

TCEQ AIR QUALITY STANDARD PERMIT NO. 92565L004
TCEQ DOCKET NUMBER 2016-0788-AIR

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|-------------------------------|----------|------------------------------|
| APPLICATION BY | § | BEFORE THE |
| VULCAN CONSTRUCTION | § | |
| MATERIALS, LLC | § | TEXAS COMMISSION ON |
| ROCK CRUSHING PLANT | § | |
| MILLSAP, PARKER COUNTY | § | ENVIRONMENTAL QUALITY |

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUEST

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this response (Response) to the request for a contested case hearing submitted by the 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 (TWC) § 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 a copy of the standard permit for concrete batch plants 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

Vulcan Construction Materials, LLC (Vulcan or Applicant) has applied to the TCEQ for a New Source Review Authorization under Texas Clean Air Act (TCAA), § 382.0518. The permit will authorize a change of location for the rock crushing plant. The rock crushing plant is currently authorized by Permit No. 92565L002, which is a portable rock crusher, and the applicant represented that no changes to the currently permitted plant operations, emission controls, character of emissions, emission rates, or previous representations would occur.

The plant would consist of crushers, screens, hoppers, conveyors, engines, and stockpiles. The plant is proposed to be located at 1111 Gilbert Pit Road near Millsap, Parker County. Contaminants authorized under this permit include particulate matter, including particulate matter (PM) with diameters of 10 micrometers or less (PM₁₀) and 2.5 micrometers or less (PM_{2.5}), carbon monoxide (CO), nitrogen oxides (NO_x, defined as the sum of NO and NO₂, collectively expressed as NO_x), sulfur dioxide (SO₂), and organic

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.

compounds (VOC). 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 November 10, 2015, and declared administratively complete on November 13, 2015. The Notice of Receipt and Intent to Obtain an Air Quality Permit (first public notice) for this permit application was published on November 19, 2015, in the Weatherford Democrat. The Notice of Application and Preliminary Decision for an Air Quality Permit (second public notice) was published on January 29, 2016, in the Weatherford Democrat. Because this application was received after September 1, 2015, it is subject to the procedural requirements of and rules implementing Senate Bill 709 (84th Legislature, 2015).

The ED's RTC was mailed on April 13, 2016 to all interested persons, including those who asked to be placed on the mailing list for this application and those who submitted comments or requests for a contested case hearing. The cover letter attached to the RTC included information about making requests for a contested case hearing or for reconsideration of the ED's decision.² The letter also explained that 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 time for requests for reconsideration and hearing requests ended on May 18, 2016. The TCEQ received timely hearing requests that were not withdrawn from the following persons: Keith Hoster and Marc K. Hoster.

II. APPLICABLE LAW FOR HEARING REQUESTS

The commission must assess the timeliness and form of the hearing requests, as discussed in Section I 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

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.

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
- (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 TWC § 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 may 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:

- (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.

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 request 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 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 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.

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

III. ANALYSIS OF HEARING REQUEST

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

Requestor Marc K. Hoster submitted a timely hearing request that was not withdrawn on December 17, 2015. The request was made in a comment submitted to the Commission during the relevant comment period. Mr. Hoster provided his phone number and address in the hearing request. Mr. Hoster also stated that he will be adversely affected by the application since he believes it will negatively impact the quality of his air and cause noise, stating that corporate greed should not take precedence over resident health and happiness.

Based on the address provided by Mr. Hoster, as shown on the attached map, the ED's staff confirmed that Mr. Hoster's residence is approximately 10 miles from the location of the proposed plant. Due to the distance of approximately 10 miles between the proposed plant and Mr. Hoster's residence, the ED finds that Mr. Hoster does not have a personal justiciable interest different from that of members of the general public. Therefore, Mr. Hoster's hearing request does not meet the form requirements under 30 TAC § 55.201(d).

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 Marc K. Hoster did not submit a response to the ED's RTC. However, Keith Hoster did submit a response to the ED's RTC and submitted a timely hearing request.

Requester Keith Hoster submitted a timely hearing request that was not withdrawn on May 18, 2016. The request was made in a comment submitted to the Commission during the relevant comment period. Mr. Hoster provided his phone number and address in the hearing request. Mr. Hoster also stated that he will be adversely affected by the application since he believes it will cause the airborne transmission of contaminants and particulates that would negatively impact his and his wife's health, as well as that of their young grandchildren who stay with them on a regular basis.

Based on the address provided by Mr. Hoster, as shown on the attached map, the ED's staff confirmed that Mr. Hoster's residence is approximately 15 miles from the location of the proposed plant. Due to the distance of approximately 15 miles between the proposed plant and Mr. Hoster's residence, the ED finds that Mr. Hoster does not have a personal justiciable interest different from that of members of the general public. Therefore, Mr. Hoster's hearing request does not meet the form requirements

⁷ See 30 TAC § 55.201(d)(4).

under 30 TAC § 55.201(d).

