State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

April 9, 2010

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-10-1698; TCEQ Docket No.2009-1483-AIR; In Re: Application of Quality Ready Mix, Ltd. For New Air Quality Standard Permit No. 85181 in San Patricio County

Dear Mr. Trobman:

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 **April 29, 2010**. Any replies to exceptions or briefs must be filed in the same manner no later than **May 10, 2010**.

This matter has been designated **TCEQ Docket No. 2009-1483-AIR; SOAH Docket No. 582-10-1698**. 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://www10.tceq.state.tx.us/epic/efilings/ 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,

Thomas H. Walston
Administrative Law Judge

THW:nl
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 475-4994

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: QUALITY READY MIX, LTD

SOAH DOCKET NUMBER: 582-10-1698

REFERRING AGENCY CASE: 2009-1483-AIR

STATE OFFICE OF ADMINISTRATIVE HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ THOMAS H. WALSTON

REPRESENTATIVE / ADDRESS | **PARTIES**

DOCKET CLERK
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF THE CHIEF CLERK
PO BOX 13087
AUSTIN, TX 78711
(512) 239-3300 (PH)
(512) 239-3311 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

JAMES B. MURPHY
ASSISTANT PUBLIC INTEREST COUNSEL
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF PUBLIC INTEREST COUNSEL
P. O. BOX 13087, MC-103
AUSTIN, TX 78711-3087
(512) 239-4014 (PH)
(512) 239-6377 (FAX)
jmurphy@tceq.state.tx.us

OFFICE OF PUBLIC INTEREST COUNSEL

HENRY LOZANO
GENERAL MANAGER/MANAGING PARTNER
QUALITY READY MIX
333 MCBRIDE
CORPUS CHRISTI, TX 78408
(361) 289-2515 (PH)
(361) 299-2004 (FAX)

QUALITY READY MIX

MARY JANE ROBERTSON
P.O. BOX 65
MATHIS, TX 78368
(361) 547-9617 (PH)
(361) 547-7084 (FAX)
mjrobertson111@hotmail.com

MARY JANE ROBERTSON

RONALD V. TATE
23816 CR 441/15 P.O. BOX 65
MATHIS, TX 78368
(361) 547-9517 (PH)

RONALD V. TATE

ROBERT L. RAMEY
ATTORNEY AT LAW
615 NORTH UPPER BROADWAY, SUITE 1605
CORPUS CHRISTI, TX 78477
(361) 882-5484 (PH)
(361) 882-5486 (FAX)

QUALITY READY MIX

---

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-10-1698
TCEQ DOCKET NO. 2009-1483-AIR

APPLICATION OF QUALITY READY MIX, LTD FOR NEW AIR QUALITY STANDARD PERMIT NO. 85181 IN SAN PATRICIO COUNTY	§ § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

I. INTRODUCTION

Quality Ready Mix. LTD, (Quality Ready Mix or Applicant) filed a registration application for new Air Quality Standard Permit No. 85181, to authorize construction of a permanent concrete batch plant, pursuant to TEX. HEALTH AND SAFETY CODE § 382.05195. The proposed plant would be located on County Road 441/15, one mile north of FM Road 3377, Mathis, San Patricio County, Texas. The Administrative Law Judge (ALJ) finds that no protesting person qualifies for party status and recommends that the Texas Commission on Environmental Quality (TCEQ or Commission) return this matter to the TCEQ Executive Director (ED) for processing as an uncontested case.

II. PROCEDURAL HISTORY

Quality Ready Mix filed its application on September 5, 2008, and the application was declared administratively complete by the ED on September 16, 2008. Required notices were published, as described in the findings of fact and conclusions of law in the attached proposed order. A public meeting was held on the application in Mathis on May 19, 2009, and the public comment period ended at the adjournment of that meeting.

On December 3, 2009, the Commission issued an Interim Order that granted hearing requests by Mary Jane Robertson and Ronald Tate and referred the matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing. The interim order referred four

substantive issues and directed SOAH to determine the affected party status of Michael T. Lumpkin under the Texas Clean Air Act, section 382.058(c).[1]

A preliminary hearing convened on February 11, 2010, in Mathis, Texas. Jurisdiction was established,[2] and the Applicant and the Office of Public Interest Counsel (OPIC) were designated as parties.[3] Evidence was then received concerning whether Mr. Michael T. Lumpkin, Mary Jane Robertson, or Ronald Tate qualified for party status. As will be discussed, the evidence showed that neither Mr. Lumpkin, Ms. Robertson, nor Mr. Tate reside within 440 years of the proposed plant; consequently, they do not qualify as affected persons for party status under the requirements of TEXAS HEALTH AND SAFETY CODE § 382.058(C).

