

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 24, 2009

CHIEF CLERKS OFFICE

2009 APR 24 PM 4: 20

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Office of the Chief Clerk
ATTN: Agenda Docket Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC 105
Austin, Texas 78711-3087

Re: Executive Director's Response to Hearing Request on Potter Ready Mix, LLC, Standard Permit No. 52168L019; TCEQ Docket No. 2009-0408-AIR

Dear Ms. Castañuela:

Enclosed for filing is the Executive Director's Response to Hearing Request in the above entitled matter.

If you have any questions, please do not hesitate to call me at extension 0891.

Sincerely,

A handwritten signature in black ink, appearing to read "Amy L. Browning".

Amy L. Browning
Staff Attorney
Environmental Law Division

Cc: mailing list

Enclosure

TCEQ AIR QUALITY STANDARD PERMIT NUMBER 52168L0009 APR 24 PM 4: 20
TCEQ DOCKET NUMBER 2009-0408-AIR

CHIEF CLERKS OFFICE

APPLICATION BY	§	BEFORE THE
	§	
Potter Ready Mix LLC	§	TEXAS COMMISSION ON
Concrete Batch Plant	§	
Southlake, Tarrant County	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this response (Response) to the requests for a contested case hearing submitted by persons listed herein. The Texas Clean Air Act (TCAA) §382.056(n) requires the commission to consider hearing requests in accordance with the procedures provided in Tex. Water Code §5.556.¹ This statute is implemented through the rules in 30 Texas Administrative Code (TAC) Chapter 55, Subchapter F.

A map showing the location of the site for the proposed facility is included with this response and has been provided to all persons on the attached mailing list. In addition, a current compliance history report, technical review summary, and draft permit prepared by the ED's staff have been filed with the TCEQ's Office of Chief Clerk for the commission's consideration. Finally, the ED's Response to Public Comments (RTC), which was mailed by the chief clerk to all persons on the mailing list, is on file with the chief clerk for the commission's consideration.

I. Application Request and Background Information

Potter Ready Mix LLC has applied to the TCEQ for a Standard Permit under Texas Clean Air Act (TCAA), §382.05195. This permit will authorize the applicant to construct a temporary concrete batch plant. The facility is located on the north side of SR 114 west of North Kimball Avenue and east of North Carroll Avenue Southlake, Tarrant County. Contaminants authorized under this permit include particulate matter (including but not limited to) aggregate, cement, road dust, and particulate matter less than 10 microns in diameter (PM₁₀). It appears the Applicant is not delinquent on any administrative penalty payments to the TCEQ. The TCEQ Enforcement Database was searched and no enforcement activities were found that are inconsistent with the compliance history.

The permit application was received on September 29, 2008, and declared administratively complete on October 7, 2008. The Notice of Receipt and Intent to Obtain an Air Quality Permit (public notice) for this permit application was published on October 15, 2008, in the *Fort Worth Star Telegram*. A

¹ Statutes cited in this response may be viewed online at www.capitol.state.tx.us/statutes/statutes.html. Relevant statutes are found primarily in the Texas Health and Safety Code and the Texas Water Code. The rules in the Texas Administrative Code may be viewed online at www.sos.state.tx.us/tac/index.shtml, or follow the "Rules, Policy & Legislation" link on the TCEQ website at www.tceq.state.tx.us.

public meeting was held on January 22, 2009 in Southlake. The public comment period ended on January 22, 2009. The ED's RTC was mailed on February 19, 2009 to all interested persons, including those who asked to be placed on the mailing list for this application and those who submitted comment or requests for contested case hearing. The cover letter attached to the RTC included information about making requests for contested case hearing or for reconsideration of the ED's decision.² The letter also explained hearing requesters should specify any of the ED's responses to comments they dispute and the factual basis of the dispute, in addition to listing any disputed issues of law or policy.

The TCEQ received timely hearing requests during the public comment period that were not withdrawn from the following persons: Danny & Gina Blaser, Scott L. Haire, Gerald & Karen Hodges, Keith A. & Barbara E. Houser, Boyd & Susan Herndon, Jeff Carl Pannell, Ann & Phillip Swanson, Marvin & Fabienne Williams, and Alex & Karen Zaal.

II. Applicable Law

The commission must assess the timeliness and form of the hearing requests, as discussed above. The form requirements are set forth in 30 TAC § 55.201(d):

- (d) A hearing request must substantially comply with the following:
- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
 - (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requester's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requester believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
 - (3) request a contested case hearing;
 - (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requester should, to the extent possible, specify any of the executive director's responses to comments that the requester disputes and the factual basis of the dispute and list any disputed issues of law or policy; and

² See TCEQ rules at Chapter 55, Subchapter F of Title 30 of the Texas Administrative Code. Procedural rules for public input to the permit process are found primarily in Chapters 39, 50, 55 and 80 of Title 30 of the Code.

