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State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

November 20, 2020

Mary Smith
General Counsel
Texas Commission on Environmental Quality
12100 Park 35 Circle, Bldg. F, Room 4225
Austin, TX 78753

Re: **SOAH Docket No.; TCEQ Docket No. 582-19-6473;**
Application of Bosque Solutions LLC for Permit No 152013

Dear Ms. Smith:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than December 10, 2020. Any replies to exceptions or briefs must be filed in the same manner no later than December 20, 2020.

This matter has been designated **TCEQ Docket No. 2019-0665-AIR; SOAH Docket No. 582-19-6473**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www14.tceq.texas.gov/epic/eFiling/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink that reads "Joanne Summerhays".

Joanne Summerhays
Administrative Law Judge

Enclosures

**SOAH DOCKET NO. 582-19-6473
TCEQ DOCKET NO. 2019-0665-AIR**

APPLICATION OF BOSQUE SOLUTIONS, LLC FOR PERMIT NO. 152013, CONCRETE BATCH PLANT TARRANT COUNTY, TEXAS	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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SOAH DOCKET NO. 582-19-6473
TCEQ DOCKET NO. 2019-0665-AIR

APPLICATION OF	§	BEFORE THE STATE OFFICE
BOSQUE SOLUTIONS, LLC FOR	§	
PERMIT NO. 152013,	§	OF
CONCRETE BATCH PLANT	§	
TARRANT COUNTY, TEXAS	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

On May 23, 2018, Bosque Solutions LLC (Bosque) submitted to the Texas Commission on Environmental Quality (TCEQ) an application (Application) seeking an Air Quality Standard Permit for a Permanent Concrete Batch Plant (CBP Standard Permit or Permit) under Texas Health and Safety Code § 382.05195 (Texas Clean Air Act (TCAA)) and 30 Texas Administrative Code (TAC) § 116.611. The Permit would authorize Bosque to construct and operate a permanent concrete batch plant (the Plant) with a maximum production rate of 300 cubic yards per hour not to exceed 6,000 cubic yards per day. Bosque has represented the Plant will operate up to 8,760 hours per year.¹ The Plant is proposed to be located at 7327 Gibson Cemetery Road, Mansfield, Tarrant County.² Contaminants authorized under the Permit would include particulate matter including particulate matter with diameters of 10 microns (PM₁₀) or less and 2.5 microns (PM_{2.5}) or less, aggregate, sand, cement, and road dust.³ The Executive Director of TCEQ (ED) supports issuance of the CBP Standard Permit.

The Application is opposed by Patricia Baines, Rene Luna, Vicki Polson, Misty Smitherman, Larry Smitherman, Sr., Lyle Lowery, Bob McClacherty, Jeffrey Alan Baines, Dennis Gene Martini, and Carolyn Kinney Martini (Protestants). TCEQ Office of Public Interest Counsel (OPIC) also opposes the Application.

The Administrative Law Judge (ALJ) recommends that the Application be denied. While Bosque prevailed in regard to three of the four referred issues, the evidence established that Bosque

¹ ED Ex. 7 at 73.

² ED Ex. 5 at 39.

³ ED Ex. 7 at 74.

failed to comply with the requirements of the CBP Standard Permit to demonstrate compliance with 30 TAC § 116.611 by failing to demonstrate that it complied with 30 TAC § 116.610(a)(1)-(6). Therefore, the preponderance of the evidence shows that the Application did not meet the applicable statutory and regulatory requirements for issuance of the registration to use the CBP Standard Permit for the Plant.

II. PROCEDURAL HISTORY, APPLICATION NOTICE, NOTICE OF HEARING, AND SOAH JURISDICTION

Bosque submitted the Application to TCEQ on May 23, 2018.⁴ The ED declared the Application administratively complete on May 29, 2018.⁵ The Notice of Receipt and Intent to Obtain an Air Quality Permit for this Application was published in English on June 27, 2018, in the *Mansfield News Mirror* and in Spanish on June 25, 2018, in *La Prensa Comunidad*, which included notice that the ED determined that the Application met all of the requirements for the Permit.⁶

A public meeting was held on October 18, 2018, in Kennedale, Texas, and the public comment period ended at the close of the public meeting. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on April 1, 2019.⁷ The deadline to request a contested case hearing was May 1, 2019. TCEQ received numerous timely comments, hearing requests, and requests for reconsideration.

TCEQ considered the Application at a regularly scheduled Commissioners' Agenda meeting on July 10, 2019, in which the Commissioners determined that there were affected persons under applicable law, and referred the application to SOAH for an evidentiary hearing on the following issues:

1. Whether the permit will be protective of the health and safety of the requesters and their families, including sensitive subgroups, and physical property;

⁴ Applicant (App.) Ex. 2 at 7.

⁵ App. Ex. 2 at 7.

⁶ Executive Director (ED) Ex. 5 at 39.

⁷ ED Ex. 5 at 38-70.

2. Whether the permit will negatively affect air quality;
3. Whether the proposed permit will be protective of general welfare, including vegetation, animals, and the environment; and
4. Whether the permit will be protective against dust emissions generated from the proposed plant, including nuisance dust emissions.⁸

On September 30, 2019, ALJ Joanne Summerhays conducted a preliminary hearing in Mansfield, Texas. At the preliminary hearing, Bosque offered three exhibits, which were admitted for the purpose of establishing notice and jurisdiction. The ED also offered an exhibit which was admitted for the purpose of establishing notice and jurisdiction. The ALJ found that notice of the hearing was both timely and adequate and that SOAH had jurisdiction over this proceeding.⁹ Also at the preliminary hearing, the ALJ took evidence and heard argument from the parties on various requests for party status. After taking the requests under advisement and receiving additional briefing on the issues, the ALJ, by order issued October 10, 2019, granted party status to Patricia Baines, Rene Luna, Vicki Polson, Misty Smitherman, Larry Smitherman, Sr., Lyle Lowery, Bob McClacherty, Jeffrey Alan Baines, Dennis Gene Martini, and Carolyn Kinney Martini, and denied the remainder of the requests for party status. The ALJ aligned the protesting parties pursuant to 30 TAC § 80.109(c). The ALJ established a procedural schedule and set the hearing on the merits for January 21-22, 2020.

On December 20, 2019, Protestants filed a Motion for Summary Disposition. On that same date, Bosque filed a Motion for Summary Disposition. Protestants filed a response to Bosque's motion, and Bosque filed a response to Protestants' motion, on January 8, 2020. On the same date, the Executive Director filed a response to Protestants' motion. After considering Bosque's motion and the responses, as well as the summary disposition evidence submitted, the ALJ determined Bosque's motion should be denied as fact issues remained.

On January 15, 2020, the ALJ held a prehearing conference to hear arguments regarding Protestants' motion. Protestants' motion for summary disposition presented uncontested evidence that TCEQ failed to send the notice required by Texas Health and Safety Code § 382.0516(b),

⁸ App. Ex. App-2, Tab A.

⁹ SOAH Order No. 1 (Oct. 10, 2019).

which stated that TCEQ must provide notice to any municipality in which a proposed plant would be located, including if located in the extra-territorial jurisdiction (ETJ) of the municipality. It was uncontroverted that the Plant would be located in the ETJ of the City of Fort Worth. TCEQ relied upon Bosque's incorrect representation in its application that the Plant would not be located in the ETJ of any municipality.

On January 17, 2020, the ALJ entered an order stating that Protestants established that the notice required by law was not given, and therefore summary disposition was appropriate in this case pursuant to 30 TAC § 80.137. The ALJ's PFD recommended that TCEQ deny the Application, or in the alternative, allow Bosque to amend and provide the required notice. On April 8, 2020, the ALJ's PFD was considered by TCEQ Commissioners at an open Agenda meeting. After considering the PFD, oral arguments, and filings, the Commissioners issued an interim order remanding the matter to SOAH and directing the ALJ to move forward with the hearing on the merits in the case. The order did not address the recommendations in the PFD. The parties submitted an Agreed Procedural Schedule on May 7, 2020, and the ALJ issued an amended scheduling order on May 15, 2020, setting the hearing on the merits on August 11-12, 2020.

The hearing on the merits was held August 11-12, 2020, via Zoom videoconferencing. The parties began submitting post-hearing briefing on September 11, 2020, and the record closed on September 25, 2020, with the filing of reply briefs.

III. APPLICABLE LAW

A. Burden of Proof and Prima Facie Case

The Application was filed after September 1, 2015, and the TCEQ referred it under Texas Water Code § 5.556, which governs referral of environmental permitting cases to SOAH based on a request for a contested case hearing.¹⁰ Therefore, this case is subject to Texas Government Code § 2003.047(i-1)-(i-3),¹¹ which provides:

¹⁰ Tex. Water Code §§ 5.551(a), .556; *see* Tex. Health & Safety Code § 382.056(n) (requiring the Commission to follow the procedures in §§ 5.556 and .557 of the Texas Water Code when considering a request for a public hearing for a permit under the Texas Clean Air Act).