Based on the foregoing, the ED finds that the requests submitted by Marc K. Hoster and Keith Hoster do not substantially comply with all of the requirements to request a contested case hearing under 30 TAC § 55.201(d). Due to the distance of approximately 10 miles and 15 miles, respectively, between their residences and the proposed plant, both requesters will not be adversely affected in a manner not common to members of the general public.

B. Are any of the requesters an affected person?

The law applicable to whether requesters Marc K. Hoster and Keith Hoster are considered an “affected person” eligible to request a contested case hearing on this permit application is outlined above in Section II.

Requester Marc K Hoster’s request claims that he will be adversely affected by the facility because he believes it will negatively impact the quality of his air and cause noise. Protection from negative impacts on air quality and noise are interests protected by the law under which the application will be considered. Further, there are no distance restrictions or other limitations imposed by law on protection from negative impacts on air quality or protection from noise interest for this type of permit. Also, a reasonable relationship exists between negative impacts on air quality and the activity regulated by the draft permit, as required under the relevant statutes and rules.

However, there is little or no likely impact of the regulated activity on the health and safety of Mr. Hoster or on the use of his property given the distance of Mr. Hoster’s residence from the proposed plant. Another consideration is whether the regulated activity will impact the use of natural resources by Mr. Hoster. The ED finds there is little to no likely impact to Mr. Hoster’s use of natural resources from the regulated activity due to his distance from the plant.

Finally, there are no governmental entities with statutory authority over or interest in the issues relevant to the application. Therefore, in addition to the fact that the request does not satisfy the requirements for form, for the above reasons Mr. Hoster would not be considered an “affected person” entitled to a contested case hearing, under the requirements of TCAA § 382.058(c).

Requester Keith Hoster’s request claims that he will be adversely affected by the facility because he believes it will produce airborne transmissions of contaminants and particulates that would negatively impact his and his wife’s health. Protection from negative health effects from the airborne transmission of contaminants and particulates is an interest protected by the law under which the application will be considered. Further, there are no distance restrictions or other limitations imposed by law on protection from negative health effects from the airborne transmission of

contaminants and particulates interest for this type of permit. Also, a reasonable relationship exists between negative health effects from the airborne transmission of contaminants and particulates and the activity regulated by the draft permit, as required under the relevant statutes and rules.

However, there is little or no likely impact of the regulated activity on the health and safety of Mr. Hoster or on the use of his property given the distance of Mr. Hoster's residence from the proposed plant. Another consideration is whether the regulated activity will impact the use of natural resources by Mr. Hoster. The ED finds there is little to no likely impact to Mr. Hoster's use of natural resources from the regulated activity due to his distance from the plant.

Finally, there are no governmental entities with statutory authority over or interest in the issues relevant to the application. Therefore, in addition to the fact that the request does not satisfy the requirements for form, for the above reasons Mr. Hoster would not be considered an "affected person" entitled to a contested case hearing, under the requirements of TCAA § 382.058(c).

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

Because the hearing requests do not satisfy TCAA § 382.056, the ED does not recommend referral of any issues. Should the commission decide to refer this matter for a hearing at the State Office of Administrative Hearings, the ED recommends the referral of the issues of whether the proposed plant will negatively impact the air quality and produce airborne transmissions of contaminants and particulates that would negatively impact the health of the requesters.

IV. MAXIMUM EXPECTED DURATION OF THE CONTESTED CASE HEARING

The ED recommends the contested case hearing, if held, should last no longer than six months from the preliminary hearing to the proposal for decision.

V. EXECUTIVE DIRECTOR'S RECOMMENDATION

The Executive Director respectfully recommends the commission:

- A. Find the requests for a contested case hearing in this matter were timely filed.
- B. Deny the requests of Marc K. Hoster and Keith Hoster because each fails to satisfy the requirements for form under 30 TAC § 55.201(d), and neither Marc K. Hoster nor Keith Hoster is an affected person under 30 TAC § 55.203:
- C. If the Commission determines either or both of the requesters are an affected person, refer the following issue to SOAH:

- Whether the proposed plant will negatively impact air quality or produce of airborne transmissions of contaminants and particulates that would negatively impact the health of the requesters.

D. Find the maximum expected duration of the contested case hearing, if held, would be six months.

Respectfully submitted,

Texas Commission on Environmental Quality

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REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
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ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

On the 13th day of June, 2016, a true and correct copy of the foregoing instrument was served on all persons on the mailing list by the undersigned via deposit into the U.S. Mail, inter-agency mail, facsimile, electronic mail, or hand delivery.

A handwritten signature in black ink, appearing to read "Amy Prescott", is written over a horizontal dashed line. The signature is fluid and cursive.

Amy Prescott

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