

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 24, 2013

Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC 105
Austin, Texas 78711-3087

Re: Executive Director's Response to Hearing Request Brief for Michael Bradley
Smith, Concrete Batch Plant Standard Permit Registration No. 51836
TCEQ Docket No. 2013-0854-AIR

Dear Ms. Bohac:

Enclosed please find a copy of the Executive Director's Response to Hearing Requests brief for the above referenced item. If you have any questions, please do not hesitate to call me at 512-239-0891.

Sincerely,

A handwritten signature in cursive script that reads "Amy L. Browning".

Amy L. Browning
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

**TCEQ AIR QUALITY STANDARD PERMIT FOR CONCRETE BATCH PLANT
RENEWAL REGISTRATION 51836
DOCKET NO. 2013-0854-AIR**

APPLICATION BY	§	BEFORE THE TEXAS
MICHAEL BRADLEY SMITH	§	
CONCRETE BATCH PLANT	§	COMMISSION ON
HUNTSVILLE, WALKER 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 current compliance history report and technical review summary prepared by the ED's staff will be filed with the TCEQ's Office of Chief Clerk for the Commission's consideration. In addition, 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

Michael Bradley Smith has applied to the TCEQ for renewal of a registration of a Standard Permit under Texas Clean Air Act (TCAA), §382.05195. This permit will authorize the continued operation of an existing permanent concrete batch plant. The plant is located at 834 Farm-to-Market Road 2296, Huntsville, Walker County. Contaminants authorized under this permit include dust, aggregate, cement, and particulate matter (PM) less than or equal to 10 and 2.5 micrometers in aerodynamic diameter (PM₁₀ and PM_{2.5}, respectively).

This permit application is for the renewal of Air Quality Standard Permit for Concrete Batch Plant registration 51836. The permit application was received on October 9, 2012, and declared administratively complete on December 28, 2012. The Notice of Receipt and Intent to Obtain an Air Quality Permit (NORI or public notice) for this permit application was published on January 25, 2013 in *The Huntsville Item*. The public comment period ended on February 26, 2013.

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.

The Office of Chief Clerk received timely hearing requests from the following: Donald C. Brown, Kimberly Brown, Sharon A. Brown, James Bryan, Judy Bryan, Barbara Humphrey, Richard Humphrey, Michael Robinson, Duane Walden, James E. White, Toniual White, Jennifer Williams, Sabrina Williams, and Tara Williams.

The ED's Response to Comments (RTC) was filed with the Chief Clerk on May 1, 2013, and mailed 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 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.

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

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

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

- 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, and 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.

In addition to the requirements noted above regarding affected person status, in accordance with 30 TAC §55.205(a), a group or association may request a contested case hearing only if the group or association meets all of the following requirements:

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

Michael Bradley Smith, Standard Permit Registration No. 51836; Docket No. 2013-0854-AIR

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- 1) One or more members of the group or association would otherwise have standing to request a hearing in their own right;
- 2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- 3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.³

Additionally, this application is for a renewal of a registration for the Standard Permit for 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: The issue must involve a disputed question of fact;

- 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 this 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.⁴ 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.⁵ 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 air pollution.⁶ The relevant rules regarding air emissions are found in 30 TAC Chapters 101 and 111-118. In addition, the Commission has the

³ 30 TAC §55.205(a)

⁴ TEXAS HEALTH & SAFETY CODE §382.0518

⁵ TEXAS HEALTH & SAFETY CODE §382.0513

⁶ TEXAS HEALTH & SAFETY CODE §382.085 (a) and (b).

authority to establish and enforce permit conditions consistent with this chapter.⁷ 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

Applicant is seeking a renewal that would not result in an increase in allowable emissions and will not result in an emission of an air contaminant not previously emitted. Texas Health & Safety Code (THSC) §382.056(g) states, "The commission may not seek further comment or hold a public hearing...in response to a request for a public hearing on an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted."⁸ Therefore, the commission should deny the hearing requests as a matter of law and approve the renewal of Applicant's Permit No. 51836.