¹¹ Acts 2015, 84th Leg., R.S., ch. 116 (S.B. 709), §§ 1 and 5, eff. Sept. 1, 2015.

- (i-1) In a contested case regarding a permit application referred under Section 5.556 . . . [of the] Water Code, the filing with [SOAH] of the application, the draft permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:
- (1) the draft permit meets all state and federal legal and technical requirements; and
 - (2) a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.
- (i-2) A party may rebut a demonstration under Subsection (i-1) by presenting evidence that:
- (1) relates to . . . an issue included in a list submitted under Subsection (e) in connection with a matter referred under Section 5.556, Water Code; and
 - (2) demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.
- (i-3) If in accordance with Subsection (i-2) a party rebuts a presumption established under Subsection (i-1), the applicant and the executive director may present additional evidence to support the draft permit.

Although this law creates a presumption, sets up a method for rebutting that presumption, and shifts the burden of production on that rebuttal, it does not change the underlying burden of proof. Accordingly, the burden of proof remains with the Applicant to establish by a preponderance of the evidence that the Application would not violate applicable requirements and that a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.¹²

In this case, the Application, the Draft Permit, and the other materials listed in Texas Government Code § 2003.047(i-1), which are collectively referred to as the “Prima Facie Demonstration,” were offered and admitted into the record at the preliminary hearing.¹³

¹² 30 Tex. Admin. Code (TAC) § 80.17(a), (c).

¹³ Exhibit App-1 (administrative record) and Exhibit App-2 (jurisdictional exhibits).

B. Texas Clean Air Act

The Texas Clean Air Act (TCAA)¹⁴ grants the TCEQ authority to issue a permit to construct a new facility that may emit air contaminants.¹⁵ The TCAA defines a facility as a “discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered to be a facility.”¹⁶ Under the TCAA, the TCEQ shall grant a permit to construct a facility if it finds:

- (1) the proposed facility for which a permit . . . is sought will use at least the best available control technology, considering the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility; and
- (2) no indication that the emissions from the facility will contravene the intent of [the TCAA], including protection of the public’s health and physical property¹⁷

C. Standard Permit for a Concrete Batch Plant

Under the authority provided to it by the TCAA, TCEQ can issue standard permits for similar types of facilities.¹⁸ A standard permit for new or existing facilities may be issued if TCEQ finds that it is enforceable, that compliance can be adequately monitored by TCEQ, and that the facilities will use BACT.¹⁹ To issue such a permit, TCEQ must publish notice of its intent to do so, hold a public meeting, allow for public comment, and issue written responses to all comments received.²⁰ The TCAA requires TCEQ to establish by rule the procedures for the application for,

¹⁴ Tex. Health & Safety Code ch. 382.

¹⁵ Tex. Health & Safety Code § 382.051(a)(1).

¹⁶ Tex. Health & Safety Code § 382.003(6); *see also* 30 TAC § 116.10(4).

¹⁷ Tex. Health & Safety Code § 382.0518(b).

¹⁸ Tex. Health & Safety Code § 382.051(b)(3).

¹⁹ Tex. Health & Safety Code § 382.05195(a)(1)-(3).

²⁰ Tex. Health & Safety Code § 382.05195(b)-(d).

and issuance and amendment of, a standard permit.²¹ TCEQ may delegate to the ED the authority to issue, amend, renew, or revoke an authorization to use a standard permit.²²

A registration to use a standard permit must be submitted on the required PI-1S form and must document:

- (a) the basis of emission estimates;
- (b) quantification of all emission increases and decreases associated with the project being registered;
- (c) sufficient information as may be necessary to demonstrate that the project will comply with 30 TAC § 116.610(b);
- (d) information that describes efforts to be taken to minimize any collateral emissions increases that will result from the project;
- (e) a description of the project and related process; and
- (f) a description of any equipment being installed.²³

A project that meets the requirement for a standard permit issued by TCEQ is entitled to the standard permit, as long as it:

- (a) meets the emission limitations of 30 TAC § 106.261, unless otherwise specified by the standard permit;
- (b) commences construction or operation prior to the effective date of a revision to the standard permit if the project would no longer qualify for the standard permit under such revision;
- (c) complies with any applicable provisions of the Federal Clean Air Act (FCAA) concerning New Source Performance Standards, Hazardous Air Pollutants, and the applicable maximum achievable control technology standards or National Emissions Standards for Hazardous Air Pollutants promulgated by the United States Environmental Protection Agency pursuant to the FCAA; and

²¹ Tex. Health & Safety Code § 382.05195(e).

²² Tex. Health & Safety Code § 382.05195(i).

²³ 30 TAC § 116.611.

- (d) obtains allocations to operate if subject to the Mass Emissions Cap and Trade Program.²⁴

If the project is a “new major stationary source” or “major modification,” it does not qualify for a standard permit and must seek a new source review permit pursuant to 30 TAC § 116.110. Further, an applicant for a standard permit may not circumvent by artificial limitations the requirements of 30 TAC § 116.110. Finally, if it involves a proposed “affected source” as defined by the FCAA, the project must comply with other requirements.²⁵ There is no evidence that the Plant would be a “major new stationary source,” a “major modification,” or an “affected source.”

TCEQ issued the CBP Standard Permit in 2001, and it was amended in 2003 and 2012.²⁶ The CBP Standard Permit defines the types of facilities that qualify for registration, including production rates, emissions controls, site layout, and operating conditions.²⁷ The CBP Standard Permit does not include maximum allowable emission rates. Prior to receiving authorization to use the CBP Standard Permit for the Plant, Bosque must demonstrate through its representations made in the Application, including maximum emission rates, construction plans, and operating procedures, that the Plant will meet the requirements for the CBP Standard Permit, including the general conditions that apply to all standard permits.²⁸ Bosque cannot vary from such representations if the change would affect its right to the CBP Standard Permit. If there is any change in the operating conditions of the Plant that involves emission controls, character of the emissions, or an increase in the discharge of the emissions as represented in the Application, Bosque must notify the ED within 30 days after such a change is made.²⁹

²⁴ 30 TAC § 116.610(a)(1)-(6).

²⁵ 30 TAC § 116.610(b)-(d).

²⁶ ED Ex. 2 (Prefiled testimony of Don Nelson) at 6; ED Ex. 4 (CBP Standard Permit).

²⁷ ED Ex. 4.

²⁸ The general conditions include requirements for compliance with the TCAA, the representations made in the application for the permit, construction progress, start-up notification, sampling, equivalency of methods, recordkeeping, maintenance of emission control, all applicable rules, and distance limitations and setback requirements. *See* 30 TAC § 116.615; App. Ex. App-1.

²⁹ 30 TAC § 116.615(2).

I. IV. ANALYSIS OF CONTESTED ISSUES AND HEARING EVIDENCE

A. Background

Bosque proposes to construct and operate the Plant with a maximum production rate of 300 cubic yards per hour not to exceed 6,000 cubic yards per day. Bosque has represented the Plant will operate up to 8,760 hours per year. The Plant is proposed to be located at 7327 Gibson Cemetery Road, Mansfield, Tarrant County. Contaminants authorized under the Permit would include particulate matter including particulate matter with diameters of PM₁₀ or less and PM_{2.5} or less, aggregate, sand, cement, and road dust. The Plant will consist of a cement silo, hoppers, storage bins, stockpiles, and a central dust collector with a baghouse.³⁰

According to the Application, washed sand and aggregate will be unloaded into stockpiles for storage after delivery by truck to the Plant. The sand and aggregate will be transported from the stockpiles and loaded into the feed hopper with a front-end loader and then transferred to the radial stacker, which is used to convey it to the aggregate bins. The sand and aggregate will then fall into weigh bins where measured amounts will be transferred to a conveyor and then to the mixer trucks at the batch point. The loading of the mixer trucks accounts for loading emissions not captured by the central dust collector. Bulk cement and fly ash will be delivered by truck and pneumatically loaded into the cement silo. From there, they will be transferred to the weigh batcher for measurement. The amount needed for the concrete mix will then be transferred to the batch point where they will be mixed with sand, aggregate, and water by the mixer trucks.³¹

Bosque's Application set out the methods that it will use to control emissions from the Plant and asserted that those methods are BACT. Emissions from the weigh hopper, the batch point and the silo will be collected by a dust collector and routed to the central baghouse. The batch point will be protected by a three-sided curtain or equivalent dust control technology that extends below the mixer truck-receiving tunnel and utilizes a suction shroud vented to the central dust collection system. Bosque will use watering, road paving and cleaning, and stockpile spraying to

³⁰ App Ex. 1.

