

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

March 3, 2011

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

**Re: SOAH Docket No. 582-10-5281; TCEQ Docket No. 2010-0660-AIR; Application by
Tommy Davis d/b/a Slick Machines for TCEQ Air Permit No. 82199L002**

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 March 23, 2011. Any replies to exceptions or briefs must be filed in the same manner no later than April 4, 2011.

This matter has been designated **TCEQ Docket No. 2010-0660-AIR; SOAH Docket No. 582-10-5281**. 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,

A handwritten signature in black ink, appearing to read "CR Bennett", written over a horizontal line.

Craig R. Bennett
Administrative Law Judge

CRB/lc
Enclosures
xc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: TOMMY DAVIS / SLICK MACHINES
SOAH DOCKET NUMBER: 582-10-5281
REFERRING AGENCY CASE: 2010-0660-AIR

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ CRAIG R. BENNETT**

REPRESENTATIVE / ADDRESS

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D/B/A SLICK MACHINES

**SOAH DOCKET NO. 582-10-5281
TCEQ DOCKET NO. 2010-0660-AIR**

APPLICATION BY TOMMY DAVIS	§	BEFORE THE STATE OFFICE
	§	
d/b/a SLICK MACHINES FOR TCEQ	§	OF
	§	
AIR PERMIT NO. 82199L002	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Tommy Davis d/b/a Slick Machines (Applicant) filed an application for new Air Quality Permit No. 82199L002, that would authorize the construction of a rock crushing facility located near 11209 U.S. Highway 67 in Glen Rose, Somervell County, Texas. In response to numerous requests for hearing, the Texas Commission on Environmental Quality (TCEQ or Commission) referred the matter to the State Office of Administrative Hearings (SOAH) for a hearing. After a preliminary hearing at which parties were admitted and aligned, the Administrative Law Judge (ALJ) adopted a procedural schedule that required that prefiled testimony be submitted. After the Applicant's prefiled testimony was submitted,¹ various protesting parties filed a motion for sanctions and/or for summary disposition. The ALJ gave Applicant an opportunity to respond to the motion for summary disposition and to further explain how he intended to meet his burden of proof in this case. Applicant filed a very brief response to the motion and the ALJ's order.²

After considering the Applicant's prefiled testimony and response to the motion for summary disposition and the ALJ's order, the ALJ found that there were no genuine issues of material fact and that Applicant could not meet his burden of proof in this case. Therefore, on February 14, 2011, the ALJ granted summary disposition. This Proposal for Decision (PFD) further explains the ALJ's conclusion and recommends that the Commission deny Applicant's requested new Air Quality Permit.

¹ A copy of this filing is attached to this PFD as Exhibit A.

² A copy of this filing is attached to this PFD as Exhibit B.

I. PROCEDURAL BACKGROUND

Applicant filed his application with the TCEQ for an air quality permit on July 25, 2008. However, due to numerous problems with the availability of the application, the provision of notice, and numerous public meetings that were held, there were delays in the processing of the application. Numerous parties protested the application and submitted requests for a hearing on it. The Commission considered the hearing requests at its open meeting on June 30, 2010. At that time, the Commission granted a number of the hearing requests and referred the matter to SOAH for assignment of an ALJ to preside over a contested case proceeding. In its Interim Order, the Commission identified 15 separate issues to be addressed in the contested case proceeding.

On September 16, 2010, a preliminary hearing was held in Glen Rose, Texas. At the preliminary hearing, the following persons or entities were admitted as parties to this proceeding: (1) Applicant; (2) Chalk Mountain Foundation; (3) Richard Lee Clauser; (4) Steve Allen; (5) Linda Gustafson; (6) Jimmie Sumners; (7) Allen Sumners; (8) Robert Portman; (9) Jean Lane; (10) Francine Singleterry; (11) Charles Brown; (12) Mark Beauregard; (13) Barry Payne; (14) Claire Payne; (15) David Whitsitt; (16) Cyd Brown; (17) Florence Brown; (18) John Yearwood; (19) Larry Parham; (20) the Executive Director (ED) of the TCEQ; and (21) the Office of Public Interest Counsel (OPIC). No other persons or entities sought party status. At the preliminary hearing, the ALJ encouraged Applicant to consult with an attorney or air quality expert so that he could understand what he would be required to prove to obtain his permit.