Although this renewal application will not result in an increase in allowable emissions and will not result in an emission of an air contaminant not previously emitted, THSC §382.056(o) states: "Notwithstanding other provisions of this chapter, the commission may hold a hearing on a permit amendment, modification, or renewal if the commission determines that the application involves a facility for which the applicant's compliance history is in the lowest classification under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections."⁹ The commission adopted 30 TAC Chapter 60 to evaluate compliance history. The lowest classification under the Texas Water Code §§5.753 and 5.754 and 30 TAC §60.2 is an "unsatisfactory performer." Under 30 TAC §60.3(a)(3)(B), the TCEQ may hold a hearing on an air permit renewal if the site is classified as an unsatisfactory performer. The compliance history for the company and the site is reviewed for the five-year period prior to the date the permit application was received by the ED. Applicant's company and this site have a rating of "unclassifiable" and not "unsatisfactory" performers according to 30 TAC Chapter 60. Therefore, a hearing should not be granted under THSC §382.056(o) based on the compliance history of Applicant.

⁷ TEXAS HEALTH & SAFETY CODE §382.0513

⁸ See also 30 TAC §55.201(i)(3)(C) (Renewals of air applications that "would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted" are applications for which there is no right to a contested case hearing).

⁹ See also 30 TAC §55.201(i)(3)(C) (stating the commission may hold a hearing if the application "involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations").

IV. Conclusion

The renewal of this permit would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. Under these circumstances, THSC §382.056(g) directs the commission to “not seek further comment or hold a public hearing.” Because consideration of hearing requests on a “no increase” renewal application is governed by THSC §382.056(g) and (o), this Response does not include an analysis of the individual hearing requests. Accordingly, the ED respectfully recommends the commission deny the hearing request as a matter of law and approve the renewal of Applicant’s Permit No. 51836.

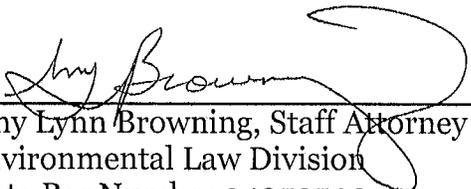
Respectfully submitted,

Texas Commission on Environmental Quality

Zak Covar, Executive Director

Caroline Sweeney, Deputy Director
Office of Legal Services

Robert Martinez, Division Director
Environmental Law Division



Amy Lynn Browning, Staff Attorney
Environmental Law Division
State Bar Number 24059503
PO Box 13087, MC 173
Austin, Texas 78711-3087
(512) 239-0891

Representing the Executive Director of the
Texas Commission on Environmental Quality

Response to Hearing Request - Permit No. 51836 - Michael Bradley Smith

Map Requested by TCEQ Office of Legal Services for Commissioners' Agenda



Texas Commission on Environmental Quality
GIS Team (Mail Code 197)
P.O. Box 13087
Austin, Texas 78711-3087

May 7, 2013

0 250 500 1,000 Feet

Projection: Texas Statewide Mapping System (TSMS)

Scale 1:8,000

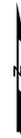
Legend

- Facility Boundary
- Approx. Requestor Location

Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestor information from the requestor. The vector data are U.S. Census Bureau 1992 TIGER/Line Data (1:100,000). The background of this map is a one-half meter photograph from the 2008 Texas Orthoimagery Project. The requestor locations were located by using MapQuest program.

This map depicts the following:

- (1) The approximate location of the facility. This is labeled "Facility".
- (2) Polygon and arrow depicting half-mile radius. This is labeled "1/2 Mile Radius".



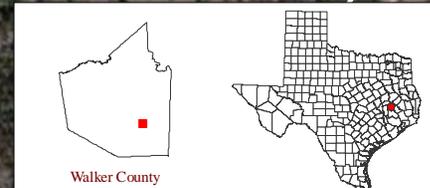
This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries. For more information concerning this map, contact the Information Resource Division at (512) 239-0800.