(5) provide any other information specified in the public notice of application.

The next necessary determination is whether the requests were filed by “affected persons” as defined by Tex. Water Code § 5.115, implemented in commission rule 30 TAC § 55.203. Under 30 TAC § 55.203, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Local governments with authority under state law over issues raised by the application receive affected person status under 30 TAC § 55.203(b).

In determining whether a person is affected, 30 TAC § 55.203(c) requires all factors be considered, including, but not limited to, the following:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

Additionally, this application is for registration for the Standard Permit for Temporary Concrete Batch Plants. Hearing requests on a concrete batch plant standard permit are considered under TCAA § 382.058(c), which states that “only those persons actually residing in a permanent residence within 440 yards of the proposed plant may request a hearing ... as a person who may be affected.”

If the commission determines a hearing request is timely and fulfills the requirements for proper form and the hearing requester is an affected person, the commission must apply a three-part test to the issues raised in the matter to determine if any of the issues should be referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing. The three-part test in 30 TAC § 50.115(c) is as follows:

- (1) The issue must involve a disputed question of fact;
- (2) The issue must have been raised during the public comment period; and
- (3) The issue must be relevant and material to the decision on the application.

The law applicable to the proposed facility may generally be summarized as follows. A person who owns or operates a facility or facilities that will emit air contaminants is required to obtain authorization from the commission prior to the construction and operation of the facility or facilities.³ Thus, the location and operation of the proposed facility requires authorization under the TCAA. Permit conditions of general applicability must be in rules adopted by the commission.⁴ Those rules are found in 30 TAC Chapter 116. In addition, a person is prohibited from emitting air contaminants or performing any activity that violates the TCAA or any commission rule or order, or that causes or contributes to a condition of air pollution.⁵ The relevant rules regarding air emissions are found in 30 TAC Chapters 101 and 111-118. In addition, the commission has the authority to establish and enforce permit conditions consistent with this chapter.⁶ The materials accompanying this response list and reference permit conditions and operational requirements and limitations applicable to this proposed facility.

III. Analysis of Hearing Requests

A. Were the requests for a contested case hearing in this matter timely and in proper form?

The hearing requests were submitted during the public comment period. Furthermore, the ED has determined the hearing requests of Danny & Gina Blaser, Scott L. Haire, Gerald & Karen Hodges, Keith A. & Barbara E. Houser, Jeff Carl Pannell, Ann & Phillip Swanson, Marvin & Fabienne Williams, and Alex & Karen Zaal substantially comply with all of the requirements for form in 30 TAC § 55.201(d).

The ED has determined the hearing requests of Boyd and Susan Herndon do not meet the requirements for form in 30 TAC § 55.201(d). The hearing requestors Boyd & Susan Herndon state only interests that are common to the general public, and therefore have not stated any "personal justiciable interest" under 30 TAC § 55.203. Without a "personal justiciable interest," these hearing requestors are not considered to be "affected persons" as defined by 30 TAC § 55.203, and therefore do not meet the requirements of a person able to request a contested case hearing according to 30 TAC § 55.201.

The ED addressed all public comments in this matter by providing responses in the RTC. The cover letter from the Office of the Chief Clerk attached to the RTC states that requesters should, to the extent possible, specify any of the ED's responses in the RTC that the requesters dispute and the factual basis of the dispute, and list any disputed issues of law or policy.⁷ In the absence of any response by the hearing requesters within the thirty-day period after the RTC was mailed, the ED

³ TEXAS HEALTH & SAFETY CODE § 382.0518

⁴ TEXAS HEALTH & SAFETY CODE § 382.0513

⁵ TEXAS HEALTH & SAFETY CODE § 382.085

⁶ TEXAS HEALTH & SAFETY CODE § 382.0513

⁷ See 30 TAC § 55.201(d)(4).

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

Potter Ready Mix LLC, Standard Permit No. 52168L019

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cannot determine or speculate whether the hearing requesters continue to dispute issues of fact, or whether there are any outstanding issues of law or policy. The ED nevertheless has evaluated the merits of the requests before action is taken regarding this application.

B. Are those who requested a contested case hearing in this matter affected persons?

Danny & Gina Blaser, Scott L. Haire, Gerald & Karen Hodges, Keith A. & Barbara E. Houser, Jeff Carl Pannell, Ann & Phillip Swanson, Marvin & Fabienne Williams, and Alex & Karen Zaal are hearing requesters who have all stated a "personal justiciable interest" in the permit, by stating that they believe that their health would be adversely affected by dust from the proposed plant. All of these hearing requesters, however, reside more than 440 yards from the proposed facility. For a concrete batch plant, TCAA § 382.058(c) requires residence within 440 yards of the proposed plant for affected person status. As indicated on the included map, none of the hearing requesters are within the 440 distance requirement. The requesters' failure to meet the distance requirement of TCAA § 382.058(c) is an absolute bar to affected person status. Therefore none of these hearing requesters are affected persons able to request a contested case hearing according to 30 TAC § 55.201.

