

Date: May 4, 2023
To: Chairman Landgraf and the Members of the House Committee on Environmental Regulation
CC: Rep. R. D. "Bobby" Guerra, Rep. Keith Bell, Rep. Jay Dean, Rep. John Kuempel, Rep. Janie Lopez, Rep. Thresa "Terry" Meza, Rep. Penny Morales Shaw, Rep. Ron Reynolds
Via hand delivery and by email.

From: Adrian Shelley, Public Citizen, ashelley@citizen.org, 512-477-1155

Re: HB 926 – Expanding the definition of affected person – Public Citizen testimony in support

Dear Chairman Landgraf and Members of the Committee:

Public Citizen appreciates the opportunity to testify in support of HB 926 by Representative Harold Dutton, relating to the persons entitled to request a public hearing from the Texas Commission on Environmental Quality related to the construction of a concrete plant.

The TCEQ and its Office of Public Interest Council support expansion of the definition of affected person.

This bill implements a recommendation included in the Texas Commission on Environmental Quality's (TCEQ) biennial report to the 86th legislature and originally made in the FY 2018 Annual Report to the TCEQ by the Office of Public Interest Counsel (OPIC).¹

In that report (see attachment), OPIC explained a situation in which the TCEQ was statutorily barred from granting a contested case hearing request filed by a hospital with legitimate concerns about the potential for dust from a proposed concrete plant to cause harm to its patients, "especially those with respiratory and pulmonary conditions."

TCEQ and OPIC have recommended the law change proposed by this bill. It would provide standing to representatives of certain vulnerable land uses—schools, places of worship, day-care centers, and hospitals—to request a contested case hearing on a concrete plant permit application. Granting that authority will ensure that these entities can participate in a public process that provides protections for health and safety.

We ask you to support HB 926 and allow other sensitive land uses to request contested case hearings on concrete batch plants.

¹ See Texas Commission on Environmental Quality, "FY2017-FY2018 Biennial Report to the 86th Legislature" (Dec. 2018), "Appendix C: Office of Public Interest Counsel Annual Report to the TCEQ" (Aug. 14, 2018) available at https://www.tceq.texas.gov/assets/public/comm_exec/pubs/sfr/057_18/SFR-057-18-X.pdf at p. 71, *see also attached in relevant part.*

Amended Texas Water Code, Section 5.351(c) would read as follows:

Notwithstanding Subsection (b) or any other statutory provisions within the commission's jurisdiction authorizing the filing of a petition to review, set aside, modify, or suspend an act of the commission, a person affected by a ruling, order, or other law may, after exhausting any administrative remedies, file a petition to review, set aside, modify, or suspend the ruling, order, or decision not later than the 30th day after:

- (1) the effective date of the ruling, order, or decision; or
- (2) if the executive director's ruling, order, or decision is appealed to the commission as authorized by Section 5.122(b) or other law, the earlier of:
 - (A) the date the commission denies the appeal; or
 - (B) the date the appeal is overruled by operation of law in accordance with commission rules.

3. Proposal Concerning Affected Persons in Contested Case Hearings on Concrete Batch Plant Registrations

This recommended legislative change would expand the right to a hearing for Standard Permit registrations pursuant to Texas Health and Safety Code, Section 382.05195. At present, Texas Health and Safety Code, Section 382.058(c) extends the right to request a hearing as an affected person to "only those persons actually residing in a permanent residence within 440 yards of the proposed plant." By narrowing the universe of affected persons to only those persons actually residing in a permanent residence, the law does not consider potential impacts to the health of potentially sensitive receptors of particulate matter who may be present at places such as schools, places of worship, licensed day-care facilities, hospitals and other medical facilities.¹ Furthermore, the current version of the law does not

¹ OPIC notes that for registrations under the concrete batch plant standard permit with enhanced controls that are not subject to the contested case hearing process, Texas Health and Safety Code, Section 382.05198(19) requires that the facility's baghouse be located at least 440 yards from "any building used as a single or multi-family residence, school, or place of worship" at the time of application if the facility would be located in an area without zoning.

protect a citizen residing in a trailer or mobile home if their home is not considered a "permanent residence."

The apparent intent of Texas Health and Safety Code, Section 382.058(c) is to limit the universe of affected persons entitled to protest a concrete batch plant registration for the sake of efficiency of the hearing process, given the relatively minimal presumed potential impact to persons beyond 440 yards from a facility. However, the public interest is best served when efficiency does not impair the TCEQ's mission of controlling or abating air pollution and the emission of air contaminants and when such efficient action is consistent with protection of public health and general welfare as required by Texas Health and Safety Code, Section 382.002. OPIC's proposal is intended to balance efficiency interests served in limiting affected person status under Section 382.058(c) with the TCEQ's mandate to protect public health and general welfare under Section 382.002.