M McDonough CRF-398624



Requestors

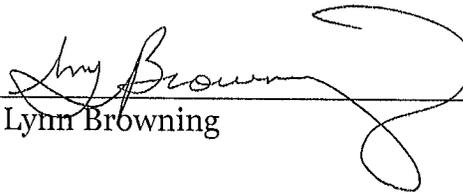
- 1 - Sharon, Donald & Kimberly Brown
- 2 - Sabrina Williams, Duane Walden & Michael Robinson
- 3 - James & Judy Bryan
- 4 - Jennifer & Tara Williams
- 5 - Toniual & James E. White
- 6 - Richard & Barbara Humphrey



The facility is located in Walker County. The red square in the first inset map represents the approximate location of the facility. The second inset map represents the location of Walker County in the state of Texas; Walker County is shaded in red.

CERTIFICATE OF SERVICE

On the 24 day of May 2013, 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, electronic mail, or hand delivery.



Amy Lynn Browning

MAILING LIST
MICHAEL BRADLEY SMITH
DOCKET NO. 2013-0854-AIR; PERMIT NO. 51836, ACCOUNT NO. 960018W

FOR THE APPLICANT:

Michael Bradley Smith
P.O. Box 149
Dodge, Texas 77334-0149
Tel: (936) 291-7680
Fax: (936) 291-1877

Monique Wells
CIC Environmental, LLC
P.O. Box 151000
Austin, Texas 78715-1000
Tel: (512) 292-4314
Fax: (512) 410-3010

FOR THE EXECUTIVE DIRECTOR
via electronic mail:

Amy L. Browning, Staff Attorney
Texas Commission on Environmental
Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

Michael D. Gould, Technical Staff
Texas Commission on Environmental
Quality
Air Permits Division, MC-163
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-1097
Fax: (512) 239-1300

Brian Christian, Director
Texas Commission on Environmental
Quality
Small Business and Environmental
Assistance Division
Public Education Program, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-5678

FOR PUBLIC INTEREST COUNSEL
via electronic mail:

Mr. Blas J. Coy, Jr., Attorney
Texas Commission on Environmental
Quality
Public Interest Counsel, MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-6363
Fax: (512) 239-6377

FOR ALTERNATIVE DISPUTE
RESOLUTION
via electronic mail:

Mr. Kyle Lucas
Texas Commission on Environmental
Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

Ms. Bridget C. Bohac

Texas Commission on Environmental
Quality

Office of Chief Clerk, MC-105

P.O. Box 13087

Austin, Texas 78711-3087

Tel: (512) 239-3300

Fax: (512) 239-3311

REQUESTER(S)

MR DONALD C BROWN
832 FM 2296 RD
HUNTSVILLE TX 77340-2433

KIMBERLY BROWN
832 FM 2296 RD
HUNTSVILLE TX 77340-2433

SHARON A BROWN
832 FM 2296 RD
HUNTSVILLE TX 77340-2433

JAMES BRYAN
788 FM 2296 RD
HUNTSVILLE TX 77340-2431

JUDY BRYAN
788 FM 2296 RD
HUNTSVILLE TX 77340-2431

BARBARA HUMPHREY
734 FM 2296 RD
HUNTSVILLE TX 77340-2431

RICHARD HUMPHREY
734 FM 2296 RD
HUNTSVILLE TX 77340-2431

MICHAEL ROBINSON
850 FM 2296 RD
HUNTSVILLE TX 77340-2433

DUANE WALDEN
850 FM 2296 RD
HUNTSVILLE TX 77340-2433

JAMES E WHITE
794 FM 2296 RD
HUNTSVILLE TX 77340

TONIUAL WHITE
794 FM 2296 RD
HUNTSVILLE TX 77340

JENNIFER WILLIAMS
858 FM 2296 RD
HUNTSVILLE TX 77340

SABRINA WILLIAMS
850 FM 2296 RD
HUNTSVILLE TX 77340-2433

TARA WILLIAMS
858 FM 2296 RD
HUNTSVILLE TX 77340

INTERESTED PERSON(S)

JAMES & JUDY BRYAN
788 FM 2296 RD
HUNTSVILLE TX 77340-2431