The hearing requesters Boyd & Susan Herndon, in addition to residing greater than 440 yards from the proposed facility, state only interests that are common to the general public, and therefore have not stated any "personal justiciable interest" under 30 TAC § 55.203. Without a "personal justiciable interest," these hearing requesters are not considered to be "affected persons" as defined by 30 TAC § 55.203, and therefore do not meet the requirements of a person able to request a contested case hearing according to 30 TAC § 55.201. Therefore, TCAA § 382.058(c) also prevents these requesters from having affected person status.

C. Which issues in this matter should be referred to SOAH for hearing?

If the commission determines any of the hearing requests in this matter are timely and in proper form, and some or all of the hearing requesters are affected persons, the commission must apply the three-part test discussed in Section II to the issues raised in this matter to determine if any of the issues should be referred to SOAH for a contested case hearing. The three-part test asks whether the issues involve disputed questions of fact, whether the issues were raised during the public comment period, and whether the issues are relevant and material to the decision on the permit application, in order to refer them to SOAH. However, none of the persons requesting a hearing on this permit are affected persons as a matter of law under TCAA § 382.058(c) because they reside more than 440 yards from the proposed facility. Therefore, there are no hearing requests that meet the necessary requirements for the commission to consider for referral to SOAH.

IV. Executive Director's Recommendation

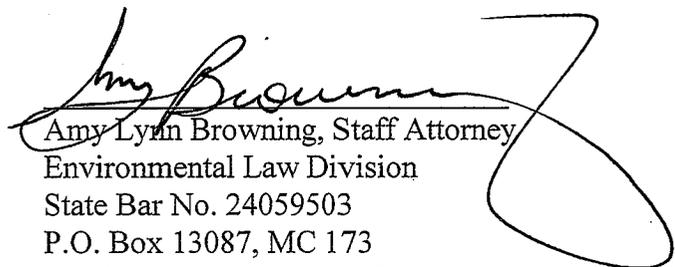
The Executive Director respectfully recommends that the commission deny all requests for a contested case hearing for this permit as a matter of law.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G., Executive Director

Robert Martinez, Director
Environmental Law Division

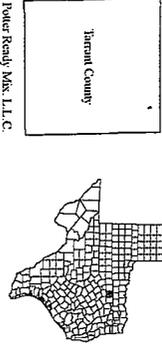
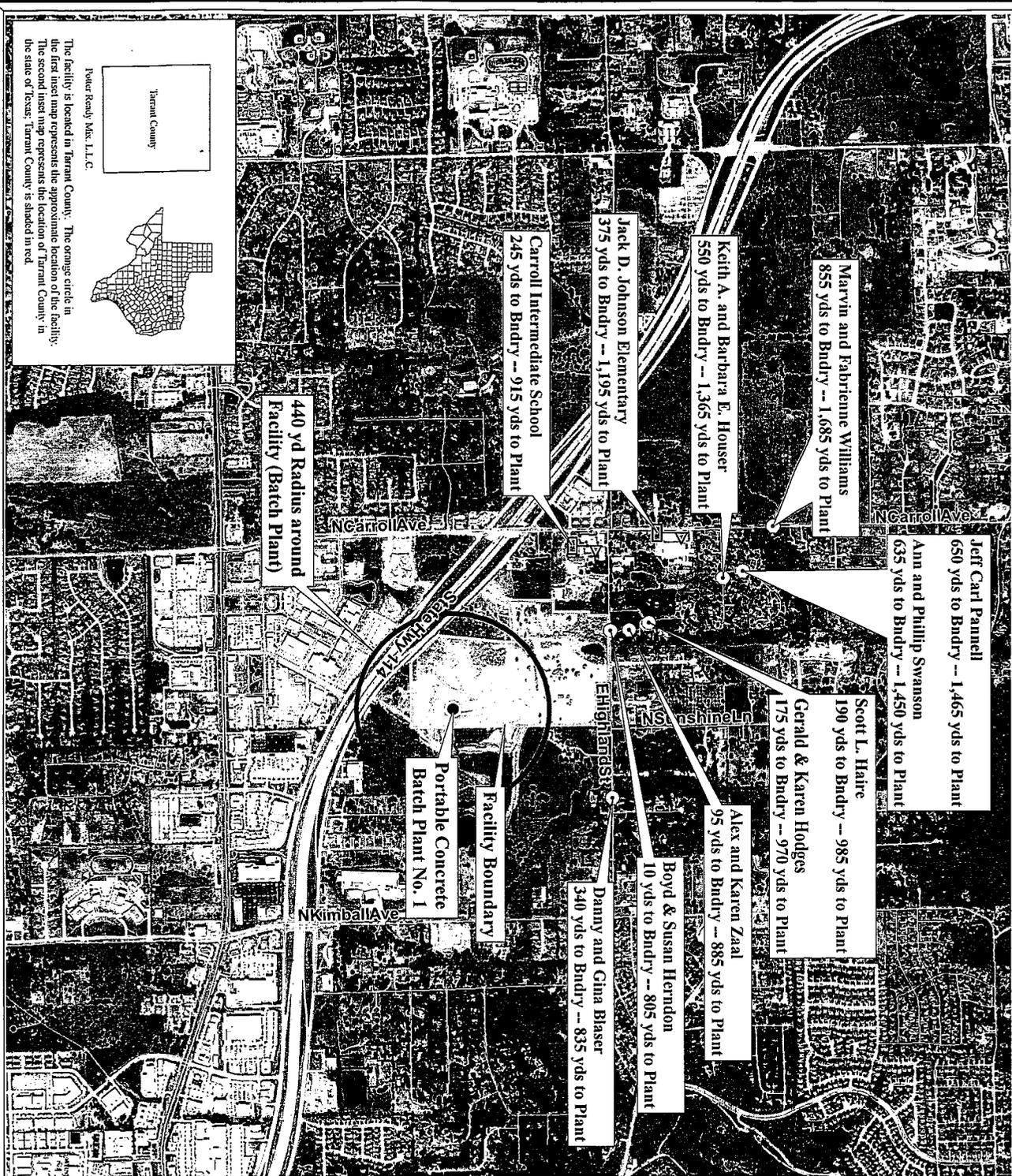