On September 27, 2010, the ALJ issued Order No. 1, which set out the procedural schedule to be followed by the parties. That schedule required Applicant to prefile his testimony and exhibits by January 7, 2011. Applicant did make a filing on January 7, 2011, but the filing merely identified a listing of relevant criteria to be evaluated in determining whether the permit may be issued, along with a statement after each factor that Applicant “will abide by all applicable local, state and federal requirements, regulations and laws.” No evidence at all accompanied the filing.

Thereafter, on January 14, 2010, Chalk Mountain Foundation and other individual protestants (collectively "Protestants") filed a motion for summary disposition or, alternatively, for sanctions and other discovery relief. The ALJ issued an order on January 21, 2011, requiring Applicant to respond to the motion and to explain how he intended to meet his burden of proof in this case. The ALJ further advised Applicant that, if the motion for summary disposition was granted, the ALJ would cancel the hearing and issue a recommendation to the TCEQ that the application be denied. The ALJ advised Applicant that it was incumbent on him to respond and explain how he intended to adequately satisfy his burden of proof in this case to obtain the permit he sought. Finally, the ALJ again encouraged Applicant to consult with either an attorney or a knowledgeable expert or consultant in the field of air quality permitting to ensure that he understood the requirements that must be met for him to obtain the permit sought.

On February 3, 2011, Applicant filed a short letter, indicating his own qualifications, but failing to respond to the legal issues raised by the Protestants or otherwise establishing how he intended to satisfy his burden of proof in this case. Moreover, Applicant did not supply any additional evidence, give any indication that he needed time to obtain appropriate experts, or offer any representation that he intended to marshal significant evidence to support the application at the hearing.

In light of Applicant's filing, the ALJ concluded that there was no purpose for moving forward with a hearing. Based upon Applicant's prefiled testimony and written response to the motion for summary disposition and the ALJ's order, the ALJ concluded that there was no possibility for Applicant to satisfy his burden of proof in the case. Therefore, on February 14, 2011, the ALJ issued an order granting Protestants' motion for summary disposition. This PFD is now issued on the basis of that order granting summary disposition.

II. CONTESTED ISSUES

In referring this matter to SOAH, the Commission identified the following 15 issues to be addressed in the contested case hearing:

- (a) Whether the facility will cause adverse effects on air quality?
- (b) Whether the proposed facility's emissions will adversely impact the requesters' health, welfare or physical property?
- (c) Whether the proposed facility's emissions will adversely impact plants, wildlife and endangered species?
- (d) Whether the proposed facility's emissions will adversely impact the requesters' recreation and use and enjoyment of the area?
- (e) Whether the draft permit achieves BACT for particulate matter?
- (f) Whether the rock crusher will create nuisance conditions due to dust?
- (g) Whether the air dispersion modeling of the proposed particulate matter emissions was accurate and appropriate?
- (h) Whether the application adequately calculated and addressed potential emission sources, emission rates, and background particulate matter concentrations?
- (i) Whether the draft permit includes adequate monitoring and record-keeping requirements?
- (j) Whether the permit conditions are enforceable?
- (k) Whether the draft permit complies with all state rules and regulations?
- (l) Whether the draft permit includes sufficient material handling and equipment maintenance requirements to ensure compliance?
- (m) Whether the application includes deficiencies that have resulted in the draft permit not including all applicable pollutants and respective emissions limitations?
- (n) Whether the Applicant met all applicable notice requirements for the application?

- (o) Whether the Applicant's compliance history warrants denial of or special conditions in the draft permit?

Under the Commission's rules, a permit applicant has the burden of proving its entitlement to the requested permit. Specifically, 30 TEX. ADMIN. CODE § 80.17 provides that "the burden of proof is on the moving party by a preponderance of the evidence . . ."³ Similarly, the Commission's rules provide that "the applicant shall present evidence to meet its burden of proof on the application . . ."⁴ Therefore, in this case, it is Applicant's burden to satisfy all of the requirements to obtain the permit he seeks and, in particular, to address all of the Commission's 15 referred issues.