³¹ App. Ex. 1.

control emissions from nine identified emissions points at the Plant. The interior roads and traffic areas at the Plant are paved with a hard cohesive surface which is capable of being cleaned, and will be sprayed with water to minimize dust emissions. Bosque utilized a control factor of 70 percent to calculate the amount of projected emissions as 13.57 tons per year after the control methods are applied.³²

Bosque has represented in its Application that it will:

- maintain the central baghouse fabric filters and collection systems by (i) operating them properly with no tears or leaks, (ii) using fabric filter systems designed to meet a minimum control efficiency of at least 99.5 percent at particle sizes of 2.5 microns and smaller, and (iii) ensuring all filter systems meet visible emissions performance standards;
- when transferring cement or fly ash, (i) ensure that conveying systems to and from the storage silos are properly operated, remain totally closed, and are maintained without tears or leaks, and (ii) keep a standard of having no visible emissions for more than 30 seconds in any six-minute period from the conveying system during cement/fly ash storage silo filling;
- ensure visible emissions do not leave the Plant and perform and record observations for visible emissions quarterly, during normal operations, and on the downwind property line for a minimum of six minutes;
- if excess visible emissions are observed, take action to eliminate the excessive visible emissions and document the corrective action;
- locate the Plant at least 550 feet from any crushing plant or hot mix asphalt plant;
- not use concrete additives at the Plant that emit volatile organic compounds;
- not use stationary internal combustion engines for electrical power or equipment operations at the Plant;
- authorize any maintenance activities at the Plant under a separate authorization, unless the maintenance activity qualifies as a *de minimis* facility or source under 30 TAC § 116.119;
- place any stationary equipment used for operation of the Plant at least 50 feet from every property line;
- locate sand and aggregate stockpiles used for the operation of the Plant at least 50 feet from every property line;
- keep vehicles used for the operation of the Plant (except for incidental traffic and the entrance and exit to the site) at least 50 feet from every property line;
- maintain written records at the Plant of the following: emission events; scheduled maintenance, startup and shutdown; production rates; repairs and maintenance of

³² App. Ex. 1.

abatement systems; Material Safety Data Sheets for all additives and chemicals used; road cleaning, application of road dust control, or road maintenance for dust control; stockpile dust suppression; silo warning device tests; and quarterly visible emissions observations and any corrective actions required to control excess visible emissions; and

- keep the written records at the Plant for a rolling 24-month period and available to TCEQ personnel or any air pollution control program having jurisdiction.³³

After it was declared administratively complete, the Application underwent a technical review by Donald Nelon, a Natural Resources Specialist in the Mechanical, Agricultural, and Construction Section of TCEQ Air Permits Division.³⁴ As part of his technical review, Mr. Nelon ensured that the Application included the required forms, including the PI-1S, a Table 11, a Table 20, a standard permit checklist, a process description, a process flow diagram, a process flow chart, and a plot plan. He reviewed the forms, confirmed the checklist was answered appropriately, verified the site location, checked Bosque's compliance history, and ensured public notice was proper.³⁵ Mr. Nelon testified that Bosque's compliance history was "unclassified" which meant it did not bar Bosque from receiving a permit.³⁶ After completing the technical review, Mr. Nelon found that the Application met the requirements of the CBP Standard Permit and recommended its approval.³⁷

B. Whether the Application Meets TCEQ Requirements

Protestants assert that the Application did not meet the CBP Standard Permit requirements for several reasons. First, Protestants claim that the Plant would be located within the Fort Worth Extraterritorial Jurisdiction (ETJ), and that Bosque misrepresented in the Application that it was not located in the ETJ of any municipality. This misrepresentation, according to Protestants, resulted in the failure of TCEQ to send the notice required by Texas Health and Safety Code § 382.0516(b), which states that TCEQ must provide notice to any municipality in which a proposed plant would be located, including if located in the ETJ of the municipality.

³³ App. Ex. 1.

³⁴ ED Ex. 2 at 6-9.

³⁵ ED Ex. 2 at 8-9.

³⁶ ED Ex. 2 at 16, ED Ex. 6.

³⁷ ED Ex. 2 at 13-14.

Second, Protestants contend that Bosque misrepresented in the Application that the CBP Standard Permit emission limits set forth in 30 TAC §§ 106.261 and .262 (collectively, the CBPSP Emission Limits) did not apply to Bosque's Proposed Plant.

1. Notice Requirement under Texas Health and Safety Code § 382.0516(b)

The evidence was uncontested that:

- Bosque's proposed Plant, if permitted, would be constructed within the City of Fort Worth's ETJ;
- The Application incorrectly claimed that the Plant would not be constructed within any municipality's ETJ; and
- Relying on the incorrect information in the Application, TCEQ did not provide the statutorily required notice of the application to the presiding officer of Fort Worth.

Texas Health and Safety Code § 382.0516(b) states:

for an application that relates to an existing or proposed concrete batch plant, on receiving an application for a construction permit, an amendment to a construction permit, an operating permit, or an authorization to use a standard permit, [TCEQ] **shall send notice of the application:**

- (1) to the county judge of the county in which the facility is or will be located; and
- (2) **if the facility is or will be located in a municipality or the extraterritorial jurisdiction of a municipality, to the presiding officer of the municipality's governing body.**³⁸

The Legislature explained its rationale for requiring notice in the Bill Analysis when Section 382.0516 was enacted:

Each year, the state's lead environmental protection agencies receive and process hundreds of applications for permits to locate and construct solid and hazardous waste management facilities throughout Texas. These permit applications frequently generate opposition from individuals or communities who fear that their air, water, and land resources will be adversely affected by the facility. State-elected officials are often called upon to intervene in these contested permit

³⁸ Emphasis added.

situations. At present, however, there is no centralized system to notify elected representatives about facilities proposed for their districts. In some cases, a representative's only knowledge of the waste management facility comes from media reports or concerned constituents.³⁹

Section II.K.3. of the Application asks: "Is the facility located in a municipality or the [ETJ] of a municipality?" Bosque incorrectly checked the box "No." It was discovered after the case was referred to SOAH for a contested case hearing that the Plant is located within the ETJ of Fort Worth.⁴⁰ Because the Application failed to reveal that it would be located in Fort Worth's ETJ, TCEQ did not provide notice of the Application to the presiding officer of Fort Worth, and did not meet the notice requirement in Texas Health and Safety Code § 382.0516(b).⁴¹

2. CBP Standard Permit Emission Limits Set Forth in 30 TAC §§ 106.261 and .262

A person seeking to use the CBP Standard Permit must submit a registration to do so.⁴² The registration must include the basis of emission estimates and quantification of all emission increases and decreases associated with the project being registered.⁴³ In the registration for its Permit Application, Bosque checked the box "N/A" (not applicable) in response to the following question: "Did you demonstrate that the emission limitations in 30 TAC Sections 106.261 and 106.262 are met?"⁴⁴ Both Protestants and OPIC argue that this response demonstrates that Bosque's registration for a CBP Standard Permit fails to meet the requirements of 30 TAC § 116.611 by failing to demonstrate that it complied with 30 TAC § 116.610(a)(1)-(6). The ALJ agrees with Protestants' and OPIC's position.

Under 30 TAC § 116.610(a)(1), a standard permit (including the CBP Standard Permit) is required to meet the emission limitations of 30 TAC § 106.261, and by reference § 106.262, unless otherwise specified by the provisions of that standard permit. Prior to 2012, the CBP Standard Permit stated "[Concrete Batch Plant] Facilities which meet the conditions of this standard permit

³⁹ Bill Analysis Tex. H.B. 426, 72nd leg. R.S. (1991).

⁴⁰ Tr. Vol. I at 111-12.

⁴¹ Protestants (Prot.) Ex. B (Deposition of Donald Nelson) at 53.

⁴² App. Ex. 2B at 5.

⁴³ 30 TAC § 116.611(a)(1)-(2).

⁴⁴ App. Ex. App-1 at 7.

do not have to meet the emissions and distance limitations listed in 30 TAC § 116.610(a)(1), Applicability.”⁴⁵ In 2012, however, this exception was deleted from the standard permit.⁴⁶ As a result, under the standard permit, the Plant is required to meet the emissions requirements in 30 TAC § 106.261, and by reference, § 106.262.⁴⁷

The ED’s witness Mr. Nelon explained in his direct testimony:

During the development of the December 2012 amendment to the standard permit, there were discussions regarding moving the waiver [allowing concrete batch plants an exception from emissions limitations] from the administrative requirements to the technical requirements. Although the waiver was removed from the administrative requirements, it was inadvertently not added to the technical requirements.⁴⁸

Mr. Nelon stated that in performing his job, he had never applied the emissions requirements to a CBP Standard Permit.

In his cross-examination, Mr. Nelon clarified his direct testimony, and agreed that the current CBP Standard Permit requires Bosque to demonstrate that its Application meets the emission limits in 30 TAC § 106.261:

Q: Is TCEQ allowed to -- you know, I guess are you, in your role, can you interpret and add rules in your analysis, or do you have to follow the letter of what those rules are?

A: **We have to follow the standard permit.**

Q: So are you still testifying today that those emission limits [in 30 TAC § 106.261] do not apply?

⁴⁵ Prot. Ex. 1003 at 38; 1004 at 6.

⁴⁶ Prot. Ex. 1006 at 25.

⁴⁷ Bosque argued in its closing argument brief that the amendment should be declared void because it was adopted without the required notice and public comment. However, the ALJ has no jurisdiction or authority to declare rules void. Tex. Gov’t Code § 2001.038 (a)-(b)(“The validity or applicability of a rule . . . may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff. . . . The action may be brought only in a Travis County district court.”)