III. APPLICABLE LAW

The Commission's authority and procedures for issuing air permits are generally governed by the Texas Clean Air Act, TEXAS HEALTH AND SAFETY CODE Chapter 382, Subchapter C, and by 30 TEX. ADMIN. CODE (TAC) Chapter 116, Subchapter F.

The Commission's rules concerning requests for a contested case hearing and party status, at 30 TAC Chapter 55, Subchapter F, apply to air permit applications for concrete batch plants.[4] To be granted a hearing request and to be admitted as a party, persons seeking to protest an application for a concrete batch plant must establish that they are an "affected person."[5] Generally, to qualify as an affected person requires a showing that the person has a specific legal

---

[1] TEX. HEALTH AND SAFETY CODE § 382.058(c).

[2] At the preliminary hearing, the ALJ took official notice of Quality Ready Mix's Application, although an extra copy of the Application was not available to mark as an exhibit and admit into evidence. Quality Ready Mix subsequently provided a copy of the Application, which was then admitted into evidence by Order No. 2 (March 26, 2010).

[3] The ED elected not to participate in this case.

[4] 30 TAC §§ 55.1 and 55.200.

[5] 30 TAC § 55.201(b)(4); 30 TAC § 80.109 (a) and (b)(5).

right or economic interest that would be affected by the application. In addition, depending on the type of permit being requested, distance restrictions or other limitations to qualify for affected-person status may be imposed by law.[6]

In this case, involving an application for an air permit for a permanent concrete batch plant, a statutory distance restriction applies. TEX. HEALTH & SAFETY CODE § 382.058(c) provides that "only those persons actually residing in a permanent residence within 440 yards of the proposed plant" may request a contested case hearing "as a person who may be affected." Therefore, to have a hearing request granted and to qualify for party status, persons seeking to protest a concrete batch plant air permit applications must establish that they live in a permanent residence within 440 yards of the proposed concrete batch plant, in addition to establishing the other requirements for affected person status.

As noted, the Commission previously granted the hearing requests for Mary Jane Robertson and Ronald Tate. However, under the Commission's rules, the Commission's decision to grant a hearing request is not a final decision,[7] and all persons must establish at the preliminary hearing that they qualify as an affected person for party status, even if the Commission previously granted their hearing request.[8] As will be discussed, evidence presented at the preliminary hearing established that Ms. Robertson and Mr. Tate do not actually reside within 440 yards of Quality Ready Mix's proposed concrete batch plant and, therefore, do not qualify as affected persons entitled to party status.

---

[6] An "affected person" is defined as "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." In determining whether a person is an affected person, all factors are considered, including "distance restrictions or other limitations imposed by law on the affected person." 30 TAC § 55.203(a) and (c)(2).

[7] Granting a hearing request "is an interlocutory decision on the validity of the request . . . and is not binding on the issue of designation of parties under § 80.109 . . . ." 30 TAC § 55.211(e). An interlocutory decision is an interim or temporary decision on an issue, not the final decision. Black's Law Dictionary at 832 (8th Ed. 2004).

[8] 30 TAC § 80.109 provides: "All parties shall be determined at the preliminary hearing or when the judge otherwise designates."

IV. DISCUSSION

The issue at the preliminary hearing was whether any person seeking party status to protest the application satisfied the 440-yard (1,230-foot) distance restriction imposed by TEX. HEALTH & SAFETY CODE § 382.058(c). It was undisputed that Mr. Lumpkin resides much farther than 1,320 feet from the proposed plant; therefore, he does not satisfy the distance restriction to qualify as a party. Ms. Robertson and Mr. Tate reside together on property adjacent to and east of the tract where the concrete batch would be located. Their status is a closer call, but a preponderance of the evidence established that they also reside farther than 1,230 feet from the proposed plant.