III. DISCUSSION

As noted, Applicant has the burden of proof on his application. This burden must be met with competent evidence, not bare assertions. Because prefiled testimony was required in this case, Applicant was required to present by the prefiling deadline all of his direct case evidence necessary to carry his burden of proof and to address the Commission's referred issues. Applicant did not do this. Rather, Applicant has merely submitted a listing of the Commission's referred issues (along with other issues that were not referred), following each issue with the statement that Applicant "will abide by all applicable local, state and federal requirements, regulations and laws."⁵ There was no prefiled testimony, no air dispersion modeling, no expert reports or opinions, or any other evidence offered along with this filing. After being warned of the inadequacy of his initial direct case filing, Applicant submitted a letter that was barely more than a page in length, indicating why he considered himself an expert and refusing the encouragement to retain an attorney or expert. He offered no additional evidence or an explanation of any additional evidence that could support his application.⁶

³ There are exceptions to this, but none of the exceptions apply to this case.

⁴ 30 TEX. ADMIN. CODE § 80.117.

⁵ See attached Ex. A (Applicant's filing of January 7, 2011).

⁶ See attached Ex. B (Applicant's filing of February 3, 2011).

Under the Commission's rules, "summary disposition *shall* be rendered if the pleadings, admissions, affidavits, stipulations, depositions transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records, if any, on file in the case . . . show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues . . ."⁷ If the ALJ grants a motion for summary disposition, the Commission's rules require that he "close the hearing and prepare a proposal for decision."⁸

In this case, summary disposition is appropriate—and arguably required given the rule's use of the directive word "shall"—because Applicant wholly failed to file any evidence to support his application. Applicant has the burden of proof, and the scheduling order adopted by the ALJ required the parties to prefile their direct case testimony and evidence. Applicant never objected to the procedural schedule or the requirement for prefiling evidence. Further, Applicant never requested additional time to retain qualified experts, or to prepare and file his necessary direct case evidence. Even after being advised by the ALJ of the inadequacy of his initial direct case filing, being encouraged to retain an attorney or expert, and being warned of the consequences of failing to obtain the needed direct case evidence, Applicant still did not request additional time to obtain evidence or experts nor did he offer any indication that he could properly meet his burden of proof in this case.

Therefore, at this point, a hearing is entirely unnecessary because Applicant would not be allowed to present additional evidence that he did not prefile, and his current filings are not sufficient to meet his burden of proof. Applicant has offered no evidence whatsoever to address any of the Commission's 15 referred issues. There is no evidence showing the potential impact upon human health, wildlife or the environment from Applicant's proposed facility, nor is there any modeling of expected emissions from the facility showing their compliance with state and federal standards.

⁷ 30 TEX. ADMIN. CODE § 80.137(c) (emphasis added).

⁸ 30 TEX. ADMIN. CODE § 80.137(i).

Simply put, Applicant has offered no evidence supporting or justifying the issuance of an application to him. And, procedurally, he has no right to offer any additional evidence at this time. As such, there is no genuine issue of material fact and the Protestants are entitled to summary disposition on the entirety of the issues referred by the Commission. Given this, the ALJ finds that there is no basis upon which to grant the application. Therefore, the ALJ recommends that Applicant's requested permit be denied. Findings of fact and conclusions of law supporting this recommendation are included in the proposed final order being sent to the Commission along with this PFD.

SIGNED March 3, 2011.



**CRAIG R. BENNETT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

To: 512-475-4994

From: Tommy Davis dba Slick Machines
325-784-8030

Application by Tommy Davis dba Slick Machines, Rock Crusher #1, for new Air Quality Permit # 82199L002, Somerville County – TCEQ Docket # 2010-0660-Air – SOAH Docket #582-10-5281

A – Whether the facility will cause adverse effects on air quality

No. I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

B – Part 1 – Whether the facility will cause adverse health impacts on the elderly, children and the public

Part 2 – Will the permitted emissions tend to be injurious to or adversely affect human health or welfare

No. I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

C – Part 1 – Whether the facility will cause adverse effects on wildlife

Part 2 – Will the permitted emissions tend to be injurious to or adversely affect animal life or vegetation?

