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Carlos Rubinstein, *Commissioner*  
Toby Baker, *Commissioner*  
Zak Covar, *Executive Director*



Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

May 24, 2013

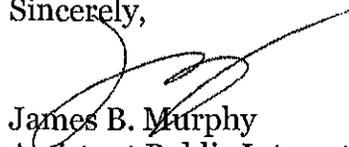
Bridget Bohac, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

Re: **MICHAEL BRADLEY SMITH**  
**TCEQ DOCKET NO. 2013-0854-AIR**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,

  
James B. Murphy  
Assistant Public Interest Counsel

cc: Mailing List

**TCEQ DOCKET NO. 2013-0854-AIR**

**IN THE MATTER OF THE  
APPLICATION OF MICHAEL  
BRADLEY SMITH FOR RENEWAL  
OF AIR QUALITY  
REGISTRATION NO. 51836**

**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO  
REQUESTS FOR HEARING**

To the Honorable Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in the above-referenced matter and respectfully shows the following.

**I. Introduction**

**A. Background of Facility**

Michael Bradley Smith (Applicant) has applied to the TCEQ for renewal of Registration No. 51836 for the Air Quality Standard Permit for Concrete Batch Plants, which would authorize the continued operation of a permanent concrete batch plant located at 834 Farm-to-Market Road 2296 in Huntsville, Walker County. The permit authorizes discharge of dust, aggregate, cement, particulate matter less than 10 microns in diameter ( $PM_{10}$ ), and particulate matter less than 2.5 microns in diameter ( $PM_{2.5}$ ).

**B. Procedural Background**

The TCEQ received this application on October 9, 2012. On December 28, 2012, the TCEQ Executive Director (ED) declared the application administratively complete. According to an affidavit of publication submitted by Applicant, the Notice of Receipt of

Application and Intent to Obtain Air Quality Standard Permit Registration Renewal (NORI) was published on January 25, 2011 in *The Huntsville Item*. On February 14, 2013, the ED extended the public comment period due to improper posting of public notice signs. The public comment period ended on February 26, 2013, which was also the deadline to request a contested case hearing. On May 1, 2013, the ED filed his Response to Public Comment, which the Office of Chief Clerk mailed on May 14, 2013 along with the letter setting this matter for consideration by the Commission.

On February 8, 2013, the TCEQ received timely comments and requests for a contested case hearing from Sharon Brown, Donald Brown, Kimberly Brown, Sabrina Williams, Duane Walden, Michael Robinson, James Bryan, Judy Bryan, Jennifer Williams, Toniual White, James E. White, Tara Williams, Richard Humphrey, and Barbara Humphrey (Requesters). On February 21, 2013, the TCEQ received additional comments from Donald Brown related to the posting of public notice signs. OPIC recommends denying the hearing requests because there is no right to a contested case hearing on this renewal application.

## **II. Applicable Law**

A person may request the Commission reconsider the ED's decision or hold a contested case hearing on an application declared administratively complete after September 1, 1999 pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Legislature, Regular Session, Section 5 (codified at Title 5, Texas Health and Safety Code (THSC), Section 382.056(n)). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest

affected by the application showing why the requestor is an “affected person” who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of the application. Title 30, Texas Administrative Code (TAC), Section 55.201(d).

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.” 30 TAC 55.203(a). This justiciable interest does not include an interest common to the general public. 30 TAC 55.203(a). Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC 55.203(b). Relevant factors considered in determining whether a person is affected include:

- (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.

30 TAC 55.203(c).

A group or association may request a contested case hearing if:

- (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.

30 TAC 55.205(a). The ED, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements.

30 TAC 55.205(b).

The Commission shall grant an affected person's timely filed hearing request if:

- (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application.

30 TAC 55.211(c).

Accordingly, responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or of law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

30 TAC 55.209(e).

There is no right to a contested case hearing for the "amendment, modification, or renewal of an air application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted." 30 TAC 55.201(i)(3)(C). The Commission may, however, "hold a contested

case hearing if the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations[.]” 30 TAC 55.201(i)(3)(C). The Commission may also hold a contested case hearing if it “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 [of the Texas] Water Code, and rules adopted and procedures developed under those sections.” THSC 382.056(o).