The critical factor for evaluating the distance restriction is the precise location of the Quality Ready Mix proposed plant, which will be built on an approximate 63-acre tract. The application states the exact location as Latitude (N) 28°, 7', 19"; Longitude (W) 97°, 50', 27".[9] Mr. Henry Lozano, on behalf of Quality Ready Mix, and Mr. Kevin Stone, who owns the tract where the proposed plant would be located, both testified that this location is near the northwest corner of the property.[10]

Four maps were introduced into evidence concerning the distance from the proposed plant to the Robertson/Tate residence. Tate/Robertson Ex. 2 is a satellite image of the property with an oval drawn to indicate the 440-yard (1,320-foot) distance from the proposed baghouse location. On this map, the Robertson/Tate residence is marked by a large black dot east of the plant property, and it is easily within the 440-yard limit.[11] It was explained that this map,

---

[9] Applicant Ex. 3, Application, at TCEQ Core Data Form. The application actually has the longitude and latitude reversed.

[10] Mr. Stone also stated that a road exists on the property that runs near and generally parallel to the western boundary, which will be used by the Quality Ready Mix for access to the plant.

[11] Tate/Robertson Ex. 2 also contains a yellow dot with the number 71. This indicates the Robertson/Tate street address, but all parties agreed that the black dot shows the actual location of their residence.

prepared by the Commission staff, was likely utilized by the Commission to grant the Robertson/Tate hearing requests. However, it is clear that this map measures the 440-yard distance from the center of the 63-acre tract, not from the northwest part of the property where the proposed plant would actually be located, and which is farther from the Tate/Robertson residence.

Tate/Robertson Ex. 1 is a copy of a 1969 survey of the tract of land where the proposed plant would be located, with the location of the proposed plant drawn by hand. This map was taken from the Application, and it shows the plant to be somewhat northwest of the center of the property. However, Mr. Lozano testified that this map was only a hand-drawn estimate of the location and is not precise, and he stated that the actual location would be farther to the northwest than shown on this exhibit. Also, this map does not show any distances to the Tate/Robertson residence.

Applicant's Ex. 1 is a somewhat crude satellite image of the area, with the location of the proposed plant in the northwest part of the property, as well as the property boundary, the access road, and the Tate/Robertson residence indicated. Concentric circles overlaid on the map indicate the distance from the proposed plant in 1,000-foot increments. These show the Tate/Robertson residence approximately 2,000 feet from the proposed plant.

Finally, Applicant's Ex. 2 is a 2010 survey of the property where the plant would be located. It shows two points, 150 feet apart, which Mr. Lozano testified is the exact location of the components of the proposed plant, as reflected by the longitude and latitude notation in the application. This survey also shows the distance from these two points to the Tate/Robertson residence as 1,767 feet and 1,857 feet respectively. Thus, using either point, the distance to the Tate/Robertson residence is well over the 1,320-foot distance restriction contained in TEX. HEALTH & SAFETY CODE § 382.058(c).

The ALJ finds that the 2010 survey information contained in Applicant's Ex. 2 is the most precise and reliable evidence of the distance between the proposed plant and the Tate/Robertson residence. This survey has the precise longitude/latitude location of the proposed plant, as designated in the Application, and it has the surveyor's measurement of the distance from the proposed plant to the Tate/Robertson residence, which is at least 420 feet farther than the 1,320-foot (440-yard) distance restriction contained in TEX. HEALTH & SAFETY CODE § 382.058(c). It is understandable that the Commission granted the hearing requests of Ms. Robertson and Mr. Tate, based on Tate/Robertson Ex. 2, which was prepared by Commission Staff. However, as discussed, that exhibit incorrectly measured the distance restriction from the center of the 63-acre tract rather than from the northwest area of the tract where the plant would actually be located. When measured from the actual location of the proposed plant, it is clear that the Tate/Robertson residence is more than 1,320 feet from the proposed plant location. Therefore, Ms Robertson and Mr. Tate are not "affected persons," as defined by TEX. HEALTH & SAFETY CODE § 382.058(c), who qualify for party status.

V. RECOMMENDATION

A preponderance of the evidence established that neither Mr. Lumpkin, Ms. Robertson, nor Mr. Tate qualified as a party for this case because they reside farther from the proposed plant than the 440-yard distance restriction contained in TEX. HEALTH & SAFETY CODE § 382.058(c). And because no other person objecting to the application sought party status, the ALJ recommends that this matter be remanded to the ED for administrative processing as an uncontested case.

SIGNED April 9, 2010.