⁴⁸ ED Ex. 2 at 11.

A: No, sir.

Q: So you agree that the emission limits in § 106.261 do apply to permanent concrete batch plant standard permits?

A: Yes, sir.⁴⁹

Under the applicable law, Bosque was required to demonstrate that the Application met the emissions requirements in 30 TAC §§ 106.261 and .262. Therefore, Bosque's response "N/A" to the Application question regarding emissions limits did not meet the TCEQ's requirements.

C. Referred Issues

1. Issue No. 1: Whether the Permit will be Protective of the Health and Safety of the Requesters and their Families, including Sensitive Subgroups, and Physical Property.

Mr. Nelson explained that a CBP Standard Permit authorizes the operation of concrete batch plants that meet all the conditions set out in the Permit, including the emissions from the stockpiles, drop points, and silos. He stated the conditions of the Permit are designed to be protective of public health. Therefore, applicants that meet the requirements are not required to submit air dispersion modeling or emissions calculations.⁵⁰ He further explained that the Standard Permit provides that "fugitive emissions" may not leave the property. Fugitive emissions are those emission points that do not have a control over the flow or direction of the contaminant, such as transfer points and stockpiles. The CBP Standard Permit requires measures that address fugitive emissions, such as paving all entry and exit roads and main traffic routes used in the operations, cleaning the roadways, using washed sand and gravel, and sprinkling stockpiles with water to prevent dust. These measures are designed to prevent fugitive emission from leaving the property.⁵¹

TCEQ established CBPSP Emission Limits which are enumerated in 30 TAC § 106.261(a)(2)-(3) and include limits for crystalline silica and cement dust by reference to tables

⁴⁹ Tr. Vol. II at 325.

⁵⁰ ED Ex. 2 at 10.

⁵¹ ED Ex. 2 at 12.

set out in § 106.262. Mr. Nelson testified that the purpose of the Emissions Limits was to protect public health and safety.⁵² At issue in this case is whether Bosque has demonstrated that the Plant's emissions of crystalline silica and cement dust will meet the CBPSP Emissions Limits, or whether the Application demonstrates those emissions will be protective of the health of Protestants.

a. Crystalline Silica

It was undisputed at hearing that one of the emissions by the Plant would be sand, which all of Bosque's and the ED's witnesses agreed contains some amount of crystalline silica, although the exact amount varies according to the type of sand used.⁵³ The evidence indicated that crystalline silica is a known carcinogen that could cause lung cancer or silicosis over long-term exposure.⁵⁴ Mr. Nelson testified that any emission of crystalline silica from the Plant would violate the emissions limits set out in 30 TAC §§ 106.261 and .262.⁵⁵

Mr. Nelson opined that, based on his knowledge of the standard permit and the typical emissions from similar facilities, he did not expect that the Plant would emit crystalline silica. However, he admitted that he did not know whether or how much crystalline silica would be emitted by the Plant.⁵⁶ He had not reviewed the data sheets showing the composition of the sand being used at the Plant.⁵⁷ He further testified that he did not require calculations of crystalline silica emissions in his review of the Application because it was submitted under the CBP Standard Permit.⁵⁸ He acknowledged that emissions calculations could be used to demonstrate protectiveness for some applications. However, he did not consider or review the Emissions Calculation Worksheet submitted by Bosque because the worksheet is not required to be submitted or reviewed under the Standard Permit.⁵⁹

⁵² Tr. Vol. II at 338.

⁵³ *E.g.* Tr. Vol. I at 161-68, 178-79, 271-74.

⁵⁴ Tr. Vol. II at 319; ED Ex. 5 at 5.

⁵⁵ Tr. Vol. II at 346-47, 350-51.

⁵⁶ Tr. Vol. I at 31-32.

⁵⁷ Tr. Vol. II at 348-49.

⁵⁸ Tr. Vol. II at 318.

⁵⁹ ED Ex. 2 at 17.

Bosque called Josh Butler as an expert witness in permitting for concrete batch plants and operating those plants in compliance with such permits. Mr. Butler was responsible for filling out the CBP Standard Permit Application. He testified that he did so with the understanding that the emissions limits in 30 TAC §§ 106.261 and .262 did not apply to the Application. At the hearing, he insisted that he continued to believe, despite the testimony by Mr. Nelson and despite the fact that the exemption had been removed from the CBP Standard Permit in 2012, that those rules did not apply to the Application for a CBP Standard Permit.⁶⁰

Mr. Butler testified that the Plant would utilize sand in its operations, which would be held in stockpiles around the facility. He stated there would be some amount of crystalline silica in the sand at the Plant.⁶¹ He admitted that he had calculated and included in the emissions worksheet submitted with the Application the total amount of particulate matter that would be emitted by the Plant from a total of nine emissions points, including the sand stockpiles, after applying a 70 percent control efficiency resulting from spraying the stockpiles and roads with water, paving roads used by trucks, and using a high-efficiency dust collector, also known as a baghouse. He agreed that he did not specify the amount of cement dust or sand that would be included in the emissions. He also did not calculate or include in the worksheet the amount of crystalline silica that would be emitted.⁶² According to his calculations, the Plant would emit 13.57 tons of particulate matter, which he testified would be made of cement dust, gravel, and sand.⁶³

According to Mr. Butler, as long as the Plant's emissions meet the National Ambient Air Quality Standards (NAAQS) for PM_{2.5} and PM₁₀, the Plant is considered protective of health under TCEQ's standard permit modeling.⁶⁴ Mr. Butler agreed that if the Plant applied under a different type of permit, known as a case-by-case permit, rather than the CBP Standard Permit, TCEQ would require a modeling of the effect that particular pollutants, such as cement dust and crystalline silica, would have on human health and safety. That assessment would require a calculation based on the state air quality standards known as effective screening levels (ESLs) of the specific pollutant.

⁶⁰ Tr. Vol. I at 120-23, 130-38, 150.

⁶¹ Tr. Vol. I at 166.

⁶² Tr. Vol. I at 166-75.

⁶³ Tr. Vol. I at 179.

⁶⁴ Tr. Vol. I at 180-82; Prot. Ex. 1007.

Mr. Butler agreed that his evaluation did not provide any information regarding the ESLs of specific pollutants, and therefore, unlike a case-by-case permit, the effect of those particular pollutants on human health and safety could not be determined from the Application or his calculations. He stated that, instead of evaluating the particular pollutants, he relied upon the TCEQ's protectiveness review when they adopted the CBP Standard Permit, which TCEQ based on the NAAQS, not the ESLs. He agreed that TCEQ's protectiveness review did not include any modeling of cement dust or crystalline silica.⁶⁵ Mr. Butler also acknowledged that the ESL of crystalline silica is .27 micrograms per cubic meter annually, which is a much lower limit than the PM limit in the NAAQS used by TCEQ as the basis for its protectiveness review.⁶⁶

Protestants' expert witness, Roberto Gasparini, PhD. agreed with Mr. Butler that the NAAQS are intended to establish safe levels of emissions of air pollutants, and are relied upon to determine whether an emission is protective of health and safety. However, he noted that the standard permit is not intended to provide authorization for all possible plant configurations and production rates. In order to utilize the standard permit, the specific plant must demonstrate that it meets the predetermined conditions of the standard permit. If the plant cannot demonstrate compliance with emissions limits, it must apply under the case-by-case permit.⁶⁷ Dr. Gasparini pointed out that the NAAQS only establish emission limits for PM_{2.5} and PM₁₀, not for larger particulate matter. He stated that under the 2012 Standard Permit, the Plant is required to meet the emissions limits in 30 TAC § 116.610(a)(1).⁶⁸ He further noted that if Bosque's witnesses' and the ED's witness's definition of cement dust is correct, one would have to assume that the remaining amount of the total projected emissions is potentially sand, along with aggregate.⁶⁹

Crystalline silica is not listed in the graphic titled Table 262 under 30 TAC § 106.262(a)(2); however, the table contains the following statement to account for chemicals that are not listed:

⁶⁵ Tr. Vol. I at 183-88, 229; Prot. Ex. 1007.

⁶⁶ Tr. Vol. I at 199-201; Prot. Cross Ex. 2; *see also* Tr. Vol. I at 83.

⁶⁷ Prot. Ex. 1000 at 11-13.

⁶⁸ Prot. Ex. 1000 at 13-14; Prot. Ex. 1006.

⁶⁹ Prot. Ex. 1000 at 13-14. As discussed under IV.C.1.b. below, Mr. Nelson testified that he originally believed and testified in his deposition that all of the 13.57 tons of projected emissions would be considered cement dust. However, after reconsidering his testimony, he testified that he had made a mistake, and only the portion of the emissions attributable to the Portland cement used in the mixture would be considered cement dust. Mr. Nelson estimated that cement dust would make up only 1.27 tons of the annual 13.57 tons of projected emissions from the Plant.