Under the current law, vulnerable populations and sensitive receptors within 440 yards of a facility may not be afforded the procedural protections available to persons residing in permanent residences within 440 yards of a facility. For instance, on May 13, 2015, the Commission considered a hearing request made by CR Emergency Room, LLC (Hospital) regarding the Standard Permit registration of Munilla Construction Management, LLC. The Hospital was concerned that dust from the proposed plant would harm its patients, especially those with respiratory and pulmonary conditions, and sought a hearing. There was no dispute that the Hospital was directly across the street from and within 440 yards of the proposed facility. However, the Commission was compelled to deny the request because it was not filed by "a person actually residing in a permanent residence within 440 yards of the proposed plant" as required by Texas Health and Safety Code, Section 382.058(c).

Briefs filed by OPIC and the Executive Director agreed that the Hospital did not meet the statutory definition of affected person; however, the issue of potential impact to human health raised by the Hospital was relevant and material to the Commission's decision on the registration. But for the limitation placed on the Commission by statute, the Hospital's concern about human health was an issue appropriate for referral to SOAH. While the Commission has authority under Texas Water Code, Section 5.556(f) to hold a hearing if the public interest warrants doing so, it also must respect the current constraints on affected person determinations imposed by the Legislature. Without a change to Section 382.058(c), the Commission will continue

to face a statutory obstacle to granting a hearing to certain vulnerable populations and other receptors within 440 yards of a registered concrete batch plant facility.

For these reasons, OPIC proposes the following amendment to Texas Health and Safety Code, Section 382.058(c) to expand the definition of affected persons and allow for the protection of human health of vulnerable populations and other receptors within 440 yards of a proposed concrete batch plant:

(c) For purposes of this section, only schools, places of worship, licensed day-care facilities, hospitals, medical facilities, and persons residing within 440 yards of the proposed plant may request a hearing under Section 382.056 as a person who may be affected.

4. Proposal Concerning Changes to Permit Applications

OPIC proposes uniform limitations on the ability of permit applicants across all agency programs to change applications after the 31st day before the date the preliminary hearing at SOAH is scheduled to begin. OPIC notes this proposal is not intended to limit the ability of the Commission to adopt changes to any draft permit or incorporate special permit provisions into permits when considering any proposal for decision following a contested case hearing.

Members of the public often express concern about perceived unfairness when permittees change their applications late in the public participation process in response to issues or evidence brought to light by protesting parties. These parties contend that when such changes are allowed – and the need to address deficiencies has been made known only through efforts and expenses of protesting parties – the subject of the hearing becomes a “moving target.” OPIC’s proposal is intended to address the “moving target” concern by discouraging application changes late in the public participation process. The proposal seeks to encourage the regulated community to ensure applications are accurate and complete when filed. The intended result is a more efficient and effective use of the time and resources of all parties to a proceeding.

Existing Texas Health and Safety Code, Section 382.0291(d) currently limits an air quality permit applicant’s ability to amend applications. With some modifications, OPIC’s proposal is based on Section 382.0291(d). OPIC proposes revisions to clarify the language of this statute and incorporate its requirements

into the appropriate provisions of Texas Water Code, Chapters 5, 11, 13, 26 and 27 and Texas Health and Safety Code, Chapters 361, 382 and 401, and any other statutory provisions relating to permits that are issued by the Commission and subject to contested case hearings. Such legislative changes would promote consistency across agency permitting programs by imposing a uniform limitation on application revisions across all media under the Commission’s jurisdiction.

For these reasons, OPIC recommends the following language be incorporated into the necessary provisions of the Texas Water Code and the Texas Health and Safety Code:

An applicant for a license, permit, registration, or similar form of permission required by law to be obtained from the commission may not request changes to the application after the 31st day before the first date scheduled for a preliminary hearing in a contested case hearing on the application. If an applicant determines that it will not proceed to hearing with the application that was on file with the commission on the 31st day before the first date scheduled for the preliminary hearing, the applicant shall withdraw the application with or without prejudice in accordance with procedures provided by commission rules. If an applicant withdraws the application without prejudice and subsequently submits a revised application, the applicant must again comply with notice requirements and any other requirements of law or commission rule in effect on the date the revised application was submitted to the commission. The prohibition on changes to applications imposed by this subsection will not apply if, following a preliminary hearing and the naming of parties to the hearing, all parties to the hearing on the application agree in writing to the applicant’s proposed changes to the application and noticing of the revised application is not otherwise required by applicable law.

5. Proposal Concerning Penalties for Violations of Public Water Supply and Drinking Water Statutes, Rules, and Orders

Texas Health and Safety Code, Section 341.049 provides that if a person causes, suffers, allows, or permits a