### **III. Discussion**

Under THSC 382.056(o) and 30 TAC 55.201(i)(3)(C), there is no right to a contested case hearing for the renewal of an air permit unless the applicant seeks to increase its allowable emissions or emit an air contaminant not previously emitted, the facility's compliance history contains unresolved violations and demonstrates a consistent disregard for the regulatory process, or the facility's compliance history is rated in the lowest classification. Applicant seeks renewal of its air permit without an increase in allowable emissions and without authorization to emit a new air contaminant.

In their contested case hearing requests, the Requesters allege Applicant has failed to follow TCEQ rules. Specifically, the Requesters state Applicant failed to upgrade or pave entrance and exit roads to the facility and facility driveways, failed to water the roads during dry conditions, exceeded limitations on operating hours, and failed to construct barriers around the facility. In addition, the Requesters state

Applicant failed to properly post public notice signs and did not properly place a copy of the application in the local public library for review.

Despite the allegations of potential emissions violations, it does not appear Applicant's compliance history for the facility is rated in the lowest classification or contains unresolved violations that demonstrate a consistent disregard for the regulatory process. The Commission has rated the compliance history for Permit No. 51836 at the facility—named "Smith CPB No. 1" in the TCEQ records—as "unclassified." See Compliance History Report for Regulated Entity Number (RN) 102802956, *available at* <http://www11.tceq.texas.gov/oce/ch/>. The Commission has not rated the compliance history of Michael Bradley Smith. See Compliance History Report for Customer Number (CN) 604241513, *available at* <http://www11.tceq.texas.gov/oce/ch/>. The TCEQ compliance history database shows "Service Ready Mix Concrete, Inc." as the Customer associated with Smith CPB No. 1. The compliance history database rates Service Ready Mix Concrete, Inc. as "unclassified." See Compliance History Report for CN601423544, *available at* <http://www11.tceq.texas.gov/oce/ch/>.

A complaint about dust emissions at the facility was submitted to the TCEQ on August 14, 2003, resulting in an investigation on September 10, 2003. See Status of Complaint for Complaint No. 25762, *available at* <http://www2.tceq.texas.gov/oce/waci/index.cfm>. No enforcement action was taken pursuant to the investigation. Based on the lack of enforcement actions against the facility, OPIC cannot conclude Applicant has demonstrated a consistent disregard for the regulatory process. Although Requesters allege the TCEQ has failed to enforce against Applicant's discharge of dust, there is no evidence before OPIC demonstrating

Applicant's disregard for TCEQ enforcement actions or the regulatory process. Accordingly, OPIC concludes there is no right to a contested case hearing for this application.

On the issue of improper posting of public notice signs around the facility, OPIC concludes the ED's decision to require re-posting of the signs and to extend the public comment period properly addressed Applicant's initial sign posting defect. After the ED required re-posting, Mr. Donald Brown filed an additional comment with a photograph of the signs, stating that there remains a defect in posting because the signs are leaning and not parallel to the facility's driveway as required by TCEQ rules. However, the TCEQ rule does not require the sign to be parallel to the driveway, but rather signs must be placed on facility property lines that parallel a public road. *See* 30 TAC 39.604(c) ("Each sign placed at the site must be located within ten feet of every property line paralleling a public highway, street, or road. Signs must be visible from the street and spaced at not more than 1,500-foot intervals."). In the photograph, the signs appear to be visible from the road. Based on Mr. Brown's photograph and OPIC's interpretation of the TCEQ rule on sign posting, OPIC cannot conclude there remains a notice defect due to improper sign posting.

Finally, the hearing requests state there was a problem obtaining a copy of the application from the local public library. It appears from the hearing requests the library misplaced the application when the Requesters attempted to view it and Applicant properly submitted a copy to the library. The ED's decision to extend the public comment period also addressed this issue.

#### IV. Conclusion

OPIC recommends denying the hearing requests because there is no right to a contested case hearing on this renewal application.

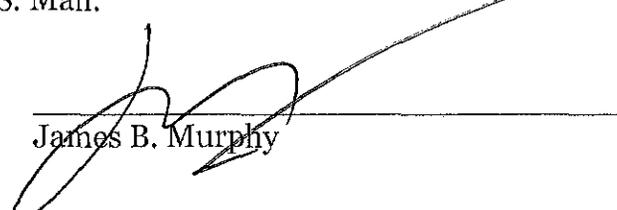
Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2013 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

  
James B. Murphy

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**TCEQ DOCKET NO. 2013-0854-AIR**

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