THOMAS H. WALSTON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER
CONCERNING THE APPLICATION BY
QUALITY READY MIX, LTD
FOR NEW AIR QUALITY PERMIT NO. 85181
TCEQ DOCKET NO. 2009-1483-AIR
SOAH DOCKET NO. 582-10-1698

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of Quality Ready Mix, LTD (Quality Ready Mix) for issuance of Standard Air Quality Permit No. 85181 to authorize construction of a permanent concrete batch plant to be located at County Road 441/15, one mile north of FM Road 3377, Mathis, San Patricio County Texas. A Proposal for Decision (PFD) was presented by Thomas H. Walston, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a preliminary hearing on this matter on February 11, 2010, in Mathis, Texas. After considering the Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. On September 5, 2008, Quality Ready Mix filed an application for Air Quality Standard Permit Number 85181 (Permit) to authorize construction of a permanent concrete batch plant to be located at County Road 441/15, one mile north of FM Road 3377, Mathis, San Patricio

County Texas.

2. On September 16, 2008, the ED declared Quality Ready Mix's application administratively complete.

3. The Notice of Receipt and Intent to Obtain an Air Quality Standard permit Registration (first public notice) for this application was published on October 16, 2008, and again on February 12, 2009, in the *Mathis News*, a newspaper of general circulation in San Patricio County.

4. The Notice of Application and Preliminary Decision (second public notice) for this application was published on March 12, 2009, in the *Mathis News*.

5. A public meeting was held in Mathis on May 19, 2009, concerning the application, and the public comment period ended at the adjournment of that meeting.

6. The Executive Director found the application was authorized under TEX. HEALTH & SAFETY CODE § 382.05195, if constructed and operated as described in the application.

7. Public comments and hearing requests concerning the Permit were filed by interested persons and considered by the Commission.

8. By Interim Order dated December 3, 2009, the Commission granted the hearing requests submitted by Mary Jane Robertson and Ronald Tate and referred the hearing request from Michael T. Lumpkin to SOAH to determine whether he was an affected person in accordance with the distance limitation found in Section 382.058(c) of the Texas Clean Air Act. The Interim Order also referred four substantive issues for a contested case hearing.

9. A Notice of Hearing scheduled for February 11, 2010, was published on January 7, 2010, in the *Mathis News*. The Notice of Hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was

to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

10. On February 11, 2010, ALJ Walston convened a preliminary hearing to establish jurisdiction, designate parties, and establish a procedural schedule.

11. Quality Ready Mix; the Office of Public Interest Counsel of the Commission (OPIC); and Mary Jane Robertson, Ronald Tate, and Michael T. Lumpkin participated in the preliminary hearing. The Executive Director of the Commission did not participate.

12. Mary Jane Robertson, Ronald Tate, and Michael T. Lumpkin do not reside in permanent residences within 440 yards of the location of the concrete batch plant proposed by Quality Ready Mix in its application.

13. No other persons requested party status in the proceeding to protest Quality Ready Mix's application.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over standard air permits pursuant to the TEX. HEALTH & SAFETY CODE § 382.05195.

2. SOAH has the authority to conduct evidentiary hearings and prepare proposals for decision on contested matters referred by the Commission pursuant to TEX. GOV'T CODE ANN. § 2003.047.

3. Pursuant to 30 TAC § 55.211(e), the Commission's granting of hearing requests for Mary Jane Robertson and Ronald Tate was an interlocutory decision on the validity of the hearing requests and was not binding on the issue of designating parties under 30 TAC § 80.109.

4. To qualify as an affected person for party status concerning a concrete batch plant application, a person must actually reside in a permanent residence within 440 yards of the proposed plant. TEX. HEALTH & SAFETY CODE § 382.058(c).

5. Based on the above Findings of Fact, Mary Jane Robertson, Ronald Tate, and Michael T. Lumpkin are not affected persons within the meaning of 30 TEX. ADMIN. CODE § 55.203 and TEX. HEALTH & SAFETY CODE § 382.058(c).

6. Based on the above Findings of Fact and Conclusions of Law, Mary Jane Robertson, Ronald Tate, and Michael T. Lumpkin do not qualify for party status in this proceeding.

III. ORDERING PARAGRAPHS

NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. In accordance with 30 TEX. ADMIN. CODE § 55.203, this matter is uncontested by a person with an affected interest and is remanded to the ED for further processing.

2. 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.

3. The effective date of this Order is the date the Order is final, as provided by TEX. GOV'T CODE ANN. § 2001.144 and 30 TAC § 80.273.

4. The Commission's Chief Clerk shall forward a copy of this Order to all parties.

5. If any provision, sentence, clause, or phase 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.

ISSUED:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

_____

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