No. I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

D – Part 1 – Whether the facility will cause adverse impacts on recreation and the use and enjoyment of the area

Part 2 – Will the permitted emissions interfere with the normal use and enjoyment of property, including public property?

No. I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

E – Part 1 – Whether the draft permit achieves VACT for particulate matter

Part 2 – Does the permit ensure that no more than VACT-level emissions are to be expected given the method by which VACT levels of emissions were identified?

Yes. I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

F – Part 1 – Whether the rock crusher will create nuisance conditions due to dust

Part 2 – Will the proposed operation result in nuisance conditions?

No. I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

G – Whether there are deficiencies in the air dispersion modeling

No. I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

H – Monitoring: Who will monitor the emissions and why no particulate monitoring has been proposed or will occur

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

I – Part 1 – Deficiencies in the application such as accurate representation of emission sources, emission rates, stock pile levels

Part 2 – Have all emission points at the facility been properly identified

Part 3 – Were all species of PM properly identified?

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

J - Part 1 - Concerns regarding response time by regional office staff**Part 2 - Concerns regarding probable response time of TCEQ investigators to the facility**

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

L - Concerns regarding location and proximity to homes, roads, churches and vacation areas

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

M - Concerns regarding starting construction prior to receiving authorization

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

N - Whether the bookkeeping requirements are sufficient to ensure compliance

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

O - Whether the permit conditions are enforceable

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

P - Whether the draft permit complies with all state rules and regulations

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

Q - Concerns regarding the effects of water run off and on ground water and water quality

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

R - Concerns regarding water usage

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

S - Part 1 - Concerns regarding effects on roads and traffic including the safety of residents and tourists**Part 2 - Concerns regarding traffic**

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

T - Concerns regarding pollution caused by trucks used in the process

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

U - Part 1 - Concerns regarding effects on property values and property rights and economic impacts**Part 2 - Concerns regarding property values or impacts on tourism generally****Part 3 - Will the proposed facility unreasonably interfere with the requestors' economic interest**

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

V - How the applicant will comply with material handling requirements

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

W – Whether the application and draft permit require equipment maintenance sufficient to ensure compliance with applicable rules and regulations

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

X – Other necessary water related approvals

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

Y – Part 1 – An archeological study should be required and the effects on nearby archeological and historical sites, including the economic impact on the Dinosaur State Park and Fossil Rim Wildlife Center

Part 2 – Concerns regarding archeological, historical sites, and fossils in the area of the facility

Part 3 – Concerns regarding endangered species and antiquities impacts of the proposed facility

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

Z – Whether there are deficiencies in the application and draft permit including whether or not all applicable emissions limitations have been considered and are included

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

AA – Whether the applicant has started construction prior to receiving authorization and its effect on compliance history

No, the applicant has never started construction prior to receiving authorization. I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

BB – Part 1 – Whether the rock crusher will cause or contribute to noise and light pollution

Part 2 – Concerns regarding light or vibration nuisance conditions

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

CC – Concerns regarding the impacts of increased particle emission on surface water solids loadings

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

DD – Concerns regarding the experience of Slick Machines principles with rock quarrying and crushing

Slick Machines' practices in all areas, including rock quarrying and crushing are always conducted morally and ethically. I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

II – Were particulate emissions from haul roads and blasting, in addition to the emissions of rock crushing operations properly considered

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

JJ – Have all emission points at the facility been properly identified

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

KK – Were the proper background concentrations of PM properly calculated

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

LL – Were all emissions sources at the proposed facility included in the NAAQS analysis

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

MM – Were the proposed annual emissions rates for the facility properly calculated

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

NN – Does the applicant provide for proper measurement and recordation of production waste

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

OO – Concerns regarding the applicant's compliance history

I, Tommy Davis dba Slick Machines, will abide by all applicable local, state and federal requirements, regulations and laws.