Amy Lynn Browning, Staff Attorney
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REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Map of Hearing Requestor Locations in Relation to Potter Ready Mix's Proposed
Temporary Concrete Batch Plant, Permit No. 52168L019

Potter Ready Mix L.L.C. Docket No. 2009-0408-AIR

Hearing Requestors and Local Schools



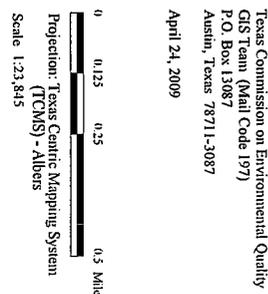
The facility is located in Tarrant County. The orange circle in the first inset map represents the approximate location of the facility. The second inset map represents the location of Tarrant County in the state of Texas. Tarrant County is shaded in red.

Protecting Texas by Reducing and Preventing Pollution

TCEQ

Texas Commission on Environmental Quality
GIS Team (Mail Code 197)
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Austin, Texas 78711-3087

April 24, 2009



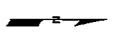
- Legend**
- School
 - Hearing Requestor (physical address)
 - Concrete Batch Plant
 - Facility Property Boundary
 - 440-Yard Radius (around batch plant)

Source: This map was requested by TCEQ's Office of Legal Services (OLS). The location of the facility was provided by OLS. The property boundaries depicted were manually digitized and approximated (survey data not available) using paper maps provided by OLS.

Hearing Requestor addresses were provided by OLS and geocoded using Tele Atlas Streets 2006-2007 geodatabase technology.

Measurements provided are estimates and have not been measured with precise ground-based instrumentation.

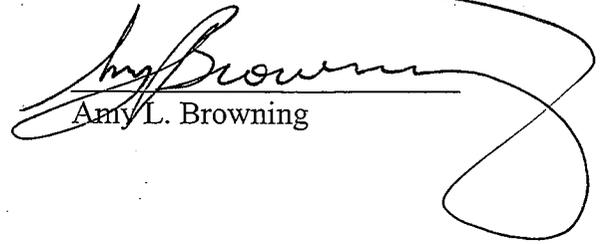
The DOQQ (Digital Orthophoto Quarter Quadrangle) aerial imagery was obtained from the USDA Farm Service Agency's National Agriculture Imagery Program (NAIP). The imagery is from 2008 at one-meter resolution.



This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This map was not generated by a licensed surveyor, and is intended for illustrative purposes only. No claims are made to the accuracy or completeness of the data or to its suitability for a particular use. For more information concerning this map, contact the Information Resource Division at (512) 239-1800.

CERTIFICATE OF SERVICE

On the 24th day of April, 2009, a true and correct copy of the foregoing instrument was served on all persons on the attached mailing list by the undersigned via deposit into the U.S. Mail, inter-agency mail, facsimile, or hand delivery.



Amy L. Browning

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2009 APR 24 PM 4: 21

CHIEF CLERKS OFFICE

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DOCKET NO. 2009-0408-AIR; PERMIT NO. 52168L019

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