“NOTE: The time weighted average (TWA) Threshold Limit Value (TLV) published by the American Conference of Governmental Industrial Hygienists (ACGIH), in its TLVS and BEIs guide (1997 Edition) shall be used for compounds not included in the table.”⁷⁰ 30 TAC § 106.261(a)(3) provides, “Emissions of a chemical with a limit value of less than 200 [milligrams per cubic meter (mg/m³)] are not allowed under this section.” Dr. Gasparini explained that, according to the 1997 version of the ACGIH’s TLVs and BEIs guide, “the limit value for crystalline silica is 0.1.[mg/m³] And with a limit value of 0.1, that’s—that’s less than 200 milligrams per cubic meter.”⁷¹ Dr. Gasparini concluded that because crystalline silica’s limit value is less than 200 mg/m³, crystalline silica emissions are prohibited by 30 TAC § 106.261(a)(3).⁷²

The ED and Bosque both contend that the TCEQ took into account all possible emissions from a concrete batch plant when adopting the CBP Standard Permit and therefore TCEQ has determined crystalline silica emissions from a concrete batch plant do not present a health issue.⁷³ They contend that by meeting the NAAQS, Bosque has established that it meets all the requirements of the CBP Standard Permit. But neither Bosque nor the ED controverted Dr. Gasparini’s testimony regarding the limit value of crystalline silica.

Bosque’s argument may be accurate as to the 2000 and 2003 standard permits. However, the 2012 standard permit expressly incorporates the emission limits stated in 30 TAC §§ 106.261 and .262. 30 TAC § 116.610(a)(1) states that:

[a]ny project that results in a net increase in emissions of air contaminants from the project other than those for which a national ambient air quality standard has been established must meet the emission limitations of § 106.261 of this title, unless otherwise specified by a particular standard permit.

Therefore, in order to meet the requirements of the current Standard Permit, Bosque must demonstrate that the Plant will comply with those limits. The evidence established that sand would

⁷⁰ 30 TAC § 106.262(a)(2)(Figure 2).

⁷¹ Tr. Vol. I at 76-77.

⁷² Tr. Vol. I at 66.

⁷³ The ED references language in TCEQ’s guidance document Modeling and Effects Review Applicability (MERA) in support of its argument. However, the MERA expressly states that it is not to be considered a regulatory document. App. Cross Ex. 1 at 1.

make up a portion of the 13.57 tons of annual emissions, and that sand contains some level of crystalline silica. There are no established NAAQS for crystalline silica. Therefore, the Application must demonstrate that emissions of crystalline silica would comply with the limits in 30 TAC §§ 106.261 and .262. There was no evidence submitted as to how much of the emissions would be sand and how much crystalline silica would be emitted. Bosque's application therefore does not demonstrate compliance with § 106.262's limits on crystalline silica. If as Bosque argues, applying those limits to concrete batch plants means that no concrete batch plant can meet the requirements of the CBP Standard Permit, that would be a policy concern that TCEQ, not the ALJ, could address through rule-making.⁷⁴ In this hearing, the ALJ is limited to interpreting and applying the applicable rules based on the evidence presented.

The ALJ finds that the Protestants' evidence rebuts Bosque's prima facie case that it has complied with TCEQ rules in regard to the limits on crystalline silica. Furthermore, Bosque failed to demonstrate compliance with the limits in 30 TAC §§ 106.261 and .262, and thus failed to establish that the Application is protective of human health and safety.

b. Cement Dust

Under the standard permit as adopted in 2012 and 30 TAC § 106.261(A)(2), a concrete batch plant may emit no more than ten tons per year of cement dust.⁷⁵ However, TCEQ has not defined the term "cement dust" in any of its rules or guidelines.⁷⁶ Mr. Nelson explained in his direct testimony, that at the time of his deposition in this case, he characterized the 13.57 tons of emissions Bosque projected in its Application as "cement dust." However, since that date, he has realized that his characterization was inaccurate, and that the 13.57 tons would actually be more accurately characterized as "concrete dust" which is the product made at the Plant. Cement dust, he clarified, was one element of concrete dust. He calculated that the Plant would use Portland cement in the concrete mix at a rate of 12.7 percent, along with fly ash, gravel, and sand. Therefore,

⁷⁴ Bosque argues that the rule-making procedure by which TCEQ adopted the 2012 standard permit was flawed, and that the ALJ should not apply the rule on that basis. This argument presumes authority beyond the actual powers of an ALJ in a contested case hearing. See Tex. Gov't Code § 2001.038(a)-(b).

⁷⁵ Prot. Ex. 1000 at 11.

⁷⁶ Tr. Vol. II at 332.

he opined that it was reasonable to assume that the same percentage would be present in the Plant's emissions. Based on that assumption, Mr. Nelon calculated that the 13.57 tons of emissions would contain only 1.27 tons of cement dust, which is less than limit set in 30 TAC § 106.261(A)(2).⁷⁷

Mr. Nelon further stated that Bosque used a conservative figure of 70 percent control efficiency for using measures to control emissions. He noted that Bosque could have used a control efficiency of 98.5 percent based on its use of BACT. According to Mr. Nelon, if Bosque had used the higher control efficiency the total emissions would have been below 10 tons.⁷⁸

On cross-examination, Mr. Nelon agreed that he had testified at his deposition that cement dust was the total of the sand, gravel, cement, and fly ash that were the ingredients of the concrete. He stated that this testimony was not correct. He also testified on cross that he had no rule or adopted guidance from TCEQ that supported his definition of cement dust. He admitted that he did not know whether cement dust, as he defined it, would emit at a higher ratio than other components of concrete.⁷⁹ He further testified that he did not review the amount of cement dust projected to be emitted from the Plant in his review of the permit.⁸⁰ He agreed that the Application submitted by Bosque did not contain the higher control efficiency of 98.5, and that based on the Application, the emissions that Bosque projected were 13.57 tons per year, after applying all control mechanisms. Because Bosque used the 70 percent control efficiency in its application, if its application were approved, it would not be held to the higher control efficiency of 98.5 percent.⁸¹

Bosque's witness, Michael Meister, also opined that only a fraction of the total PM potential emissions should be classified as "cement dust" under 30 TAC § 106.261(a)(2). He calculated that, based on Bosque's Application, the cement ingredient is approximately 13 percent of the concrete product that will be manufactured by the proposed Plant. He postulated in addition that only emission points 8 (Central Baghouse) and 7 (Truck Loading Fugitive Emissions) would emit cement dust, as those are the discharge points that will handle product containing cement.

⁷⁷ ED Ex. 2 at 19-20.

⁷⁸ ED Ex. 2 at 18.

⁷⁹ Tr. Vol. II at 330-38.

⁸⁰ Tr. Vol. II at 318, 350.

⁸¹ Tr. Vol. II at 344-45.

The combined PM emissions from points 7 and 8 are projected to be 4.63 tons per year. Thus, he reasoned, the potential emissions of cement dust would be below the ten ton-per-year threshold.⁸²

Dr. Gaspirini noted that Bosque did not specify the amount of cement dust that would be included in the emissions in the Application. Rather it gave the total emissions amount without breaking it down into the amount of cement dust or other components that would be included. Furthermore, he pointed out that TCEQ's protectiveness review did not include any modeling of cement dust or sand.⁸³ It was his understanding, based on the testimony of Mr. Nelson at his deposition and the fact that TCEQ's rules do not define cement dust as specifically Portland dust, that the total 13.57 tons of projected emissions are considered cement dust. Based on that interpretation of the rules, the Application would not meet the ten-tons-per-year emissions requirement of 30 TAC § 106.261(A)(2).

Under the TCEQ's rules, Bosque had the burden of proving that its Application demonstrated that emissions from the Plant will meet the requirements for BACT and will achieve the performance specified in the permit application. The ALJ finds that Bosque met its burden of proof on this issue. Although Bosque failed to specify in its Application the total amount of cement dust that would be emitted, and its witnesses calculated different amounts of cement dust emissions based on different methodologies, both witnesses opined that it would be below the ten tons per year limit in the TCEQ rules. The ED's witness agreed that under the types of controls proposed in the Application, total emissions will actually be reduced below ten tons per year, which would meet the TCEQ rules regardless of how cement dust is defined. Protestants did not provide sufficient evidence to rebut Bosque's evidence that the controls proposed in the Application are sufficient to reduce emissions by that amount. The representations made in the Application regarding construction plans, operating conditions, and maximum emission rates become conditions under which the Plant must be constructed and operated.⁸⁴ Therefore, the ALJ finds Bosque proved that the level of projected cement dust emissions by the Plant does not pose a threat to human health and safety.

⁸² App. Ex. 300 at 19-20.

⁸³ Tr. Vol. I at 53-55.

⁸⁴ 30 TAC § 116.615(2).