Witnesses to be called for Tommy Davis, dba Slick Machines – John Yearwood and Larry Parham

TIME RECEIVED
February 3, 2011 2:58:22 PM CST

REMOTE CSID

DURATION
35

PAGES
3

STATUS
Received

Slick Machines

762 Spillway Rd. Brownwood, TX 76801

325-642-3949

888-442-0244

slickmachines@hughes.net

To:		From:	Tommy Davis
Fax:	(512) 322-2061	Date:	2/3/2011 2:56:06 PM
Phone:		Re:	Response to SOAH Docket#5820-10-5281

Comments

Please see attached Response Letter
SOAH Docket# 582-10-5281
TCEQ Docket# 2010-0660-AIR

facsimile

Slick Machines
Tommy Davis
762 Spillway Road
Brownwood, TX 76801

Response to SOAH Docket #582-10-5281
TCEQ Docket #2010-0660-AIR

February 1, 2011

To the State Office of Administrative Hearings:

Thank you for your concern about my ability to understand the requirements of an air permit. Though your suggestion that I consult an attorney to help obtain this permit is appreciated, it seems quite ironic that someone like an attorney who has absolutely no understanding of the operation of a mine site, or the knowledge of operating a crusher, much less controlling the dust that is emitted from the crusher is able to help obtain this permit. Although it should not be this way, it appears that TCEQ is more concerned with paperwork to obtain the permit than the actual quality of air that is emitted. This observation has become more and more clear to me not only through my own dealings with TCEQ but also with John Yearwood's dealings with TCEQ Region 11's refusal to enforce their own water, air and solid waste regulations and allowing vast areas of land, Texas waters and aquifers to be polluted. Because of TCEQ's refusal, or inability, to enforce the environmental regulations, John Yearwood has had no recourse but to contact the EPA for assistance in remediating. Though these two extreme situations may appear to have nothing in common, the commonality does appear to be the incompetencies of TCEQ. It appears that you are neither protecting the environment nor facilitating business in Texas, which is certainly not your mission statement.

The second suggestion of consulting an expert is one with which I will agree. I consider myself an expert and I assure you that I do consult with myself daily. To ensure this court that I do understand an air permit and all that entails, I have included my qualifications and past mining that has all been in compliance with TCEQ regulations. I have successfully operated mine sites in:

Valera, TX – operating for 8 years

Customers City of Coleman
 Coleman County Precincts 1-4
 City of Ballinger
 Runnels County
 City of Cross Plains

Desdemona, TX – Location 2

Customer Comanche County

Desdemona, TX – Location 1

Customer Cook Canyon Ranch

Galveston, TX – Hurricane Ike clean up – 1 year

Customers Galveston County
 FEMA

Brownwood, TX

Customer City of Brownwood

Hearne, TX

Customer Love's Truck Stop

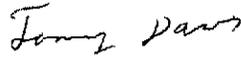
Glen Rose, TX Underwood Lease

This lease is directly across the highway from the permit in question. While operating the Underwood Lease, there were three TCEQ inspections with no citations issued. Surely this successful record could be walked across the highway and be replicated.

Why does TCEQ question me now when this agency has never questioned my mining knowledge in the past? This is unfair, prejudiced politics.

I might suggest that TCEQ consult an attorney, not necessarily one in their employment, to ensure that the 14th Amendment is understood and practiced by their agency.

Sick of TCEQ,



Tommy Davis
Slick Machines

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



ORDER
REGARDING THE APPLICATION BY TOMMY DAVIS D/B/A SLICK MACHINES
FOR TCEQ AIR PERMIT NO. 82199L002
TCEQ DOCKET NOS. 2010-0660-AIR
SOAH DOCKET NOS. 582-10-5281

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of Tommy Davis d/b/a Slick Machines for a new State Air Quality Permit that would authorize the construction of a rock crushing facility located near 11209 U.S. Highway 67 in Glen Rose, Somervell County, Texas. A Proposal for Decision was presented by Administrative Law Judge (ALJ) Craig R. Bennett of the State Office of Administrative Hearings (SOAH). After considering the Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On July 25, 2008, Tommy Davis d/b/a Slick Machines (Applicant) filed an application for a new State Air Quality Permit that would authorize the construction of a rock crushing facility located near 11209 U.S. Highway 67 in Glen Rose, Somervell County, Texas.
2. Applicant published "Notice of Receipt of Application and Intent to Obtain Air Permit" in the *Glen Rose Reporter* on August 14, 2008.
3. Notice of a public meeting on the application was given on October 7, 2008, for a public meeting to be held on October 23, 2008, at the Somervell County Citizens Center in Glen Rose, Texas.

