBP moves after a CBP SP registration is accepted, a new registration is not required if the registrant demonstrates an “as built” need for changing its representation regarding the location of the

plant. This demonstration would constitute a prima facie case of no circumvention of the TCAA Section 382.058(c) hearing provision. AGC further requests that the proposed rule be clarified to except a registrant from submitting a new or amended registration if persons were not actually residing in a permanent residence at the time of the initial registration issuance. This is consistent with the statutory framework affording the opportunity to request a contested case hearing "to only those persons actually residing in a permanent residence within 440 yards of a proposed facility."

AGC appreciates the intended purpose of the rulemaking but, again, respectfully requests the commission consider the unintended consequences of this rulemaking. Please do not hesitate to contact me at 512/478-4691 if you have any questions or require additional information.

Sincerely,



Jennifer Woodard
Chief Executive Officer