**2. Issue No. 2: Whether the Permit Will Negatively Affect Air Quality.
Issue No. 3: Whether the Proposed Permit Will Be Protective of General
Welfare, including Vegetation, Animals, and the Environment.**

Protestants did not specifically address these two issues in their closing argument or in their evidence. To the extent that the issues overlap with Issue No. 1, the ALJ has detailed the evidence and the findings that relate to the adverse effect on human health and safety of crystalline silica emissions. Otherwise, Bosque's prima facie case as to these issues was not directly challenged. The evidence was undisputed that the Application would meet NAAQS secondary standard, which is set to be protective of public welfare.⁸⁵ Furthermore, the evidence was undisputed that BACT will be used to prevent and protect against dust emissions.⁸⁶

Other than compliance with 30 TAC §§ 106.261 and .262 as discussed above, Bosque demonstrated that its Application complied with the requirements of the CBP Standard Permit regarding NAAQS and specifically that the Plant would (1) not negatively affect air quality or (2) fail to be protective of general welfare, including animals, vegetation and the environment.

**3. Issue No. 4: Whether the Permit will be Protective against Dust Emissions
Generated from the Proposed Plant, including Nuisance Dust Emissions.**

Under 30 TAC § 101.4, "no person shall discharge from any source whatsoever one or more air contaminants or combinations thereof, in such concentration and of such duration as are or may tend to be injurious to or to adversely affect human health, or as to interfere with the normal use of enjoyment of property." As discussed above in regard to crystalline silica, Bosque has not demonstrated that emissions will meet the ESLs required by TCEQ rules. However, Protestants take the position that, in addition to the crystalline silica emissions, the Plant will emit nuisance dust that would pose a detriment to their enjoyment of their nearby property. Bosque proved by preponderance of the evidence that the Application demonstrates that the emissions would not pose a nuisance to nearby residences.

⁸⁵ App. Ex. 300 at 18; App. Ex. 400 at 20.

⁸⁶ App. Ex. 400 at 17; Tr. Vol. I at 290; App Ex. 200 at 16; ED Ex. 2 at 20.

Dr. Gasparini opined that the number of residences nearby, their proximity to the emissions, how the occupants use and enjoy their homes, and the area's climatic conditions affected the analysis of whether the emissions would pose a nuisance. Dr. Gasparini based his assessment of potential nuisance conditions at the Plant on two emission sources: (1) the facility and (2) trucks re-suspending emissions from the roads when picking up finished product at the Proposed Plant. He used Bosque's emission calculations of 13.57 tons per year of PM, and added .118 tons per year of PM from on-site truck travel, to arrive at a figure of 13.688 tons per year of dust emissions. Dr. Gasparini identified 14 homes within one-quarter mile of the Plant that could be affected by the emissions. Dr. Gasparini opined that 25 percent to 50 percent of the 13.57 TPY of projected PM will likely migrate at least one-quarter mile off-site and that local climatological data shows the wind blows directly towards the Protestants' homes 105 days out of the year—i.e. three to four months. Dr. Gasparini concluded that the Application is not protective against nuisance dust emissions because the amount of dust emissions combined with the number of nearby homes and prevailing wind patterns will interfere with Protestants' ability to use and enjoy their homes and will expose all of the Protestants to health risks associated with particulate matter, even at concentrations below NAAQS.⁸⁷

Mr. Gasparini elaborated on this testimony at the hearing, explaining that a nuisance could exist even in the absence of a direct effect on health and safety. He gave as an example the effect that dust might have on a person's ability to go outside and sit at a table and enjoy a cup of coffee. He agreed that NAAQS were objective standards that must be met to protect health, and that nuisance is a subjective standard.⁸⁸ He postulated that the nuisance effect of the Plant was heightened by the fact that it was in a residential area, rather than in an industrial area.⁸⁹

It was undisputed that the CBP Standard Permit was designed to comply with the NAAQS. The NAAQS were specifically designed to be protective of "public welfare," which encompasses the protection of vegetation, animals, environmental receptors as well as "personal comfort and well-being."⁹⁰ Bosque's witness, Lori Seigelman, an expert in industrial environmental and health

⁸⁷ Prot. Ex. 1000 at 16-24; Prot. Ex. 1009.

⁸⁸ Tr. Vol. I at 37-39.

⁸⁹ Tr. Vol. I at 43.

⁹⁰ See 42 U.S.C. §§ 7408, 7409(b), 7602(h).

and safety compliance in regard to air permits, testified that the NAAQS secondary standard was designed to address and be protective of conditions including nuisance dust.⁹¹ Dr. Gasparini also agreed that the Application would meet the NAAQS requirements at the fence line of the Plant.⁹²

Mr. Nelon testified that the CBP Standard Permit contains controls to protect against nuisance dust emissions, including spraying water on stockpiles and roads and ensuring that all equipment, including all baghouses, are properly functioning. Additionally, the Permit includes on-site distance setback requirements to help ensure that flyaway dust does not leave the property. Other controls include the requirements that Bosque receive pre-washed sand and gravel, and pave all entry and exit roads and main traffic routes, which are required to remain intact and be cleaned regularly. Also, the CBP Standard Permit requires that visible fugitive emissions do not leave the property. Mr. Nelon testified that he does not expect nuisance dust to leave the Plant as long as it is operated in accordance with the CBP Standard Permit.⁹³

The representations made in the Application regarding construction plans, operating conditions and maximum emission rates become conditions under which the Plant must be constructed and operated.⁹⁴ The CBP Standard Permit prohibits visible emissions from leaving the Plant. The best management practices required in the CBP Standard Permit are designed to comply with the NAAQS to prevent nuisance conditions. The preponderance of the evidence shows that operation of the Plant will comply with 30 TAC § 101.4, and will not cause nuisance dust emissions.

D. Assessment of Transcript Costs

A certified court reporter must make a verbatim record and transcript of any contested case hearing.⁹⁵ TCEQ may assess reporting and transcription costs to one or more of the parties participating in the proceeding. However, under TCEQ's rules, transcription costs may not be

⁹¹ App. Ex. 400 at 18.

⁹² Tr. Vol. I at 86.

⁹³ ED Ex. 2 at 12-13

⁹⁴ 30 TAC § 116.615(2).

⁹⁵ 30 TAC § 80.23(a).

assessed against the ED or OPIC.⁹⁶ TCEQ shall consider the following factors in assessing reporting and transcription costs:

- (A) the party who requested the transcript;
- (B) the financial ability of the party to pay the costs;
- (C) the extent to which the party participated in the hearing;
- (D) the relative benefits to the various parties of having a transcript;
- (E) the budgetary constraints of a state or federal administrative agency participating in the proceeding;
- (F) in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
- (G) any other factor which is relevant to a just and reasonable assessment of costs.⁹⁷

No party addressed the assessment of transcription costs.

Under the circumstances, and in considering the factors, it is recommended that TCEQ assess all of the transcript costs to Bosque. As the applicant, Bosque bore the burden of proof. It also participated in the hearing extensively; used the transcript throughout its briefing; and has the financial resources to bear the costs. While Protestants did make use of the transcript in their briefing, they are individuals that have already expended significant litigation costs in procuring legal counsel and an expert witness to represent their interests in this case. Protestants presented a reasonable case with extensive evidence and well-organized, rational legal arguments, and expressed valid concerns with the Application. Protestant raised reasonable issues with Bosque's case, and after full consideration of the evidence, those issues resolved in part in Protestants' favor. For all these reasons, it is just and reasonable for Bosque to bear all of the transcript costs.

⁹⁶ 30 TAC § 80.23(d)(2).

⁹⁷ 30 TAC § 80.23(d)(1).

E. Summary and Conclusion

The ALJ proposes that TCEQ adopt the attached order denying the Application and allocating all transcript costs to Bosque. Based on the reasons stated in this Proposal for Decision, the ALJ rejects all proposed Findings of Fact and Conclusions of Law not included in the proposed order.

SIGNED November 20, 2020.

A handwritten signature in black ink, appearing to read 'Joanne Summerhays', is written over a solid horizontal line.

**JOANNE SUMMERHAYS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Denying the Application of
BOSQUE SOLUTIONS LLC for Air Quality
Standard Permit Number 152013
TCEQ Docket No. 2019-0665-AIR
SOAH Docket No. 582-19-6473**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of Bosque Solutions LLC (Bosque) for Air Quality Standard Permit No. 152013 for a Permanent Concrete Batch Plant under Texas Health and Safety Code § 382.05195 and 30 Texas Administrative Code (TAC) § 116.611 (the CBP Standard Permit). Administrative Law Judge (ALJ) Joanne Summerhays of the State Office of Administrative Hearings (SOAH) presented a Proposal for Decision (PFD) recommending that the Commission deny the application. After considering the PFD, the Commission adopts the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

General and Procedural Findings

1. On May 23, 2018, Bosque submitted to TCEQ an application seeking a CBP Standard Permit or Permit to build and operate a concrete batch plant (Plant) at 7327 Gibson Cemetery Road, Mansfield, Tarrant County (Application).
2. The TCEQ Executive Director (ED) declared the Application administratively complete on May 29, 2018.
3. The Notice of Receipt and Intent to Obtain an Air Quality Permit was published in English on June 27, 2018, in the *Mansfield News Mirror* and in Spanish on June 25, 2018, in *La Prensa Comunidad*, which included notice that the ED determined that the Application met all of the requirements for the Permit. Both newspapers were of general circulation in Tarrant County, Texas.
4. The TCEQ Chief Clerk held a public meeting to discuss the Application on October 18, 2018, in Kennedale, Texas. The public comment period ended at the close of the public meeting.
5. The Chief Clerk mailed the ED's Decision and Response to Comments on April 1, 2019, and made no changes to the ED's preliminary determination that the Application met the applicable requirements for the CBP Standard Permit.