4. Applicant published "Notice of Application and Preliminary Decision for an Air Quality Permit" in the *Glen Rose Reporter* on January 15, 2009.
5. Notice of a public meeting on the application was given on March 25, 2009, for a public meeting to be held on March 31, 2009, at the Glen Rose Junior High Auditorium in Glen Rose, Texas.
6. As of June 5, 2009, the Permit Application was made available for public inspection at the Somervell County Library in Glen Rose, Somervell County, Texas, and remained available after that time.
7. Notice of a public meeting on the application was given on June 25, 2009, for a public meeting to be held on July 16, 2009, at the Somervell County Expo Center Exhibit Hall in Glen Rose, Texas.
8. Notice of a public meeting on the application was given on August 7, 2009, for a public meeting to be held on September 3, 2009, at the Somervell County Expo Center Exhibit Hall in Glen Rose, Texas.
9. Notice of the Permit Application was given to all agencies, regulatory bodies, and other entities to which notification is required.
10. Numerous parties objected to the application and requested a hearing on it.
11. On June 30, 2010, the Commission considered the hearing requests at its regularly-scheduled open meeting. At that time, the Commission granted a number of the hearing requests and referred the matter to the State Office of Administrative Hearings (SOAH) for assignment of an Administrative Law Judge (ALJ) to preside over a contested case proceeding. In its Interim Order memorializing its decision at the open meeting, the Commission identified 15 separate issues to be addressed in the contested case proceeding.
12. Notice of a hearing on the application was published on August 11, 2010, in the *Glen Rose Reporter*, for a hearing to be held at the Somervell County Courthouse Annex in Glen Rose, Texas.
13. On September 16, 2010, a preliminary hearing in this matter was convened by ALJ Craig R. Bennett in Glen Rose, Texas. At the preliminary hearing, the following persons or entities were admitted as parties to this proceeding: (1) Applicant; (2) Chalk Mountain Foundation; (3) Richard Lee Clauser; (4) Steve Allen; (5) Linda Gustafson; (6) Jimmie

Sumners; (7) Allen Sumners; (8) Robert Portman; (9) Jean Lane; (10) Francine Singleterry; (11) Charles Brown; (12) Mark Beauregard; (13) Barry Payne; (14) Claire Payne; (15) David Whitsitt; (16) Cyd Brown; (17) Florence Brown; (18) John Yearwood; (19) Larry Parham; (20) the Executive Director (ED) of the TCEQ; and (21) the Office of Public Interest Counsel (OPIC). No other persons or entities sought party status.

14. At the preliminary hearing, the ALJ encouraged Applicant to consult an attorney or air quality expert so he could understand what he was required to prove to obtain the permit.
15. On September 27, 2010, the ALJ issued Order No. 1, which set out the procedural schedule to be followed by the parties. That schedule required Applicant to prefile his testimony and exhibits by January 7, 2011.
16. On January 7, 2011, Applicant filed a list of relevant criteria to be evaluated in determining whether the permit may be issued, along with a statement after each factor that Applicant “will abide by all applicable local, state and federal requirements, regulations and laws.” No other “testimony” or evidence accompanied the filing.
17. On January 14, 2010, Chalk Mountain Foundation and other individual protestants (collectively “Protestants”) filed a motion for summary disposition or, alternatively, for sanctions and other discovery relief.
18. On January 21, 2011, the ALJ issued Order No. 2, requiring Applicant to respond to the motion for summary disposition and to explain how he intended to meet his burden of proof in this case.
19. In Order No. 2, the ALJ advised Applicant that, if the motion for summary disposition was granted, the ALJ would cancel the hearing and issue a recommendation to the TCEQ that the application be denied. The ALJ further advised Applicant that it was incumbent on him to respond and explain how he intended to adequately satisfy his burden of proof in this case to obtain the permit he sought. Finally, the ALJ again encouraged Applicant to consult with either an attorney or a knowledgeable expert or consultant in the field of air quality permitting to ensure that he understood the requirements that must be met for him to obtain the permit sought.
20. On February 3, 2011, Applicant filed a short letter, indicating his own qualifications, but failing to respond to the legal issues raised by the Protestants or otherwise establishing how he intended to satisfy his burden of proof in this case. Moreover, Applicant’s filing

did not supply any additional evidence, give any indication that he needed time to obtain appropriate experts, or offer any representation that he intended to marshal significant evidence to support the application at the hearing.