6. The deadline to request a contested case hearing was May 1, 2019. TCEQ received numerous timely comments, hearing requests, and requests for reconsideration.
7. TCEQ considered the Application at a regularly scheduled Commissioners' Agenda meeting on July 10, 2019, in which the Commissioners determined that there were affected persons under applicable law, and referred the application to SOAH for an evidentiary hearing on four specific issues.
8. The TCEQ Chief Clerk published notice that a preliminary hearing would be held in this case in Mansfield, Texas, on September 30, 2019.
9. On September 30, 2019, ALJ Joanne Summerhays convened the preliminary hearing, assumed SOAH jurisdiction over this case without objection, and admitted evidence and heard argument regarding various requests for party status.
10. At the preliminary hearing, the following were made parties:
 - a. Bosque;
 - b. ED; and
 - c. Office of Public Interest Counsel (OPIC).
11. By order issued October 10, 2019, the ALJ granted party status to Patricia Baines, Rene Luna, Vicki Polson, Misty Smitherman, Larry Smitherman, Sr., Lyle Lowery, Bob McClacherty, Jeffrey Alan Baines, Dennis Gene Martini, and Carolyn Kinney Martini (Protestants), and denied the remainder of the requests for party status. The ALJ aligned all protesting parties pursuant to 30 TAC § 80.109(c).
12. On December 20, 2019, Protestants filed a Motion for Summary Disposition. On that same date, Bosque filed a Motion for Summary Disposition. Protestants filed a response to Bosque's motion, and Bosque filed a response to Protestants' motion, on January 8, 2020. On the same date, the Executive Director filed a response to Protestants' motion.
13. After considering Bosque's motion and the responses, as well as the summary disposition evidence submitted, the ALJ determined Bosque's motion should be denied as fact issues remained.
14. On January 15, 2020, the ALJ held a prehearing conference to hear arguments regarding Protestants' motion.
15. After considering the motion, the responses, the arguments, and the applicable law, the ALJ issued a PFD on January 17, 2020, granting Protestants' motion for summary disposition and recommending that TCEQ deny the Application, or in the alternative, allow Bosque to amend its application to comply with Texas Health and Safety Code § 382.0516(b).
16. On April 8, 2020, the ALJ's PFD was considered by TCEQ Commissioners at an open Agenda meeting. After considering the PFD, oral arguments, and filings, the Commissioners determined to remand the matter to SOAH and directed the ALJ to move forward with the hearing on the merits in the case.

17. The parties submitted an Agreed Procedural Schedule on May 7, 2020, and the ALJ issued an amended scheduling order on May 15, 2020, setting the hearing on the merits on August 11-12, 2020.
18. On August 11-12, 2020, the hearing on the merits convened virtually by Zoom video conference, with ALJ Joanne Summerhays presiding. The record closed on September 25, 2020, with the submission of closing argument briefs and replies.
19. All parties appeared at the hearing on the merits.

General Description of the Proposed Plant, the Site, and the Process

20. Bosque proposes to construct and operate a permanent concrete batch plant (the Plant) with a maximum production rate of 300 cubic yards per hour not to exceed 6,000 cubic yards per day. Bosque has represented the Plant will operate up to 8,760 hours per year. The Plant is proposed to be located at 7327 Gibson Cemetery Road, Mansfield, Tarrant County.
21. Contaminants authorized under the Permit would include particulate matter including particulate matter with diameters of 10 microns (PM₁₀) or less and 2.5 microns (PM_{2.5}) or less, aggregate, sand, cement, and road dust.
22. The Plant will consist of a cement silo, hoppers, storage bins, stockpiles, and a central dust collector with a baghouse.
23. Stationary equipment, stockpiles, and vehicles used for the operation of the Plant will be located no less than 50 feet from the property line. Any stockpiles within 50 feet of the property line will be located within a three-walled bunker that extends two feet above the top of the stockpile. The central dust collector system exhaust will be located at least 100 feet from the property line.
24. Washed sand and aggregate will be unloaded into stockpiles for storage after delivery by truck. The sand and aggregate will be transported from the stockpiles and loaded into the feed hopper with a front-end loader and then transferred to the radial stacker, which is used to convey it to the aggregate bins. The sand and aggregate will then fall into weigh bins where measured amounts will be transferred to a conveyor and then to the mixer trucks at the batch point. The loading of the mixer trucks creates loading emissions not captured by the central dust collector.
25. Bulk cement and flyash will be delivered by truck and pneumatically loaded into the cement silo. From there, they will be transferred to the weigh batcher for measurement. The amount needed for the concrete mix will then be transferred to the batch point where they will be mixed with sand and aggregate and water by the mixer trucks.
26. Emissions from the weigh hopper, the batch point and the silo will be collected by a dust collector and routed to the central baghouse. The batch point will be protected by a three-sided curtain or equivalent dust control technology that extends below the mixer truck -receiving tunnel and utilizes a suction shroud vented to the central dust collection system.

27. Bosque will use watering, road paving and cleaning, and stockpile spraying to control emissions.

Bosque's Application for Air Quality Standard Permit for a Concrete Batch Plant

28. An air quality standard permit authorizes the construction or modification of facilities that are similar in operations, processes, and emissions.
29. The TCEQ originally issued the CBP Standard Permit in 2001 and amended it in 2003 and 2012.
30. Bosque seeks authorization under the most recent revision to the CBP Standard Permit, which became effective December 21, 2012, for a permanent concrete batch plant.
31. With the Application, Bosque submitted a completed Form PI-1S, Registrations for Air Standard Permit; a TCEQ Core Data Form; Table 11, Fabric Filters; Table 20, Concrete Batch Plants; a CBP Standard Permit Registration checklist; and the standard permit fee.
32. The TCEQ Air Permits Division developed the CBP Standard Permit Checklist to allow the Air Permits Division to confirm that a proposed concrete batch plant would be constructed and operated in accordance with the requirements of the CBP Standard Permit.
33. Bosque's proposed Plant, if permitted, would be constructed within the City of Fort Worth's extra-territorial jurisdiction (ETJ).
34. Bosque incorrectly answered "no" to the CPB Standard Permit Registration question whether the Plant would be built in the ETJ of any city.
35. TCEQ failed to provide the statutorily required notice to the presiding officer of Fort Worth.
36. In the registration for its CPB Standard Permit, Bosque checked the box "N/A" (not applicable) in response to the following question: "Did you demonstrate that the emission limitations in 30 TAC Sections 106.261 and 106.262 are met?"
37. Bosque did not demonstrate that the Application met the emissions limitations in 30 TAC §§ 106.261 and .262.
38. The Application includes a description of the Plant, including a process description, a process flow diagram, and a description of the equipment to be installed.
39. The Application indicates that the maximum production rate at the Plant will be 300 cubic yards per hour and 6,000 cubic yards per day, and the maximum hours of operation will be 24 hours per day and seven days per week.
40. The sand and aggregate stockpiles used for operation of the Plant will be no greater than five acres in size, and there will be one silo in the Plant.
41. The plot plan in the Application shows where the sand and aggregate stockpiles will be located at the Plant.

42. Bosque has not started construction or operation of the Plant.
43. Bosque will maintain the central baghouse fabric filters and collection systems by (i) operating them properly with no tears or leaks, (ii) using fabric filter systems designed to meet a minimum control efficiency of at least 99.5 percent at particle sizes of 2.5 microns and smaller, and (iii) ensuring all filter systems meet visible emissions performance standards.
44. When transferring cement or fly ash, Bosque will (i) ensure that conveying systems to and from the storage silos are properly operated, remain totally closed, and are maintained without tears or leaks, and (ii) keep a standard of having no visible emissions for more than 30 seconds in any six-minute period from the conveying system during cement/fly ash storage silo filling.
45. Bosque will (i) install an automatic shut-off or warning device on each bulk storage silo; (ii) ensure that each automatic shut-off device shuts down loading operations prior to reaching capacity; (iii) ensure the warning device alerts operators in time to prevent adverse impact on the pollution abatement equipment or other parts of the loading operation; (iv) prevent particle build-up on visible warning devices; and (v) test warning devices monthly during operations.
46. Bosque will ensure visible emissions do not leave the Plant and will perform and record observations for visible emissions quarterly, during normal operations, and on the downwind property line for a minimum of six minutes.
47. If excess visible emissions are observed, Bosque will take action to eliminate the excessive visible emissions and document the corrective action.
48. Bosque will locate the Plant at least 550 feet from any crushing plant or hot mix asphalt plant.
49. Bosque will not use concrete additives at the Plant that emit volatile organic compounds.
50. Bosque will not use stationary internal combustion engines for electrical power or equipment operations at the Plant.
51. Bosque will authorize any maintenance activities at the Plant under a separate authorization, unless the maintenance activity qualifies as a *de minimis* facility or source under 30 TAC § 116.119.
52. Bosque will limit production at the Plant to 300 cubic yards in any one hour and 6,000 cubic yards per day.
53. Any stationary equipment used for operation of the Plant will be kept at least 50 feet from every property line.
54. The sand and aggregate stockpiles used for the operation of the Plant will be at least 50 feet from every property line.

55. Vehicles used for the operation of the Plant (except for incidental traffic and the entrance and exit to the site) will be kept at least 50 feet from every property line.
56. The Application included an emission calculation for the Plant that provided emissions on hourly and tons-per-year from the stockpiles, all material handling drop points, and the central baghouse of all PM.
57. The Application did not specify the amount of cement dust or crystalline silica that would be included in the emissions.
58. Bosque will maintain written records at the Plant of the following: emission events; scheduled maintenance, startup and shutdown; production rates; repairs and maintenance of abatement systems; Material Safety Data Sheets for all additives and chemicals used; road cleaning, application of road dust control, or road maintenance for dust control; stockpile dust suppression; silo warning device tests; and quarterly visible emissions observations and any corrective actions required to control excess visible emissions.
59. Bosque will keep the written records at the Plant for a rolling 24-month period and available to TCEQ personnel or any air pollution control program having jurisdiction.
60. Bosque has a compliance history classification of “unclassified.”
61. To the extent the Application contains inconsistent representations, the most restrictive representation is enforceable against Bosque.

Protectiveness Issue

62. A CBP Standard Permit authorizes the operation of concrete batch plants that meet all the conditions set out in the Permit, including the emissions from the stockpiles, the drop points, and the silos. The conditions of the Permit are designed to be protective of public health.
63. The CBP Standard Permit requires concrete batch plants to demonstrate compliance with the effective screening levels (ESLs) set out in 30 TAC § 106.261 and .262(a)(2).
64. Using a control factor of 70, the Application projects that 13.57 tons per year of PM will be emitted from the Plant. The emissions will include cement dust, sand, and aggregate.
65. Sand contains some amount of crystalline silica, which is a known carcinogen.
66. Crystalline silica is not listed and referenced in 30 TAC § 106.262(a)(2). However, the rule contains the following statement to account for chemicals that are not listed: “NOTE: The time weighted average (TWA) Threshold Limit Value (TLV) published by the American Conference of Governmental Industrial Hygienists (ACGIH), in its TLVs and BEIs guide (1997 Edition) shall be used for compounds not included in the table.”
67. According to the 1997 version of the ACGIH’s TLVs and BEIs guide, the limit value for crystalline silica is 0.1 milligrams per cubic meter (mg/m³).

68. Emissions of a chemical with a limit value of less than 200 mg/m³ are prohibited by 30 TAC § 106.261(a)(3).
69. Bosque failed to demonstrate that emissions from the sand used at the Plant would meet the ESL for crystalline silica required under 30 TAC §§ 106.261(a)(3) and 106.262(a)(2).
70. Emissions of crystalline silica pose a danger to human health and safety; therefore, Bosque has failed to demonstrate that the Application is protective of human health and safety.
71. Under 30 TAC § 106.261(A)(2), a concrete batch plant may emit no more than ten tons per year of cement dust.
72. The term “cement dust” is not defined in TCEQ’s rules or guidelines.
73. Bosque failed to specify in the Application the amount of cement dust that would be included in the total 13.57 tons per year of emissions.
74. Cement is only one component of the concrete mix from which the total emissions derive; therefore, the amount of cement dust emissions will be less than the total emissions.
75. Using the emissions control mechanisms proposed in the Application, total emissions will effectively be reduced by a factor of 98.5 percent, not the 70 percent factor set out in the Application. Applying the 98.5 percent factor rather than the more conservative 70 percent factor, total emissions at the Plant would be reduced below ten tons per year, which would meet the TCEQ requirement regardless of how cement dust is defined.
76. The evidence demonstrated that cement dust emissions at the Plant would not be a risk to human health and safety.

Air Quality and General Welfare Issues

77. Bosque demonstrated that the Plant would (1) not negatively affect air quality, other than the effects of emissions of crystalline silica, or (2) fail to be protective of general welfare, including animals, vegetation and the environment. Protestants failed to rebut this showing.
78. The Application demonstrates that the Plant’s emissions will meet National Ambient Air Quality Standards secondary standard, which is set to be protective of general welfare.

Nuisance Dust Issue

79. There are 14 homes within one-quarter mile of the Plant that could be affected by the emissions from the Plant.
80. If Bosque constructs and operates the Plant consistent with the maximum operational scenario represented in the Application and fully complies with the CBP Standard Permit, the Plant should not have an adverse effect on nearby residents’ enjoyment of their physical property.

Transcript Costs

81. As the applicant, Bosque bore the burden of proof. It also participated in the hearing extensively; used the transcript throughout its briefing; and has the financial resources to bear the costs.
82. Protestants are individuals with fewer financial resources than Bosque.
83. Protestants will not recoup their litigation costs regardless of whether the Application is granted or denied.
84. While Protestants did make use of the transcript in their briefing, they are individuals that have already expended significant litigation costs in procuring legal counsel and an expert witness to represent their interests in this case.
85. Protestants presented a reasonable case with extensive evidence and well-organized, rational legal arguments, and expressed valid concerns with the Application.
86. Protestant raised reasonable issues with Bosque's case, and after full consideration of the evidence, those issues resolved in part in Protestants' favor.
87. It is just and reasonable for Bosque to bear all of the transcript costs.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction to consider Bosque's application pursuant to Texas Health and Safety Code § 382.05195.
2. SOAH has jurisdiction to conduct a hearing and to prepare a Proposal for Decision in this matter. Tex. Gov't Code § 2003.047.
3. Notice was provided pursuant to Texas Health and Safety Code § 382.056, Texas Government Code §§ 2001.051 and 2001.052, and 30 TAC § 39.601, *et seq.*
4. The filing of the Application, the Draft Permit, the preliminary decisions issued by the ED, and other supporting documentation in the administrative record of the Application established a prima facie case that: (i) the Draft Permit meets all state and federal legal and technical requirements; and (ii) the permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property. Tex. Gov't Code § 2003.047(i-1).
5. The applicant retains the burden of proof on the issues regarding the sufficiency of the Application and compliance with the necessary statutory and regulatory requirements. 30 TAC § 80.17(a), (c).
6. A party protesting the application may rebut the prima facie demonstration of compliance by presenting evidence (1) that relates to a referred issue; and (2) demonstrates that one or

more provisions in the draft permit violate a specifically applicable state or federal requirement. Tex. Gov't Code § 2003.047(i-2); 30 TAC §§ 80.17(c)(2), .117(c)(3).

7. Standard permit application representations with regard to construction plans, operating procedures, 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. 30 TAC § 116.615(2).
8. It is unlawful for any person to vary from standard permit application representations if the change will affect that person's right to claim the standard permit. 30 TAC § 116.615(2).
9. TCEQ established the CBP Standard Permit pursuant to 30 TAC § 116.602.
10. TCEQ may only grant a permit to construct a facility if it finds no indication that the emissions from the facility will contravene the intent of the Texas Clean Air Act (TCAA), including protection of the public's health and physical property. Tex. Health & Safety Code § 382.0518(b).
11. An Application for a standard permit must meet the requirements set out in the standard permit unless otherwise specified by the standard permit. 30 TAC § 116.610(a)(1).
12. The CBP Standard Permit required the Application to demonstrate that it meets the emissions limitations in 30 TAC § 106.261 and, by reference, § 106.262.
13. Bosque failed to demonstrate that the Plant will be constructed and operated in accordance with the emissions limitations of 30 TAC § 106.261 and, by reference, § 106.262.
14. Based on the above Findings of Fact and Conclusions of Law, the Application fails to meet the requirements applicable to the Air Quality Standard Permit for Concrete Batch Plants. 30 TAC § 116.610.
15. Notice of the Application was not provided to the presiding officer of the City of Fort Worth's governing body in accordance with Texas Health and Safety Code § 382.0516(b).
16. The emissions from the Plant will not comply with all TCEQ rules and with the intent of the TCAA, including the protection of public health and physical property.
17. The application for Air Quality Standard Permit Registration No. 152013 provides insufficient information, fails to satisfy TCEQ requirements, and should not be approved.
18. The TCEQ's rules provide a list of factors to be considered when determining a proper allocation of transcript costs. 30 TAC § 80.23(d).
19. Based on the above Findings of Fact and the factors established in 30 TAC § 80.23(d), Bosque should pay all of the transcription costs for the hearing on the merits.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. The application of Bosque Solutions LLC for registration to use the CBP Standard Permit is denied and the attached permit is not issued.
2. Bosque Solutions LLC shall pay all of the transcript costs.
3. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
4. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Texas Government Code § 2001.144.
5. The Commission's Chief Clerk shall forward a copy of this Order to all Parties.
6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

SIGNED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**Bryan W. Shaw, Ph.D., Chairman
For the Commission**