21. On February 14, 2011, the ALJ issued an order granting Protestants' motion for summary disposition. The order was based upon Applicant's prefiled documents and the ALJ's conclusion that there was no possibility for Applicant to satisfy his burden of proof in the case based upon the documents he had prefiled.
22. The record closed in this docket on February 14, 2011, with the issuance of the ALJ's order granting summary disposition.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the application pursuant to TEX. HEALTH & SAFETY CODE Chapter 382 and TEX. WATER CODE Chapter 5.
2. Pursuant to TEX. GOV'T CODE § 2003.047, SOAH has jurisdiction to conduct a hearing and to prepare a proposal for decision in this matter.
3. Notice of the permit application was provided pursuant to 30 TEX. ADMIN. CODE § 39.601, et seq., and TEX. GOV'T CODE §§ 2001.051 and 2001.052.
4. Pursuant to 30 TEX. ADMIN. CODE §§ 80.17(a) and 80.117, in a contested case hearing on an air quality permit application, the burden of proof is on the applicant to prove by a preponderance of the evidence that it satisfies all statutory and regulatory requirements.
5. Pursuant to 30 TEX. ADMIN. CODE § 80.137(c), summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, depositions transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records, if any, on file in the case show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues.
6. If summary disposition is granted, the ALJ is required to close the hearing and prepare a proposal for decision based on the summary disposition. 30 TEX. ADMIN. CODE § 80.137(i).

7. The ALJ properly granted summary disposition in this case because Applicant's prefiled direct case evidence is wholly inadequate to meet his burden of proof, in that Applicant has not presented evidence to establish:
- (a) Whether the facility will cause adverse effects on air quality;
 - (b) Whether the proposed facility's emissions will adversely impact the requesters' health, welfare or physical property;
 - (c) Whether the proposed facility's emissions will adversely impact plants, wildlife and endangered species;
 - (d) Whether the proposed facility's emissions will adversely impact the requesters' recreation and use and enjoyment of the area;
 - (e) Whether the draft permit achieves BACT for particulate matter;
 - (f) Whether the rock crusher will create nuisance conditions due to dust;
 - (g) Whether the air dispersion modeling of the proposed particulate matter emissions was accurate and appropriate;
 - (h) Whether the application adequately calculated and addressed potential emission sources, emission rates, and background particulate matter concentrations;
 - (i) Whether the draft permit includes adequate monitoring and record-keeping requirements;
 - (j) Whether the permit conditions are enforceable;
 - (k) Whether the draft permit complies with all state rules and regulations;
 - (l) Whether the draft permit includes sufficient material handling and equipment maintenance requirements to ensure compliance; or
 - (m) Whether the application includes deficiencies that have resulted in the draft permit not including all applicable pollutants and respective emissions limitations.
8. Because Applicant has failed to meet his burden of proof on the referred issues and to make the showing necessary for issuance of the requested state air quality permit, the permit application should be denied.

NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. The application by Tommy Davis d/b/a Slick Machines for new Air Quality Permit No. 82199L002, that would authorize the construction of a rock crushing facility located near 11209 U.S. Highway 67 in Glen Rose, Somervell County, Texas, is denied.
2. The Executive Director's Response to Public Comments is adopted; however, if there is any conflict between this Order and the Executive Director's Response to Comments, this Order prevails.
3. 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 for want of merit.
4. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN CODE § 80.273 and TEX. GOV'T CODE § 2001.144.
5. The Chief Clerk of the Commission shall forward a copy of this Order to all parties.
6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion 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